Republic v Multi-Sectoral Committee on Unsafe Structures & 4 others; Dakawou Transport Limited (Exparte) (Miscellaneous Civil Application 176 of 2018) [2022] KEELC 3981 (KLR) (25 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3981 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION 176 OF 2018

SO OKONG'O, J

JULY 25, 2022

BETWEEN

REPUBLIC ..... APPLICANT

AND

MULTI-SECTORAL COMMITTEE ON UNSAFE STRUCTURES .... 1ST RESPONDENT

NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

MINISTRY OF LANDS AND PHYSICAL PLANNING ..... 3RD RESPONDENT

NAIROBI CITY COUNTY ..... 4TH RESPONDENT

ATTORNEY GENERAL ..... 5TH RESPONDENT

AND

DAKAWOU TRANSPORT LIMITED ..... EXPARTE

JUDGMENT

1. Pursuant to the leave that was granted on October 23, 2018, the ex-parte applicant (hereinafter referred to only as "the applicant") brought the present judicial review application by way of Notice of Motion dated October 24, 2018 seeking the following reliefs;

    1. That an order of *Certiorari* do issue to bring into this Honourable Court for the purpose of being quashed the 1st respondent's decision contained in the circular letter dated September 25, 2018 as the applicant has neither encroached nor constructed any illegal structures on its land.

    2. That an order of Prohibition do issue to prohibit the respondents by themselves, their servants, agents, employees or whomsoever from reviewing, revoking, alienating or interfering with the

applicant's ownership and quiet possession of all that parcel of land known as L.R No. 25469 or having any other dealing whatsoever in relation to all that parcel of land known as L.R. No. 25469 or demolishing the applicant's development thereon or taking any further illegal action thereon.

3. That a declaration be and is hereby issued that the applicant is the legal and beneficial owner of the premises comprised of L.R No. 25469.

4. That costs of the application be provided for.

The Applicant's case:

2. The application was brought on the grounds set out in the statutory statement and a verifying affidavit of Mohamed Ahmed Abdulle both dated October 12, 2018 in which the applicant has set out its case against the respondents as follows:

   The applicant conducted due diligence before purchasing all that parcel of land known as L.R. No. 25469, I.R No. 90921 measuring 0.9880 of a hectare or thereabouts (hereinafter referred to as "the suit property") from Munyas Villas Limited (hereinafter referred to only as "Munyas") in 2004. On December 23, 2004, the applicant was registered as the proprietor of the suit property and was issued with a title in respect thereof by the Registrar of Titles having complied with the requisite legal procedures. The applicant had since then paid all land rates and rents for the suit property.

3. On October 25, 2018, the applicant was issued with a circular letter of the same date by the 1st respondent to the effect that all properties that had encroached on Kenya Airports Authority (hereinafter referred to as "KAA") land at Jomo Kenyatta International Airport (hereinafter referred to as "JKIA") shall be demolished upon expiry of the period that was set out in the circular. Upon receipt of the circular, the applicant made every effort to find out from the 1st respondent whether the suit property was part of those referred to in the said circular but there was no response from the 1st Respondent. The applicant had carried out extensive developments on the suit property which would be disrupted by the intended demolition. The developments included, workshops, office suites, go-downs, a fuel station, a storage for LPG gases and white and black oil products which could pose a great risk and extensive damage to the environment if interfered with. The applicant was not granted an opportunity to be heard prior to the making of the decision contained in the said circular dated September 25, 2018.

4. The applicant has contended that the impugned circular by the 1st respondent that sought the demolition of the developments on the suit property was illegal, null and void for various reasons. Firstly, the 1st respondent was a body unknown in law and had no legal mandate to issue notices on demolition of buildings and secondly, the notice was purportedly issued under the *Wayleaves Act,* Chapter 292 Laws of Kenya which was repealed in 2012 and the *Physical Planning Act,* 286 Laws of Kenya (now repealed) which had no provision authorising the giving of such notice. The applicant has contended further that the actions of the 1st respondent complained of offended its rights as provided for in the *Fair Administrative Action Act* 2015 in addition to being a breach of the rules of natural justice and the constitutional right to a fair hearing. The applicant has contended that the said circular also offended the applicant's legitimate expectation to enjoy quiet possession of its property as the bona fide owner of thereof. The applicant has contended further that the 1st respondent acted unreasonably by not taking into account the applicant's lawful title that had not been revoked and the approvals it had obtained from the 4th respondent to construct a boundary wall on the suit property.

