Mungai v Cabinet Secretary Ministry Of Interior and Co-ordination of National Government & 5 others; County Government of Nairobi & 2 others (Interested Parties) (Environment and Land Judicial Review Case 185 of 2013) [2022] KEELC 3748 (KLR) (26 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3748 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 185 OF 2013

SO OKONG'O, J

JULY 26, 2022

BETWEEN

GEORGE KAHURA MUNGAI ..... APPLICANT

AND

CABINET SECRETARY MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT ..... 1ST RESPONDENT

PRINCIPAL SECRETARY MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT ..... 2ND RESPONDENT

CABINET SECRETARY MINISTRY OF DEFENCE ..... 3RD RESPONDENT

PRINCIPAL SECRETARY MINISTRY OF DEFENCE ..... 4TH RESPONDENT

KENYA AIR FORCE COMMANDANT EASTLEIGH AIR FORCE ..... 5TH RESPONDENT

ATTORNEY GENERAL ..... 6TH RESPONDENT

AND

COUNTY GOVERNMENT OF NAIROBI ..... INTERESTED PARTY

KENYA CIVIL AVIATION AUTHORITY ..... INTERESTED PARTY

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... INTERESTED PARTY

JUDGMENT

1. What is before the court is an application for Judicial Review. By an amended Notice of Motion dated July 21, 2020, the Applicant sought the following reliefs:

1. An order of *certiorari* to bring to this Honourable Court for quashing the decision of the Respondents to demolish all buildings within a radius of 12 metres from the boundary and fence of Eastleigh Airbase and all buildings within 30 metres radius which have more than two floors.

2. And order to prohibit the Respondents from demolishing the Applicant's building which is within 12 metres from the boundary fence of Eastleigh Airbase and all buildings within 30 metres radius from the said boundary having more than two floors and particularly the building belonging to the Applicant built on L R No 36/111/27.

The Applicant's case:

2. The Applicant's application was supported by the amended statutory statement dated July 21, 2020, verifying affidavit dated July 21, 2020, further affidavit dated February 24, 2012 and Replying Affidavit dated December 3, 2012. The Applicant's case against the Respondents can be summarised as follows:

> The Applicant was the registered owner of all that parcel of land known as L R No 36/111/27 situated in Eastleigh Nairobi where he had constructed a four storey building consisting of double rooms and shops which had been rented out (hereinafter referred to as "the suit property").The Respondents made a decision to demolish all buildings on parcels of land lying within 12 metres from the boundary of Eastleigh Airbase and any building with more than two floors and within 30 metres of the said Airbase. The decision was not communicated verbally or in writing to the Applicant. This, the Applicant averred was an affront to the sanctity of the Applicant's title/property rights and constitutional rights. The Applicant's building on the suit property was marked with an 'X' sign and while it had not been demolished, other buildings in the vicinity had been brought down.

3. The Applicant averred that before putting up the building on the suit property, he obtained all the necessary approvals from the City Council of Nairobi. The Applicant averred that he could not attach a copy of the decision complained of to his affidavit as none was issued to him. The applicant urged the court to dispense with that requirement.

The Respondent's case:

4. The 1st, 2nd and 6th Respondents filed grounds of opposition dated December 28, 2011. The 1st, 2nd and 6th Respondents contended that they had power to determine issues relating to demolition, alteration and compliance with construction requirements around Eastleigh Airbase. The 1st, 2nd and 6th Respondents contended that the application was misconceived and offended the provisions of Order LIII of the *Civil Procedure Rules*. The 1st, 2nd and 6th Respondents contended further that the application was contrary to public policy and social good.

5. The 3rd, 4th and 5th Respondents opposed the application through a replying affidavit sworn by Colonel Appollo Ogola Aloka, Commanding Officer Moi Airbase, Headquarters Wing on January 15, 2021. The 3rd, 4th and 5th Respondents contended that the decision sought to be quashed was not attached to the application. Consequently, the 3rd, 4th and 5th Respondents contended that they were unable to prepare a proper defence. The 3rd, 4th and 5th Respondents averred further that since the suit had been pending since 2013, the orders sought were either stale or had been overtaken by events.

