



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT THIKA
JUDICIAL REVIEW NO 1 OF 2020
IN THE MATTER OF AN APPLICATION BY PROLAND HOLDINGS LIMITED FOR LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS

AND

IN THE MATTER OF ARTICLES 22 (1), 23(!), 23(f), 165 (3) & THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF REFUSAL BY THE HONOURABLE MAGISTRATE OF KIKUYU LAW COURTS TO ISSUE CONSERVATORY ORDERS

PROLAND HOLDINGS LIMITED.....APPLICANT

VERSUS

HON SENIOR PRINCIPAL MAGISTRATE KIKUYU LAW COURTS....RESPONDENT

MARY WAMBUI WANYOIKEINTERESTED PARTY

RULING

1. What is before me for determination are;

- a. The Applicants Chamber summons dated the 22/12/2020
- b. The Applicants Notice of Motion dated the 17/2/2021
- c. The Preliminary Objection brought by the Interested Party dated the 4/5/2021.

The Chamber Summons dated the 22/12/2020

2. On the 21/12/2020 the Applicant filed chamber summons expressed under Articles 50 (1) 159(2) of the Constitution, Section 10 of the Judicature Act, Section 10(4) and 39(2) & Rules 16 – 19(1-5) of the High Court (Organization and Administration Act No 27 of 2015 and all other enabling provisions of the law.

3. The orders sought by the Applicant in the said summons are;

a. Spent.

b. **THAT leave be granted to the Applicant to apply for the Judicial Review Orders of CERTIORARI to quash the Respondent's directions o 4th December 2020 and PROHIBITION to restrain the Respondent from further acting in the dispute between the Applicant and Interested Party in Kikuyu MCL&E Case No. 15 of 2019.**

c. **THAT the leave so granted does operate as a temporary injunction on the property L.R No. 7497/18 pending the *inter partes* hearing and determination of these Judicial Review Proceedings.**

d. **THAT the leave so granted does operate as stay of all dealings on the property L.R No. 7497/18 pending the hearing and determination of these Judicial Review Proceedings.**

e. **THAT leave so granted does operate as stay of proceedings of the Kikuyu Senior Principal Magistrate's Case MCL&E No. 15 of 2019.**

f. **THAT the costs of this Application be provided for.**

4. The application is supported by the statutory statement and the verifying affidavit of John Mburu Ikinu both of even date. The Applicants case is that it is a limited liability company operating in Kenya. That it entered into an agreement for sale with the Interested Party on the 26/5/2016 for the purchase of a portion of LR 7497/18 measuring one acre from the Interested Party and paid Kshs 2.8 million as deposit. According to para 3.1 the Applicant was to take possession of the portion of the suit land upon payment of the 1st installment of Kshs 1.4 Million. That it was a condition of the agreement that the Interested Party would procure the subdivision of the suit land and land control board consent to transfer and the balance of the purchase price would be paid to the Interested Party upon registration of transfer of the portion to the Applicant.

5. That the Interested Party failed to perform her part of the bargain and the Applicant sued the Interested Party for interalia specific performance and injunctive reliefs in MCL 15 of 2019. The Applicant obtained injunctive orders issued by Hon L. N. Musyoka (SPM) on the 17/12/2019. That notwithstanding, the Interested Party continued to deal with the property in flagrant disregard of the orders leading to the filing of contempt proceedings which are pending determination. That the orders could not be registered against the suit land because of an error on the land reference which read as LR No 7491/18 instead of 7497/18.

6. Vide an application dated the 4/12/2020, the Applicant sought the correction of the said typographical order. On the 8/12/2020, the application came up for hearing when the he Interested Party opposed it and sought time to file her response. That the learned Hon Magistrate refused to issue interim relief preserving the property pending the hearing of the said application and directed that the matter be heard on the 16/3/2021. It is the Applicant's contention that the refusal by the Hon Magistrate to correct the typographical error or issue interim preservatory orders on the suit property allowed the Interested Party latitude to deal with the suit land unlawfully; amounted to abuse of discretion; decision was unreasonable and violated the legitimate expectation of the Applicant; unfair; failed to protect the suit property and aided the disobedience of the orders by the Interested Party.

7. Vide her replying affidavit sworn on the 4/5/2021 the Interested Party contended that the Application is unmerited, wholly spent and overtaken by events. That pursuant to the orders issued by this Court on 28/12/2020 the typo was rectified by the trial Court on 31/12/2020. She swore that this Court has no powers to grant orders of injunction in Judicial Review proceedings since the same falls outside the purview of Section 8 of the Law Reform Act.