The 1st, 3rd and 5th Respondents' case:

5. The 1st, 3rd and 5th respondents opposed the application through a replying affidavit sworn by Moses Nyakiongora on March 20, 2019. In the affidavit, Moses Nyakiongora stated that he was the Secretary, National Buildings Inspectorate in the Ministry of Transport, Infrastructure, Housing and Urban Development and that he was deployed to the National Building Inspectorate and the 1st respondent. He explained that the National Building Inspectorate was established under Executive Order No. 1 of 2018 and its mandate included coordinating with other government agencies to demolish and remove unsafe/encroaching structures. He contended that the Applicant's structures on the suit property were encroaching on KAA's land known as L.R No. 21919 (hereinafter referred to as "Plot No. 21919) and that the same were on a flight path. He contended further that the Applicant was given proper notice and that the public interest superseded the applicant's private interest in the suit property.

6. The 1st, 3rd and 5th respondents filed an undated further replying affidavit sworn by Joseph Waitheru. In his affidavit, Joseph Waitheru who was a Land Surveyor at Kenya Airports Authority(KAA) stated as follows in summary: KAA was the registered proprietor of all that parcel of land known as L.R No.21919, Grant No. I.R 70118("Plot No. 21919"). Plot No. 21919 was allocated to KAA by the Commissioner of Lands through a letter of allotment Ref.182879/2 dated July 24, 1996. KAA accepted the allotment of Plot No. 21919 which measured 4674.60 hectares and paid a sum of Kshs. 3530/- on August 9, 1996 as conveyancing, registration and approval fees that were required under the said letter of allotment. Plot No. 21919 was subsequently registered in the name of KAA on 1August 3, 1996. Plot No. 21919 was created through Survey Plan No. F/R 265/27 dated 23rd April 1996.

7. Joseph Waitheru contended that the applicant's parcel of land L.R. No. 25469, I.R No. 90921(the suit property) that came into existence on December 31, 2002, though Land Survey Plan No. 237075 dated August 3, 2001 was created irregularly in that the same fall within and overlaps the Survey Plan for Plot No. 21919 owned by KAA. He contended that the suit property was registered long after KAA had warned the Commissioner of Lands on August 10, 2001 on encroachment on Plot No. 21919. He stated that KAA reported to the Multi-Sectoral Committee on Unsafe Structures (1st respondent) about the encroachment on Plot No. 21919 by persons who had purportedly acquired portions thereof irregularly and illegally and requested that the structures put up on the said parcels of land which were within and abutting JKIA be demolished as they posed security threats to aircrafts and other aviation facilities.

8. He stated that the National Buildings Inspectorate and the Multi-Sectoral Committee on Unsafe Structures on receipt of the said report and request by KAA in turn wrote to the 2nd respondent on October 31, 2018 to seek its advice on the status of the titles for the parcels of land that KAA claimed to have been acquired illegally. He reiterated that the National Buildings Inspectorate Department was established under Executive Order No. 1 of 2018 to profile unsafe and dangerous buildings and structures and to demolish such structures and others that did not have proper documentation. He stated that its mandate extended to the demolition and removal of unlawful encroachments on road reserves, riparian land and way leaves for railways, power lines, petroleum and sewer lines.

9. He stated that through a letter dated February 8, 2019, the 2nd respondent forwarded a report and recommendations in respect of the inquiries and investigations that it had carried out in respect of the parcels of land that had been created within Plot No. 21919 which report was also published in the Kenya Gazette dated 1February 5, 2019. He stated that the suit property was within the Light Industrial Zone at JKIA where no development could take place without the approval of KAA on account of security and safety reasons. He contended that the orders sought by the applicant had no

basis since the Applicant held an irregular title that could not be afforded protection even under *the Constitution* of Kenya.

He contended that the notice or circular complained of by the applicant was meant to serve greater public good and interest that would be severely affected if the orders sought were granted.

The 4th Respondent's case:

10. The 4th respondent opposed the application through a replying affidavit sworn by Jasper Ndeke its Director, Planning, Compliance and Enforcement on February 13, 2019. In the affidavit, the 4th respondent contended that it was wrongly joined as a party in the application. The 4th respondent averred that it did not issue any enforcement notice or any notice requiring demolition of the structures on the suit property. The 4th respondent contended further that there was no relationship between the 4th respondent and the 1st respondent which was said to have issued the impugned circular.

