Republic v Commissioner of Lands & 2 others (Application 13 of 2023) [2024] KEHC 8150 (KLR) (Judicial Review) (9 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8150 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION 13 OF 2023

J NGAAH, J

JULY 9, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

COMMISSIONER OF LANDS ..... 1ST RESPONDENT

CHIEF LAND REGISTRAR ..... 2ND RESPONDENT

LAND REGISTRAR, NAIROBI ..... 3RD RESPONDENT

JUDGMENT

1. The application before court is a motion dated 25 September 1997. It is expressed to be brought under sections 75 and 123 (8) of the retired constitution of Kenya; sections 8 and 9 of the *Law Reform Act*, cap. 26; the Registered *Land Act* cap. 300 (Repealed) and Order 53 of the Civil Procedure Rules. The prayers in the motion are in the following terms:

> " 1. The leave granted on the day 4th September, 1997 do (sic) operate as stay of any further registration of all dealings relating to land parcel no. Nairobi/Block 82/1786.
>
> 2. This Honourable Court be pleased to issue an order of certiorari to bring to the High Court of Kenya the decisions, deliberations, correspondence, survey maps and plans, minutes, letters of allotment, land registers and files of the Commissioner of Lands, the Chief land registrar and the land register, Nairobi relating to land parcel no. Nairobi/Block 82/1786 and to nullify and quash all such decisions that have deprived and dispossessed or have the effect of

depriving and dispossessing M/S Nkugwe Investments Limited, the interested party, of the land known as L.R. No. Nairobi/Block 82/1786.

3. This Honourable Court be further pleased to issue an order of mandamus directing the Commissioner of Lands, the Chief Land Registrar and the Land Registrar, Nairobi to cancel or to remove all entries entered in the register of L.R. No. Nairobi/Block 82/1786 and to restore the name of the interested party M/S Nkugwe Investments Limited as the registered proprietor thereof.

4. In the alternative to the prayer (3) above this Honourable Court be pleased to order the Commissioner of lands pay the interested party M/S Nkugwe Investments Limited a sum of Kshs. 104, 123,000.00 (Kenya Shillings One Hundred and Four Million and One Hundred and Twenty Three Thousand) only being compensation for deprivation and/or loss of land parcel no. Nairobi/Block 82/1786.

5. This Honourable Court be further pleased to issue an order of prohibition directed against the Commissioner of Lands, Chief Land Registrar and Land Registrar Nairobi to prohibit the said persons from proceedings relating to the land parcel no. Nairobi/Block 82/1786."

The applicant also asked for an order on costs.

2. The application is based on a statutory statement dated 19 August 1997 and an affidavit sworn on even date by Lawrence Muriithi Mbabu verifying the facts relied upon. In the affidavit, Mr. Mbabu swore that he is the managing director of Nkugwe Investments Limited. On 6 May 1996 the Commissioner lands executed a lease in respect of LR. Nairobi/Block 82/1786 in the name of the applicant. I will henceforth refer to this property as "the suit land". With the approval of Nairobi City Council, the suit property was subdivided into various acreages for development of a school, residences and a commercial centre.

3. On 5 August 1997, the applicant discovered that the land had been transferred into the name of Continental Developers Limited. This discovery was made after the applicant made an official search at the land registry in Nairobi. It is for this reason that the applicant seeks the orders set out in his motion.

4. There does no appear to be any response from the respondents although the record shows that the soon after this suit was filed in 1997, the Honourable Attorney General entered appearance on behalf of the respondents.

5. It is also apparent from the record that the suit has a somewhat chequered past. It was filed in 1997 but the first time it was scheduled to be heard was 31 October 2012. Even then it was not heard because on 11 October 2012, it was erroneously dismissed for want of prosecution. An appeal to the Court of Appeal was lodged against the dismissal order. The appeal was allowed on 21 July 2017. The court of Appeal reinstated the suit and remitted it to the High Court for hearing on priority basis.

