



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL CASE NO. 21 OF 2009

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI, PROHIBITION
AND MANDAMUS**

AND

IN THE MATTER OF THE FOREST ACT, NO. 7 OF 2005

AND

IN THE MATTER OF THE REGISTRATION OF TITLES ACT, CAP 281 LAWS OF KENYA

AND

**IN THE MATTER OF A CAVEAT EMPTOR ISSUED ON 1ST AUGUST 2008 OVER LR NO.
13642 – KIAMBU**

AND

**IN THE MATTER OF THE HARASSMENT, INTIMIDATION, ARREST AND PROSECUTION
OF REGISTERED AND**

**BENEFICIAL OWNERS OF LAND IN THE ARE FORMERLY KNOWN AS KIAMBU FOREST
RESERVE**

REPUBLIC.....APPLICANT

VERSUS

THE KENYA FOREST SERVICE.....RESPONDENT

EX PARTE

**1. WARIARA NJENGA KARUME, NDUTA KORE, NELLY WANGARI NJAGI
(TRUSTEES OF KIAMBAA DIVISIONAL (141 WOMEN GROUPS) & 144 OTHERS**

RULING

The ex parte applicant's application dated 25th June, 2009 seeks the following orders:

- “1. That an order of certiorari do issue to remove into this honourable court for the purpose of being quashed the decision contained in the respondent's Caveat Emptor notice dated 1st August 2008 advertised in the daily newspapers of 1st August 2008, declaring LR. No. 13642 a portion of protected Kiambu Forest Reserve and warning the general public against any purchase thereof.**
- 2. That an order of prohibition do issue to restrain the respondent, its Director and officers subordinate to him from placing caveats against the applicants' properties or harassing, intimidating, arresting or prosecuting the applicants over the ownership of their properties derived from the said LR. No. 13642.**
- 3. That costs of this application be borne by the respondents”.**

The application is based on grounds, *inter alia*, that:

- 1. The 1st ex parte applicant was the original registered owner of the suit property known as LR No. 13642, hereinafter referred to as “the suit land”, which measures approximately 39.82 hectares.**
- 2. The 2nd to 145th applicants are the registered owners of the suit land by virtue of subsequent subdivision of the suit land.**
- 3. The respondent's complaint against the applicants is a nullity due to the reasons that:**
 - (i) the suit land was leased to the 1st applicant for a period of 99 years from the 1st day of December 1984 by virtue of grant No. IR 74148 following a previous allocation by the former President Daniel Arap Moi in 1983.**
 - (ii) The grant was obtained vide an open and legal process that involved all the necessary consents and approvals from the previous Government organs established by the laws of the land.**
- 4. The respondent's decision and action contained in the caveat emptor notice was reckless, malicious, unreasonable and motivated by ulterior motive.**

5. The said decision contravenes the principles of natural justice in that the respondent had not informed the applicants of the nature of irregularities (if any) affecting the suit property and the manner in which the said irregularities were carried out.

The application was supported by a statutory statement and a verifying affidavit sworn by **Nelly Wangari Njagi**.

The deponent is a co-trustee of the 1st applicant. She stated that the 1st applicant is composed of about 141 women groups from around the Kiambaa Division of Kiambu District. The 1st applicant was allocated the suit land by the former President Moi at a public function in Karuri in 1983. The land was thereafter surveyed and a Grant issued in 1996.

Subsequently, the suit land was subdivided and new titles issued for a majority of the subdivisions. They were later on passed on to the individual women groups.

On 1st August, 2008 a “**Caveat Emptor**” was advertised in the daily newspapers declaring the suit land a portion of the protected Kiambu Forest Reserve and warning the general public against any purchase thereof. The applicants stated that the action of placing that “**Caveat Emptor**” notice is irregular since the suit land and the subdivisions emanating therefrom are not part of the Kiambu Forest Reserve but are private properties.

The respondent filed a replying affidavit that was sworn by **I.S. Owino**, a Senior Legal Officer. He stated, *inter alia*, that the “**Caveat Emptor**” notice complained of constitutes a mere expression of the interests of the respondent and most importantly is a re-statement of the law. The notice does not constitute a binding decision of a public body that can be quashed by way of an order of certiorari. He added that the proceedings in respect of the order of certiorari are time barred as they were instituted more than six months from the date of the alleged notice contrary to the provisions of **Section 9(3) of the Law Reform Act** and **Order 53 rule 2 of Civil Procedure Rules**.

With respect to the prayer for an order of prohibition, the deponent stated the same cannot issue for the reasons that before such an order can be granted the court must first ascertain the contested ownership of the suit land and it cannot do so in judicial review proceedings. The only proper and legal way to do so is by way of a normal suit.

The advocates for the parties filed their respective submissions which I have carefully perused. **Section 9(3) of the Law Reform Act** states as follows:

“In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law”

Order 53 rule 2 of the Civil Procedure Rules states as follows:

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act, and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

The notice complained about was published on 1st August, 2008. The application for leave was filed on 23rd February, 2009. It is therefore clear that the prayer for certiorari was made outside the statutory six months limitation period. It follows therefore that leave ought not to have been granted to apply for such a relief. See the Court of Appeal decision in **AKO vs SPECIAL DISTRICT COMMISSIONER KISUMU & ANOTHER [1989] KLR 163**. I need not consider prayer 1 any further in view of the fact that the relief was sought out of time.

With regard to the prayer for an order of prohibition, although the applicants stated that they are the lawful owners of the suit land, that assertion has been contested by the respondent who states that the creation of the title to the land was done unlawfully since the suit land was part of the Kiambu Forest Reserve. The subdivision thereof was contrary to the Forest Act, the respondent stated.

In judicial review proceedings the court cannot conclusively determine issues of land ownership. Such an issue can only be properly be determined properly in ordinary civil proceedings where parties can adduce evidence. In determining an application in judicial review proceedings, the court is not concerned with the merits of a decision but the decision making process thereof. See **REPUBLIC vs JUDICIAL SERVICE COMMISSION ex parte PARENO [2004] 1 KLR 203**.

If the applicants contend that they are the lawful owners of the suit land and desire to assert their right of proprietorship thereof they ought to file an appropriate civil suit.

For the reasons aforesaid, I find no merit in this application and dismiss the same with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JUNE, 2011.

D. MUSINGA

JUDGE

In the presence of:

Nazi – Court Clerk

Mr. Atanda for Mr. Chahenza for the Respondent

No appearance for the Applicant