The submissions by the parties:

11. The parties filed written submissions which they highlighted on December 15, 2021. The Applicant filed its submissions on January 29, 2021 and further submissions in reply to the 1st, 3rd and 5th Respondents' submissions on April 30, 2021 which were highlighted by its advocate, Mr. Fred Ngatia SC. The applicant recounted how it came to own the suit property. The applicant emphasised that it conducted all necessary due diligence as required of purchasers of private land. The applicant submitted that it followed all the requisite procedures in the purchase, transfer of ownership from the previous owner and development of the suit property. The applicant submitted that it had occupied the suit property for several years prior to the events complained of and had been paying the land rates and rent for the same. The applicant submitted that it was not an allottee of the suit property from the Government. The applicant submitted that it was a purchaser of the suit property in the market who relied entirely on the land register for the ownership of the suit property.

12. On the events leading to the filing of the current application, the applicant submitted that the 1st Respondent, an amorphous entity issued a public notice on September 25, 2018 of the impending demolition of illegal structures. The applicant submitted that the notice was not addressed to the Applicant directly and that the same was based on the repealed *Wayleaves Act* and the *Physical Planning Act* which did not authorise such demolitions.

    On the relevant law, the Applicant submitted that article 40 of *the Constitution* does not allow for arbitrary deprivation of private property. Further, any deprivation should adhere to due process. The applicant submitted that article 47 of *the Constitution* gave it a right to a lawful administrative action. The Applicant submitted that the impugned notice did not meet the requirements of sections 2, 4 and 5 of the *Fair Administrative Actions Act* 2015 as the applicant was not given sufficient notice or an opportunity to be heard. The applicant submitted further that views of the public were not sought before the notice was given and the notice was given to the public not to the applicant. Relying on section 11 of the said Act, the applicant submitted that the court has authority to hear the Applicant's complaint and to give declaratory and other orders sought.

13. On the defences put forth by the respondents, the Applicant submitted that there is no mention of the 1st respondent in the Executive Order No. 1 of 2018 that was referred to by the 1st, 3rd and 5th Respondents. The applicant submitted further that there was no law giving the 1st respondent power to conduct demolitions. The applicant submitted that there had never been a suit between KAA and the Applicant over the suit property and that the suit property was far away from Plot No. 21919 owned by KAA. The applicant submitted that if KAA had an issue with the applicant, it did not

require the 1st respondent to sort it out. The applicant submitted that it had not been demonstrated by the respondents that the previous owner of the suit property had acquired the property illegally and that the applicant was aware of such illegality. The applicant submitted that the applicant's title was indefeasible as the respondents did not prove any illegality in its acquisition.

15. On case law, the applicant relied on *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR in support of its submission that Judicial Review goes against the technicalities of common law. The applicant also cited *Rutongot Farm Ltd v Kenya Forest Service & 3 others [*2018] eKLR to support its submission that no person should be arbitrarily denied his property. Relying on *Midland Finance & Securities Globetel Inc. v Attorney General & another [*2008] eKLR, the applicant submitted that public officers only exercise power donated by law or statute. The applicant submitted that the 5th respondent had not stated which statute or law had given the 1st respondent authority to issue the impugned notice. Relying on *Kuria Greens Limited v Registrar of Titles & another* [2011] eKLR, the applicant submitted that if an owner of a property is not given an opportunity to be heard, revocation of his title is null and void. The applicant also cited *Emfil Limited v Registrar of Titles Mombasa & 2 others* [2014] eKLR and submitted that the essence of judicial review is to ensure that the exercise of power is put in check. The applicant also cited, *Kenya Human Rights Commission v Non-Governmental Organisations Co-ordination Board* [2016] eKLR to emphasise the right to be heard, *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] eKLR to emphasise the conclusiveness of the register and *Child Welfare Society of Kenya v Republic & 2 others Ex-parte Child in Family Focus Kenya [*2017] eKLR to emphasise that judicial review is available as a relief to a claim of violation of constitutional rights such as property rights which are in contention in the present application.

16. In conclusion the applicant submitted that balancing of public interest and private interest cannot be an excuse for disregarding private rights. The applicant reiterated that the 2nd respondent had not challenged the transaction through which the applicant acquired the suit property. The applicant submitted further that the 4th respondent was not wrongly joined in the application as it had not disputed approving plans for the developments on the suit property nor receiving annual land rates. The applicant urged the court to grant the orders sought the necessity of which had been established.