6. The 3rd, 4th and 5th Respondents contended that Moi Eastleigh Airbase was declared a protected zone through Legal Notice No 309 of 1961. The 3rd, 4th and 5th Respondents contended that there had been illegal construction in the areas surrounding the Airbase. The 3rd, 4th and 5th Respondents contended

that the structures that had been put up around the Airbase offended Aviation Regulations and posed safety and security threat. The 3rd, 4th and 5th Respondents averred that the suit property owned by the Applicant was within a safe guarding area. The 3rd, 4th and 5th Respondents averred that the Applicant was required to get approvals from Kenya Civil Aviation Authority, Kenya Air Force and the City Council of Nairobi before putting up structures on the suit property. The 3rd, 4th and 5th Respondents contended further that in accordance with the special conditions of Grant Number I R 58593 for the suit property, the Applicant was also required to get approval from the Commissioner of Lands. The 3rd, 4th and 5th Respondents contended that the Applicant had not shown evidence of the said approvals. The 3rd, 4th and 5th Respondents contended that if the Applicant had obtained the said approvals, he would have constructed a two storey and not a four storey building. In conclusion the 3rd, 4th and 5th Respondents contended that if any order for demolition of the structures on the suit property was issued, it was because of the Applicant's failure to obtain all the requisite approvals before putting up the same.

7. The 1st and 3rd interested parties filed replying affidavits in which they supported the positions taken by the Respondents on the Applicant's application.

The submissions by the parties:

8. The Applicant filed his submissions on August 31, 2021. Relying on the case of *Republic v National Environment Management Authority & Another* [2006] eKLR, the Applicant challenged the decision of the Respondents on several grounds which he contended satisfied the requirements for granting orders of judicial review. Firstly, the decision was challenged on procedural fairness. The Applicant argued that there was unfairness as he was not notified of the intended demolition. Secondly, the Applicant contended that the issue of protected interest was ignored. The Applicant submitted that the Respondents acted without considering the fact that the Applicant's right to own property was constitutionally protected. Thirdly, the Applicant contended that his right to legitimate expectation was violated. The Applicant argued that he had a legitimate expectation to be treated fairly by the state and to be given notice of the intended demolition. Fourthly, the decision was challenged on consideration of irrelevant matters and illegality. The Applicant submitted that the decision was illegal as no notice was given, no enabling law was stated and it is not known what was considered before the decision was made. Fifthly, the decision was challenged on unreasonableness and bias. The Applicant relied on *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 in support of his submission that the Respondents acted unreasonably by not giving him a notice of their intention to demolish a building which was worth millions of shillings. Sixthly, the Applicant submitted that the Respondents had a duty to act fairly which they did not. The Applicant relied on *R v Devon CC ex parte Baker* [1995] 1 All ER 73 and submitted that the Respondents should have consulted the Applicant before making the decision.

9. In conclusion the Applicant submitted that his right to information under Article 35 of the *Constitution* and his right to own property under Article 40 of the *Constitution* were infringed. The Applicant argued further that the actions of the Respondents infringed on his right to adequate housing guaranteed under the International Covenant on Economic, Social and Cultural Rights.

10. The 3rd, 4th and 5th Respondents (hereinafter referred to only as "the Respondents") filed their submissions on February 28, 2022. Their first line of argument was that under Order 53 Rule 2 of the Civil Procedure Rules, an order of *Certiorari* must be sought within six months. The Respondents submitted that the Applicant had not disclosed the date when the alleged decision he was seeking to have quashed was made. This, according to the Respondents should warrant a dismissal of the application. Their second argument was that the Applicant had not met the requirements of Order 53

Rule 7(1) of the *Civil Procedure Rules* as he did not lodge a copy of the notice complained of with the registrar. They also argued that the decision could not simply be inferred from the placing of an 'X' mark on the Applicant's building on the suit property. It was also contended that while the Applicant had joined many parties to the application, he had not stated with certainty which of them made the decision he was complaining about.

