



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

**Misc Appli 922 of 2005**

**HARRISON MAINA KARIUKI.....PLAINTIFF**

**V E R S U S**

**HON. ATTORNEY GENERAL**

**THE COMMISSIONER OF LANDS & OTHERS..... DEFENDANT**

**R U L I N G**

The Ex-Parte Applicant, Harrison Maina, was the purchaser by private treaty of the parcel of land known as L.R. 9508, Mountain View Estate-Kasarani which was prior to the purchase and transfer by the mortgage/chargee, to the ex-parte applicant the property of the Interested Party, Peter G.N. Ng'anga. There are currently pending both in the High Court at Milimani, H.C.C.C. No. 1304 of 2001 (which is stayed pending the outcome of an Appeal (C.A. No. 149 of 2003 Nairobi), and the said Appeal in the Court of Appeal.

Whilst the case at Milimani Commercial Courts, and an Appeal in the Court of Appeal were pending, the ex-parte Applicant came to this Court, by an Application for leave dated 22-06-2005, and filed on 23-06-2005, and was granted leave to bring an application for judicial review, the subject of this Ruling.

By a Notice of Motion dated and filed on 14-07-2005, (and brought pursuant to the said leave granted on 8-07-2005) the ex parte Applicant seeks the following orders:-

- (1) an order of Certiorari to remove into the High Court and quash the decision by the Commissioner of Lands, the Principal Registrar of Titles and the Director of Surveys made on 28-02-2005 and 17-03-2005, refusing registration of sub-divisions of L.R. No. 9508 by the Applicant.**
- (2) an order of mandamus directing the Respondents to register the applicant's sub-divisions of L.R. No. 9508,**
- (3) an order that the Respondents be prohibited from further breaches of the statutes,**
- (4) that costs be provided for,**

The Notice of Motion was based upon the statement dated and filed with the motion but no Affidavit, although the Affidavit Verifying the facts sworn on 20-06-2005 by the ex parte Applicant at the leave stage) did not set out any facts and merely stated in paragraph 2 thereof - **that I have read and understood the statement of Facts and I confirm the same as true and accurate.** I shall presently

revisit this issue.

To this application, upon being served, the Respondents filed a Replying Affidavit of one Gordon Ochieng, a Senior Land Officer of the Ministry of Lands, sworn on 25-11-2005 the material parts of which say that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in particular could not accede to the ex Parte Applicant's applications for sub-division of the subject land because of information they had received from the Interested Party *inter alia* that:-

- (a) ***land rents due to the Government had not been paid before the transfer of the said premises to the Ex parte Applicant;***
- (b) ***No rent Clearance Certificate was granted to facilitate the transfer of the suit premises to the ex-Parte Applicant,***
- (c) ***there were irregularities in the obtention of rates Clearance Certificates issued by the Nairobi City Council,***
- (d) ***no consent of the Commissioner of Lands to transfer the land was obtained to transfer the land to the ex parte Applicant;***
- (e) ***the value of the property had been under declared in order to deny the Government Stamp Duty.***

This deponent also depones at paragraph 9 of his Replying Affidavit that the matters stated above formed part of the Interested Party's claims of fraud in H.C.C. No. 1364 of 2001 at Milimani, and concludes at paragraph 10 of his Affidavit that the legality of the transfer to the Ex Parte Applicant and of the entire sub-division exercise can now only be determined if the Courts rule on proceedings filed in Nairobi, H.C.C.C. No. 1364 of 2002 and in Civil Appeal No. 149/2003 Nairobi.

Mr. Njoroge Senior Litigation Counsel from the AG's Office relied upon the said Affidavit and also Skeletal Arguments dated 20-03-2006, and filed on 21-03-2006, I will presently refer to those submissions.

Mr. Njoroge appearing for the Interested party opposed the Application, he said "**Vigorously**". He filed Preliminary Submissions on 11.11.2005 and dated the same day. In his submissions Mr. Njoroge raised the same issues as substantially paraphrased in the Replying Affidavit of Mr. Gordon Ochieng referred to above. He also raised the issue of form, and Verifying Affidavit, and concluded that by virtue of the want of form, and an appropriate Verifying Affidavit the Ex Parte's Notice of Motion dated and filed on 14-07-2005 was incompetent and ought to be struck out with costs.

The basic issue raised in this application, and the Respondent's reply is whether in the circumstances of this application, the orders of Certiorari, and Mandamus, and prohibition ought to be granted as prayed by the ex-parte Applicant. Both Mr. Njoroge and Mr. Ngoge learned counsel for the Respondent and the Interested Party submitted that the orders do not lie, and both have raised identical technical objections to the Notice of Motion by the Ex-Parte Applicant. Before I however consider the technical points raised by the said Counsel, I wish to dispose of prayer 3 "**that the Respondents be prohibited from further breaches of the statutes**"

This prayer is incapable of being granted even if I were to allow all the other prayers sought by the ex Parte applicant. This is the one prayer this court will not grant. An order of Prohibition will issue for lack or excess of jurisdiction, and not otherwise. There would be no basis for granting a wide order – what breaches, of which statutes? This is an omnibus speculative prayer, and the same is declined and struck out.

