



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC J. R NO. 008 OF 2020

IN THE MATTER OF AN APPLICATION FOR AN ORDER FOR MANDAMUS

=AND=

IN THE MATTER OF THE LAND REGISTRATION ACT

=AND=

IN THE MATTER OF THE CONSTITUTION ARTICLES 40 AND 47

=AND=

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT

BETWEEN

REPUBLIC.....APPLICANT

=VERSUS=

DIRECTOR LAND ADMINISTRATION

MINISTRY OF LANDS AND PHYSICAL PLANNING.....1ST RESPONDENT

THE CHIEF LANDS REGISTRAR

MINISTRY OF LANDS AND PHYSICAL PLANNING.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

EX PARTE: ROYSA COMMUNITY DEVELOPMENT SOCIETY LTD

JUDGMENT

A. Background

1. By a chamber summons dated 21st September 2020 filed under Order 53 Rule 1 of the Civil Procedure Rule, 2010 and Section 1A, 1B and 3A of the Civil Procedure Act, the *exparte* Applicant sought leave to apply for the Judicial Review Order of Mandamus to compel the 1st and 2nd Respondent to process and issue Certificate of Leases and Certificates of Titles to individual members of the *exparte* Applicant as per the approved subdivision scheme relating to L.R No. 5875/2 as approved by the National Land Commission by the letter reference NLC/CHAIRMAN/VOL.XIX/143 and as per the allotment letters issued by the Nairobi City County. The *exparte* Applicant also sought for leave to apply for an order of Mandamus directed at the 1st and 2nd Respondent to process and issue Certificate of Leases and Titles for public utilities being ROYSAMBU BUSPARK and MARKET, ROYSAMBU RECREATION CENTRE and ROYSAMBU TECHNICAL TRAINING INSTITUTE and SECONDARY SCHOOL as per the approved subdivision scheme relating to L.R No. 5875/2 as approved by the National Land Commission by the letter reference NLC/CHAIRMAN/VOL.XIX/143 and as per the allotment letters issued by the Nairobi City County.

2. Upon leave being granted on 18th May, 2021, the *ex parte* Applicant filed the substantive motion dated 21st May 2021 seeking the following orders:

i) ***THAT this Honourable Court do grant Judicial Review orders of Mandamus directed at the Director Land Administration, 1st Respondent and the Chief Land Registrar, 2nd Respondent herein to process and issue Certificate of Leases and Certificate of Titles to individual members of the Ex parte Applicant as per the approved subdivision scheme relating to L.R No. 5875/2 as approved by the National Land Commission by the letter reference NLC/CHAIRMAN/VOL.XIX/143 and as per the allotment letters issued by the Nairobi City County.***

ii) ***THAT this Honourable Court do grant Judicial Review orders of Mandamus directed at the Director Land Administration, 1st Respondent and the Chief Land Registrar, 2nd Respondent herein to process and issue Certificate of Leases and Titles for public utilities being ROYSAMBU BUSPARK and MARKET, ROYSAMBU RECREATION CENTRE and ROYSAMBU TECHNICAL TRAINING INSTITUTE and SECONDARY SCHOOL as per the approved subdivision scheme relating to L.R No. 5875/2 as approved by the National Land Commission by the letter reference NLC/CHAIRMAN/VOL.XIX/143 and as per the allotment letters issued by the Nairobi City County.***

iii) ***Costs of the application be costs in the cause.***

iv) ***THAT this Honourable Court do issue such order or further reliefs that the Honourable Court may deem just and expedient to grant in the interest of justice.***

3. When the matter came up for directions on 28th October 2021, it was directed that the application for judicial review be canvassed through written submissions and parties would be given time to highlight their written submissions on 10th November 2021.

B. The Ex parte Applicant's Case

4. The Application for judicial review was based upon the grounds set out in the Notice of Motion dated 21st May 2021, the statutory statement and the verifying affidavit accompanying. It was the Applicant's case that the lease for **L.R No. 5875/2** which was a leasehold for 99 years with effect from 1904 expired on 1st November 2004 and the same was not renewed by the Government. The land was initially owned by Mr. Mayer Jacob Samuels and the members of the Ex parte Applicant were its former employees.

5. It was contended that the said lease reverted back to Nairobi City County upon the promulgation of the Constitution of Kenya 2010 and the County was mandated to deal with the said parcel of land.

6. According to the Ex parte Applicant, at the time of expiry of the lease, its members were residing and in occupation of the said parcel of land and had even built houses on the same. After expiry of the lease, the former employees of Mr. Mayer Jacob Samuels applied to be allocated the land by the Nairobi City County vide their letter dated 16th September 2014. It was further the Ex parte Applicant's case that the County did carry out due diligence to confirm some facts as stated in the Ex parte Applicant's letter and the following facts were established; that the squatters were employees and persons born on the land, their population at the time was approximately 400 to 500 people, there was an informal primary and nursery school for the children, the land was occupied by permanent and semi-permanent buildings and two structures were being used as churches, there were also few commercial buildings, numerous kiosks, a market center, garages and workshops and an area had been set aside and approved by Kasarani Sub District Development Committee for a polytechnic in 1994.

