Republic v Multi-Sectoral Committee on Unsafe Structures & 4 others; Milicons Limited (Exparte Applicant) (Miscellaneous Civil Application 175 of 2018) [2022] KEELC 3888 (KLR) (25 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3888 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION 175 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

MILICONS LIMITED ..... EXPARTE APPLICANT

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 LR No 25471 or having any other dealing whatsoever in relation to all that parcel of land known as LR No 25471 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 in LR No 25471.

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 Harshad Vara dated October 12, 2018 in which the applicant set out its case against the respondents as follows:

> The applicant conducted due diligence before purchasing all that parcel of land known as LR No 25471, IR No 90928 measuring 0.9880 of a hectare or thereabouts (hereinafter referred to as "the suit property") from the previous owners thereof (hereinafter referred to only as "the vendors") on or about July 8, 2015. On July 28, 2015, the applicant was registered as the proprietor of the suit property and issued with a title in respect thereof by the Registrar of Titles having complied with the requisite legal procedures. The applicant had paid all land rates and rents for the suit property since acquiring the same.

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 among others, Kenya Airports Authority land at Jomo Kenyatta International Airport known as plot No 21919 would be demolished upon expiry of the period that was set out in the said circular letter. 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. Several officials of the 1st respondent initially informed the applicant that the suit property was not among those that were identified for demolition. The applicant thereafter commenced construction of godowns on the suit property which was approved by the 4th respondent. The applicant was later informed on October 12, 2018 that the developments on the suit property were set for demolition on October 15, 2018.

4. The applicant averred that it was the lawful owner of the suit property and that the property was not part of the land owned by Kenya Airports Authority (hereinafter referred to only as "KAA"). The applicant averred that it was not granted an opportunity to be heard prior to the making of the decision contained in the said circular letter dated September 25, 2018 to the effect that the suit property had encroached on KAA's land at Jomo Kenyatta International Airport (hereinafter referred to only as JKIA) and that the structures on the property would be demolished unless the applicant demolished the same within the period of the notice. The applicant contended that having not been granted an opportunity to be heard, it was denied an opportunity to explain the manner in which it acquired and developed the suit property

5. The applicant contended that the impugned circular letter 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 applicant contended that the 1st respondent was a body unknown in law and had no legal mandate to issue notices for demolition of buildings and secondly, the notice was purportedly issued under the *Wayleaves Act*, chapter 292 laws of Kenya that was repealed in 2012 and the *Physical*

Planning Act, 286 laws of Kenya (now repealed) that had no provision authorising the giving of such notice.

6. The applicant contended further that the applicant's title to the suit property had not been revoked by a competent court and as such the same was lawful and valid. The applicant averred that there was no irregularity or impropriety in the sale transaction through which it acquired the suit property. The applicant averred that it was a bona fide purchaser of the suit property for value without notice of any defect in its title and that its title to the suit property enjoyed protection of law.

7. The applicant 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 contended further that the 1st respondent acted unreasonably by not taking into account the applicant's lawful title and the approvals it had obtained from statutory bodies and Government agencies to construct a boundary wall on the suit property.

The 1st, 3rd and 5th Respondent's Case:

8. The 1st, 3rd and 5th respondents opposed the application through grounds of opposition dated January 15, 2019 and a replying affidavit sworn by Moses Nyakiongora on March 20, 2019. In their grounds of opposition, the 1st, 3rd and 5th respondents (the respondents) contended that the applicant's application was frivolous, vexatious and an abuse of the process of the court. The respondents averred that the developments by the applicant on the suit property offended the development regulations of the area where the suit property was situated. The respondents averred further that the said developments were against public interest since they went against the safety of buildings and the aviation security.

9. Moses Nyakiongora the deponent of the replying affidavit was the Secretary, National Building Inspectorate in the Ministry of Transport, Infrastructure, Housing and Urban Development. He stated that he was deployed to the National Building Inspectorate and the 1st respondent. He stated that the National Building Inspectorate was established under Executive Order No 1 of 2018 and its mandate included coordination with other government agencies to demolish and remove unsafe/ encroaching structures. He stated that the applicant's structures on the suit property were encroaching on KAA's parcel of land known as LR No 21919 (hereinafter referred to only as "plot No 21919") and that the same were on a flight path. He stated that the Applicant was given a proper notice to remove the said structures. He stated that public interest overrides the applicant's private interest in the suit property.

The 4th Respondent's Case:

10. The 4th respondent opposed the application through a replying affidavit sworn by Jasper Ndeke its Director of Planning, Compliance and Enforcement on February 13, 2019. The 4th respondent contended that it was wrongly joined 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 averred further that it had no relationship with the 1st respondent when the impugned circular letter was issued.

The Submissions By The Parties

11. The Applicants filed submissions dated January 29, 2021 on the same date. The 1st, 3rd and 5th respondents filed their undated submissions on April 19, 2021 while the 4th respondent filed its submissions dated September 6, 2021 on October 1, 2021. The submissions by the parties in this application were similar to those made in ELC Miscellaneous Application No 176 of 2018. During the highlighting of the submissions made herein, the advocates for the parties adopted their submissions in that application No 176 of 2018.

12. I have analysed the submissions by each party at length in ELC Miscellaneous Application No 176 of 2018. It is not necessary for me to reproduce the same in the present application as that is what it would take should I attempt to engage in an analysis of the submissions made herein. I will adopt the said analysis in this application save for reference to the applicant in that application and the property involved which shall be deemed as reference to the applicant and the suit property herein.

Determination:

13. 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, ie, 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..."

14. 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".

15. In the book, HW Wade and CF 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."

16. 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."

17. 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."

18. 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."

19. It is on the foregoing principles that the applicant'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 LR No 21919, Wilson Airport land, LR No 209/13080 and Embakasi Village Airport Staff Quarters"

20. 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.

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

22. 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 first 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 Moses Nyakiongora. 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.

23. 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 in the country. From the affidavit of Moses Nyakiongora and the minutes of the said committee that were produced in court, the committee had three major mandates namely; profiling and demolishing of unsafe buildings/structures, removal of illegal structures without necessary documentation and clearing of illegal developments on riparian reserves. The institutions and agencies represented in the Committee from the minutes of its deliberations 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, Water Resources Management Authority among others. 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.

24. I now turn to the legality of the notice that was issued by the 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 were alleged to have encroached on KAA 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 land, they would be evicted.

25. 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 notice was issued. 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."

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

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

27. 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.

28. 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."

29. 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 a procedure for carrying out eviction. They provide for the giving of a notice, a right of the person served with the notice to approach the court for relief and the manner of carrying out the actual eviction.

30. 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.

31. As concerns the order of prohibition and the declaration sought, I am not satisfied that a case has been made out for granting the 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 between the applicant and KAA. 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:

32. 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 LR No 25471.

    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 LR No 25471.

    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 3rd and 5th respondents.

Mr Mbuthia for the 2nd respondent.

Mr Kibiru h/b for Mr RM Wafula for the 4th respondent.