11. In their third argument, the Respondents relied on the case of *Reddiff Holdings Limited v Registrar of Titles & 2 others* [2017] eKLR_and submitted that the dispute between the Applicant and Eastleigh Moi Airbase was complex as it touched on aviation and military concerns and as such could only be resolved through a normal civil suit rather than by way of judicial review.

12. Finally, the Respondents argued that there was inordinate delay in the prosecution of the application and as such the determination of the application would not serve any functional purpose. The Respondents urged the court to dismiss the application.

13. The 1st, 2nd and 6th Respondents filed submissions dated April 5, 2022 in which they raised similar issues as the 3rd, 4th and 5th Respondents. The 1st, 2nd and 6th Respondents submitted that failure by the Applicant to produce the decision complained of was fatal to his application. The 1st, 2nd and 6th Respondents submitted further that the Applicant's application did not meet the threshold for granting the orders sought. Finally, the 1st, 2nd and 6th Respondents submitted that the Applicant had an alternative remedy and as such judicial review was not available to him.

Determination:

14. I have considered the Applicant's application together with the statutory statement and affidavits filed in support thereof. I have also considered the grounds of opposition and replying affidavits filed by the Respondents and the interested parties in opposition to the application. Finally, I have considered the submissions by the advocates for the parties. In *Municipal Council of Mombasa v Republic & another* [2002] eKLR the Court of Appeal stated as follows concerning judicial review:

> ... And as the Court has repeatedly said, judicial review is concerned with the decision - making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decision; acting as an appeal court over the decision would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review..."

15. In *OJSC Power Machines Limited, Trans Century Limited, and Civicon Limited (Consortium) v Public Procurement Administrative Review Board Kenya & 2 others* NRB CA 28 of 2016, [2017] eKLR, the Court of Appeal stated as follows:

> The law on the jurisdiction of the High Court to entertain judicial review proceedings are encapsulated in several decisions, some of which were cited before us while the learned Judge applied others in his judgment. The law, from these decisions is to the following effect; That

> the purpose of judicial review is to ensure that a party receives fair treatment in the hands of public bodies; that it is the purpose of judicial review to ensure that the public body, after according fair treatment to a party, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court in a judicial review proceeding. Put another way, judicial review is concerned with the decision making process, not with the merits of the decision itself. In that regard, the court will concern itself with such issues as to whether the public body in making the decision being challenged had the jurisdiction, whether the persons affected by the decision were heard before the decision was made and whether in making the decision, the public body took into account irrelevant matters or did not take into account relevant matters".

16. In the book, *H W Wade and C F Forsyth, Administrative Law*, 10th Edition, the authors have stated as follows at page 509 on the remedies of Certiorari and Prohibition:

> The quashing order and prohibiting order are complementing remedies, based upon common law principles .... A quashing order issues to quash a decision which is *ultravires*. A prohibiting order issues to forbid some act or decision which will be ultravires. A quashing order looks to the past, a prohibiting order to the future."

17. In *Kenya National Examination Council v Republic, Ex-parte Geoffrey Gathenji Njoroge & 9 others*[1997]eKLR, the court stated as follows on the scope and efficacy of remedies of Prohibition and *Certiorari*:

> .... prohibition is an order from the High Court directed to an inferior tribunal or body which prohibits that tribunal or body to continue proceedings in excess of its jurisdiction or in contravention of the laws of the land.... Only an order of Certiorari can quash a decision already made and an order of Certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons."

18. In *Republic v National Land Commission Ex-Parte Ephrahim Muriuki Wilson & others* [2018] eKLR the court stated as follows:

> "In this regard, it is important to mention that what emerges is that there is a land dispute, and this Court cannot allow itself to be used to resolve a land dispute disguised as a Judicial Review application. Behind the curtain of these Judicial Review proceedings is the real dispute, namely, ownership, use and or occupation of land. These questions call for the need for this Court to exercise caution, care and circumspection. First, there is the question of jurisdiction discussed earlier. Second, there is a real danger of this Court rendering a decision that will have the implication of determining ownership of the disputed land. I decline the invitation to venture into this forbidden territory. The upshot is that I dismiss this Judicial Review application with costs to the Interested Parties. I award no costs to the Respondent since it did not participate in the proceedings."