6. By a motion dated 4 October 2022 the applicant moved the court for an order for reconstruction of the court file apparently because the original file could not be located. The motion was filed in the Civil Division of this Honourable Court. On 5 July 2023 the court (Meoli,J.) allowed the application in the following terms:

> " The DR having confirmed that the original of file herein cannot be traced the court allows the motion dated 4.11. 2022 in terms of prayer 2. The applicant to furnish a bound copy

of the record in the suit by close of the business on 6 July 2023 to the court and serve the Attorney General and all other parties."

When the matter came up again before Meoli, J on 6 November 2023, the learned judge ordered as follows:

> "In the view of the orders sought in the motion dated 25 September 1997, this matter is hereby transferred to the judicial review division of the high Court."

7. And so when the suit was brought to my attention on 13 December 2023, I directed the respondents to file and serve their response after which the parties were to file and exchange their written submissions in respect of the motion. In the submissions filed on behalf of the applicant, it has been urged that the alteration of the land register in respect of the suit land effectively deprived the applicant of his property and was contrary to section 142 the Registered *Land Act*, cap. 300(repealed). That Section provided:

   (1) The Registrar may rectify the register or any instrument presented for registration in the following cases -

      (a) Informal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;

      (b) In any case and at any time with the consent of all persons interested;

      (c) Where, upon resurvey, a dimension or area shown in the register is found to be incorrect, but in such case the Registrar shall first give notice to all persons appearing by the register to be interested or affected of his intention so to rectify.

   (2) Upon proof of the change of the name or address of any proprietor, the Registrar shall, on the written application of the proprietor, make an entry in the register to record the change.

8. The applicant has submitted that in view of this provision of the law, the respondents' alteration of the Land Register to register Continental Developers Limited as the proprietor of the suit land without any notice to the Applicant was unlawful and unprocedural. The applicant, therefore, seeks an order of certiorari to quash the respondents' decision that led to alteration of its title. For the same reason, the applicant seeks the order for Mandamus directing the respondents to cancel all the entries they have made in the register and to restore the registration of the applicant as the proprietor of the suit land. In support of the applicant's submission, the applicant cited the decisions in Kenya National Examinations Council versus Republic; ex parte, Geoffrey Gathenji Njoroge & Others (1997) eKLR in which the Court of Appeal explained what mandamus entails and Zachariah Wagunza & Another versus Office of the Registrar, Academic Kenyatta University & 2 Others (2013) eKLR in which the decision of Pastoli versus Kabale District Local Government and Others (2008 2EA 300 was cited with approval on grounds upon which relief for judicial review may be granted.

9. As far as the alternative prayer for indemnity is concerned, the learned counsel for applicant invoked section 144(1) of the repealed Registered *Land Act* which provided for indemnity to any person who suffered damage by reason of rectification of the register or any commission or mistake in the register which could not be rectified under the Act. And for the prayer for prohibition, it was submitted on behalf of the applicant that it is in the interest of justice and fairness that the Respondents be restrained from leasing the suit land or issuing subdivision and development approvals in respect of the suit land to any other party except applicant.

10. The major issue that arises out of the applicant's suit is that of ownership or proprietorship of the suit land. The ownership dispute is between the applicant and an entity called Continental Development

Limited. Although the applicant has referred to it as an interested party, it has not been so named in the application. As matter of fact, the applicant has been named in the instant application as the interested party.

11. Amongst the evidnce that the applicant has exhibited to the affidavit verifying the facts relied upon in proof of its case are documents showing that there could have been a case of double registration of the suit land such that both the applicant and Continental Developers Limited hold what they both claim to be valid titles to the property.

12. From the certificate of official search dated 5 August 1997, given to the applicant after he conducted a search on the suit property at lands registry in Nairobi, Continental Developers Limited is indicated to have been registered as the owner of the property on 30 August 1995 yet according to the applicant, the applicant was the first leasehold owner, from the government, having been registered as such on 14 May 1996.

