



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC. CIVIL APPLI. NO. 323 OF 1999**

**IN THE MATTER OF AN APPLICATION BY PRAVIN KUMAR HARIMBHAI PATEL
IBRAHIM G. JAGANI & MRS. M.P. SAULA FOR LEAVE TO APPLY FOR ORDERS OF
CERTIORARI, MANDAMUS AND PROHIBITION**

AND

**IN ACCORDANCE WITH ORDER L111 RULES 1, 2 AND 3 OF THE CIVIL PROCEDURE
RULES AND SECTION 3A AND SECTION 63 OF THE CIVIL PROCEDURE ACT.**

- VERSUS -

1. COMMISSIONER OF LANDS 1ST RESPONDENT

2. MUNICIPAL COUNCIL OF MOMBASA 2ND RESPONDENT

AND

1. SAID NOOR NADHIR

2 ABUBAKAR MWINYIALI INTERESTED PARTY

RULING

The applicants by chamber summons dated 19.11.99 brought under the Provisions of order 53 rules 1, 2 and 3 of the Civil Procedure Rules and Section 3A and 63 of the Civil Procedure Act applied for the grant of leave to institute Judicial Review proceedings for orders of certiorari against the Commissioner of Lands and Municipal Council of Mombasa. Also named as parties are SAID NOOR NADHIR and ABUBAKAR MWINYI ALI named as the Interested parties”

The Applicants are the Registered owners of residential properties adjacent to each other known as Plots 225, 226 and 251 of Block XXVI Mombasa, KIZINGO. The plots 225 and 226 are on the same side and while Plot 251 is directly opposite them and almost of the same length. In between them is a strip of land which the applicants say they have used as a road to access their respective properties for more than 15 years and that the properties were developed after plains including the gate of access were approved by the municipal Council. The said portion of land is marked as Public Land on a survey plan annexed to both verifying Affidavit and the Affidavit in reply by the 1st Interested party SAID NOOR NADHIR. In December, 1995, the Applicants got to know that these were plans to allocate the Public land which they used as a road of access to their houses to individual developers. Two of the applicants Mr. E.G. Jagani who owns a property on Plot No.251 ad PRAVIN PATEL who owns property on Plot 225 wrote to the Commissioner of lands on the 7th December, 1995 protesting any such allocation on the grounds that the plot served as an access road to their respective houses and would compromise the security, and privacy of their homes. They went ahead and attached a copy of a site plan to ensure the commissioner was clear

on what they were referring to. They did not hear from the Commissioner only to find a contractor on site in November, 1999 taking measurements for an intended office Block. This prompted them to rush to Court and sought leave which was granted on 11.11.99 and the same was to operate as a stay.

At the hearing of the Notice of motion filed therein after and dated 29th November, 1999, the Commissioner of Lands was represented by the Attorney General but M/s. Shah opted to say nothing as regards. This left the main arguments between Mr. Gikandi for the Applicants and Mr. Abubakar for the Interested parties

. Mr. Gikandi strongly submitted that the land in question being public land was not subject to any allocation to any individual by the Respondents before it was established that it's allocation would not affect the said application for reason that the Commissioner had failed to give them the necessary instruction.

Mr. Karisa Iha who represented the Municipal Council too had very little to say and relied on his preliminary objection to the effect that the municipal Council had been wrongly sued as neither did the decision originate from them and neither was the said land under their trust, rights of others. He further said the proposed construction of a high rise office block would be overlooking the Applicants residential houses which would interfere with their privacy.

In response, Mr. Abubakar said the courts had failed to show any sufficient interest in the said suit premises and the mere claim that the same is an access road only gives them a right of which can not be granted in an application of this nature. He further submits that since the suit property was public land and not a Public road, the Applicants have no locus standi. He also raised the issue for limitation in that the application was filed more than 6 months after the said decision and that even the said decision, that is the letter of allotment had not been exhibited to the verifying Affidavit as required by order 53.

He also raised the defence of innocent purchasers on the part of the Interested parties and that it had not been shown by the applicants that any rules of natural justice had been violated.

I have evaluated the evidence by affidavit and all the submissions from the exhibited area plans from the survey department, it is clear that there is a narrow strip of land which without going into accurate measures appears to be of the same width as the one appearing at the back row of all the plots on that side and which is a road. This land is marked P.L. and both parties have submitted that PL stands for Public land. It is a portion of this strip of land that was allocated to three persons, namely NURU KIBWANA, ALI RAMADHAN and BARASA NAUTUTU and they in turn sold it to the interested parties. From the annexures to the Affidavit by Pravin Patel, it is clear the Applicants on learning of the intention by the Commissioner of Lands to allocate the said land, without delay immediately registered their protest to the Commissioner lands. Things appeared to have been in control though they received no response to their letter until about 4 years later when they found a contractor busy preparing to put up an office block on behalf of the Interested parties.

There has been no denial that the disputed land has been used by the applicants as an access to their respective houses. Save that the Interested parties say the applicants can relocate the said access to face the other available and existing roads. The applicants did say, they had built their houses using approved plans by the Municipal Council and that included the accesses.

I have closely examined the disputed strip of land and noted that on the survey plan, directly opposite and across the road is another row of properties and a similar strip of land has been set aside directly opposite the one now marked PL. The only difference is that the strip of land on the opposite side of the road is not marked. Whether the said lands were earmarked for future road development is not an issue at this stage but what is clear is that they are too narrow and there is every possibility that if a high rise building is put up, there is likely hood of interfering with the free flow of air to the other properties. It is also noted that the lease document describes the land as residential and this area has been set aside for residential buildings. The question is, whether having a high rise office block overlooking at close proximity private residential houses would not amount to breach of ones right to privacy in their own

homes. Does the fact that it was public land also entitle the Commissioner of lands to allocate it without taking into consideration the protests by the applicants? The fact that the applicants had been using it as a road of access and had taken the initiative to alert the Commissioner, and the effect the construction of a building on it would have on the applicants property to me demonstrates nothing less but a legal right. The Commissioner however decided to ignore the Applicants. I would have probably concluded at this point but I need to consider an issue raised by Mr. Abubakar as to the defence in the statement filed herein. The statement does give the description of the parties herein and the grounds upon which the claim is brought but fails to say what relief is sought. Order 53 rule (4) (1) is clear and states

“Copies of the statement accompanying the application for leave shall be served with the notice of motion and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement”

The statement filed herein has no prayer for relief and although it is contained in the motion, the rule does not give a leeway on this. It only provides for an amendment of the statement. If the same is sought, I do not see any other way round this in light of the said provision.

The other issue which is also utmost importance is the provision of order 53 rule 2 which clearly provides that such leave shall not be granted to apply for an order of certiorari unless the application for leave is made not later than 6 months after the date of the proceedings. In this case, the decision by the Commissioner of lands to allocate the land to NURU KIBWANA, ALI RAMADHAN and BARAST NAVTUTU is not exhibited. It is therefore not possible to establish when the decision was arrived at but it is certainly before the issuance of the lease document to them which was issued on 14th July, 1999.

As I have stated earlier, the statement does not contain the relief sought and since a party is bound by its own proceedings I am unable to grant the relief sought which I would otherwise have granted had the statement been in order. This is an unfortunate case as the allocation of the disputed land is one of those the government is trying to put right. Perhaps the applicants can pursue other avenues to protect their rights. The application is otherwise dismissed with costs.

Dated and Delivered at Mombasa this 10th day of April, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE

Read by Commissioner of Assize J. Khaminwa in the presence of Mr. Abubakar for Interested party

Absent – Applicant

Absent – Attorney General

Absent – 2nd Respondent this 10th day of April, 2003