Having disposed of that prayer, I now turn to the submissions of Counsel for the Respondents and the Interested party, and the issues they raised against the Ex-parte Notice of Motion.

## **1. The Intitule of the Application**

The Application for leave was sought by the Ex-Parte Applicant. This was in order in my view.

Once leave was given, the Notice of Motion had to be brought in the name of the Republic, and not an Applicant – FARMERS BUS SERVICE AND OTHERS –VS- THE TRANSPORT LICENSING APPEAL TRIBUNAL [1959] E.A. 779, and so also held in MOHAMMED AHMED –VS- R. [1957] E.A. 523.

In this instance the substantive application, the Notice of Motion dated and filed on 14-07-2005 is properly intituled contrary to the contention by the Respondents and the Interested Party's Counsel. I reject that contention.

## **2. THE NOTICE OF MOTION IS NOT SUPPORTED BY ANY EVIDENCE.**

It was the contention of Counsel of both the Respondents and the Interested Party that there was no evidence to support the Notice of Motion. Their collective reason was this. The Ex-Parte Applicant had both in the Application and indeed the Notice of Motion itself set out all the facts in the Statement and annexed the supporting documents to the Statement. This is clearly contrary to the clear provisions of rule 1 (2) of Order LIII which prescribe what a Statement should contain-

- (1) The name and description of the Applicant,
- (2) The relief sought;
- (3) the grounds in which it is sought, and

the application should also be "**accompanied**" by Affidavits (could be more than one) verifying the facts relied upon.

So it is clear that it is the affidavit which should contain or set out the verification of the alleged grounds relied upon, and attach thereto the necessary annexures in proof of the averments in the Affidavit. It is thus, the Affidavit and not the statement which is of probative or evidential value – see the case of **COMMISSIONER-GENERAL, KENYA REVENUE AUTHORITY through REPUBLIC –VS- SILVANO ONEMA OWAKI T/A MIRENGA FILING STATION (CA. 45 of 2000 at Kisumu** – unreported, where the Court of Appeal said this of Affidavits and Statements:-

***“We would observe that it is the Verifying Affidavit, not the statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1 (2) of Order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol. 1 as paragraph 53/1.***

***“The Application for leave – By Statement” the facts relied on should be stated in the Affidavit – Republic –Vs- Wandsworth JJ Ex Parte Read [1942] K.B. 251.”***

***The statement should contain nothing more than the name and description of the applicant and the relief sought and grounds of which it is sought. It is not correct to lodge a statement of all the facts verified by an affidavit.”***

This is exactly what happened in this matter. The ex-parte Applicant as I have already stated above by reference to the Applicant's Verifying Affidavit. This being the case, the Notice of Motion is left bare, it has no clothing. It is affected by a severe chill which causes a clog in its lungs. It has no oxygen. It can not breath, it has no withal to breath. It has no affidavit. It is dead. On this ground alone, I would strike out the Application, but the Respondents and the Interested Party's Counsel had other reasons for wanting the Notice of Motion equally struck out.

## THE ORDERS OF CERTIORARI AND MANDAMUS ARE NOT AVAILABLE TO APPLICANT

It was the contention of both Counsel for the Respondents and the Interested Party expressed in similar language in their respective skeletal arguments that, the High Court in exercise of its jurisdiction on judicial review should look at the procedures employed by the alleged offending authority, and see whether those procedures are in accord with the rules of natural justice, and other rules of procedural fairness. It is **not** the province of the judicial review court to substitute its decision for that of the body authorized in law to make those decisions. The Judicial review court will not direct a statutory body like the Commissioner of Lands, the Registrar of Titles, or the Director of Surveys to sub-divide or not sub-divide his land, or to register or not to register such sub-divisions. The discretion to carry out those duties is by law reposed in those offices, and the court will not direct them to act in any specific way.

An Order of ***Mandamus*** will not therefore issue to compel the Respondents to do, any of those acts. The Ex-Parte's prayer for such order therefore fails.

An Order of Certiorari will only issue where an inferior tribunal or court has acted without authority or jurisdiction or in excess of such authority. If that happens this Court will issue an order to quash such a decision. In this case, neither the Commissioner of Lands nor the Registrar of Titles, nor still less the Director of Surveys has made any decision capable of being quashed. All the Commissioner of Lands and the Principal Registrar of Titles seem to have done is to sit back until the ex-Parte Applicant and the Interested Party battle it out in Milimani Commercial Courts High Court Civil Case No. 1364 of 2001 and Civil Appeal No. 139 of 2003 Nairobi.

The decisions in those cases will ultimately unlock the doors to the registration of the proposed sub-divisions of the ex-Parte Applicant's land L.R. No. 9508 Nairobi. Until those cases are determined the ex parte Applicant's hands will continue to be tightly bound. This means that the grappling by the ex Parte Applicant against the Respondents and the Interested Party in the Application the subject of this Ruling is completely misplaced and without any merit at all.

For those reasons, the ex-parte Applicant's Notice of Motion dated and filed on 14-07-2005, is therefore dismissed with costs.

Dated and delivered at Nairobi this 10<sup>th</sup> day of July, 2006.

**ANYARA EMUKULE**

**JUDGE.**