



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CIVIL APPLICATION NO. 167 OF 2001
IN THE MATTER OF ORDER LIII CIVIL PROCEDURE RULES
SECTION 32 OF THE REGISTERED ACT CAP.300
ALL THE ENABLING PROVISIONS OF LAW

AND

IN THE MATTER OF LAND PARCEL NO. NAIROBI/BLOCK 94/247

AND

IN THE MATTER OF ISSUE OF CERTIFICATE OF LEASE

CAPRI HOLDINGS LTD.....1ST APPLICANT
KAILIMU ENTERPRISES.....2ND APPLICANT
MBALE FARMS.....3RD APPLICANT
J. MUCHANGI.....4TH APPLICANT
A.K. MWANGI.....5TH APPLICANT

-VERSUS

COMMISSIONER OF LANDS.....RESPONDENTS

RULING

In seeking leave on 6th March, 2001 to institute Judicial Review Proceedings, the applicants obtained orders from Justice Osiemo that:

“(1) THAT leave be and is hereby granted to the applicants to apply for an Order of Prohibition issuing a certificate of Title on L.R. No. Nairobi Block/94/247 from transferring, selling, alienating and/or issuing a certificate of title of the suit premises till further order of this court.

(2) THAT the grant for leave do operate as a stay of any further dealing in the suit premises for twenty-one (21) days”

In this application, they are seeking the following orders in their Notice of Motion dated and filed on 21st March, 2001.

“(a) THAT this honorable court be pleased to issue an order of mandamus compelling the commissioner of lands to issue a certificate of title and/or certificate of lease to the applicants herein jointly.

(e) THAT an order of prohibition be and is hereby issued prohibiting and or restraining the Commissioner of Lands herein from selling, transferring, alienating and or issuing a certificate of lease/certificate of title in parcel of land Number Nairobi/Block 94/247 to any other person and/or party save to the applicants”.

I have set out these in full in order to point out the latent mischief incumbent in this application. The leave the applicants sought and obtained before Justice Osiemo on 6th March, 2001 was clearly for an order of prohibition and not a blanket leave to encompass the varied Judicial Review remedies that the present applicant now seeks. In this application, the applicants seek a mandamus and prohibition, whereas they only sought leave to apply for an order of prohibition. I would not go beyond this in pointing out the mischief in it but simply state that the order of mandamus which the applicants are seeking in this application cannot be granted as they sought no leave to apply for the same. I will only dwell with the application to which they sought leave for namely an order for prohibition.

In **Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others in Civil Appeal No. 2666/94**, where the respondents sought an order for prohibition against the Council from withholding cancelled examination results, the Court of Appeal stated that with respect to a prohibition:

“What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior Tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws. It lies not only for excess of jurisdiction or absence of it but also for departure from the rules of justice. It does not, however, lie to correct the cause, practice of procedure of an inferior tribunal or a wrong decision on the merits of the proceedings.....”

I would concur with this statement in establishing the extent of the order.

The respondent is clearly a ‘tribunal’ or ‘body’ determining the rights of citizens in so far as he allocates and confers interests to citizens in immovable property. In **Re Kisima Farm Ltd. (1978 KLR 36)**, Justice Hancox (as he then was) expressed the view that the Commissioner of Lands acts as a tribunal in determining compensation under S. 9 of the Land Acquisition Act. I would find that even in the present instance, he would be acting with legal authority to determine questions affecting the rights of subjects/citizens and hence a tribunal and or body within the meaning of the wordings expressed by the Learned Justices in **KNEC** case above.

There has been no representation by the respondent in this case as he did not appear nor did his representative appear though duly served during the hearing of this application. Further, they did not even file any affidavits replying or otherwise. I would hold that in so far as they have not traversed the allegations contained both in the notice of motion and the affidavits accompanying it, then they have admitted the contents as set out.

It is clear also that as at the moment the respondent has not issued title/lease certificates in respect of the suit property save that there is considerable apprehension on the part of the applicants, which may be well founded, that the respondent having received payments from themselves and the alleged third party to the new file No.212113 which has been opened, will issue the said titles/lease certificates to the latter and not the former, who made the payments first.

A prohibition cannot be issued to quash a decision which is already made, it can only prevent the making

of a contemplated decision see **KNEC** Case at page 11. A prohibition order is only concerned with proceedings in the future and not in the past (See **Judicial Review** by Michael Superstone 2nd edition, para. 13-4

The main ground advanced by the applicant as set out in the Notice of Motion and the supporting affidavit is that the respondent having accepted allocated the parcel to the applicants, and further having accepted payments as demanded by himself cannot again subsequent issue certificate of title/lease to any other body of person other than the applicants. In essence, they do argue that the applicant does lack jurisdiction to entertain any other allotment proceedings on the suit parcel as by its own action, it has opined that the applicants would have the certificates of title/lease when called upon to so take.

I find this ground to have considerable merit. Once the respondent had issued the letter of allotment, which among others contains conditions upon which a grant can be issued, and those conditions like the payment of the fees due in the instant case, have been met or even substantially complied with, the competence of the respondent to subsequently issue title documents on the same parcel to certain other different people is taken away.

As it is, the applicants apprehend that if not granted the orders, their interests in the suit land will be extinguished by the actions of the respondent.

Having divested himself of the jurisdiction to allot a particular parcel of land to an individual or person, subsequent re-allocation of the same parcel without nullification of the previous allocation is purely without competence and besmirches of actions done in excess of jurisdiction.

In the circumstances, I would grant the application in terms of prayer (e) of the Notice of Motion and accordingly issue an order of prohibition, to prohibit and or restrain the respondent from selling, transferring, alienating and/or issuing a certificate or lease/certificate of title in parcel of land number Nairobi/Block 94/247 to any other person and/or party save to the applicants.

The applicants shall have the costs of this application.

Delivered and dated this 5th day of June, 2001.

KASANGA MULWA

JUDGE