REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 784 OF 1996

IN THE MATTER OF AN APPLICATION BY:

AMINA MOHAMED

JAMES KARIUKI MURAGE

JOSEPH THIGA NJOROGE

KASSIM MOHAMED

RACHEL NJOKI WAINAINA

ADAN ALIO

JOSEPH MANYASIA

STEPHEN NZUKI

for leave to apply for an order of certiorari

- AND -

IN THE MATTER OF:

THE CHIEF OF EMBAKASI LOCATION

THE PROVINCIAL COMMISSIONER, NAIROBI

- AND -

IN THE MATTER OF: ORBIT CHEMICAL

INDUSTRIES LIMITED (Interested Party)

RULING

A. PROPERTY OCCUPIED FOR A DECADE UNDER EX PARTE ORDERS: APPLICATION, PRAYERS, DEPOSITIONS

This was an application by the Interested Party, brought by Chamber Summons dated and filed on ***16th***

September, 2004. The substantive prayers in the application were as follows:

(a) that, Orbit Chemical Industries Limited (the Interested Party) be granted leave to join the case as a Respondent/Interested Party;

(b) that, the order issued by the Court on 29th August, 1996 be set aside;

(c) that, the Provincial Commissioner, Nairobi and the Chief, Embakasi Location be allowed to proceed with the eviction of the petitioners.

The following grounds formed the basis of the application.

(i) The Interested Party (the applicant) is the registered owner of L.R. No. 12425 which the petitioners have illegally occupied and on which they have put up their residential and other structures without consent or authority of the applicant;

(ii) The petitioners have no ***locus standi*** as their occupation of the said piece of land is illegal and amounts to trespass;

(iii) The petitioners' occupation of the said piece of land has caused immense inconvenience to the applicant, thereby making it impossible for the applicant to utilize it;

(iv) Any decision reached by the Court in this case will affect the interests of the applicant;

(v) Since this case was filed in ***1996*** and a ***temporary injunction issued at the same time,*** the petitioners have shown no interest in the case.

Evidence to support the application is set out in the affidavit of ***Ashok Chandaria*** dated 16th September, 2004. He depones that he is a director of a company known as Solvents Kenya Limited (not a party herein), and has the authority of the directors of the applicant company and of Solvents Kenya Limited to conduct and take charge of all matters, legal or otherwise, relating to L.R. No. 12425. The deponent deposes that Orbit Chemical Industries Limited (the applicant herein) is the rightful owner of L.R. No. 12425 on which the applicants are residing (he annexes a copy of the title deed for the property – in the name of the applicant). The deponent avers that the petitioners are illegal squatters on the suit land. He depones that the presence of the petitioners on the suit land has rendered it impossible for the rightful owners to develop the same. The deponent avers that it is in the interest of the applicants to join in this case as respondents, because they are the rightful owners and any decision made by the Court will affect their interests. He further depones that the petitioners have no right to sue in respect of a property which does not belong to them. He depones too that the petitioners had obtained orders in their favour without disclosing to the Court the true ownership of the suit property.

The relevant order, made by ***Mbito, J***. on 23rd August, 1996 and issued by the Deputy Registrar on 29th August, 1996 is annexed to the instant application. The content of this order so far is material, may be set out here:

"***Upon hearing*** **the application presented to this Court on 23rd August by counsel for the applicants under Order** ***LIII,*** **rule 1 (1), (2), (3) and all other enabling provisions of the law supported by the affidavit of** *Amina Mohamed* **sworn in support of the application and the statement filed herein;**

"And upon **hearing counsel for the applicants** ***in the absence of the respondent;***

"IT IS ORDERED

1. THAT leave be and is hereby granted to the applicants to file an application for prohibition

and certiorari against the respondent herein.

2. <u>THAT</u> the said leave do *operate as stay* of any further eviction actions by the respondents of their agents and officers until the hearing of the application for orders of prohibition against the respondents."

Three weeks following the filing of the instant application, two of the parties herein, namely the Chief of Embakasi Location, and the Provincial Commissioner, Nairobi served notice that they had appointed the office of the Attorney-General to represent them in the main proceedings and in the attendant applications. The designated Litigation Council in the Attorney- General's Office, ***Mr. J.W. Mwaniki***, wrote a letter to the Deputy Registrar of the High Court on 7th October, 2004 as follows:

"Kindly and urgently let us have copies of the pleadings ***except*** Chamber Application dated 16th September, 2004 in the above case."

