



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc. Civil Appli. 555 of 2006

**IN THE MATTER OF: AN APPLICATION BY THE EVANGELICAL LUTHERAN CHURCH
IN KENYA REGISTERED TRUSTEES (“THE APPLICANT) FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW FOR THE ORDERS OF CERTIORARI, MANDAMUS AND
PROHIBITION DIRECTED TO THE COMMISSIONER OF LANDS AND THE PERMANENT
SECRETARY, MINISTRY OF LANDS AND SETTLEMENTS (“THE RESPONDENTS)**

AND

IN THE MATTER OF: GOVERNMENT LANDS ACT, CHAPTER 280, LAWS OF KENYA

AND

**IN THE MATTER OF: THE ALLOTMENT TO THE EVANGELICAL LUTHERAN CHURCH
IN KENYA OF AND KNOWN AS NAIROBI BLOCK 61/436 AND NAIROBI BLOCK 61/634
(LATER MERGED TO MAKE NAIROBI BLOCK 61/705).**

AND

**IN THE MATTER OF: THE PROPOSED EXCISION OF LAND KNOWN AS NAIROBI
BLOCK 61/705 BY PDP NO. 42/32/98/01 TO CREATE A OAD OF ACCESS.**

BETWEEN

EVANGELICAL LUTHERAN CHURCH IN KENYA

REGISTERED TRUSTEES APPLICANT

AND

THE COMMISSIONER OF LANDS 1ST RESPONDENT

THE PERMANENT SECRETARY,

MINISTRY OF LANDS AND SETTLEMENT 2ND RESPONDENT

JUDGMENT

The Notice of Motion dated 28th December, 2006 seeks the judicial review orders of certiorari,

prohibition and mandamus.

The quashing order is sought to quash the decision of the Commissioner of Lands to create a road of access out of Nairobi Block 61/705.

An order of prohibition is sought to prohibit the Commissioner his agents and or servants from implementing the decision to excise a portion of land parcel number Nairobi Block 61/705 for the purposes of creating a road of access.

Finally an order of mandamus is sought to compel the Commissioner of lands to forthwith issue to the Applicants, the Evangelical Lutheran Church in Kenya with appropriate title in respect of Nairobi 61/705.

The Court has considered the contents of the Statement and Verifying Affidavit, the replying affidavit of the Respondent and written submissions filed by both parties including lists of authorities.

It is common ground that the Commissioner of Lands has already implemented the decisions concerning the excise of the parcel of land in question namely Nairobi/Block 61/710 and a lease has already been issued after being duly signed by the Applicants Trustees. The Lease was issued pursuant to the provisions of the Registered Land Act Cap 300 of the LOK.

This application must fail for the following reasons:

(1) In the Statement, which is the principal pleading in judicial review proceedings, the Applicant has sought leave instead of seeking the substantive judicial review orders of certiorari, prohibition and mandamus. The application is therefore incompetent since the applicant would not be entitled to any reliefs which they have not claimed in the statement. Order 53 rule 4(1) states:

“Copies of the Statement accompanying the application for leave shall be served with the Notice of Motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided *be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.*”

In other words the applicants are specifically barred by this rule, from the reliefs they have sought, since they do not appear in the statement. In addition several decisions emanating from this division and other judges have interpreted the above rule as a bar to any reliefs not sought in the statement. I need not go further since this ground alone disposes of the entire application. However for the sake of good order and in the interest of developing the law, there are other additional grounds why this application must fail.

(2) The application by way of Notice of Motion has not been instituted on behalf of the Republic. In this regard it is trite law since 1957 that if this happens and no amendment is sought the defect is fatal - see the case of *FARMERS BUS SERVICE v TRANSPORT APPEAL LICENSING BOARD, WELAMONDI v ECK (Ringera J)* and the case of *EVANS MUSUNGU* where *WENDO H J* held at page 8:

“Judicial Review orders are sought in the name of the Republic because judicial review is a mechanism that the State has put in place to check excesses of its officers authorities and tribunals.”

(3) The impugned decision to create an access road has already been made by the Commissioner on merit, and it is not the function of a judicial review court to make decisions on merit on behalf of the bodies or persons empowered to make them. It is only concerned with the decision making process and this has not been challenged see *R v JUDICIAL SERVICE COMMISSION ex-parte PARENO Misc Civil Application No. 1025 of 2003*. Also see Nyamu J’s decision in the case of *R v MINISTER FOR FINANCE & ANOTHER ex-parte PETER NYONGO & 2 OTHERS Misc Civil Application No. 1078 of 2007*

(4) It is also clear to the Court that the applicants could have taken action pursuant to part X of the Registered Land Act or institute a private law suit against the Commissioner the lease having been issued

under the Registered Land Act Cap 300. They could have sought rectification of the title. Accordingly they would not be welcome to the public law courts where alternative statutory relief is specifically provided pursuant to sections 142-147. They would only be entitled to come to a judicial review court where they can demonstrate that the alternative relief is less effectual or less beneficial to them than the public law relief see the holding in the case of *R v CHIEF LAND REGISTRAR KAJIADO ex-parte KERIASK Misc Civil Application No. 689 of 2001* (unreported).

(5) Finally, since certiorari would not lie to attack a decision to issue a lease on merit and prohibition operates only to the future (lease already issued) and mandamus issues to enforce public duties (they have not shown any breach of duty owed to them and which the Commissioner has not fulfilled) all the judicial review orders sought would not issue in favour of the Applicants. With respect the application is grossly incompetent.

For the above reasons the application for judicial review is dismissed with costs.

DATED and delivered at Nairobi this 30th day of May, 2008.

J.G. NYAMU

JUDGE