13. This point of double registration was captured in a letter dated 5 February 1997 addressed to the applicant by the land registrar in Nairobi. The letter read as follows:

> " Re: Notice Of Registration Of Restriction
>
> Title No. Nairobi/block 82/1782
>
> Refer to your letter on the subject matter dated 30th October 1996.
>
> Please note that a restriction has been placed on the above title following disclosure of double allocation and issuance of lease certificate to both parties claiming interest in the above referenced parcel of land.
>
> Further, please note that notice of registration of caution now herewith forwarded, was inadvertently forgotten to be posted to you in time.
>
> Please note sections 131(1), 136 (1) and 137 (1) of the Registered *Land Act* (cap. 300) are complied with.
>
> Signed
>
> F.B. Kiriago
>
> Land Registrar-Nairobi"
>
> This letter was copied to the Chief Land Registrar and Continental Developers Limited. It has been deposed that although the caution and restriction were later removed, the dispute over ownership of the property not was not resolved.

14. As much as the application is presented as one seeking for judicial review reliefs, the applicant is, to a greater degree, seeking this Honourable Court to determine which of the two claimants; the applicant and Continental Developers, is the legal owner of the suit land. The court is thus being asked to evaluate evidence which, even from the applicant's own affidavit, is competing on the ownership of the suit land.

15. The question that immediately arises is whether a judicial review court is the best suited forum for the analysis of affidavit evidence for a concrete determination on the ownership of the suit land. In the English decision of R versus Secretary of State for the Home Department, ex p Khawaja (1984) AC

74 the court considered the question of whether a judicial review court is suited to analyse evidence on a disputed fact.

> " The migration officer, whether at this stage of entry or at that of removal, as to consider a complex of statutory rules and non-statutory guidelines. He has to act upon documentary evidence and such other evidence as inquiries may provide. Often there will be documents was genuineness is doubtful, statements which cannot be verified, misunderstandings as to what was said, practices and attitudes in a foreign state which have to be estimated. There is room for appreciation, even for discretion. The Divisional Court, on the other hand, on judicial review of a decision to remove and detain, is very different situated. It considers the case on affidavit evidence, as to which cross-examination, though available, does not take place in practice. It is, as this case well exemplifies, not in a position to find out the truth between conflicting statements-did the applicant receive notes, did he read them, was he incapable of misunderstanding them, what exactly took place at the point of entry? Nor is it in a position to weigh the materiality of personal or other factors present, or not present or partially present, to the mind of the immigration authorities. It cannot possibly act as, in effect, a court of appeal as to the facts on which the migration officer decided. What it is able to do, and this is the limit of its powers, is to see whether there was evidence on which the immigration officer, acting reasonably, would decide as he did. (Per Lord Wilberforce at p. 949B-D). (Emphasis added).

16. The case concerned immigration and the questions raised were pertinent to the immigration; nonetheless, the principle applied as to the limits of a judicial review court entertaining disputes on factual issues would be applicable in any case, including the instant one. Taking cue from this decision, I am of the humble view that the evidence before court being affidavit evidence, the court cannot affirm, with any measure of certainty, who between the applicant and Continental Developers Limited is the legal owner of the suit land.

17. Lord Woolf was more apt in R versus Derbyshire County Council, ex p Noble (1990) ICR at p. 813C-D where he stated:

> " The present application is one which is unsuitable for disposal on an application for judicial review-unsuitable because it clearly involves a conflict of fact and conflict of evidence which would require investigation and would involve discovery and cross examination. Cross-examination and discovery can take place on application for judicial review, but in the ordinary way judicial review is designed to deal with matters which can be resolved without resorting to those procedures."