On 21st October, 2005 counsel for the original applicants, M/s Mathenge Gitonga & Company Advocates filed a ***notice of preliminary*** objection and the same was canvassed before me on 26th October, 2005. In the preliminary objection proceedings, learned counsel ***Mr. Mwaniki*** informed the Court: "The Hon. The Attorney-General will be a by-stander"; and so the matter engaged only the original applicants and the Interested Party, and I delivered my ruling on 2nd December, 2005 in the following terms:

"**The history of the proceedings in the matter would call for an exercise of *discretion* by the Court. The respondents obtained Court orders given *ex parte* on *23rd August, 1996*; those orders touched on sensitive questions concerning *ownership* and *possession* of the suit property; the application to set aside those orders was made on *16th September, 2004* and service was duly effected; then, more than a year later, on *21st October, 2005* the respondents filed a notice of preliminary objection. It is a case in which the respondents have enjoyed *ex parte* orders which, besides, stayed all proceedings for an interminable period when the state of relations among the parties has been crying out for *settlement* under the law. These circumstances, in my judgment, clearly favour the exercise of the Court's discretion in favour of an opportunity for expeditious hearing and determination of the main issues in dispute. I therefore hold that this is, without doubt, not a condition for the termination *in limine* of an application such as that filed by the Interested Party.**

"Accordingly I hereby dismiss with costs the respondents' preliminary objection."

The effect of the above ruling was that the Interested Party was now at liberty to obtain a date for the hearing of its Chamber Summons application of ***16th September, 2004***. In the intervening period, however, M/s. Mathenge Gitonga & Company for the original applicants, on 1st March, 2006 filed an interlocutory application, a Chamber Summons by which they sought "leave to withdraw from acting in the instant suit".

When the Interested Party's application came up before me for hearing on ***10th March, 2006*** learned counsel ***Mr. Pete***, holding brief for ***Mr. Gitonga*** had the application by M/s. Mathenge Gitonga & Company Advocates for leave to cease acting for the original applicants, and was requesting to be accorded priority before the hearing of the instant application. ***Mr. Pete*** was, in effect, seeking an ***adjournment***, as he contended that the application by M/s. Mathenge Gitonga & Company and that by the Interested Party (which was on the day's cause list) ought to be heard ***separately.***

After hearing both ***Mr. Pete*** and ***Mr. Oseko*** (for the Interested Party) I ruled:

"**What was coming up substantively for hearing was the Interested Party's Chamber Summons application of 16th September, 2004. That application has an important and urgent purpose: to deal with a situation presented by ex parte orders of 1996 which have been**

enjoyed continuously by one party, without much sense of responsibility, and without any basis in law.

"**But the beneficiary of those orders of 1996 has today come up with yet another application: the Chamber Summons filed on *1st March, 2006*. By this application counsel for the [original] applicants seeks to withdraw from representation of the applicant. Why? (i) Because the applicant has not supplied him with some documents; (ii) Because he has asked the client to act [appropriately], but the client has not done so.**

"**Strangely enough,** *the application is not served upon the client.* **And strangely enough, the documents now said to be sought have not featured in any application since 1996.**

"On a preliminary objection from the [same][original] applicant I had in December 2005 ruled that the continued enjoyment of *ex parte* **orders of 1996 by the applicant, and the applicant's endeavours to impede any hearing of challenges to the orders of 1996, would amount to an abuse of the judicial process.**

"**In the application of 1st March, 2006 I see a repeat of the said use of technicalities to obviate the regular play of the judicial process. The grounds stated in support of the application of 1st March, 2006 cannot stand up; and the supporting affidavit does not carry [any] material of fact genuinely deponed – with respect.**

"Therefore I now dismiss with costs the applicants' Chamber Summons which is dated *28th August, 2006* but filed on *1st March, 2006*[!]

"**I have seen no justification in this application by counsel; and consequently I mulct counsel in costs, in respect of this puzzling application**".

It had become necessary to assign a new date for the hearing of the instant application, ***24th of March, 2006***; and on that occasion the original applicant was ***unrepresented***; ***Mr. Chahale*** represented the Attorney-General; ***Mr. Oseko*** represented the Interested Party.