17. The 2nd respondent relied on the affidavits filed by the 1st, 3rd and 5th respondents in opposition to the application. The 2nd respondent submitted that the impugned notice concerned Plot No. 21919 and that there was no relationship between the suit property and Plot No. 21919. The 2nd respondent submitted further that there was no dispute over ownership of land before the court and that even if there was one, judicial review was not the proper forum to determine such dispute. The 2nd respondent reiterated much of what is contained in the further affidavit of Joseph Waitheru the contents of which I highlighted herein earlier at length. The 2nd respondent submitted that KAA had complained to the 2nd respondent about the illegal excisions of Plot No. 21919. The 2nd respondent submitted that it carried out a review and made a report that was published in the Kenya Gazetted on February 15, 2019. The 2nd respondent submitted that it was that report that informed the 1st respondent's impugned notice. The 2nd respondent submitted that the said notice was not issued arbitrarily as claimed by the applicant. The 2nd respondent submitted that the applicant did not challenge the 2nd respondent's recommendation that its title to the suit property be revoked.

18. On the applicant's rights, the 2nd respondent submitted that the rights guaranteed under Article 40 of *the Constitution* can be limited. Referring to *Gitwany Investment Limited v Tajmal Limited & 3 others* (2006) eKLR, the 2nd respondent submitted that the defence of a bona fide purchaser was not available to the applicant which should have learnt from a simple search that the suit property was

already committed. The 2nd respondent submitted that the applicant's title was void ab initio and that the court should not allow the sanitization of such title. The 2nd Respondent submitted that the court should lean towards the preservation of airport land in the public interest.

19. The 1st, 3rd and 5th respondents filed their submissions on April 19, 2019. They submitted that there were parallel titles in respect of the suit property and as such it was necessary that the issue of the ownership of the suit property be determined first. The 1st, 3rd and 5th Respondents submitted that judicial review was not the right forum for such determination. The 1st, 3rd and 5th respondents submitted that while a certificate of title is a primary evidence of ownership, it can be impeached and the court should do that in the instant suit as the suit property was first registered in the name of KAA. The 1st, 3rd and 5th Respondents submitted that the notice that was given to the applicant was sufficient. The 1st, 3rd and 5th respondent urged the court to dismiss the application.

20. The 4th respondent filed its submissions dated September 6, 2021 on October 8, 2021. The 4th respondent reiterated that it was wrongly joined as a party to the applicant's application. The 4th Respondent submitted that the applicant had not made any allegation of wrong doing on its part. The 4th respondent urged the court to dismiss the application as against the 4th respondent.

In a rejoinder, theapplicant submitted that if indeed there was no relationship between Plot No. 21919 and the suit property then there was no basis for the 1st respondent's notice. The applicant submitted further that the 2nd respondent's report could not have been the basis for the actions of the 1st respondent as it was issued in 2019 while the impugned notice was issued in 2018. The applicant submitted that it could not have challenged a report that was issued while this suit was already in court. The Applicant submitted that the 1st respondent was not housed in any Ministry. The applicant submitted further that the issue of ownership of the suit property as between the applicant and KAA was not before the court since KAA had not complained against the applicant. The applicant submitted that if KAA directed its complaint to the 2nd respondent, the 2nd respondent was not a court of law. The applicant distinguished the authorities that were cited by the respondents and urged the court to find that due process must be followed.

Analysis of the issues arising and determination thereof:

21. What is before the court is an application for judicial review. What I need to determine is whether the applicant has satisfied the conditions for the grant of the orders of Certiorari, Prohibition and Declaration sought. I think that it is necessary to consider the general principles applied by the courts on applications of this nature before going to the merit of the application which would involve merely applying the said principles to the facts of the case. A few notable cases and legal texts would suffice for that purpose. 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..."

22. 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".

23. 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."

24. 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."

25. 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."

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."

26. 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."

