



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO 23 OF 2020

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

BETWEEN

DR. SALOME LUDENYI MUNUBI..... APPLICANT

AND

ETHICS AND ANTI-CORRUPTION

COMMISSION.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

DASAHE INVESTMENTS LIMITED.....1ST INTERESTED PARTY

OLOMOTIT INVESTMENTS

LIMITED.....2ND INTERESTED PARTY

KENYA RAILWAYS CORPORATION.....3RD INTERESTED PARTY

RULING

What is before the court is an ex-parte Chamber Summons application dated 15th October, 2020 brought by Dr. Salome Ludenyi Munubi (“the applicant”) seeking leave to apply for the following orders;

1. Spent.

2. That the applicant be granted leave to apply for;

a. An **ORDER OF CERTIORARI** to bring to this honourable court for the purposes of being quashed the decision of the 1st respondent dated 28th September 2020 demanding/seeking to recover a sum of Kshs. 221,375,000/= as loss occasioned to the public through compensation arising from compulsory acquisition of L.R. Nos. 9085, 9086, 9087 and 9088 Nairobi.

b. An **ORDER OF PROHIBITION** prohibiting/restraining the 1st respondent, its agents, servants and employees from demanding / recovering from the applicant the sum of Kshs. 221,375,000/= or part thereof as money lost by the public as compensation arising from compulsory acquisition of L.R. Nos. 9085, 9086, 9087 and 9088 Nairobi.

c. An **ORDER OF MANDAMUS** compelling the 2nd respondent to recover the sum of Kshs.221, 375,000/= from the 1st and 2nd interested parties which was compensation arising from compulsory acquisition of L.R. Nos. 9085, 9086, 9087 and 9088 Nairobi.

3. That the grant of leave to institute proceedings do operate as a stay of the decision contained in the letter dated 28th September 2020 seeking to recover a sum of Kshs. 221,375,000/= from the applicant as loss occasioned to the public through compulsory

acquisition of L.R. Nos. 9085, 9086, 9087 and 9088 Nairobi.

4. Cost of the application.

The application was brought on the grounds set out in the statutory statement and verifying affidavit of the applicant both dated 15th October, 2020. The applicant's case is as follows: In her capacity as a director of taxation and valuation at the 2nd respondent, the applicant participated in the process of compensation in respect of L.R. Nos. 9085, 9086, 9087 and 9088 Nairobi (hereinafter referred to as "the suit properties") that were compulsorily acquired by the 2nd respondent. The claim for compensation in respect of the suit properties had been made by the 1st and 2nd interested parties. The 3rd interested party had renounced any claim in respect of the suit properties and as such the properties were eligible for compensation. The 1st and 2nd interested parties who claimed to be the owners of the suit properties received a sum of Kshs.221, 375,000/= as compensation. The 1st respondent had claimed that this compensation was made in error since the 1st and 2nd interested parties were not eligible to be compensated. The 1st respondent had insisted that the suit properties were owned by the 3rd interested party. The 3rd interested party had on its part maintained that it did not own the suit properties and as such the 1st and 2nd interested parties were properly compensated.

In 2018, USD 168,900 and Kshs.1, 000,000/= were found in the applicant's house. The 1st respondent had insisted that the same were proceeds of crime and linked the same to compensation paid in respect of the suit properties to the 1st and 2nd interested parties. The 1st respondent brought proceedings against the applicant at the High Court Anti-Corruption and Economic Crimes(ACEC) Division in ACEC Suit No. 16 of 2018 in relation to the alleged proceeds of crime. The said suit was dismissed. Prior to the institution of ACEC Suit No. 16 of 2018 against the applicant, the 1st respondent had conducted an audit on the applicant's wealth and had made a finding that her wealth had been sufficiently explained.

Through a letter dated 28th September 2020, the 1st respondent sought to recover from the applicant the said sum of Kshs.221, 375,000/= that was paid to the 1st and 2nd interested parties as compensation. It is this decision by the 1st respondent to claim the said sum of Kshs.221, 375,000/= from the applicant that the applicant intends to challenge through judicial review application in respect of which leave is being sought.