B. LEAVE FOR JUDICIAL REVIEW MOTION, WITH INJUCTIVE EFFECT IMPROPERLY OBTAINED, THEN ABUSED; SHOULD BE REVOKED – SUBMISSIONS FOR INTERESTED PARTY

Learned counsel ***Mr. Oseko***, at the beginning, made an application to bring the Chamber Summons of 16th September, 2004 under s.3A of the Civil Procedure Act (Cap. 21) and Order ***LIII***, rule 6 of the Civil Procedure Rules. He had taken over from another advocate, and those specific provisions had not been cited in the original application. There being no objection from learned counsel ***Mr. Chahale***, I did allow the oral application, by virtue of O. ***VI*** A rule 5 of the Civil Procedure Rules. ***Mr. Chahale*** also stated for the record that the Office of the Attorney-General was not opposed to the substantive application herein. Besides, as ***Mr. Oseko*** noted, the original applicants (respondents herein) had not filed any replying affidavit or grounds of opposition. The effect, as learned counsel noted, was that there was no contest to the Interested Party's application. It was, thus, plausible to conclude the issues for resolution, appropriately, at this stage.

However, ***Mr. Oseko*** proposed: "[Due] to the nature of the subject-matter and the likely repercussions, I will address the Court on the substance of the application." And he went on to ask that the Interested Party be joined in the suit; secondly, that the ***ex parte*** orders of ***23rd August, 1996*** be set aside; thirdly, that there be an eviction order – the Provincial Commissioner, Nairobi and the Chief, Embakasi Location be allowed to proceed with eviction of the original applicants.

Learned counsel submitted that the original applicants are staying on the suit land without any legal rights in their favour; they are squatters. The Interested Party is the registered owner of L.R. No. 12425 Nairobi,

indeed, absolute owner thereof, registered as such on ***10th March, 1987***. In the words of counsel:

"This is the factual and legal position. Orbit Chemical Industries Limited owns this land. This had never been disputed even in the affidavit of ***Amina Mohamed*** [1st original applicant], one of the squatters, made in 1996".

Further, in the original applicants' statement of facts accompanying their judicial review application for leave, of 1996, the squatters had acknowledged that the land they were occupying was ***not theirs.***

Learned counsel submitted that the Interested Party merited orders as prayed, because the squatters lacked ***locus standi*** and could not face the applicant herein, in any motion before the Court; they never had ***locus standi*** in 1996, and they have it not, today. Counsel submitted that the said squatters (the original applicants) had, without the consent or knowledge of the owners, occupied the Interested Party's property, and gone as far as securing ***ex parte*** orders which have been their basis for perpetuating their unwarranted occupancy of the suit land.

Counsel noted that the original applicants had filed their Notice of Motion for ***judicial review*** on ***16th September, 1996***; but ***for more than 9½ years they have never attempted to prosecute the same***. This, counsel urged – and quite correctly, in my view – was an ***abuse*** of the process of the Court. Not only have the squatters used their 1996 application and ex parte orders as a device to ward off the possibility that the owners of the suit land might win possession of the same, they have also resorted to a series of technicalities to obstruct the hearing of the instant application which was filed on 16th September, 2004. In the meantime the full City Council rates burden of the suit land has lain on the Interested Party who, however, had no access to its own property.

Mr. Oseko urged that the original applicants had wrongly obtained the ***ex parte*** orders which they then never followed up with prosecution of their case, even as they used the same to keep out the true owner of the land; they obtained the orders wrongly because they did not disclose to the Court that the suit land did not belong to them. Counsel urged, and this, with respect, is the correct position in law:

> "**Where a party in an *ex parte* application fails to disclose a material fact to the Court, the Court will vacate the *ex parte* orders so granted – and this is done *ex debito justitiae*."**

When the original applicants moved the Court on ***23rd August, 1996*** they claimed that hey had lived on the suit land for as long as twenty years, and with the consent of the Government. There was no proof of such an allegation. The applicants at that time claimed that ***the Provincial Commissioner was in the process of demolishing their buildings***. But those applicants ***did not at the time show any title*** to the suit land; and they ***did not disclose that the suit land was the property of another party.***

Learned counsel submitted that the squatters' application of 23rd August, 1996 had not been accompanied with any ***order*** or ***decision*** that could be quashed in the exercise of the Court's powers of judicial review; and so there was no proper application before the Court – and even on this ground alone, the orders of ***23rd August, 1996*** merited being quashed.