8. Further that judicial review remedies are remedies of last resort and in this instant case the Applicant had the option of an appeal and or a review of the discretionary decision of the trial Court. That having failed to demonstrate grounds of judicial review the application should be rejected.

The Notice of Motion dated the 17/2/2021

9. Vide the application dated the 17/2/2021, the Applicant sought the following orders;

10. The Applicant filed the Notice of Motion application dated 17/2/2021 and filed on even date for orders THAT;

a. Spent.

b. Spent.

c. **Pending the hearing and determination of the application for leave to commence Judicial Review proceedings herein, this Honorable Court be pleased to issue an order of injunction restraining the Defendant, her servants, agents and anybody under her lawful authority from selling, transferring, alienating, further subdividing or otherwise deal in a manner that is inconsistent with the rights of the Applicant on the properties described as L.R No. 7497/84, 7497/85, 7497/86, 7497/87, 7497/88, 7497/89 and 7497/90.**

d. **Pending the hearing and determination of the Judicial Review Application, this Honorable Court be pleased to issue an order of injunction restraining the Defendant, her servants, agents and anybody under her lawful authority from selling, transferring, alienating, further subdividing or otherwise deal in a manner that is inconsistent with the rights of the Applicant on the properties described as L.R Nos. 7497/84, 7497/85, 7497/86, 7497/87, 7497/88, 7497/89 and 7497/90.**

e. Pending the hearing and determination of this Application, this Honorable Court be pleased to issue an order of stay of proceedings of Kikuyu MCL&E No. 15 of 2019 before the Respondent herein.

f. The Court be pleased to issue an order compelling the Land Registrar, Nairobi to cancel and revoke the titles L.R No. 7497/84, 7497/85, 7497/86, 7497/87, 7497/88, 7497/89 and 7497/90 and any other subdivision thereof and restore the status quo as at the inception of Kikuyu MCL&E No. 15 of 2019 on 25th March 2019.

11. The application is founded on the grounds thereto and Supporting Affidavit of **John Mburu Ikinu** of even date. Inter alia, the Applicant averred that upon the trial Court correcting the typographical error on the face of the Court order, it was surprised to learn that the Interested Party had further subdivided the suit land. That the subdivisions generated new title numbers for parcels 7497/84, 7497/85, 7497/86, 7497/87, 7497/88, 7497/89 and 7497/90. That as a result, the said subdivisions have rendered the Lower Court orders of 17/12/2019 and 31/12/2020 irrelevant and ineffectual. That its application dated 8/2/2021 for the trial Court to grant injunctive orders on the new subdivisions was declined. That unless the Interested Party is stopped, she will continue to act in breach of Court orders and undermine the Court's authority.

12. The application is vehemently opposed. The Interested Party filed a Preliminary Objection dated 4/5/2021 in opposition. She reiterated that the said application offends provisions of Order 53 Rule 1 of the Civil Procedure Rules. Secondly, that the prayers sought fall outside the relief that this Court can grant under Section 8 of the Law Reform Act.

The Written Submissions

13. The Applicant filed its submissions dated 8/9/2021 through the firm of **Ng'etich Chiira Associates**. The submissions addressed both the instant application and the application dated 17/2/2021. It highlighted the background of the trial Court suit and the instant application. That upon filing the instant application, on 28/12/2020 this Hon. Court directed the Respondent to correct the typographical error in the description of the suit land. That upon the Duty Magistrate complying with the said directive, the Applicant was shocked to learn that the Interested Party had further subdivided the suit land into 7 smaller parcels.

14. That the above development prompted the Applicant to file an application dated 8/2/2021 in the trial Court for temporary reliefs on the new subdivisions. That the Respondent directed that the application be prosecuted by submissions despite the eminent threat posed by the subdivisions. Accordingly the Applicant submitted that it was constrained to file the application dated 17/2/2021 before this Court to preserve the subject matter. It contended that if this Honorable Court does not intervene, the suit land will be lost rendering the suit a nullity.

15. The Applicant framed three issues for determination; whether the Applicant has met the threshold for grant of leave to commence Judicial Review proceedings, whether this Court has Jurisdiction to grant the Orders sought and lastly whether the orders for temporary injunction can be granted now.