19. In *Sanghani Investment Limited v Officer in Charge Nairobi Remand and Allocation Prison* [2007] 1 EA 354 the court stated as follows:

> "Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application.....Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated

> and determined as there would be a need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not. In cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation, and disposition, there would be need to allow viva voce evidence and cross-examination of the witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced...It may indeed be true that the notice that is impugned is irregular or unlawful and an order of certiorari would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles....So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of certiorari because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and viva voce evidence at another forum preferably the Civil Courts."

20. In the book; *Public Law in East Africa published* by Law Africa, the author Ssekaana Musa has stated as follows at page 250;

> Judicial review is a discretionary jurisdiction. The prerogative remedies, the declaration and the injunction are all discretionary remedies with exception of *habeas corpus* which issues *ex debito justitiae* on proper grounds being shown. A court may in its discretion refuse to grant a remedy, even if the applicant can demonstrate that a public authority has acted unlawfully."

21. It is on the foregoing principles that the Applicant's application falls for consideration. I have no doubt from the material before me that the Applicant had a genuine complaint against some of the Respondents. I am unable to say which Respondent in particular made the decision the subject of the Applicant's complaint. There is actually no decision placed before the court which the court can be called upon to quash. From the evidence before the court, the Applicant saw buildings in the neighbourhood of the suit property being brought down by "Kenya Airforce personel" backed by Kenya Police. The Applicant has claimed that he made inquiries and was informed that a decision had been made by the Respondents to demolish buildings within 12 metres radius from the boundary of the perimeter wall of the Kenya Airforce Eastleigh Airbase (the Airbase) and buildings of more than two floors within 30 metres radius. The Applicant claimed that since the suit property was within 12 metres from the boundary of the Airbase and the same had been marked with an "X" sign, he got apprehensive that his building on the suit property would be the next target of the demolition squad.

22. In their affidavits, the parties have raised many issues which go to the merit of the alleged decision such as whether the Applicant got all the requisite approvals for the structure on the suit property and whether the suit property falls within the safeguarding area for the Airbase. I am of the view that these issues are beyond the scope of judicial review and cannot be determined in the present application.

23. I am in agreement with the Respondents that the issues raised by both parties can be better resolved in a normal civil suit. I am of the view that if the applicant felt that the building on the suit property was threatened with demolition and that the threat was illegal, his recourse should have been to file a civil suit against those who were engaged in the demolition. Now that he did not have the decision complained of and did not know who had made the decision and when, judicial review was not open to him. A suit for injunction in my view would have been more appropriate.

24. The decision complained of has not been pleaded with sufficient clarity to enable the court to scrutinize it and determine if it was lawful or not. Whilst there are several Respondents in the suit, the Applicant has not sufficiently identified which one made the impugned decision or how they each contributed to the impugned decision. As a result, the court cannot determine whether the Respondents acted lawfully or not. The Applicant has contended that he could not furnish the court with the decision complained of because it was not served upon him directly. I am not convinced that he has explained the existence of the decision sufficiently for the court to dispense with the requirement for production of the same. He has not established that the decision was indeed made, when it was made and by whom.

25. In the absence of any administrative decision that can be brought to this court for quashing, I am unable to grant the order of certiorari sought by the Applicant. An order of prohibition is also not available for the same reason.

Conclusion:

26. In the final analysis and for the foregoing reasons, I find no merit in the amended Notice of Motion dated July 21, 2020. The application is dismissed with each party bearing its own costs.

DELIVERED AND DATED AT NAIROBI THIS 26TH DAY OF JULY 2022

S OKONG'O

JUDGE

JUDGMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM IN THE PRESENCE OF:

Ms Ngugi h/b for Ms Mungai for the Applicant

Mr Mugira for the 3rd , 4th and 5th for the Respondents

Mr Njagi for the 1st , 2nd and 6th Respondents

Mr Kichwen h/b for Mr Odoyo for the 2nd Interested Party

Ms C Nyokabi - Court Assistant