Counsel submitted that the squatters had, besides, not had ***locus standi*** to come before the Court. By Order ***LIII*** rule 2 the application of 23rd August 1996 should have had accompanying evidence showing ***sufficient interest***, on the part of the applicants.

The concept of "sufficient interest" in the mode proposed by learned counsel, is considered in ***Judicial Review of Administrative Action*** by ***de Smith, Woolf*** and ***Jowell*** (page 120):

> "***Other more general difficulties may arise to do with the standing of representative and pressure groups. Lord Wilberforce considered that a body which represents a group of applicants, such as the Federation of the Self-Employed and Small Business Limited, who are seeking to establish standing are in no better position than an individual, 'since an aggregate of individuals, each of***

whom has no interest, cannot of itself have an interest'."

On that basis ***Mr. Oseko*** urged that in the group that was the original applicants, the ***individuals,*** such as ***Amina Mohamed, James Kariuki Murage***, etc had no legal interest in the suit property; and therefore, equally, their whole lot, standing collectively, would have ***no interest in the suit property*** entitling them to move the Court.

In ***Regina v. Secretary of State for the Environment, ex parte Rose Theatre Trust Company*** [1990] 1Q.B.504 a trust company was set up with the objects of preserving the remains of an historical theatre which had been found – and making the same accessible to the public. The issue was whether such a body had legal standing to enable it to apply for prerogative writs. The following words of ***Schiemann, J.*** (pages 518-519) are relevant:

> "**I turn now to consider the question of *locus standi*. It follows … that I do not accept that the decision of the Secretary of State is flawed in law. I go on to consider what logically I ought perhaps to have considered first, namely, does the applicant have any standing to move for judicial review. I introduce this section of my judgment by pointing out something which may well surprise many laymen and some lawyers who do not practice in this branch of the law.**
>
> "**Inevitably, in the tide of human affairs decisions are from time to time reached which are unlawful, occasionally by someone who knows he is acting unlawfully but more usually by someone who does not know this. The law provides in general that even an unlawful decision is to be treated as lawful until such time as the Court, *at the suit of someone with a sufficient interest* in the matter to which the application relates, allows an application to quash that decision. Often the law provides a time limit or other conditions which have to be complied with before the Court is empowered to quash an admittedly unlawful decision. The reason for that, at first sight, surprising willingness of the law to treat the admittedly unlawful as lawful is that in many fields, if it were otherwise, *uncertainty and, at times, complete chaos would result.*"**

Mr. Oseko submitted that as at 23rd August, 1996 the original applicants lacked sufficient interest, on the basis of which they could have moved the Court to consider giving judicial review orders in their favour. He urged that the leave granted be set aside. The propriety of such an application is not in doubt, as can be seen from ***Judicial Review of Administrative Action*** by ***de Smith, Woolf*** and ***Jowell*** (op. cit, at pages 667-668):

> **"Where leave has been granted, a respondent may apply to set aside a grant of leave on the grounds that the application discloses absolutely no arguable case or that there had not been frank disclosure by the applicant of all material matters both of fact and law."**

Learned counsel submitted that the original applicants, firstly, had ***no arguable case*** – because the suit land does not belong to them; and secondly, those applicants had ***not disclosed that fact*** – that the land does not belong to them. The principle is clearly stated in ***The Supreme Court Practice 1995,*** Vol. I Part 1 (London, 1994), page 865 (paragraph 53/1-14/12):

> "***Duty on applicant to make full and frank disclosure*** **– The applicant for leave must show *uberrima fides,* and if leave is obtained on false statements or a suppression of material facts in the affidavit, the Court may refuse an order on this ground alone … *In R v. Jockey Club Licensing Committee, ex p. Wright* [1991] C.O.D. 306 QBD, the grant of leave to move for judicial review was set aside on the grounds of material non-disclosure on the part of the applicant …"**

Mr. Oseko submitted that the squatters had come before the Court and made false representations – ***that they had some interest in the suit land***; but they gave no proof of this claim. In their affidavit, the squatters claimed that the land belonged to ***the Government***; but in truth, the suit land had been ***purchased by the Interested Party from the National Bank of Kenya;*** so this land had not belonged to

the Government: the statement made by the applicants had been a material misrepresentation.

