



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**Misc. Civ. Appli.65 of 2006**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**THE OFFICER IN CHARGE G. K. PRISON ELDORET ..... RESPONDENT**

**EX-PARTE: DAVID KIBIWOT ACHIKWA**

**JUDGEMENT**

This is an application under the provisions of Order LIII, Rule 3 (1) and 4 Civil Procedure Rules and Section 8 and 9 of the Law Reform Act, Cap 26 Laws of Kenya. It seeks an order of prohibition so as to prohibit the Respondent, the Officer in Charge G.K Prison Eldoret from trespassing and ploughing or “harassing” the Applicant’s occupation of Land Parcel No. Eldoret Municipality Block 10/951. (Sic)

In The Statutory Statement, the Applicant states as that:-

1. The applicant is the registered owner of land parcel number Eldoret Municipality Block 10/951 having obtained title on 20/11/2002 under the provision of the Land Control Act, Chapter 300, Laws of Kenya.
2. The Applicant has since moved into the said parcel of land, built his family house beside doing farming activities.
3. On several days being 15/3/2006 and 16.3.2006 the Respondent has been sending armed prison guards who have since destroyed his fence and forcefully ploughed part of his parcel of land.
4. That efforts to stop him have been fruitless and even the Area Chief has been unable to do so and as a result of this the applicant has been forced to seek this Court’s intervention.
5. The suit land is the applicant’s personal property having title and the same is indefeasible as it is acquired under first registration pursuant to the provisions of the Registered Land Act, Cap. 300.
6. That the Respondent’s acts are ultra vires and such uses of force to acquire the use of private property is totally unconstitutional.
7. The Applicant has nowhere to go neither can he resist the Respondent herein by use of necessary force to repulse a trespasser.

8. It is only this Court which can stop such belligerent acts by the Respondent.
9. The said parcel of land does not belong to the Respondent or at all therefore there is no reason for his actions.
10. The Applicant's application therefore be granted.

The application was opposed by the Respondent.

Through a Replying Affidavit sworn by a Senior Government Surveyor, the Respondent stated:-

1. That by a circular No. L/3/Vol. V/114 dated 18<sup>th</sup> October, 2005, the Permanent Secretary, Office of the Vice President and Ministry of Home Affairs ordered repossession of all illegally and irregularly acquired public land belonging to the Prisons Department.
2. That the deponent carried out an audit and identified land parcels including one belonging to the Applicant herein was among those parcels which had been illegally and irregularly alienated from the G.K. Prison Eldoret.
3. That land belonging to G.K. Prison cannot be allocated as the same was declared by a Gazette Notice published in 1961.
4. That the said Gazette Notice has not been revoked and is still in force.
5. That before the Applicant herein was evicted from the Prisons' land a notice was duly served on him and the eviction carried out at the expiry of the notice.

I have considered the application and the rival affidavits.

I have also considered the submissions by Counsel.

The High Court sitting under its judicial review jurisdiction is able to consider and determine whether the decision of persons or bodies which perform public duties and functions are appropriate for judicial review by way of orders of certiorari, mandamus and/or prohibition. **"The Wednesbury Principle"** would guide this Court in such a situation. In the case of **Associated Provincial Picture Houses –V- Wednesbury Corporation (1948) I KB 223**, Lord Green M.R. laid down the said principle as follows:-

**"Decisions of persons and bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the Court concludes that the decision is such that no such person or body properly directing itself and the relevant law and acting reasonably could have reached the decision."**

In this application, the Officer in Charge, G.K. Prison Eldoret is a public officer appointed under the Prisons Act Chapter 90 to carry out statutory duties set out therein. The Prisons Act in the preamble is said to be:-

**"An Act of Parliament to consolidate and amend the law relating to prisons, to provide for youth corrective training centres, extra moral penal employment, to provide for the organization, discipline, powers and duties of prison officers and for matters incidental thereto and connected therewith."**

And an officer in charge is described as **"a prison officer or administrative officer appointed by the Commissioner to be in charge of a prison."**

I do find that the said officer in charge carrying out any statutory duties under the Act is amenable to judicial review and if found appropriate to be directed by judicial review orders.

