REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Misc Civ Appli 468 of 2006

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS FOR AN ORDER OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF REGISTERED LAND ACT CAP 300 LAWS OF KENYA SECTION 75 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE DISTRICT COMMISSIONER NAKURU DISTRICT DEMANDING SURRENDER, VACATION AND EVICTION IN RESPECT OF A SECTION OF LIKIA SETTLEMENT SCHEME (EXTENSION) BELONGING TO BARNABAS KIPTARUS BARNO AND 353 OTHERS BEING PARCELS OF LAND NOS. NAKURU/LIKIA/1429 AND MANY OTHERS.

REPUBLIC…….....……...
……..APPLICANTS

VERSUS

THE DISTRICT COMMISSIONER NAKURU DISTRICT…...…….
….RESPONDENTS

MR. ANDREW RUKARIA

EX-PARTE

BARNABAS KIPTARUS BARNO AND 354 OTHERS ……..…….....SUBJECTS

RULING

The exparte applicants filed an application by way chamber summons brought under **Order LIII rule 1(1)(2)(3)(4)** and **3(1)** of the **Civil Procedure Rules** seeking leave to commence judicial review proceedings. I will reproduce as hereunder the orders that are intended to be sought in the main application:-

1. *"That an order of certiorari do issue to remove to this honourable court the decision of the respondent of evicting the applicant from their land for quashing."*

2. *"That an order for prohibition do issue against the decision of the respondent, Andrew Rukaria prohibiting the respondent by himself, agents, servants and/or employees from demanding the surrender vacation or evicting the subjects from land parcels numbers Nakuru/Likia/1429"* and many other plots as stated in the application.

In this application the applicants also prayed "***That the leave herein to operate as stay of decision of the respondent, the District Commissioner Nakuru, his servants, agents and/or employees from demanding the surrender vacation and/or evicting the subjects in respect of land parcels numbers Nakuru/Likia/1429"*** and many other plots as stated in the application.

I wish to observe that the aforesaid prayers are not properly framed. The application was made on the grounds that the respondent had forcefully evicted the applicants from their respective parcels of land by use of the provincial administration. The applicants were said to have been evicted in a selective and discriminatory manner because some of their neighbours in the same locality and who held similar title deeds as those held by the applicants had not been evicted. The applicants further stated that no proceedings of any kind had been commenced against them prior to their eviction and therefore the action by the respondent was arbitrarily, oppressive, discriminative and in total violation of the law and sanctity of private property.

In an affidavit sworn by Barnabas Kiptarus Barno in support of the said application, the applicants stated that they all held valid title deeds which were issued to them in 1997. The land that was allocated to them was excised from the Eastern Mau forest and was 590 acres out of the total forest area of approximately 35,301 hectares. The applicants had been in occupation of their respective pieces of land since 1997 but on the 5th day of May 2006 the respondent ordered demolition of the applicants' homes and the police and forest guards evicted all the applicants. They said they were now accommodated at market centres, churches and schools. It was further deponed that the respondent had instructed the Nakuru District Land Registrar to recall the title deeds from the applicants without any reasonable explanation having been given to them for so doing. For those reasons, the applicants sought leave to commence judicial review proceedings for the orders as stated hereinabove.

I have carefully perused the application herein and heard counsel for the applicants. While I agree in principle that the applicants have a valid claim as against the respondent and/or the Government, I am not satisfied that an order of prohibition can be granted in the circumstances of this matter. The applicants have stated that they have already been evicted from their respective parcels of land which they were occupying. An order of prohibition looks to the future and cannot be granted to undo that which has already been done. In ***KENYA NATIONAL EXAMINATION COUNCIL VS THE REPUBLIC*** Exparte

G.G. NJOROGE, Civil Appeal No. 266 of 1996 (unreported) the Court of Appeal held as follows:-

"Where a decision has been made whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made. It can only prevent the making of contemplated decisions."

I cannot therefore grant leave to the applicants to commence proceedings for an order that in law cannot be made in the circumstances obtaining herein. For the same reason, I cannot also grant the prayers for stay of a decision that has already taken place since the applicants have already been evicted.

I have misgivings about the propriety of the orders sought in prayer number one in the said application, that is, leave to institute judicial review proceedings for an order of certiorari. I will however grant the leave as sought and hope that the matter will be canvassed in details once the main application is filed and argued. The main application should be filed and served within 21 days from the date hereof. The costs of this application will abide the outcome of the main application.

DATED, SIGNED and DELIVERED at Nakuru this 5th day of October, 2006.

D. MUSINGA

JUDGE

Ruling delivered in open court in the presence of Mr. Nyangweso holding brief for Mr. Onkoba for the applicants.

D. MUSINGA

JUDGE