18. On the same point Lord Diplock at p.316G in Hoffmann-La-Roche (F) & Co AG versus Secretary of State for Trade and Industry (1975) AC 295 was of the view that the procedure on a judicial review motion is unsuited to enquiries into disputed facts. Oral evidence and discovery, although catered for by the rules are not part of the ordinary stock in trade of the prerogative jurisdiction. Our own Supreme Court is of the same view. In *Saisi & 7 others v Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019* (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) the Court noted as follows:

> (76) Be that as it may, it is the Court's firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then

pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in Section 11 (1) and (2) of the Fair Administrative Actions Act. Third, the Court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in Section 11(1)(e) and (h) of the *Fair Administrative Action Act*. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this Court held in the case of *Kenya Vision 2030 Delivery Board v. The Commission on Administrative Justice, the Attorney General and Eng. Judah Abekah, SC Petition 42 of 2019*; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised." (Emphasis added).

For the reasons I have given, the applicant's application would fail to the extent that it demands of this court an inquiry into disputed facts.

19. But even if the applicant's application was to surmount the interrogation of evidence hurdle, it would still fail for one other reason which is, the conduct of the applicant. The court record reconstructed with the help of the applicant shows that the suit was filed in 1997 but it was not until 2012, five years down the line when the applicant took the first step in prosecuting it. It was eventually dismissed for want of prosecution and an appeal against the dismissal order was allowed only because the applicant's counsel was not notified of the date when the suit was dismissed and because, although the court dismissed the suit on its own motion under order 17 rule 2 of the Civil Procedure Rules, no notice to show cause why the suit should not be dismissed was served upon the applicant or his counsel.

20. Even then, although the appeal was allowed in July 2017, with a specific direction by the Court of Appeal that the suit be remitted to this Honourable Court and be heard on priority basis, it was not until 20 August 2021, four years down the line, that the applicant's advocates wrote to the deputy registrar of the Civil Division of the Court asking that the matter be placed before the judge for directions on the hearing of the matter.

21. In these circumstances, to say that the applicant has been lethargic and lackadaisical in prosecution of its case would be an understatement. A judicial review court frowns upon such a conduct and it would take it into consideration in exercising its discretion to grant or decline to grant judicial review reliefs.

22. It has been held in Caswell v Dairy Produce Quota Tribunal for England and Wales [1990] 2 AC 738, [1990] 2 All ER 434, HL.), that undue delay may result in the court denying judicial review relief. Another consideration is the effect of doing so (R versus Brent Health Authority, ex p Francis [1985] QB 869, [1985] 1 All ER 74,). Factors which may be relevant include whether the grant of the remedy is unnecessary (R v GLC, ex p Blackburn [1976] 3 All ER 184) or futile(R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities [1986] 1 All ER 164), whether practical problems, including administrative chaos and public inconvenience (Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141; R v Paddington Valuation Officer, ex p Peachey Property Corpn Ltd [1964] 3 All ER 200 at 208), would result; and, the effect on third parties (R v Panel on Take-overs and Mergers, ex p Datafin plc [1987] QB 815 at 842,).

23. According to Halsbury's Laws of England/Judicial Review (Volume 61 (2010) 5th Edition)/ paragraph 692, the court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully (See R versus Monopolies and Mergers Commission, ex p Argyll Group plc [1986] 2 All

ER 257). The demands of good public administration may lead to a refusal of relief (R v Monopolies and Mergers Commission, ex p Argyll Group plc [1986] 2 All ER 257 at 266).

24. It is almost three decades since the suit land was registered in the name of Continental Developers Limited. So much may have happened on the property; its ownership may, for instance, have changed hands or its status changed from one form to another so that issuing the sort of orders the applicant is bidding for may prove to be futile or unnecessary. In all likelihood, considering the passage of time, third parties in whose hands the suit land has fallen and who are not parties to this suit will may be prejudiced. The orders may also result to practical problems, including administrative chaos and public inconvenience.

25. For the reasons I have given, I am not satisfied that the applicant's application has any merit. It is hereby dismissed. Considering that there is no evidence that the respondents responded to the application and that they never appeared at the hearing of the application, I will not make any order as to costs. It is so ordered.

SIGNED, DATED AND POSTED ON THE CTS ON 9 JULY 2024

NGAAH JAIRUS

JUDGE