



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS

JUDICIAL REVIEW 719 OF 2008

REPUBLIC..... APPLICANT

V E R S U S

1. THE PERMANENT SECRETARY MINISTRY OF ROADS;
2. THE CHIEF ENGINEER (ROADS) MINISTRY OF ROADS
3. THE ATTORNEY-GENERAL..... RESPONDENTS
4. KENYA RAILWAYS CORPORATION...INTERESTED PARTY

Exparte: KINGFISHER PROPERTIES LIMITED

R U L I N G

Before me is a Notice of Motion dated 16th March, 2009 filed by Walker Kontos advocates for the ex-parte applicants M/S Kingfisher Properties Ltd. The respondents are the Permanent Secretary Ministry of Roads (**1st respondent**), The Chief Engineer (**Roads**) (**2nd respondent**) the Attorney General (**3rd respondent**). Kenya Railways Corporation is the **interested party**.

The Notice of Motion was brought under Order LIII Rule 3(1) of the Civil Procedure Rules pursuant to leave granted by court on 13th March, 2009. The orders sought are-

- (a) ***AN ORDER OF CERTIORARI quashing the Public Notice published by the 2nd Respondent on Monday 3rd November, 2008 in so far as it applies to the applicant's property being title No. Mombasa/Block1/351- Mombasa.***
- (b) ***AN ORDER of MANDAMUS directed at the 1st and 2nd Respondents compelling them to wash out, scrub out, eliminate or otherwise remove the crosses or other markings they have placed on the Applicants property being Title No. Mombasa/Block 1/351 Mombasa.***
- (c) ***AN ORDER OF PROHIBITION directed at the 1st and 2nd Respondents and any other government department or body from issuing any other notice indicating, suggesting or otherwise implying that the Applicant's property being Title No. Mombasa/Block 1/351- Mombasa is constructed on a road or a road reserve.***
- (d) ***ORDER OF PROHIBITION directed at the 1st and 2nd Respondent restraining them from demolishing, defacing, destroying, bringing down or otherwise interfering in any way with the buildings located on the Applicant's property being Title No. Mombasa/Block 1/135- Mombasa or in***

any way blocking the Applicant's constitutional right of ownership, possession, access, ingress and egress to the same.

The application is grounded on the **STATUTORY STATEMENT** dated 19th November, 2008 and **VERIFYING AFFIDAVIT** sworn by Tajdin Thanawalla on 19th November, 2008 as director of the ex-parte applicant, both filed with the Chamber Summons for leave. The grounds of the application are, inter alia, that the 2nd respondent issued a public notice (*in the newspapers*) that was misleading as it was headlined **ILLEGAL PARKING & WASHING OF VEHICLES AND ILLEGAL BILLBOARDS**; that the 2nd respondent has no authority or capacity under section 90 and 91 of the Traffic Act to issue such a notice; that the intended demolition of the applicant's property was oppressive and vexatious as the subject piece of land was not a road reserve and in fact was land belonging to the interested party (**Kenya Railways Corporation**) who have title and who have formally leased it to the applicant; and that there were already many developments on the subject land and the threat of the 2nd respondent is a violation to proprietary rights contrary to the law, and without complying with the provisions of the Kenya Railways Corporation Act (**Cap. 397**).

At the grant of leave stage, interim orders of stay were given by the court. After filing the Chamber Summons for leave, applicant's counsel filed a supplementary affidavit on 11/12/2008, which was sworn by the same **TAJDIN THANAWALLA** on 11th December, 2008 (**TTI**) annexing a copy of a letter dated 21st November, 2008 signed by Engineer. P. Omondi as Provincial Roads Engineer/Coast addressed to M/s Manyara Building C/o Mr. Kangwana Mombasa, stating that the premises marked for demolition are not on a road reserve. The said letter of which I have seen a copy, does not identify the premises marked for demolition, nor the land and location where the premises are situated.

The applicant's counsel also on 21st May, 2009 filed written submission, contending *inter alia* that the notice was illegal and that the orders sought should be granted.

On illegality of the notice given by the 2nd respondent, reliance was placed on the provisions of section 2 of the Traffic Act which defines the **Highway Authority** as either the Minister for the time being responsible for roads, or any other authority or body to whom the Minister delegated powers, subject to such terms and conditions as he may deem appropriate. In addition, under section 90 and 91 of the Act, only the **Highway Authority** can issue such a notice. The Chief Engineer (**Roads**) cannot therefore issue such notice and same was consequently *ultra vires* and since it has not been withdrawn, it has to be quashed by way of certiorari. Mandamus as prayed was also to issue the applicant contended.