7. It was further the Ex parte Applicant's contention that the Nairobi City County had on 15th February 2015 written to the National Land Commission seeking for permission to allocate the said land as proposed and that the County had requested the Director of Survey to amend the Registry Index Map (RIM) so that the allottees could get individual plots. It was further stated that upon payment of the requisite survey fees of Ksh 191,700/=-, the Director of Survey had approved the new Registry Index Map a copy of which was produced as annexure '**PKM-8a and 8b**'.

8. It was averred, that the County had also issued allotment letters for the subleases for the public utilities and also for individuals on the approved sub division scheme.

9. It was also stated that the Department of Defence had purported to acquire the land alleging compulsory acquisition but failed to do so after the valuation for compensation was enhanced from Ksh 3,530,500/= to Ksh 23,000,000/= pursuant to court proceeding from Nairobi High Court Land Acquisition No. 2 of 1996 to the Nairobi Court of Appeal Civil Appeal No. 109 of 1997.

10. It was the Ex parte Applicant's further contention that the compulsory acquisition having failed, the land still belonged to the Nairobi City County.

11. The Ex parte Applicants further averred that despite all these efforts, the Respondents had abdicated on their duties in issuing them with the sub leases and they requested the court to intervene and grant the prayers sought.

C. The Respondent's Case

12. The Respondents opposed the application vide their grounds of opposition dated 17th September 2021. The Respondents argued that the Application was *res judicata* by dint of **Case No. 153 of 2017 (formally 495 of 2011) Kasarani Mall Ltd v Daniel Otieno Miganga, Roysa Community Self Help Group and Others and Nairobi ELC CASE No. 1522 of 2013 Daniel Otieno Miganga and Roysa Community Self Help Group and Others v Kasarani Mall Ltd and Uchumi Supermarkets Plc.**

13. The Respondents also stated that the suit property had an existing title and it was prudent for the proprietors to have been made a party to these proceedings.

14. It was also contended that the Exparte Applicant lacked the locus standi to institute the suit and further that judicial review was not the efficacious means to resolve the issue of ownership.

D) Exparte Applicant's Submissions

15. The Exparte applicant outlined four issues in their submissions for consideration by the court. These included the following: -

i) *Whether the suit property reverted back to the Nairobi City council upon expiry of the lease.*

ii) *Whether proper procedure for allocation was followed.*

iii) *Whether the government compulsorily acquired suit land for the department of defense then.*

iv) *Whether the respondents have failed to perform the legal duty and orders ought to issue to compel them to perform the legal duty.*

16. On the first issue, it was submitted that the lease expired on the 1st of November 2004 and pursuant to Section 21(6) of the Land Act, the land reverted back to the county government since it was never renewed.

17. On the second issue, the Exparte Applicant submitted that pursuant to section 12 of the Land Act, the County Executive Committee member answerable for the matters relating to land, may tender a request to the National Land Commission for the allocation of the land. It was contended that in the present case, a request was made to National Land Commission which gave an approval vide a letter dated 14th March 2015. However, the Land Registrar did not act on the same. The exparte applicant referred to the Case of **Republic – Vs- Land registrar, Trans-Nzoia & Another Exparte Mary Odhiambo & Another (2019) eKLR** in support of their position,

18. In respect to the third issue, it was the Exparte Applicants' submissions that the former employee of the late Samuel having been in possession of the suit property, they acquired interest over the same.

19. Finally, in the fourth issue, it was the Exparte Applicant's submissions that the Ministry of Defense had by their letter dated 7th of April 1987 indicated that the earlier letter which requested for compulsory acquisition be disregarded until further notice and as such the land still remained with the County Government.

E) Respondents Submissions

20. The Respondents submissions elaborated on their grounds in opposition to the application.

21. It was submitted that Judicial review is not the efficacious way to move the court since the suit has an already registered proprietor in the name of **Kasarani Mall Ltd**.

22. Accordingly, it was submitted that according to **Sections 24, 25(i) and 26(i) of the Land Registration Act**, the title to Kasarani Mall is absolute and indefeasible and can only be challenged on grounds of fraud or misinterpretation and/or if it is shown that the title was acquired illegally, procedurally and through a corrupt scheme.

23. It was argued that the issues of the ownership would require adducing of evidence through a suit and cross examination of either party and not by way of judicial review.

24. The Respondents relied on the Case of **Sanghami investment Ltd -vs- officer in Charge Nairobi Remand and Allocation prison (2007) I EA 354**.

25. On the issue of locus standi, it was submitted that the Exparte Applicant being a Community Development Society duly registered under Societies Act, lacked basis to sue on its own name and the same could only be done through its officials.

