



**REPUBLIC OF KENYA
IN THE HIGH COURT KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
MISC. APPLICATION NO. 57 OF 2011**

**IN THE MATTER OF AN APPLCIATION BY KIMEO STORES LIMITED FOR LEAVE TO
APPLY FOR ORDERS OF CERTIRORARI MAND AUS AND PROHIBITION**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 64(B), ARTICLES
68(a),68(c),(ii) ARTICLES 162 (2)(b) ARTICLES 165 (3)(b) AND (e) AND ARTICLES 165 (5)(b)**

AND

**IN THE MATTER OF REGISTRATION OF TITLES ACT, CHAPTER 281 OF THE LAWS OF
KENYA**

AND

IN THE MATTER OF LAND ACQUISITION ACT, CHAPTER 295 OF THE LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 RULES 1 OF THE CIVIL PROCEDURE RULES

KIMEO STORES LIMITEDAPPLICANT

VERSUS

THE MINISTER FOR LANDS.....1ST RESPONDENT

THE COMMISSIONER OF LAND2ND RESPONDENT

THE REGISTRAR OF TITLES3RD RESPONDENT

AND

KENYA AGRICULTURAL RESEARCH.....1ST INTERESTED PARTY INSTITUTE

KENYA VERTTERINARY VACCINES2ND INTERESTED PARTY

PRODUCTIONS INSTITUE (KEVEVAPI)

JUDGEMENT

This cause is the child of a letter Ref. 199178/(8) dated 14th December, 2010 addressed to Kimeo Stores Ltd (the ex-parte applicant) by the Commissioner for Lands (the 2nd respondent). The letter from the 2nd respondent spoke to the ex-parte applicant as follows:-

RE: L.R. 23213,23375 & 2950

I have been directed to inform you that K.A.R.I were issued with title L.R. 27628 for the above land.

You are therefore advised to surrender the titles since the same forms part of public utility land.

In this cause, the Minister of Lands is named as the 1st respondent whereas the Registrar of Titles is named as the 3rd respondent. Kenya Agricultural Research Institute (KARI) and Kenya Veterinary Vaccines Production Institute (KEVEVAPI) are named as the 1st and 2nd interested parties respectively.

Through an unsigned notice of motion dated 23rd June, 2011 the ex-parte applicant seeks the following orders:-

1. THAT this Honourable court be pleased to grant leave to the applicant to institute Judicial review proceedings against the Respondents seeking for :-

a) AN ORDER OF CETIORARI to remove into the High Court for the purposes of its being quashed the 2nd and 3rd Respondent's directive as contained in the letter dated the 14th day of December, 2010 which purported to cancel the applicant's title and ownership over the following parcels of land.

- i) Land Reference Number 23213 (Grant No. I.R. No. 73387) measuring 11.93 Hectares.**
- ii) Land Reference Number 23375 (Grant No. I.R. No. 76376) measuring 5.554 Hectares**
- iii) Land Reference Number 2950/11 (Grant No. I.R. No. 102735) measuring 43.00 Hectares**
- iv) Land Reference Number 166/9 (Letter of Allotment Ref No. 58792/16) measuring 10.11 Hectares**

b) AN ORDER OF MANDAMUS compelling the 1st, 2nd and 3rd Respondent and any of their agents, departments and or servants respectively to cancel the title issued to the 1st interested Party's namely known as Land Reference Number 27628 forthwith.

c) AN ORDER OF MANDAMUS compelling the 1st, 2nd and 3rd Respondents and any of their agents, departments and or servants respectively to reinstate the Applicant's title and ownership over the following parcels of land:

- i) Land Reference Number 23213 (Grant No. I.R. No. 73387) measuring 11.93 Hectares.**
- ii) Land Reference Number 23375 (Grant No. I.R. No. 76376) measuring 5.554 Hectares**
- iii) Land Reference Number 2950/11 (Grant No. I.R. No. 102735) measuring 43.00 Hectares**
- iv) Land Reference Number 166/9 (Letter of Allotment Ref No. 58792/16) measuring 10.11 Hectares**

d) AN ORDER OF PROHIBITION prohibiting the Respondents by themselves, their agents and/or servants from proceeding with the process of offering, allocating, issuing Letters of allotment and Titles or in any other manner dealing in a way adverse to the interests and legal rights of the Applicant in respect of the Applicant's said parcels of land known as:

- i) Land Reference Number 23213 (Grant No. I.R. No. 73387) measuring 11.93 Hectares.**
- ii) Land Reference Number 23375 (Grant No. I.R. No. 76376) measuring 5.554 Hectares**
- iii) Land Reference Number 2950/11 (Grant No. I.R. No. 102735) measuring 43.00 Hectares**
- iv) Land Reference Number 166/9 (Letter of Allotment Ref No. 58792/16) measuring 10.11 Hectares**

2. The grant of leave to operate as a stay of any implementation and/or execution of the decision by the 2nd and 3rd Respondents as contained in the letter dated the 14th day of December, 2010, pending the final hearing and determination of the Judicial Review application.

3. If leave to apply as aforesaid is granted, a direction be made that the hearing of the application for judicial review be expedited.

4. The Costs of this application be provided for.

According to the grounds in support of the application, the statutory statement and the verifying affidavit the applicant is the registered owner of four parcels of land namely L.R. Nos. 23213,23375,2950/11 and 166/9. It is the ex-parte applicant's case that the respondents have illegally amalgamated various parcels

of land which include those of the ex-parte applicant to form L.R. No. 27628 which is registered in the name of the 1st Interested Party. The ex-parte applicant states that through the letter dated 14th December, 2010 the respondents have cancelled the ex-parte applicant's titles in respect of the said parcels of land. Now the ex-parte applicant seeks the prayers contained in the notice of motion dated 23rd June, 2011.

The respondent and the interested parties strongly opposed the applicant's case.

Before coming to this court the applicant had sued Kenya Agricultural Research Institute (KARI) the 1st interested party herein and Commissioner of Lands the 2nd respondent herein in Nairobi High Court Civil Suit ELC No. 175 of 2010. According to the amended plaint dated 2nd March, 2011 which was filed in court on 3rd March, 2011 Kimeo Stores Limited (the plaintiff) seeks orders against Kenya Agricultural Research Institute (the 1st defendant) and Commissioner of Lands (the 2nd defendant) as follows:-

(a) An order of a permanent injunction restraining the 1st Defendant by itself, its agents, workmen and/or servants from entering, accessing, remaining onto, getting ingress into the suit land and/or from destroying or otherwise injuring the hedge or fence on the boundaries thereof, or from erecting or causing to be erected any structure thereon whether temporary or permanent thereon or from in any way interfering with the plaintiff's peaceful access, use and enjoyment of the suit land namely:

- (i) Land Reference Number 23213 (Grant No. I.R. No. 73387) measuring 11.93 Hectares.**
- ii) Land Reference number 23375 (Grant No. I.R. No. 76376) measuring 5.554 Hectares**
- iii) Land Reference Number 2950/11 (Grant No. I.R. No. 102735) measuring 43.00 Hectares**
- iv) Land Reference Number 166/9 (Letter of Allotment Ref No. 58792/16) measuring 10.11 Hectares**

(b) A declaration that the ALL THE said suit properties lawfully belong to the Plaintiff.

(c) A declaration that any Title held by the 1st Defendant purporting to be in respect of the suit land in the form of land Reference No. 27268 is illegal and ought to be recalled by the land registrar for cancellation.

(d) An order that the 1st Defendant do surrender to the ~~land Registrar~~ 2nd defendant any title held by the 1st Defendant and purporting to be in respect of the suit land and more particularly Title Land Reference Number 27268 for immediate cancellation.

(e) A declaration that the 1st Defendant's actions of entering into the said suit land and demolition of the Plaintiffs structures and causing of loss of property is a trespass and is illegal.

(f) That the ~~land Registrar~~ 2nd Defendant be and is hereby ordered to reinstate/restitute/rectify any interference that may have been caused to the plaintiff's said suit properties and Land register thereof by reason of the Defendants' said fraudulent and illegal actions and/or dealings.

(g) Compensation for all the suit properties at their prevailing current market value.

