



**Republic v County Government of Narok & another; Ochweri
(Exparte Applicant) (Environment and Land Judicial Review Case
E002 of 2023) [2023] KEELC 20336 (KLR) (4 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20336 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E002 OF 2023**

CG MBOGO, J

OCTOBER 4, 2023

**IN THE MATTER OF PARCEL NUMBERS NAROK TOWNSHIP BLOCK 11/1033,
NAROK TOWNSHIP BLOCK 11/1034 AND NAROK TOWNSHIP BLOCK 11/1035
AND IN THE MATTER OF THE FUNDAMENTAL RIGHT TO THE PROTECTION
OF PROPERTY AS ALLOWED UNDER THE PROVISIONS OF ARTICLE 40 OF
THE CONSTITUTION OF KENYA AND IN THE MATTER OF BREACH OF THE
FUNDAMENTAL RIGHT TO FAIR ADMINISTRATIVE ACTION AS ALLOWED
UNDER THE PROVISIONS OF ARTICLE 47 OF THE CONSTITUTION OF KENYA**

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY GOVERNMENT OF NAROK 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

AND

ENG DANIEL OGWOKA OCHWERI EXPARTE APPLICANT

JUDGMENT

1. Pursuant to leave granted on 23rd February, 2023 the ex-parte applicant filed a Notice of Motion Application dated 1st March 2023 seeking the following orders: -
 1. Of prohibition staying any action by the 1st respondent claiming any right of possession of the ex-parte applicant’s properties being parcel numbers Narok Township Block 11/1033, Narok township Block 11/1034 and Narok Township Block 11/1035.



2. Of mandamus against the 1st respondent claiming any right of possession of the ex-parte applicant's properties being parcel numbers Narok Township Block 11/1033, Narok township Block 11/1034 and Narok Township Block 11/135.
 3. For the costs.
2. The application is premised on the grounds *inter alia* that the 1st respondent has without any right proceeded to demolish structures built by the ex-parte applicant on claims that the properties are public land which information has not been formally communicated. Further, that no formal explanation has been given to the ex parte applicant for the 1st respondent's action or intended action which is a breach of his rights to fair administrative action as demanded under Article 47 of the Constitution. Also, that the said properties do not form part of public land as envisaged by Article 62 (1) of the Constitution.
 3. The application was supported by the affidavit of the ex-parte applicant sworn on even date. In his affidavit, the ex-parte applicant deposed that together with Linet Odhiambo Ochweri, they entered into a sale agreement dated 12th April, 2017 for purchase of Narok Township Block 11/1035 from David Maina Gichuki and Moses Mugwanja Kinuthia following which he was issued with a letter of allotment by the 1st respondent but which he later misplaced.
 4. That he then paid the 1st respondent Kshs 15,000/- to register the transfer and since then, they have been paying rates. Further, that together with Linet Odhiambo Ochweri, they entered into a sale agreement dated 12th April, 2017 for the purchase of Narok Township Block 11/1034 from John Njoroge Kinuthia. The ex-parte applicant further deposed that upon purchase of the property he was issued with a letter of allotment which he misplaced but he paid Kshs. 15,000/- being the registration fees and has also been paying rates over the years. Further, that they also purchased Narok Township Block 11/1033 from Vitalis Amolo Odhiambo vide an agreement of sale dated 15th September, 2016 and thereafter was issued with a letter of allotment which he unfortunately misplaced but reported the matter to the Narok Police Station as OB 53/17/12/2021.
 5. The exparte applicant further deposed that on 26th January, 2017, the 1st respondent confirmed their ownership of the properties and acknowledged receipt of their Environmental Impact Assessment Report. Further, that the 1st respondent has been making demands for the rates of the property and which rates they have been paying. That on 31st January, 2022, his advocate wrote a letter to the 1st respondent on the issue of ownership of their properties and further reported damage to their property on 4th December, 2022 at the Narok Police Station.
 6. The exparte applicant further deposed that the damage caused by the 1st respondent to their property was extensive and they received no written notice of the demolition of their structures on the parcels of land.
 7. On 9th May, 2023 the 2nd respondent filed grounds of opposition dated 24th April, 2023 challenging the application and seeking dismissal on the following grounds:-
 1. That a judicial review is not the right in which to determine the dispute. The ex-parte applicant is basically asking the court to determine the ownership of the suit properties.
 2. That as a matter of law, Judicial Review proceedings are not a forum where disputes on ownership of land can be adjudicated and determined because it is restricted to affidavit evidence while such disputes require viva voce evidence and cross examination of witnesses.
 3. That the present forum causes prejudice to the 2nd respondent's right to be heard as enriched in Article 50 and is unduly oppressive and prejudicial to the 2nd respondent because the 2nd



respondent is denied its right to interrogatories, and all the instruments of defences available in an ordinary civil dispute.