In summary, the applicant intends to seek a review of the 1st respondent's said decision on the following main grounds;

1. That pursuant to section 116 of the Land Act, 2012 payment made by the 2nd respondent in error, as is claimed to be the case herein, is recoverable as a debt due to the 2nd respondent from the 1st and 2nd interested parties.
2. That the 1st respondent has no legal authority to recover the claimed amount from the applicant and the other persons to whom the said demand letter is addressed as such powers are vested exclusively upon the 2nd respondent under section 116 of the Land Act,2012.
3. That in any event, a determination on whether compensation made to the 1st and 2nd interested parties in respect of the suit properties was erroneous can only be the subject of determination by Environment and Land Court.
4. That the said compensation was not made in error since the suit properties did not belong to the 3rd interested party as claimed by the 1st respondent.
5. That there is no legal basis for the 1st respondent to claim that the applicant owes a debt to the government in this instance and that if any debt exists, it should be payable to the 2nd respondent by the 1st and 2nd interested parties.
6. That the decision of the 1st respondent is unlawful, ultra vires, in bad faith and contrary to the principles of natural justice.
7. That it is in the interests of justice that this Honourable court be pleased to grant the orders sought.

Determination.

The application was heard on 17th February 2021 ex parte. In his submissions, the applicant's advocate Mr. Musyoka reiterated the contents of the applicant's statutory statement and verifying affidavit filed in support of the application. What I need to determine in the application before me are, whether the applicant has established valid grounds to warrant the grant of the leave sought and whether leave if granted should operate as a stay. The following is my view on the matter.

In Njuguna v Minister for Agriculture [2000] 1 E.A 184, it was held that:

“the test as to whether leave should be granted to an applicant for judicial review is whether, without examining the matter in any depth, there is an arguable case, that the reliefs might be granted on the hearing of the substantive application.”

In Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others [1998] 1 KLR (E&L) the court set out the rationale for seeking leave to apply for judicial review as follows:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.”

The court’s power to grant leave is discretionary. In the book; Public Law in East Africa published by Law Africa, the author Ssekaana Musa has stated as follows at page 250:

“Judicial review is a discretionary jurisdiction. The prerogative remedies, the declaration and the injunction are all discretionary remedies with exception of habeas corpus which issues ex debito justitiae on proper grounds being shown. A court may in its discretion refuse to grant a remedy, even if the applicant can demonstrate that a public authority has acted unlawfully.”

As I have stated earlier in this ruling, the applicant has sought leave to apply for; an order of certiorari to quash the decision by the 1st respondent made through a letter dated 28th September, 2020 to demand or seek to recover from the applicant a sum of Kshs.221,375,000/= as loss occasioned to the public through compensation that was erroneously made to the 1st and 2nd interested parties in respect of the suit properties, an order of prohibition to prohibit the 1st respondent from demanding or recovering the said amount from the applicant and an order of mandamus compelling the 2nd respondent to recover the said amount from the 1st and 2nd interested parties.

I am not satisfied that the applicant has established a prima facie case against the respondents to warrant the grant of the leave sought. The applicant has not satisfied me that the respondents have violated any of her rights in the demand that has been made against her by the 1st respondent. The applicant has not disputed that the 1st respondent has a statutory power to recover loss occasioned to the public through corruption or other illegal means. Whether or not the applicant is liable for the claim made against her by the 1st respondent is an issue that will be determined by the court that will hear the recovery proceedings that the 1st respondent has threatened to institute. The letter complained of by the applicant is just a demand letter. If the applicant fails to honour the demand, the 1st respondent will have to institute civil proceedings for the recovery of the amount that has been demanded. When such proceedings are instituted, the applicant will have an opportunity to defend herself. Most of the issues that have been raised by the applicant herein as grounds for reviewing the 1st respondent’s demand should form part of her defence in the said recovery proceedings. This court cannot determine in a judicial review proceeding whether the compensation of Kshs. 221,375, 000/= was validly made to the 1st and 2nd interested parties. In the absence of any evidence that any of the applicant’s public law or constitutional rights have been violated by the respondents, I find no basis for the grant of the leave sought.

Having come to the conclusion that a case has not been made out for leave, it is not necessary for me to consider whether the leave sought if granted should operate as a stay.

Conclusion.

The upshot of the foregoing is that the Chamber Summons dated 15th October, 2020 is without merit. The same is dismissed with no order as to costs.

Dated and Delivered at Nairobi this 25th day of February 2021

S. OKONG’O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Makhoka for the Applicant

Ms. C. Nyokabi-Court Assistant