- (h) **General damages for trespass.**
- (i) **General damages for injury/damage to the suit land.**
- (j) **Costs of the suit with interest thereon at court rates.**
- (k) **Any other relief the court deems fit to grant.**

Looking at the prayers in Nairobi H.C. Civil suit ELC 175 of 2010 it becomes clear that the orders the ex-parte applicant seeks from this court are the same orders it seeks in ELC 175 of 2010. In order not to preempt the outcome of ELC 175 of 2010, I will not address the issue of ownership of the parcels of land in question in this cause. I have taken this route because it is only the court in ELC 175 of 2010 which can hear the evidence and make a substantive decision as to the ownership of the parcels of land in question. The way forward for me therefore is to consider whether the remedies of judicial review are available to the applicant.

The scope of the orders of certiorari, mandamus and prohibition were clearly outlined by the Court of Appeal in **CIVIL APPEAL NO. 266 OF 1996 KENYA NATIONAL EXAMINATION COUNCIL VS. REPUBLIC EX-PARTE GEOFFREY GATHENJI NJOROGE & 9 OTHERS.** As for an order of prohibition the court stated as follows:-

“What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.”

The court went ahead and concluded that:-

“The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision.”

Thereafter the court went ahead to answer the question on the scope and efficiency of an order of mandamus and stated that :-

“.....an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”

What did the Court of Appeal say about an order of certiorari ? it stated that :-

“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.”

From paragraph 12 of the verifying affidavit sworn by James N. Mungai on 31st May, 2011 it is clear that by November, 2009 the applicant had learned that the respondents had amalgamated its parcels of land with others and issued a title in favour of the 1st interested party. In fact James N Mungai averred that the respondents issued a title for L.R. No.27628 in favour of the 1st interested party on 28th June,

2007.

Applying the law already outlined to the facts of the case, it is clear that an order of prohibition cannot issue because what the applicant intends to stop was done on 28th June, 2007. From the documents of the applicant it is clear that the parcels of land it claims to own were consolidated with other parcels of land and title L.R. No.2728 issued in favour of the interested party.

As for the order of certiorari the applicant prays that the directive of the 2nd and 3rd respondents contained in the letter dated 14th December, 2010 cancelling the applicant's title and ownership of the parcels of land in question be quashed. What purpose will such an order serve? The applicant's titles were cancelled in 2007. The letter simply serves as a red herring. The prayers for mandamus will also meet the same impracticalities.

Why did the applicant come to this court after filing H.C.ELC No. 175 of 2010? I do not seem to have an answer. It already knew that its titles for the parcels of land in question were cancelled way back in 2007. There was already a case in court challenging the cancellations. There was no longer any need to seek judicial review orders because the act that the applicant was trying to stop had been done. The Court of Appeal in the **Ex-parte GEOFFREY GITHENJI NJOROGI** case already cited made two crucial observations which I believe are applicable to this case. The court stated that:-

“.....courts do not, or ought not to act in vain by making futile orders and secondly that it has always been a policy of the law to prevent a multiplicity of suits on one issue.”

The observation speaks to the case placed before this court by the applicant.

In **REPUBLIC VS. NATIONAL ENVIRONMENTAL AUTHORITY Ex-parte SOUND EQUIPMENT LIMITED Civil Appeal No. 84 of 2010** the Court of Appeal observed that although the availability of another remedy was not a bar to the commencement of judicial review proceedings, a party who opts for judicial review should demonstrate why judicial review and not the other remedy or remedies is the more efficacious way of solving the dispute. In the case before me the ex-parte applicant already has a case before the Environment and Land Division which in my view will clearly answer the questions the ex-parte applicant wants to be answered by this court. The Environment and Land Court will hear witnesses unlike this court which has only proceeded by way of statement of facts, affidavits and submissions. In my view the best solution is available in ELC 175 of 2010. After all the applicant cannot say it has been left without recourse to the justice system.

It is also noted that the applicant's notice of motion was not signed. Signing of documents and particularly pleadings is a sign of ownership. Without a signature a document cannot be attributed to the alleged maker. In my view failure to sign the notice of motion is a fatal mistake which should result in the dismissal of the applicant's case.

For all the reasons already stated, the applicant's notice of motion fails and the same is dismissed with costs to the respondents and the interested parties.

Dated and signed at Nairobi this 20th day of December, 2011

W.K.KORIR
JUDGE