



**REPUBLIC OF KENYA**

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

**(MILIMANI LAW COURTS)**

**MISC APPLI 1757 OF 2005**

**THE REPUBLIC.....APPLICANT**

**Versus**

**ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> RESPONDENT**

**EX-PARTE: ABERDARE ENGINEERING LIMITED**

**JUDGMENT**

This is an application for Judicial Review. The ex parte Applicant, Aberdare Engineering Ltd. seeks the following orders against the Attorney General and the City Council of Nairobi:-

- (1) Mandamus to command the Minister in charge of Provincial Administration and Internal Security to remove and/or evict all occupants upon LR Nos. 22767 and 22768;
- (2) Mandamus to compel the City Council of Nairobi to demolish and remove all the structures on LR 22767 and 22768;
- (3) Prohibition to prohibit the Minister in (1) above, District Officer Westlands and the Chief of Kitsuru Location, from allocating any portion of the suit lands to any member of the public or at all.
- (4) That the costs of this Application be in the cause.

The Notice of Motion is grounded on the Verifying Affidavit of John W. Njaaga dated 23<sup>rd</sup> November 2005. The deponent is the Managing Director of the Applicant.

The Application was opposed and a Replying Affidavit was filed by Peter Kibinda, a Director of City

Planning and Architecture of the 2<sup>nd</sup> Respondent and skeleton arguments filed on 28<sup>th</sup> August 2006. The 1<sup>st</sup> Respondent did not file any Replying Affidavit but filed Skeleton arguments on 28<sup>th</sup> December 2006.

It is the Applicants case that they own plots Nos. 22767 and 22768 in Westlands area of Nairobi as per titles 'JWN 1'. The Applicant wanted to start developing the said plots and applied to the 2<sup>nd</sup> Respondents for the necessary approvals which were granted and on 26<sup>th</sup> November 2001 when Mr. Njaaga visited the plots, he found that temporary structures had been erected thereon and efforts made to try and evict the illegal occupants have been futile. He has also made efforts to have the structures removed through the District Officer Westlands and Chief of Kitsuru but has not been successful.

It is the Applicant's contention that the illegal occupants were allowed on the plots by the District Officer Westlands who falls under the docket of the Minister for internal Security and that is why the Attorney General is sued. The City Council of Nairobi has been sued because they have allowed the illegal structures to be put up and to remain on the plots.

Mr. Njoroge, Counsel for the 1<sup>st</sup> Respondent submitted that the title to the properties have not been determined and rules of natural justice require that all parties be heard. He also contended that Order 53 R 3 (2) requires that all parties affected should be notified of the Application yet the alleged illegal occupants or trespassers have not been served with this Application and the application is therefore fatally defective.

Counsel also submitted that the property in dispute is private land and the alleged occupants are trespassers and the issues should be sorted out in the ordinary civil courts as it is not a public law issue.

It was also the 1<sup>st</sup> Respondent's contention that the prayer for mandamus is misplaced because there is no duty imposed on the minister over private property and the public duty to be performed has not been shown. Counsel relied on the case of **NATIONAL GOVERNING COUNCIL OF AFRICA PEER MECHANISM V PROF ANYANG NYONG'O MISC HC APPLICATION 1124/05**.

It is another submission of the 1<sup>st</sup> Respondent that failure to serve the District Officer, the Chief and Minister with the Application is fatal to the Application and the same should be dismissed.

Mr. Omoti, Counsel for the 2<sup>nd</sup> Respondent associated himself with the submissions of the 1<sup>st</sup> Respondent. Counsel observed that this Application offends Order 53 R 3(2) Civil Procedure Rules in that the alleged trespassers who will be effected by the very orders that this court may make are not served with this Application.

Mr. Omoti further contended that the primary issue here is ownership of property as the Applicant has exhibited titles and alleges that the plots have been allocated to other parties. That the Applicants should have tried to resolve the issue of ownership.

That the 2<sup>nd</sup> Respondent does not have any statutory obligation to interfere with private property or to remove squatters from private land which would require allocation and use of Council funds.