The Applicant is not challenging any decision or action by the Respondent in the discharge of his duties as an officer in charge of the G.K. Prison, Eldoret.

The Applicant wants this Court to issue an order of prohibition to prohibit the Respondent from alleged “trespassing and ploughing or “harassing” the Applicant’s occupation of his property”. (Sic)

From the Respondent’s reply it is clear that the Respondent was purportedly following instructions of his senior, the Commissioner of Prisons dated 18<sup>th</sup> October, 2005. The said letter states:-

**18<sup>th</sup> October, 2005.**

**“All Provincial Prisons Commanders,**

**All Officers in Charge,**

**Superintendents I/C – Borstal Institutions/YCTC**

**RE: IRREGULARLY ACQUIRED PRISONS LANDS BY PRIVATE DEVELOPERS**

**I forward herewith a copy of the Permanent Secretary’s letter office of the Vice President and Ministry of Home Affairs Ref ..... on repossession of irregularly/illegally allocated public land.**

**All the affected Officers In Charge should read carefully and take the necessary action as per the recommendations of the Circular.**

**Meanwhile, all Provincial Prisons Commanders should take note and make a follow up where their Officers In Charge are affected.**

**Kindly treat this exercise as urgent and confirm compliance.**

**Gilbert M. Omondi, MBS**

**COMMISSIONER OF PRISON”**

The Applicant may not have known of these instructions which the Respondent was purportedly following. Strictly, the Applicant should have otherwise challenged the said decision.

What the Respondent then proceeded to do is to move in and evict the Applicant. They do not recognize the Applicant’s title to the land. The Respondent Claims that the land is prison land. The Court was referred to a Legal Notice No. 371 of 22<sup>nd</sup> June, 1961 under the then Prisons Ordinance which allegedly declared and gazetted the land to be part of the prison.

From the foregoing, I am of the view that the dispute between the Applicant and the Respondent is a land dispute relating to ownership. The applicant claims that he is the lawfully and duly registered owner of the suit property while the Respondent on behalf of the Commissioner of Prison is claiming that the Appellant acquired the property illegally and irregularly. They intend to repossess what they claim is a public land.

The Respondent did not make the decision. It was a decision of the Commissioner of Prisons who himself was instructed by the Permanent Secretary in the Office of the Vice President and Ministry of Foreign Affairs. He was not carrying out any duties under the Prisons Act Qua Officer in Charge of Prisons. He was not carrying out any statutory duties for which he is amenable to judicial review.

The Respondent is staking a claim of ownership to the suit land. It may appear to be improper of the

prisons officer to proceed to purportedly evict the Respondent without challenging the title in a Court of Law but that does not make the case a judicial review one. The dispute between the parties clearly belongs to the Civil Courts as an ownership and title to land dispute.

Judicial review is not the appropriate process to ventilate their causes of action or otherwise.

It would be improper and irregular for this Court to grant judicial review orders of prohibition on the basis of the registration of the Applicant as the owner of the property. This would interfere with the rights of the Respondent to make a claim on the land and pursue such in the Court or defend itself.

I therefore hold that this Court has no jurisdiction to grant any orders of judicial review as the dispute is strictly not of a public nature or interest. It is of a “private nature” in so far as judicial review is concerned even if the Respondent is a public officer or body. Even public bodies have proprietary interests and rights.

I therefore do hereby dismiss the application dated 10<sup>th</sup> April, 2006 with costs to the Respondent. I hereby discharge the order of stay granted on 21<sup>st</sup> March, 2006 in Miscellaneous Civil Application No. 65 of 2006.

**DATED AND DELIVERED AT ELDORET ON THIS 2<sup>ND</sup> DAY OF JULY, 2008.**

**M. K. IBRAHIM**

**JUDGE**

**In the presence of:**

Mr. Chirchir holding brief for the Respondent

No appearance for the Applicant