27. It is on the foregoing principles that theapplicant's application falls for consideration. These proceedings were brought following a public notice dated September 25, 2018 that was issued by the Government through the National Buildings Inspectorate. The notice was signed by Moses Nyakiongora as the Secretary National Buildings Inspectorate and Chairman Multi-Sectoral Committee On Unsafe Structures. The notice concerned "Removal of illegal structures" and it was addressed to "the owners/developers of illegal developments, buildings/structures and go-downs

which have encroached to Kenya Airports Authority land at JKIA on L.R No. 21919, Wilson Airport land, L.R No. 209/13080 and Embakasi Village Airport Staff Quarters"

28. The notice was said to have been issued "in the interest of safeguarding aviation Safety, Security and Human Life..". The notice called upon those who had undertaken any development, entered, occupied, developed or initiated any human activity on KAA land or any portion thereof, on the flight path or upon any restricted area of JKIA or Wilson Airport or KAA Embakasi Staff quarters without approval by KAA to remove the illegal structures and vacate the encroached areas within 14 days for their own safety. They were warned that if the notice was not heeded, the illegal buildings, installations or erections would be demolished or removed from the encroached areas without any further reference to them.

29. The applicant has challenged the said notice on various grounds which are set out in its Statutory Statement dated October 12, 2018and a Verifying Affidavit of the same date. As mentioned earlier in the judgment, the Applicant has contended that the notice was illegal, ultra-vires, irrational, a breach of the rules of natural justice and constituted an abuse of power and discretion, unreasonable and an infringement of the Applicant's legitimate expectation. The applicant contended that the notice was issued under non-existent provisions of the law and contrary to the *Fair Administrative Action Act* 2015. The applicant contended that it was entitled to adequate notice of the decision, the reasons for the decision and an opportunity to be heard regarding the decision.

30. As I have mentioned earlier, the impugned notice was issued by the Secretary National Buildings Inspectorate and Chairman Multi-Sectoral Committee On Unsafe Structures. It is not clear why the Applicant sued only "Multi-Sectoral Committee On Unsafe Structures" as the 1st respondent. The notice was issued by the "National Buildings Inspectorate" and "Multi-Sectoral Committee On Unsafe Structures." The two cannot be separated. The National Buildings Inspectorate is a department within the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works (the Ministry) as deposed in the affidavit of Joseph Waitheru. It is not true however that it was established through Executive Order No. 1 of 2018. The executive order merely placed the department under that Ministry. From the literature that I have come across on National Buildings Inspectorate, the same was established earlier in 2015 to carry out audits of buildings for conformity with land registration, planning, zoning and building standards and soundness.

31. National Buildings Inspectorate therefore exists in law. As for Multi-Sectoral Committee On Unsafe Structures, it appears from the evidence before the court to have been a committee composed of various agencies or organs of the national and county governments which was formed to deal with the problem of unsafe structures. From the affidavit of Joseph Waitheru and the minutes of its meetings that were produced in court, the committee had three major mandates namely; profiling and demolishing unsafe buildings/structures, removal of illegal structures without necessary documentation and clearing of illegal developments on riparian reserves. Among the institutions and agencies represented in the Committee from the minutes of its deliberations aforesaid were National Buildings Inspectorate, Kenya Airports Authority, Kenya Power & Lighting Co. Ltd, Nairobi City County, National Construction Authority, National Environmental Management Authority, Kenya Urban Roads Authority, National Youth Service and Water Resources Management Authority. The committee was operating under the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works (the Ministry) as its mandate to a large extent fell within that Ministry. I am of the view that there is nothing illegal in a Government Ministry forming a committee comprising of various agencies to assist it handle any particular mandate falling under it. It is therefore my finding that it was not unlawful for the National Buildings Inspectorate department under the Ministry working together with the Multi-Sectoral Committee On Unsafe Structures in dealing with the

problem of unsafe structures and illegal developments in the country. Neither the National Buildings Inspectorate nor the Multi-Sectoral Committee On Unsafe Structures was an illegal entity as claimed by the applicant.

32. I now turn to the legality of the notice that was issued by National Buildings Inspectorate and Multi-Sectoral Committee On Unsafe Structures (hereinafter referred to only as "the 1st respondent"). I have set out the particulars of the said notice earlier in the judgment. There is no doubt that the notice was issued on behalf of KAA that was a member of the 1st Respondent. The notice was not addressed to any particular person or individual. It was a public notice that was addressed to the persons who had encroached on KAA's land to vacate the same and to remove the structures they had put up thereon illegally without the approval of KAA. There is no doubt that this was an eviction notice to those concerned. The notice was clear that if they failed to vacate and demolish the structures that they had put up on KAA's land, they would be evicted.