It is further submitted that the Application offends Order 53 R 4 in that the Notice of Motion was accompanied by a Supporting Affidavit whereas the Statutory Statement and Verifying Affidavits were just annexures.

That no demand was issued to the 2<sup>nd</sup> Respondent because whatever was issued was directed at the mayor of the City Council of Nairobi who is not an officer of the 2<sup>nd</sup> Respondent for purposes of discharging Statutory duties and that therefore an order of mandamus cannot issue against the 2<sup>nd</sup> Respondent.

There is no doubt that the plots Nos 22767 and 22768 are registered in the names of the Applicant as evidenced by the exhibited titles 'JWN 1'. From the deponements of Mr. Njaaga, a director of the

Applicant, there are squatters settled on that land by Government Officials, Chiefs and District Officer Westlands. I have also seen communication between the Applicants and the Provincial Commissioner's office, and District Officer's office. It is not known under what circumstances the said squatters were settled on those plots and that issue has to be resolved before the court can make a unilateral decision to remove the squatters by orders of Judicial Review. I do find that there is indeed a dispute over ownership of the land in question that needs to be resolved and that cannot be done in a Judicial Review Application. It can only be resolved by the Applicants filing a civil suit where evidence can be adduced by both parties in order for the court to decide on ownership of the plots once and for all.

The Respondents have raised objection to this Application on grounds that the Applicant did not comply with Order 53 Rule 3(2) Civil Procedure Rules. That rule provides that notice shall be served on all persons directly affected by the Application. Rule 3 (3) then goes on to provide that an affidavit giving the names and addresses of all the people served and the place and date of service on all the persons served with the Notice of Motion shall be filed before the Notice of Motion is set down for hearing. If service has not been effected, the reasons for failure to serve will also be stated. The Applicants' Counsel did not respond to this objection. I have perused the court file. There is an affidavit of service filed on 14<sup>th</sup> March 2006 and dated 14<sup>th</sup> March 2006. In it, the process server, one Donald Wambua only served the Notice of Motion on the City Council of Nairobi and the Honourable the Attorney General.

The Notice of Motion was never served on the District Officer Westlands against whom orders of prohibition are sought nor the Chief of Kitsuru also named in the Application and against whom orders are sought, served. There is also no service on the alleged illegal squatters who have been settled on the land in dispute. They are parties who will be affected by any orders that the court may make and therefore should have been served. Order 53 Rule 3 (2) and (3) are couched in mandatory terms and should be complied with.

The reason is obvious. No person should be condemned unheard. Orders of prohibition or removal from land have far reaching effects on the parties and should not be made without a party being given a chance to be heard. Failure to serve the affected parties and failure to file an affidavit to that effect is fatal to this Application.

Mr. Githongo submitted that the Applicant does not know who the squatters are, but if they had been settled by the District Officer and Chief of the area, the names of the squatters should have been sought from the offices of the District Officer and Chief. If the District Officer and Chief failed to give the names, then an affidavit filed pursuant to Rule 3 (3) should have indicated so.

In **WAMBU V R MISC APPLICATION 85/1992**, the court held that even if not served, the Interested Parties have to be disclosed and reasons for failure to serve given in an affidavit under Order 53 R 3 (3) Civil Procedure Rules should be complied with.

Failure to comply with Order 53 Rules 3 (2) and (3) is fatal to this Application.

The 2<sup>nd</sup> Respondent also raised an objection to the Applicant having filed an affidavit along with the Notice of Motion which was contrary to Order 53 R 4 (1) Civil Procedure Rules. A Notice of Motion should only be served with copies of the affidavits accompanying the Application for leave and the Statutory Statement. There is no requirement that the Notice of Motion be accompanied by an affidavit. In this case, the Applicant filed the Notice of Motion dated 28<sup>th</sup> February 2006 which is supported by an affidavit of John Njaaga and that Affidavit then annexes the Statement and Verifying Affidavit filed along with the Chamber Summons.