4. That this application therefore lacks merit, made in bad taste, malicious, full of vexatious and gross abuse of the court process and deemed as persuading this court or attempting to waste the courts time and therefore must be dismissed at the first opportunity with costs.
8. On the 3rd June, 2023 the 1st respondent filed its reply to the application vide the replying affidavit of Godfrey Ndubi Kwena-Acting County Land Registrar sworn on 6th June, 2023. In his affidavit, the 1st respondent deposed that the application is brought in bad faith and wrong forum as judicial review does not determine the dispute of ownership which require viva voce evidence and cross examination. Further, that the ex parte applicant has not adduced evidence that he reapplied for a new letter of allotment with the 1st respondent but has adduced an OB number which goes to show unsubstantiated allegations.
9. The 1st respondent further deposed that the courts have held that payment of rates is not conclusive proof of ownership of land and that the allegations of damage to property is unfounded as the ex parte applicant had not obtained the requisite development approvals from the relevant county authorities prior to commencement of the construction.
10. The application was canvassed by way of written submissions. On the 16th June, 2023 the 2nd respondent filed its written submissions dated 16th June, 2023 and raised two issues for determination as follows: -
 - a. Whether a judicial review application is the right forum to determine the issues raised in the notice of motion.
 - b. Whether a judicial review application offends the 2nd respondent's right to be heard.
11. On the first issue, the 2nd respondent submitted that the underlying issues in the application is ownership of land as the ex-parte applicant claims that he is the legal and rightful owner of the parcels of land while the 1st respondent is of the opinion that the parcels of land are public land and these issues cannot be deliberated by way of affidavit evidence. The 2nd respondent relied on the cases of *Scorpion Properties Limited versus Nairobi County Governor (Mike Mbuvi-Sonko) & Another* [2020] eKLR, *Republic versus National Land Commission Ex-parte Ephrahim Muriuki Wilson & Others* [2018] eKLR and *Republic versus Cabinet Secretary, Ministry of Interior & Co-ordination of National Government & 2 Others Ex-parte Kisimani Holdings Limited* [2015] eKLR.
12. The 2nd respondent further submitted that it is not proper for the ex-parte applicant to bring up a judicial review application staying any action by the 1st respondent claiming right of possession yet the grounds presented suggest issues of ownership of land.
13. On the second issue, the 2nd respondent submitted that in cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation and disposition, there would be need to allow viva voce evidence and cross examination which is not available in judicial review proceedings. Reliance was placed in the case of *Republic versus District Land Registrar, Nakuru Ex-Parte Lawi Kigen Kiplagat; Lee Maiyani Kinyanjui (Interested Party)* [2021] eKLR and submitted that the present forum causes prejudice to the 2nd respondent's right to be heard as enshrined in Article 50 of the *Constitution* and is unduly oppressive as it is denied its right to interrogate the ex-parte applicant's allegations in the motion by way of cross examination.
14. The ex-parte applicant and the 1st respondent did not file written submissions. Be that as it may, I have considered the application, replying affidavit, grounds of opposition and the written submissions filed



by the 2nd respondent and the issue for determination is whether the ex-parte applicant is entitled to the orders of prohibition and mandamus.

15. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in *Kenya National Examinations Council versus Republic Ex parte Geoffrey Gathenji Njoroge & Others* Civil Appeal No. 266 of 1996 [1997] eKLR in which the said Court held *inter alia* as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, 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 a contemplated decision...Prohibition 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 of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way... These principles mean that an order of mandamus compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of certiorari and that is all the court wants to say on that aspect of the matter.”



16. In addition, judicial review proceedings do not deal with the merits of the decision but by the decision-making process. In *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* Civil Appeal No. 185 of 2001 the Court of Appeal held:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself- such as whether there was or there was not sufficient evidence to support the decision.”

17. It is important to remember that in every case the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *Halsbury's Laws of England* 4th Edition Vol (1)(1) Para 60.
18. In this case, the ex-parte applicant contended that he is a joint proprietor together with Linet Odhiambo Ochweri of three parcels of land which they bought on diverse dates from different sellers through valid sale agreements for the same and have over the years paid for rates. The ex-parte applicant further contended that without notice, the 1st respondent caused demolitions of structures built on the parcels of land and he reported the same to the Narok Police Station and obtained an OB number. On the other hand, the 1st respondent disputed ownership of the parcels of land more so that proof of payment of rates is not conclusive proof ownership of land. Further, that the ex-parte applicant has not obtained the requisite development approvals from the relevant county authorities prior to the commencement of construction.
19. The question then is, would judicial review proceedings provide solutions to the issues presented by both parties especially where the facts are disputed? It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision-making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See *R v Secretary of State for Education and Science ex parte Avon County Council* (1991) 1 All ER 282, at P. 285.
20. It follows, therefore, that where the determination of the dispute before the court requires the court to decide on disputed issues of fact, that is not a suitable case for judicial review. Judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the *Civil Procedure Act* does not apply. In order to determine the questions in this dispute, it is my view, that it would be necessary to make certain findings which do not fall under the purview of judicial review for the simple reason that the court would require viva voce evidence to be adduced for the determination of the case on the merits.
21. This court can only leave the parties to ventilate the merits of the dispute through the ordinary civil suit. As such, the notice of motion application dated 1st March, 2023 being the substantive suit is dismissed. Each party to bear its own costs. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 4TH DAY OF OCTOBER, 2023.

HON. MBOGO C.G.



JUDGE

4/10/2023.

In the presence of:

CA:Pere Meyoki