It was further contended that prohibition orders should also issue. Reliance was placed on the case of **MUNICIPAL COUNCIL OF KISUMU -VS- MADOWO (1996 – 1989) EA 373** where it was contended that the Court of Appeal approved what was held by Nyarangi JA in the case of **Kadamas – vs- Municipality of Kisumu** wherein his Lordship stated-

“Prohibition lies not only for excess of or absence of jurisdiction, but also for departure from rules of natural justice. The High Court in deciding whether or not to grant an order of prohibition would not be fettered by the availability of an alternative remedy.”

The Attorney-General on behalf of respondents opposed the application and filed a replying affidavit sworn on 12th May, 2009 by **PETER BOSIRE** a Senior State Litigation Counsel. The said replying affidavit was filed on 13th May, 2009. It was deposed in the replying affidavit that the action of the applicant in pursuing these judicial proceedings is academic, an abuse of due process, incompetent and a nullity, as, before the Chamber Summons for leave was heard inter partes as ordered by court, the Litigation Counsel had gotten in touch with the Provincial Roads Engineer/Coast together with officials from the ex-parte applicant Company and the Provincial surveyor visited the premises and found out that the said property was not on a road reserve and confirmed same in writing per the letter marked “**TTI**” to the supplementary affidavit of Tajdin Thanawalla sworn and filed on 11/12/2008. It was also deposed that by dint of that confirmation there was no matter for judicial review to proceed and the only remedy

available to the applicant, if any, lay in civil action for damages. However, the ex-parte applicant proceeded and filed a Notice of Motion on 18/3/2009 and continued to prosecute the same, which is objectionable.

The interested party, Kenya Railways corporation did not oppose the application.

At the hearing, whose date was taken in the presence of counsel for all parties on 29th June, 2009, with Ms. Mbiyu representing the respondents, there was no appearance for the respondents. Mr. A. Gichuhi submitted in support of the application. Mr. Ochieng for the interested party supported the application.

This is a judicial review application and relates to the exercise of statutory power by a public official or officials on the basis of the written law that is the Traffic Act (**Cap. 403**)

It has been the contention of the respondents, as per their replying affidavit, that this application is not called for as contentious issues had been clarified even before the Chamber Summons for leave was determined. That contention is a preliminary issue which could determine the whole matter, but unfortunately it will fail. It cannot succeed because firstly, a notice supposedly under an Act of Parliament (**the Traffic Act**) was issued, which affected the applicants. That notice was not or has not been withdrawn and therefore still stands. Secondly, the purported letter dated 21st November, 2008 annexed to the supplementary affidavit of Tajdin Thanawalla sworn on 11th **December 2008 as “TTI” was not addressed to the applicant who had already filed judicial review proceedings, nor was it annexed to an affidavit of the writer of that letter one Engineer P. Omondi deponing in no uncertain terms, what authority he of the Chief Engineer Roads had to issue the notice complained of, and on what legal basis that notice and the marking of premises for demolition was done, and who ordered the same to be done. Thirdly, and more importantly, there does not appear to be any offer from the respondents to compromise or settle the case which had already been filed amicably. Therefore, in my view the applicants had a right to pursue the proceedings to the ultimate conclusion since issues were left by the respondents hanging to its detriment.**

The complaints of the applicant hinge firstly, on the notice in the Standard newspaper published on 3rd November, 2008, and subsequent action on same as well as intended action on same, and secondly whether that notice was legal according to the law.

The said notice reads-

“REPUBLIC OF KENYA

MINISTRY OF ROADS DEPARTMENT

PUBLIC NOTICE

ILLEGAL PARKING & WASHING OF VEHICLES AND ILLEGAL BILLBOARDS WITHIN CLASSIFIED ROADS IN COAST PROVINCE.

Pursuant to sections 90 and 91 of the Traffic Act (Cap. 403), it is illegal for any person to willfully obstruct a public road.

The following actions must be taken by all concerned and in any case not later than 17th November, 2008.

- Removal of all illegally parked vehicles along all public roads and in particular Shimanzi and Port Reitz Roads.***
- Cessation of washing of vehicles on road shoulders especially along Mombasa to Nairobi Road (A 109) at Mikindani Miritini Section.***

- **Removal of all illegal billboards and any other structures on the road reserve.**

Notice is hereby given that the Ministry of Roads shall act in accordance with the provisions of the Traffic Act on expiry of this notice. No further reference shall be made to the persons concerned and appropriate legal action shall be instituted to recover the costs of removal of the same from the respective owners in accordance with this Act.

Engineer Mwangi Maingi Chief Engineer Roads.

It can be observed that, other than the Mombasa to Nairobi road (A 109), none of the so called public roads or road reserves were described in the notice in any way at all. It is also not disputed that the structures on the subject land herein were later physically marked by officials on behalf of the Ministry concerned for action (most probably demolition)

The said above notice was given under section 90 and 91 of the Traffic Act (Cap. 403) which reads-

90. (1) No owner or persons in charge of a vehicle drawn by animals shall allow an animal which is of materially defective vision to be used for drawing such vehicle on a road.