That was irregular. However I do note that the Supporting Affidavit of Njaaga was not referred to by the Applicants Counsel. The Affidavit relied upon in arguing the Notice of Motion is the Verifying Affidavit filed with the Chamber Summons which sought leave. The Respondents will not suffer any prejudice with the presence of the Affidavit dated 28<sup>th</sup> February 2006 on record as its contents were not referred to in support of the Application.

The Applicant seeks two orders of mandamus and one of prohibition. These are public law remedies, and are discretionary in nature. The Respondent argued that they cannot be available to the Applicants.

The case of **KENYA NATIONAL EXAMINATION COUNCIL V REP CA 266/00** sets out the scope and efficacy of Judicial Review orders.

Of Mandamus, the Court said:

**“What is the scope and efficacy of an order of mandamus? (quoting Halsburys Laws of England 4<sup>th</sup> Ed Vol I)**

“.....the order of mandamus is of a vast extensive remedial nature, and is, in form, a command issuing from the High Court of Justice directed to any person, corporation, or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly, it will issue, to the end that justice may be done in all cases where there is a specific legal right and a specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

For an order of mandamus to issue the Applicant has to show that both the 1<sup>st</sup> and 2<sup>nd</sup> Respondent have a statutory duty to remove and evict the squatters from the Applicants land and demolish and remove all the structures on the Applicants land. No such statutory duty has been shown to exist.

I do agree with the finding of Justice Nyamu in case of **NATIONAL GOVERNING COUNCIL OF AFRICA PEER REVIEW MECHANISM & ANOTHER V PROF ANYANG NYONG’O HMISC APPLICATION 1124/05** where the court observed that a mandamus cannot issue where a public duty imposed by statute does not exist. In this case, none has been shown to exist. As Mr. Omoti pointed out, the plots belong to the Applicants, a private individual, and it would need allocation of funds to remove squatters from the said land and yet there is no statutory provision that allows the application of Council funds to private properties such as the Applicant’s.

Further to the above, for an order of mandamus to issue, an Applicant has to show that a demand for performance of the statutory duty was made but the same was not done.

In this case it was submitted that demand was made to the mayor of the City Council of Nairobi. The Applicant did not deny that fact. Under Cap 265 Laws of Kenya, it is the Town Clerk who should have been served with any demand as he is the one charged with discharge of statutory obligations on behalf of Council. It means that no demand was served on the 2<sup>nd</sup> Respondent.

Having failed to demonstrate that a public duty imposed by statute does exist that both the 1<sup>st</sup> and 2<sup>nd</sup> Respondent were required to perform, an order of mandamus cannot lie. Further, having failed to demand the performance of the duty by the 2<sup>nd</sup> Respondent, an order of mandamus would not issue even if there was evidence of existence of a statutory duty.

The Applicant also seeks to prohibit the 1<sup>st</sup> Respondent, the District Officer Westlands and the Chief of Kitsuru from allocating any portion of land Ref. Number 22767 and 22768 to any member of public or at all. What is the scope of an order of prohibition. In the **KENYA NATIONAL EXAMINATION COUNCIL CASE**, the Court of Appeal said this of prohibition:-

“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 the tribunal or body to continue proceedings therein in excess of its functions 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 merits of the proceedings..... It can only prevent the making of a contemplated decision..... 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.”

In the instant case, the Applicant’s case is that illegal squatters are already settled on the land having been settled by the District Officer and the Chief. That having been done, an order of prohibition is powerless in prohibiting what has already taken place. Besides an order of prohibition would not lie as against the District Officer and Chief of Westlands who are not parties to this Application.

In the result, I find that both prayers of mandamus and prohibition are not merited for reasons given in the judgment and for the reason that failure to serve all affected parties renders the Application fatally defective.

I hereby dismiss the Notice of Motion dated 28<sup>th</sup> February 2006 with costs to the Respondent.

Dated and delivered 27<sup>th</sup> day of April 2007.

R.P.V. WENDOH

**JUDGE**

**In presence of:**

Mr. Kimani Githongo – Applicant

Mr. Njuguna for – 1<sup>st</sup> Respondent

& holding brief for Mr. Omati – 2<sup>nd</sup> Respondent