



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Appli 99 of 2006**

**SANGHANI INVESTMENT LIMITED.....APPLICANT**

**Versus**

**THE OFFICER IN CHARGE**

**NAIROBI REMAND & ALLOCATION PRISON.....RESPONDENT**

**JUDGMENT**

This is an Application for Judicial Review brought under Order 53 Rule 3 of the Civil Procedure Rules. The Applicant, Sanghani Investments Ltd. Moved the court seeking the following orders;

- (1) That the Hon. Court do issue an order of certiorari to bring up into the High Court and quash the order given by the Officer in charge, Nairobi Remand and Allocation Prison to the Applicant to vacate from its property known as LR No. 209/8335 situate in Nairobi;
- (2) That the Hon. court do issue an order of prohibition directed at the Officer in Charge Nairobi Remand and Allocation Prison, its Officers, servants and or agents from entering, removing demolishing or in any way trespassing on all that parcel of land known as LR No. 209/8335 being the property of the Applicant pursuant to an order issued by the Officer in Charge Nairobi Remand and Allocation Prison dated 9<sup>th</sup> November 2005 or in any other manner howsoever enforcing the order against the Applicant.
- (3) That the Honourable court do issue a declaration that all that parcel of land known as LR No. 209/8335 situate in Nairobi is legally and rightfully registered in the name of the Applicant.
- (4) The Honourable court do issue a declaration that the property known as LR No. 209/8335 in Nairobi was lawfully and legally acquired by the Applicant.
- (5) That the costs of the Application be borne by the Respondent

The above prayers are sought against the officer in charge Nairobi Remand and Allocation Prison. The Application is supported by the affidavit of Vasant D. Sanghani dated 7<sup>th</sup> March 2006. The grounds upon which the Application is based are that the order of the Officer in charge Remand & Allocation Prison is unlawful; he acted in excess of his jurisdiction; he flouted principles of natural justice by denying the Applicant a hearing.

It is the Applicants case that the Applicants purchased the suit land from one Rosemary Angaine and had it registered in their name in 1985 and the Applicant has had an uninterrupted occupation of the land since. The Applicants have put up two buildings on the plot which are leased to several tenants. It is on 9<sup>th</sup> November 2005 that the Applicant received a letter from the Officer in charge the Industrial Area Remand and Allocation Prison asking the Applicants to vacate the land for reasons that the land had been acquired irregularly.

The said letter is said to be null and void as it is based on the findings of the Ndungu Report which report has no force of law. The Applicant claims having adversely acquired the land since they have been on the land for over 12 years. See Section ( 38 (1) of Limitation of Actions Act). It was Mr. Okundi's submission that if the Government wants to compulsorily acquire the land, then it must follow procedure under S. 6 of the Land Acquisition Act, Cap 295. Otherwise the Applicant contends that the land is registered under the Registration of Titles Act and their title is conclusive and indefeasible and can only be challenged under S. 23 of the Registration of Titles Act on account of fraud and misrepresentation to which the Applicant must have been a party.

The Notice of Motion was opposed and Mr. Rotich, Counsel for the Respondents relied on a Notice of Preliminary Objection he had filed and whose grounds of objection are as follows;

- 1) That the Application is fatally defective and bad in law;
- 2) That the Application is misconceived and incompetent;
- 3) The Applicant's supporting affidavit is fatally defective and improperly on record.

Before considering the merits of this Application it is proper that I do consider the points raised by the Respondent in the Preliminary Objection.

The first point that Mr. Rotich took up was that the affidavit filed in court on 7<sup>th</sup> March 2006 and upon which the Notice of Motion is predicated is improperly on record and offends order 53 Rule 4 (1) and (2) of the Civil Procedure Rules as it was filed without the leave of the court and should be struck off. It therefore leaves the Notice of Motion naked and there is nothing for the court to look at and consider as evidence.

In reply, Mr. Okundi said that they never filed further affidavits but an affidavit in support of the Notice of Motion. The Chamber Summons herein is dated 20<sup>th</sup> February 2006 and filed in court on 22<sup>nd</sup> February 2006. It was accompanied by a verifying affidavit of Vasant Devji Sanghani sworn on 20<sup>th</sup> February 2006 and a statement of the same date.

