



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO 9 OF 2020

REPUBLIC.....APPLICANT

- VERSUS -

THE NAIROBI CITY COUNTY GOVERNMENT.... RESPONDENT

EX PARTE KENOL KOBIL PLC, THE EXPARTE APPLICANT

RULING

1. This is the Notice of Motion dated 23rd February 2020 brought pursuant to order 53 rule 3(1) of the Civil Procedure Rules.

2. It seeks:-

1. Spent.

2. Spent.

3. That this honourable court do issue an order of certiorari to remove into this court for purposes of being quashed, quashing and quash the Enforcement Notice dated 13th February 2020.

4. That this honourable court do issue an order of prohibition prohibiting the Nairobi City County Government from implementing the Enforcement Notice dated 13th February 2020.

5. That this honourable court does issue a Declaratory Order that the Enforcement Notice dated 13th February 2020 is unlawful and tainted with illegality for contravening Section 4(3) and (4) of the Fair Administrative Action Act and Articles 47 and 50(1) of the Constitution and is consequently null and void.

6. That any other or further and consequential orders and/or directions that may be given.

7. That costs of the application be awarded to the Ex-parte Applicant.

3. The grounds are on the face of the application and are set out in paragraphs (a) to (L).

4. The application is supported by the affidavit of Pius Muindi Kioko, the Operations Manager of the Exparte Applicant sworn on the 23rd February 2020.

5. Upon being served with the said application the Respondent entered appearance on 10th March 2020 through the firm of Njenga Maina & Co. Advocates.

6. On the 29th July 2020 the court directed that the application be canvassed way of by way of written submissions. Parties were given 21 days to file the submissions.

7. On the 28th October 2020, Ms Kamene holding brief for Mr. Maina for the Respondent intimated to the court that they had been unable to get instructions from their client. The Respondent was given twenty one (21) days to file their submissions. By the time of writing this ruling the respondent's submissions had not been filed. In essence the Notice of Motion date 23rd February 2020 is not opposed.

8. The Ex parte Applicant's submissions are dated 16th September 2020. They raise three (3) issues for determination. They are:-

i. Whether the respondent can evict the applicant from its property.

ii. Whether the enforcement notice is valid and

iii. Whether the applicant will suffer serious risk and prejudice if the orders for Judicial Review are not granted.

9. Article 40 (1) of the Constitution of Kenya 2010 guarantees the protection of the property as long as the property was acquired through lawful means. The respondent's action requiring the applicant to vacate the premises is therefore unconstitutional null and void. It has put forward the case of **Elizabeth Wambui Githinji & 29 Others vs Kenya Urban Roads Authority & 4 Others [2019] eKLR**.

10. Section 26 of the Land Registration Act 2012 provides that a Certificate of Title is to be held as conclusive evidence of proprietorship. The applicant holds a valid Certificate of Title with respect to LR No 209/9641 and is therefore the absolute and indefeasible owner of the said property.

11. The eviction notice issued in the enforcement notice was issued *ultra vires* section 4 (3) and (4) of the Fair Administrative Action Act and Article 47 and 50(1) of the Constitution. The same should be quashed. It has relied on Section 72(2) and (3) of the Physical Planning Act. It has put forward the case of **Republic vs Nairobi City County Ex parte Joyce Waceke Ng'ang'a [2014] eKLR**.

12. The applicant will suffer serious prejudice if these orders are not granted. It has put forward the case of **Kevin K. Mwiti & Others vs Kenya School of Law & 2 Others [2015] eKLR**. Pursuant to the approvals issued by the respondent the applicant had commenced construction works. The applicant will face great financial risk if the construction does not go on.

13. The Enforcement Notice was an administrative action by the respondent. Article 47 (1) of the Constitution places a duty on the respondent to ensure that its action was expeditious, efficient, lawful, reasonable and procedurally fair. The Respondent failed to afford the Applicant an opportunity to be heard. It prays that the application be allowed as prayed.

14. I have considered the Notice of Motion and the affidavits in support. I have also considered the written submissions filed by the Applicant. The issue for determination is whether this application is merited.

15. As stated earlier, the application is not opposed. It is not in dispute that the Ex parte Applicant is the registered owner of the property known as LR NO 209/9641. A copy of the Certificate of Title is annexed to the application.

16. On page 17 there is permission by the Respondent allowing the Ex parte Applicant to undertake alterations to the existing petrol station. The permission is dated 14th March 2019. On page 19 is the permission from the Director General of Kenya National Highways Authority, allowing the Ex parte Applicant to upgrade access to the petrol station on LR NO 209/9641. The letter is dated 3rd September 2019. It has also attached an Agreement with a contractor who was undertaking the works.

17. The Enforcement Notice is on page 49 and is dated 13th February 2020. It requires the Ex parte Applicant to **"stop any further construction forthwith and vacate the site immediately."** Section 72 (2) and (3) of the Physical Planning Act envisages a situation where the developer would be served and given time either to rectify the wrongs and comply with the enforcement notice or prefer a complaint to the liaison committee.

18. From the reading of the Enforcement Notice herein, it appears the same does not afford the Ex parte Applicant any opportunity to be heard in respect of any objection it may have. In the cited case of **Republic vs Nairobi City County Ex parte Joyce Waceke Ng'ang'a [2014] eKLR** the court stated thus:-

"It is clear that the said notice was mischievously issued in order to render the provisions of section 38 redundant. In my view a decision deliberately taken with a view to render the protective provisions of the applicable legislation superfluous must be clearly unlawful and irrational. Even if the applicants wished to invoke the provisions of section 38(4) she was not afforded time within which to do so. Accordingly, the respondent's action was tainted with procedural irregularity and out not to be allowed to stand".

The said enforcement notice is therefore illegal and improperly issued.

19. On the issue of grant of orders of Certiorari. I am guided by the case of **Republic vs Chief Magistrate Milimani Commercial Court & 2 Others Ex parte Violet Ndanu Mutinda & 5 Others [2014] eKLR** the court stated thus:-

"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 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.....".

20. On the issue of orders of prohibition. I am guided by the case of **Kenya National Examination Council Ex parte Gathenji & Others**

Civ. Appeal NO 266 of 1996 where the Court Appeal stated thus:-

“.....prohibition cannot quash a decision which has already been made; it can only prevent the making of 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 in contravention of the laws of the land. It lies, not only for excess of jurisdiction in absence of it but also for a departure from the rules of natural justice.....”.

21. In conclusion, I find merit in this application. I find that the Ex parte Applicant has made out a good case for review.

22. Accordingly I grant the orders sought namely:-

a. That an order of certiorari is hereby issued to remove into this court for purposes of being quashed, the Enforcement Notice dated 13th December 2020 and the same is quashed.

b. That this honourable court do issue an order of prohibition prohibiting the Nairobi City County Government from implementing the Enforcement Notice dated 13th February 2020.

c. That a declaration is hereby issued that the Enforcement Notice dated 13th February 2020 is unlawful and tainted with illegality for contravening Section 4(3) and (4) of the Fair Administrative Action Act and Articles 47 and 50(1) of the Constitution and is consequently null and void.

d. That each party do bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 29TH DAY OF JULY 2021

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Muthui for the Applicant

No appearance for the Respondent

Phyllis

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Court

Assistant