In ***Rex v. Kensington Income Tax Commissioners, ex parte Princess Edmond de Polignac*** [1917] 1 KB 486 it was held (***Viscount Reading, CJ*** at pages 495-96):

> "…**Where an ex parte application has been made to this Court for a rule *nisi* or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, *the Court ought, for its own protection, and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits.* This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of *the Court that it has been deceived.* Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination is to leave no doubt that the Court has been deceived, then it will *refuse to hear anything further from the applicant* in a proceeding which has only been set in motion by means of a *misleading affidavit*".**

Mr. Oseko submitted that a discharge of the impugned order of 1996, by itself would not benefit the Interested Party, unless the squatters on L.R. No. 12425 were also ordered to be evicted. Counsel urged that the Court by virtue of the Constitution had unlimited jurisdiction, and the same could be applied to order the squatters evicted from the suit land.

C. FINAL ANALYSIS AND ORDERS

The original applicants, who did not care to respond to the instant application or indeed to be represented in Court, on ***23rd August 1996***, about ten years ago, appeared ***ex parte*** before ***Mr. Justice Mbito*** in this Court, and obtained leave to apply by Notice of Motion for judicial review orders. The application appeared to be defective, as the applicants did not exhibit the orders or decisions or instruments which they were seeking to have quashed by way of judicial review. The applicants did not state the ***nature of their interest***, in relation to the land as to which they were seeking orders of ***Certiorari*** and ***Prohibition***. At that time the land in question ***was*** the property of the Interested Party herein and was duly registered as such and a simple search conducted in the Lands Office would have disclosed the same. Without securing and supplying such elementary but crucial information to the Court, the applicants were able to secure leave to file proceedings for judicial review. Obviously such leave was obtained without observing the principle of ***uberrima fides*** which required full and frank disclosure of material facts before the Court. On those grounds, the leave obtained ***ex parte*** by the judicial review applicants was defective and, on the basis of well-established principles of law as already discussed in this ruling, was liable to be vacated. It was an ***abuse of*** the ***judicial process*** to obtain leave to commence judicial review proceedings in those circumstances.

I assume the applicants were well aware that they were not entitled to the leave they obtained. Yet they had gone further than just securing the leave improperly; they obtained orders that such leave operate as ***stay,*** thus having an injunctive effect, over any such actions as might be taken to enable the Interested Party to possess and to develop the suit land.

The impropriety committed by the judicial review applicants was accentuated by the fact that they now used the orders they had irregularly obtained to keep the Interested Party out of the suit land, even as they studiously avoided prosecution of their own proceedings, and even as they continued to establish their settlements upon the Interested Party's land. This wanton abuse has continued to-date, calculated and deliberately executed by the judicial review applicants.

The whole scenario exemplifies blatant breaches of the law by the applicants; it represents calculated abuses to the process of the Court, over a prolonged period of time; it betokens an insufferable denial of the ***property rights*** of the owner of the suit land – and in this respect it represents a serious violation of

the rights of enjoyment of private property which are guaranteed to the Interested Party by virtue of s***. 75 of the Constitution of Kenya***.

It is a prime duty of this Court, today, to stop all the abuses of process and violations of the law thus enumerated. And so I will make ***orders*** as follows:

1. In the event that the judicial review applicants shall be inclined to take any litigious steps in respect of their matter, the Interested Party herein shall be and remain a respondent and a party.

2. The order which was made by the High Court on 23rd August, 1996 and issued on 29th August, 1996 is hereby set aside.

3. It is hereby declared that no person, save under the law, or with leave of the Interested Party, may enter upon or remain on the suit property, L.R. No. 12425 Nairobi.

4. In the event of non-compliance with Order No. 3 herein, the Interested Party may apply to the Court for eviction orders; and any such application made in the High Court shall be heard and disposed of in the Civil Division, and on the basis of priority

5. Leave is hereby granted to the Provincial Commissioner, Nairobi and the Chief, Embakasi Location, Nairobi to take action as necessary to evict the original applicants (the respondents herein) from the property of the Interested Party, to wit, L.R. No. 12425 NAIROBI.

6. The judicial review applicants (who are respondents herein) shall bear the Interested Party's costs in this application.

DATED and **DELIVERED** at Nairobi this 5th day of May, 2006.

J. B. OJWANG

JUDGE

Coram: Ojwang J.

Court Clerk: Mwangi

For the Interested Party/Applicant: Mr. Oseko

Instructed by M/s Oseko & Co. Advocates

For the State Law OfficeL: Mr. Chahale

Original Applicants/Respondents: Absent and

unrepresented.