(2) No person shall do any of the following on a road.

(a) willfully or negligently lead or drive any animal or vehicle on a footpath or in a road drain;

(b) play any games to the annoyance, inconvenience or danger of persons using the road;

(c) willfully obstruct the free passage of persons or vehicles passing along the road;

(d) drive or conduct any vehicle drawn by animals without having reins to guide the animals unless a person leads the animals in such a manner as to have proper control over them;

(e) when driving a vehicle, sleep whilst such vehicle is in motion;

(f) permit any cattle to be at large without being under such efficient control as to prevent their damaging the road.

(g) outspan any animals from a wagon or cart.

Section 91 reads as follows-

91(1) Every person who, without the written permission of the highway authority-

(a) Encroaches on a road or a road reserve thereof at the sides or sides thereof by making or erecting any building, fenced ditch, advertising sign of other obstacle, or by digging thereon or planting or sowing any tree, shrub seeds, thereof; or

(b) deposits or causes to be deposited in any manner whatsoever on a road any material or matter, other than road making materials deposited for the purpose of making up or repairing the road; or

(c) digs up, removes or alters in any way the soil or surface of a road, or of any land reserved thereof at the side or sides thereof, or if done for the purpose of removing a vehicles without immediately thereafter making good the damage.

(d) willfully files up, alters or obstructs any ditch or drain, whether on a road or contiguous thereto, made by or under control of the highway authority, to carry water off the road or to keep it from flowing on to the road; or

(e) allows any sludge or any filthy or noisome matter to flow from any building or land in his occupation on to a road or into any ditch or drain made by the highway authority;

(f) causes or allows any timber, sledge, plough or other heavy material, vehicle or implement not wholly raised above the ground on wheels to be dragged on a road;

or

(g) pitches any tent, booth or stall on a road;

or

(h) makes any fire on any road, shall be guilty of an offence.

(2) It shall be lawful for the highway authority to remove anything, whatsoever which has been placed or erected on a road or land reserved therefor in contravention of this section."

Under Section 2 of the Act, highway authority is defined as follows-

"highway authority" means the Minister for the time being responsible for public roads or any other Authority body to whom the Minister delegates powers subject to such terms and conditions as he may deem appropriate."

It is clear to me that other than the prohibition of certain actions and the creation of offences under the two sections, section 91(2) of the Act grants power to the "highway authority" to remove anything erected or placed on a road reserve contrary to the law.

Considering the provisions of the Act, only the Minister for the time being responsible for public roads or authority or body to whom the Minister has delegated his powers could issue such a notice complained of herein. The Chief Engineer Roads, in his own capacity as such cannot and does not have the mandate to issue such a notice or take the action he intended or intends to take on behalf of the Ministry or the Government. The said notice also does not state that he was acting on powers delegated to him by the Minister.

Secondly, my understanding is that any delegation has to be done properly and in accordance with the law. The Chief Engineer Roads, being a civil servant in the Ministry, I presume was purporting to act on behalf of the Minister. As I have held elsewhere in the case of REPUBLIC –VS- KENYATTA UNIVERSITY & 2 OTHERS - Ex Parte ELENA D. KORIR – Nairobi High Court Miscellaneous Application No. 1285 of 2007.

"It is important that when there are statutory institutions or committees, they act in that name when they are making decisions. Otherwise you will get bureaucrats pretending to act and usurp the functions of those statutory institutions. The Registrar Academic, is not the Senate. The Deputy Vice Chancellor is also not the Senate."

In our present case the Chief Engineer Roads is not the Minister for public roads. There is no indication that the said Minister delegated any authority to that officer, or whether the Minister has powers, to so delegate to a single officer. It is also important to note that because the action by the said Chief Engineer Roads affects the general public in the whole country, not individuals working in a certain institution, or performing a common function or in particular locality like the case of Kenyatta University above.

In my view the notice issued by the Chief Engineer Roads herein is illegal, null and void, lacking any legal basis and has to be quashed in so far as it relates to the applicant as requested. I will grant orders of certiorari sought.

Since also the respondents appear to have admitted that the land in question is neither on a public road nor on a road reserve, and seem to be defending themselves on technicalities alone, I will grant the prohibition orders sought.

As for mandamus, because the respondents claim to be acting under a public law obligation and powers, I will also grant the same, because what they did was unlawful *abinitio*. They did not have any lawfully authority to deface other peoples properties.

Regarding costs, they are for the successful party as well as the interested party because the land actually belongs to the interested party.

Consequently, I allow the application and grant certiorari, mandamus and prohibition orders as prayed. The respondents will bear the costs of the applicants and the interested party.

It is so ordered.

Dated and delivered at Nairobi this 22nd day of September, 2009.

GEORGE DULU

JUDGE.

In the presence of-

Mr. Allan Gichuhi for applicants

Mr. C.N. Mange for respondents