The Notice of Motion was filed on 7<sup>th</sup> March 2006 and was supported by an affidavit of Vasant Devji Sanghani dated 7<sup>th</sup> March 2006 and filed in court on same date. In his submissions Mr. Okundi said that the Notice of Motion is supported by the Applicant's affidavit sworn on 7<sup>th</sup> March 2006.

I think it is important to set out the provisions of Order 53 Civil Procedure Rules to appreciate what documents are supposed to be relied upon by the Applicant at the hearing of the motion.

Order 53 Rule 4 (1) and (2) provide as follows:

"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.

**(2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of**

**any other party to the Application and where the Applicant intends to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement and shall supply on demand copies of any such further affidavits.**

**(3) .....**”

Clearly, Order 53 Rule 4(1) provides that the affidavit(s) and statement to be relied upon in support of the Notice of Motion are those filed with the Chamber Summons at the time leave was granted. In this case, the statement and verifying affidavit which accompanied the Chamber Summons are dated 20<sup>th</sup> February 2006 and filed in court on 2<sup>nd</sup> February 2006. The Applicants Counsel never made reference to these two documents at all.

Under Order 53 Rule 4(2) Civil Procedure Rules, in order to file any further affidavits, leave of the court must be sought. The affidavit of the Applicant dated 7<sup>th</sup> March 2006 and filed in court on the same date and which counsel made reliance on in support of the Notice of Motion was filed without the leave of the court. It is improperly on record and offends Order 53 Rule 4 (1) and (2) Civil Procedure Rules and is hereby struck off. It is noteworthy that once the Notice of Motion is served on the other parties with the statement and affidavit(s) filed with the Chamber Summons, the Applicant need not file any other documents with the Notice of Motion.

The other objection raised by the Respondents is that the Application is brought in the name of the Sanghani Investment Ltd. as the Applicant but not the Republic as required by law. Sanghani Investment Ltd. is the ex parte Applicant. Can they also be the Applicant? Mr. Rotich urged that there is no Applicant before the court and hence no Judicial Review Application before the court. Mr. Okundi in reply to that objection said that the same is raised late in the day and cannot be allowed. Besides, Counsel said that the Respondent is a Government Officer, represented by the Attorney General and thirdly the court has wide discretion to ensure justice is done. There is a wealth of authority on who should bring Judicial Review proceedings before the court. The leading case on this issue is the case of **FARMERS BUS SERVICE & OTHERS V TRANSPORT LICENSING APPEAL TRIBUNAL (1959) EA 719** where the Court of Appeal of Eastern Africa held that Judicial Review Applications should be brought in the name of the crown. By the time of that decision in 1959, prerogative writs (now judicial review orders) were issued in the name of the crown. On 12<sup>th</sup> December 1964, upon Kenya's assumption of Republican status, the place of the crown was taken over by the Republic and the Judicial Review orders are now made in the name of the Republic. Why are these orders issued in the name of the Republic (Crown)?

The intention was to ensure that public authorities, officials and tribunals treat individuals who come before them fairly and adhere to the law and the power conferred upon them.

The State or Republic has set up a system/mechanism of checking itself and its officials' excesses. The **FARMERS CASE** set out the format which a Judicial Review Application should take. The **FARMERS BUS CASE** decision was followed in the case of **R V THE CHAIRMAN OF THE ELECTORAL COMMISSION OF KENYA**

re **JOTHAM MULATI WELAMONDI MISC APPLICATION 81/02** in which Justice Ringera held that an Application for Judicial Review has to be brought in the name of the Republic at the instance of the person affected by the action or omission in issue and the court set out the format as was set out in the **FARMERS BUS CASE**. See also **KENTON KIJABE HILL FARMERS CO-SOCIETY V D.O. NAIVASHA MISC APPLICATION 280/1996; MISC APPLICATION 1124/05 THE NATIONAL GOVERNING COUNCIL OF AFRICA PEER REVIEW MECHANISM V HON. PROF. ANYANG NYONG & OTHERS**. There are many other decisions in which the courts have upheld that position and this being Judicial Review proceedings governed by procedure laid down in Order 53 Civil Procedure Rules, it is strictly observed. I do therefore uphold the Respondents objection that the Notice of Motion is not properly intitled. There is no Applicant to move the court for Judicial Review orders and the Application is incompetent and fatally defective and must be struck out.