32. I am not in agreement that the persons targeted with the said notice some of whom may not have been known to the 1st respondent were entitled to be heard before such the notice was issued or acted upon. The notice was addressed to the persons considered trespassers by both KAA and the 1st Respondent. Trespass is a criminal offence. Section 3 of the *Trespass Act*, Chapter 294 Laws of Kenya provides:

(1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.

(2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him."

Section 152A of the *Land Act*, 2012(as amended) provides as follows:

" A person shall not unlawfully occupy private, community or public land."

33. I am of the view that a person considered a trespasser on land is not entitled to be heard before he is asked by the land owner to vacate the land. The law does not place such obligation on the land owner. What is secured by the law is the process and manner of eviction of a trespasser. I am of the view that what was required of the 1st respondent was to comply with the law on evictions which law has an inbuilt mechanism of ensuring that those considered trespassers are given an opportunity to approach the court for relief before they are evicted.

Section 152B of the *Land Act* 2012(as amended) provides as follows:

" An unlawful occupant of private, community or public land shall be evicted in accordance with this Act."

Kenya did not have eviction law for a long time. The law was introduced in 2016 through an amendment to the *Land Act* 2012 which introduced sections 152A to section 152I which deals with evictions from public, community and private late. These provisions of the *Land Act* provide for a procedure for carrying out eviction. They provide for a notice before eviction, a right of the person served with the notice to approach the court for relief and the manner of carrying out the actual eviction.

34. The notice that was served by the 1st respondent fell short of the form of notice that is provided for in section 152C and 152E of the *Land Act*, 2012(the Act) in several material respects. The 1st Respondent gave the Applicant and others to whom the impugned notice was addressed 14 days notice to vacate

what was referred to as KAA's land in default of which they would be evicted. The Act however provides for 3 months notice. The applicant was in the circumstances given inadequate notice. There is also no evidence that the notice was served in accordance with the provisions of the Act. In the circumstances, the 1st respondent's notice that was purportedly served under the Wayleaves Act that had been repealed and the *Physical Planning Act*, Cap. 286 Laws of Kenya was illegal, null and void. A null and void notice is open to review by the court. The Applicant is therefore entitled to an order of Certiorari to quash the decision contained in the notice.

35. As concerns the order of prohibition and the declaration sought, I am not satisfied that a case has been made out for granting the said orders as prayed. Although the applicant denied it, it is clear on the face of the filings by the parties that there is an underlying dispute over the ownership of the suit property registered in the name of the Applicant. The applicant is well aware of the dispute. In a letter dated October 6, 2018(annexure DT.11 to the verifying affidavit), the applicant stated that it was aware of the claim by KAA that the suit property was within its land. In fact, the applicant stated that it was having negotiations with KAA to have its lease formalised. The prohibitory order sought by the Applicant is framed in very wide terms. The court can only grant an order on the said terms where a determination has been made that the applicant is the lawful owner of the suit property. The court cannot make such determination in these proceedings. First, the applicant did not join KAA to the suit although it was well aware that the impugned notice was issued on its behalf. Secondly, a dispute over ownership of land cannot be determined in a judicial review application through affidavit evidence. I will therefore grant the order of prohibition but limited only to any action that may be taken pursuant to the impugned notice that I have found to be illegal, null and void. As for the declaration, the applicant is not entitled to the same. On the material before the court, the title of the applicant to the suit property is under serious challenge. The applicant should file a normal civil suit for such a declaration to issue.

Conclusion:

In conclusion, I hereby make the following orders;

1. An order of *Certiorari* is hereby issued to bring into this Honourable Court for the purpose of being quashed the 1st respondent's decision contained in the public notice dated September 25, 2018 as concerns the Applicant and L.R. No. 25469.
2. An order of Prohibition is hereby issued prohibiting the 1st respondent by itself, its servants, agents, employees or whomsoever from acting on the public notice dated September 25, 2018 as concerns the applicant and L.R. No. 25469.
3. That applicant shall have half (½) the costs of the application to be paid by the 1st Respondent.

DELIVERED AND DATED AT NAIROBI THIS 25TH DAY OF JULY 2022

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Applicant

Mr. A. Kamau for the 1st rd and 5th Respondents

Mr. Mbuthia for the 2nd Respondent

Mr. Kabiru for the 4th Respondent

Ms. C. Nyokabi - Court Assistant