16. On the first issue, the Applicant urged that for such leave to be granted, a Court must be satisfied that a prima facie case exists. That it has not only set a prima facie case but also established a case with a high probability of success. That the manner of the Respondent's handling the impugned applications was laced with irrationality and unfairness resulting in the new sub-divisions.

17. Secondly, the Applicant termed the Preliminary Objection as unmerited since the Prayers in application dated 17/2/2021 do not seek any of the orders as contained in Order 53 Rule 1 of the Civil Procedure Rules. That the Constitution of Kenya and the Fair Administrative Actions Act (Section 11) have expanded the scope of Judicial Review where fundamental freedom under the Bill of Rights is threatened, an Applicant can move the Court under Article 23 of the Constitution.

18. Lastly, the Applicant rehashed the case of **Giella v Cassman Brown & Co. Ltd (1973) EA 358** for the grant of temporary injunction. Reference was also made to the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125** on what constitutes a prima facie case. That the Interested Party's continued breach of Court orders is posing a threat to the Applicant who has heavily invested in the suit land which it stands to lose.

19. On the other hand, the firm of **Masaviru & Ketoo Advocates** filed submissions dated 26/10/2021 on behalf of the Interested Party. Similarly the Interested Party drew three issues for determination; whether this Court sitting as a Judicial Review Court has jurisdiction to determine the application dated 17/2/2021 without leave as required under Order 53 Rule 1 of the Civil Procedure Rules, whether the reliefs sought in the application dated 17/2/2021 are outside Judicial Review purview and lastly whether the Chamber summons dated 22/12/2020 has been overtaken by events.

20. The Interested Party submitted that no application or order under Order 53 Rule 1 of the Civil Procedure Rules can be granted without first seeking leave of Court. That the Applicant having failed to obtain such leave, the application dated 17/2/2021 is incompetent ab initio.

21. In reference to the application dated 22/12/2020, the Interested Party argued that the same has been overtaken by events. That the trial Court having complied with the directive of this Court on 31/12/2020, there is no decision to be quashed as prayed in the said Application. Concerning the prayer for prohibition, the Interested Party pointed out that the cited Learned Magistrate Hon. Musyoka has since been transferred from the station and any proceedings against him would be an exercise in futility.

Analysis and Determination

22. The issues for determination are

a. Whether the Preliminary Objection is merited.

b. Whether the application dated 22/12/2020 is overtaken by events.

c. Whether the application dated 17/2/2021 is merited.

23. I shall start with the Preliminary objection for the reason that if it is founded, it is capable of disposing the matter in its entirety.

24. The definition of a Preliminary Objection is set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696**, where it was held that:

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

25. For a preliminary objection to succeed the following tests ought to be mustered: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.

26. The Interested Party posed the question whether this Court sitting as a judicial review Court has the jurisdiction to entertain the application dated the 17/2/2021 without leave of the Court having been sought under order 53 rule 1 of the Civil Procedure Rules. Secondly whether the reliefs of interim injunctive orders sought in the said application are outside the purview of Order 53 rule 1 of the Civil Procedure Rules and Section 8 of the Law reform Act and lastly whether the chamber summons have been overtaken by events. The Applicants think not.

27. The Environment and Land Court is a creature of the constitution birth under Article 162 (2)(b). Its original and appellate powers are further sculpted in the Environment and Land Court Act at Section 13 of the Act. Section 13(7) provides as follows;

“(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including?

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.”

28. In the case of **Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR**, the Court had this to say in respect of prerogative writs;

“These provisions appear, on their face, to be complicated and confusing, but in reality they are not. In the old days in England mandamus, prohibition and certiorari used to be called “prerogative writs.....”

29. Orders in the nature of mandamus, certiorari and prohibition form prerogative orders or writs.

30. This Court is empowered under Article 23 of the Constitution to in any proceedings brought under Article 22 of the constitution, to grant appropriate reliefs including an order of judicial review.

31. Section 8 of the Law Reform Act provides;

“8. (1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.

(2) In any case in which the High Court in England is, by virtue of the provisions of Section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom empowered to make an order of mandamus, prohibition or

certiorari, the High Court shall have power to make a like order.”

32. It is the law in Kenya that the High Court (read ELC Court) exercises the power to grant prerogative powers as the High Court in England. It is therefore incorrect to say that this Court is bereft of jurisdiction to grant prerogative powers.