The third objection raised by the Respondent is that the court has no jurisdiction to grant declarations that are sought by the Applicants in the Notice of Motion. Prayers 3 and 4 of the Notice of Motion seek declarations to the effect that the suit land belongs to the Applicant and that the same was lawfully acquired by the Applicant.

In the case of **THE COMMISSIONER OF LANDS V HOTEL KUNSTE LTD CA 234/1995**, the Court of Appeal described the Judicial Review jurisdiction as a special jurisdiction which is neither civil nor criminal and the Civil Procedure Act does not apply. It is governed by Section 8 and 9 of the Law Reform Act being the substantive law and Order 53 Civil Procedure Rules being the procedural law.

S. 8 of the Law Reform Act provides

**“(1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction issue any of the prerogative writs of mandamus, prohibition or certiorari;**

**(2) In any case in which the High Court in England is, by virtue of the provisions of Section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.”**

Section 8 of the Law Reform Act specifically sets out the orders that this court can issue in Judicial Review proceedings. The orders are, mandamus, certiorari and prohibition. A declaration does not fall under the purview of Judicial Review for the simple reason that the court would require viva voce evidence to be adduced for the court to determine the case on the merits before declaring who the owner of the land is. 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.

The notice that is under challenge in these proceedings gave the Applicants 14 days to vacate the disputed land. The letter (Notice) was written based on the findings of the Ndungu Report on land. As observed by Justice Nyamu in the case of **JOHN MUREITHI & OTHERS V THE HON. THE AG MISC APPLICATION 158/05**, the recommendations in the Ndungu Report have not acquired any statutory form. They are mere recommendations and have no force of law. It is doubtful whether the said Report can be a basis for issuance of such a notice as the one under attack in this Application.

Mr. Rotich urged that the notice raised issues of land ownership, whether the land belongs to the Applicants or the Respondent. The Applicants exhibited a title and other documents as proof that the land is registered under the Registration of Titles Act and that title is therefore sacrosanct and indefeasible unless challenged on grounds of fraud or misrepresentation under S. 23 of the Registration of Titles Act. The Respondents did not file any reply nor did they attempt to prove that the land belongs to the Respondent.

Be that as it may, I do agree with the Respondents that the underlying dispute herein is ownership of land. Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be 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 the case of **REP V EX PARTE KARIA MISC APPLICATION 534/03**, Justice Nyamu, Justice Ibrahim and Justice Makhandia held that 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 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.

To buttress the fact that this is indeed a dispute over ownership of land, the Applicant’s Counsel invoked Section 38 of Limitation of Actions Act Cap 22 Laws of Kenya, and contends that even if the land belonged to the Respondent, the Applicant has acquired prescriptive rights by way of adverse

possession since the Applicant has been in an uninterrupted possession of the land for over 20 years. One claiming adverse possession would need to prove that allegation by adducing viva voce evidence but not by way of Judicial Review. In any event, if the land in question is Government land, the doctrine of adverse possession would not apply because S. 41 of the Limitation of Actions Act provides that the Act does not apply to Government land and so Section 38 of the Limitations of Actions Act would not apply.

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 a discretionary remedy will only issue if it will serve some purpose. **Halsburys Law of England 4<sup>th</sup> Ed Vol II page 805 para 1505**, says of the order of certiorari;

**“certiorari is a discretionary remedy which a court may refuse to grant even when the requisite grounds for its grant 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. It will still require determination by way of filing pleadings and viva voce evidence at another forum preferably the Civil Courts.

In sum, the Notice of Motion as filed is incompetent and fatally defective. It is hereby struck out. In addition this court has no jurisdiction to grant declarations that have been sought nor is the Application merited. Each party to bear its own costs.

Dated and delivered this 2<sup>nd</sup> day of March 2007.

**R.P.V. WENDOH**

JUDGE

In presence of:-

Mr. Bitta Holding Brief for Mr. Rotich for Respondent

Daniel: Court Clerk

R.P.V. WENDOH

JUDGE