33. I agree with the Applicant that the new Constitution has expanded the scope of judicial review remedies in the constitution. These remedies are now entrenched in Art 23 and Art 47 of the Constitution and embodied in Sections 8 and 11 of the Fair Administrative Act.

34. Rule 1 of Order 53 of the Civil Procedure Rules states that:

“[Order 53, rule 1.] Applications for mandamus, prohibition and certiorari to be made only with leave.

1. (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the Applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

(3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.

4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:

Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave.

Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.”

35. The reasons why leave is necessary before a substantive judicial review proceedings are filed has been explained in the case of **Republic v County Council of Kwale & another Ex-parte Kondo & 57 others, Mombasa HCMCA No. 384 of 1996** as follows:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for Judicial Review which are frivolous, vexatious or hopeless and secondly to ensure that the Applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for Judicial review is designed to prevent the time of the Court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for Judicial review of it were actually pending even though misconceived.”

36. In the case of **Uwe Meixner & Another v Attorney General [2005] eKLR**, it was held that:

“The leave of the Court is a prerequisite to making a substantive application for judicial review. The purpose of the leave is to filter out frivolous applications. The granting of leave or otherwise involves an exercise of judicial discretion...The appellants invoked the judicial review jurisdiction rather than the constitutional jurisdiction to question the exercise of the discretion by the Attorney General. In deciding whether or not to grant leave the learned Judge was entitled to consider, as he did, whether the grounds of challenge were within the narrow scope of judicial review...The test to be applied in deciding whether or not to grant leave is whether the Applicant has an arguable case.”

37. It therefore follows that the grant of leave is subject to the discretion of the judge. The application is ex parte however the Court may direct that the same be served upon the Respondent before granting leave. The instant application has been served but is yet to be determined.

38. That said the application before me is for leave to file judicial review. There is therefore no substantive suit before this Court to anchor an application for injunction like the one dated the 17/2/2021.

39. The Preliminary objection is upheld and the Notice of motion dated the 17/2/2021 is struck out.

40. I shall now delve into the Chamber summons dated the 22/12/2020. As explained in the pleadings this is an application under order 53 rule 1 of the Civil Procedure Rules seeking leave to file judicial review orders with respect to two orders; certiorari to quash the Hon Magistrates directions of the 4/12/2020 and prohibition to restrain the Respondent from further presiding over the dispute between the Applicant and the Interested Party in MCL& E No 15 of 2019.

41. It is trite that the Applicant seeking leave must demonstrate a prima facie case. In the case of **Felix Kiprono Matagei v Attorney General; Law Society of Kenya (Amicus Curiae) [2021] eKLR** the Court stated as follows;

“The Court upon hearing an application for leave will determine whether there exists an arguable case and will proceed to dismiss the case where an arguable case has not been established. It is undeniable that leave has been established in law and practice as a necessity for smooth administration of justice. The necessity of rules of procedure in judicial review proceedings is to ensure the Court process is not abused by busybodies filing frivolous suits thus impeding instead of enhancing access to justice.”

42. It is evident that the issue of correction of the typographical orders was settled by the Court orders issued on the 28/12/2020. This Honorable Court (Lady Justice Gacheru) gave substantive directions on the same on 23/12/2020 which were admittedly complied with by the trial Court. The directions of the Hon Magistrate directing the application dated the 4/12/2020 to be heard interpartes on the 16/3/2021 became moot upon the issuance of the orders of 28/12/2020.

43. Further the Interested Party led evidence that the Hon L N Musyoka was transferred from the station. This evidence was not controverted by the Applicant. It therefore follows that the substratum of the application dated the 22/12/2020 being to quash the directions issued by the magistrate on the 8/12/2020 as well as a prohibition prohibiting the said judicial officer from hearing the matter have become otiose.

44. In the end the Applicant has failed to demonstrate a prima facie case and consequently the application dated the 22/12/2020 is unmerited. It is dismissed.

45. Final orders and disposal;

a. The Preliminary Objection dated the 4/5/2021 partially succeeds. It is upheld.

b. The application dated the 17/2/2021 is struck out.

c. The Chamber Summons dated the 22/12/2020 is dismissed.

d. Costs shall be in favour of the Interested Party.

46. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 25TH DAY OF NOVEMBER 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of;

Onyango holding brief for Ms. Ngetich for the Applicant

Attorney General - absent

Masaviru for the Interested Party

Ms. Phyllis Mwangi – Court Assistant