26. On the issue of res judicata, it was argued that there were already previous cases that were heard and determined relating to the issue of the instant case. The Respondents brought to the attention of the Court the following cases: - **Nairobi ELC No 153 of 2017 Kasarani Mall Ltd – vs- Daniel Otieno Miganga, Roysa Community Self Help Group and others, Nairobi ELC case 1522 of 2013 Daniel Miganga and Roysa Community and Self-Help group and others versus Kasarani Mall Ltd and Uchumi Supermarket PLC**

27. It was further disclosed that the courts of competent Jurisdiction has already made a finding in respect to the **L.R No 5875/2** to the effect that **Kasarani Mall Ltd** holds a valid title to the suit property and the court cannot direct the Respondent to process and issue Certificate of leases and Certificate of titles to individual members of the Exparte Applicant.

28. The respondent further submitted that the exparte applicant ought to have disclosed and included **Kasarani Mall Ltd** as the registered proprietor of the suit property.

29. For this reason the Respondent prayed for dismissal of the Judicial review application.

F) Exparte Applicant rebuttal Submissions

30. The Exparte Applicant filed further submissions which was a rebuttal to the Respondents Submissions.

31. It was submitted that there was no dispute of ownership but only the process of acquisition of the suit property by the beneficiaries. According to the exparte applicants, the issue was about failure by the public officers to perform their duty as per the law which was within the purview of judicial review.

32. It was further submitted that since post 2010 constitution, the issue of locus standi has since changed and further that the same cannot be a ground for striking out judicial review proceedings.

33. The Exparte Applicant also countered the Respondent's submissions on the matter being resjudicata and submitted that the parties in those cases were different and further the issues and prayers that were sought in the previous cases were different from the instant case.

34. The exparte applicant further submitted that in as much as the respondent have submitted on the issue of ownership in respect to the suit property, they did not adduce any evidence before court to confirm ownership and as such submissions cannot replace evidence.

G) Issues and Determination

35. The court has considered the application for judicial review and the submissions filed by the Exparte Applicant. The court is of the opinion that the following key issues arises for determination herein: -

i) Whether the Exparte applicant has locus standi to institute the court proceedings.

ii) Whether this court proceedings are resjudicata.

iii) Whether the Exparte Applicant have made out a case for grant of the judicial review orders sought.

Issue No 1 – Whether the Exparte Applicant has locus standi to institute the court proceedings.

36. The Respondents argued that the Exparte Applicant lacks standi to institute these proceedings; it was the Respondents' case that only juristic person endowed with legal personality can have locus standi before the court and can be the subject of rights and liabilities and the Exparte Applicant herein had not met the constitutional considerations of capacity to institute legal proceedings.

37. The promulgation of the new constitution has substantially altered the strict application of locus standi in matters. In the instant case, the exparte Application filed this suit seeking for judicial review remedy of Mandamus.

38. The Constitution of Kenya 2010 has expanded locus standi beyond the pre-2010 constitution as was expressed in the case of *Mumo Matemo –vs- Trusted Society of Human Rights Alliance & 5 Others* when the court stated as follows–

“Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the constitution by necessity and logic broadens access to the courts. In this border context, this court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the argument of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this; we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution.”

39. The Constitution has also expended the remedies that may be granted by courts as provided in **Article 23** as follows: -

Article 23. Authority of courts to uphold and enforce the Bill of Rights

(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review. [Emphasis added]

40. In view of the foregoing, it is evident that, **Article 22 of the Constitution** stipulates that court proceedings may be instituted by a person acting on behalf of another person who cannot act in their own name, a person acting as a member of, or in the interest of, a group or class of person, a person acting in the public interest or an association acting in the interest of one or more of its members. **Article 23 of the constitution** further stipulates that for any further proceedings brought under **Article 22**, a court may grant appropriate relief, including order of the judicial review.

41. The Exparte Applicant averred that they were registered entity and that they had brought this suit on behalf of its members. A member's resolution granting authority to its official to file and execute the pleadings on its behalf was also annexed. As such this court finds that the Exparte Applicant has the locus standi to institute the suit and the Respondent's objection to the same on the lack of locus standi is overruled.

Issue No 2 – Whether this suit is Res judicata

42. The Respondent submitted that this suit was resjudicata by dint of *Nairobi ELC No 153 of 2017 Kasarani Mall Ltd – vs- Daniel Otieno Miganga, Roysa Community Self Help Group and others, Nairobi ELC case 1522 of 2013 Daniel Miganga and Roysa Community and Self-Help group and others versus Kasarani Mall Ltd and Uchumi Supermarket PLC.*

43. The doctrine of *res judicata*, is set out in **Section 7 of the Civil Procedure Act**. The doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.

44. A close reading of **Section 7 of the Civil Procedure Act**, reveals that for the bar of *res judicata* to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that: -

- i) *The suit or issue raised was directly and substantially in issue in the former suit.*
- ii) *That the former suit was between the same party or parties under whom they or any of them claim.*
- iii) *That those parties were litigating under the same title.*
- iv) *That the issue in question was heard and finally determined in the former suit [emphasis added].*
- v) *That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit. [emphasis added].*

45. On the other hand, the Exparte Applicant stated that the cases cited and the parties are different and that even the prayers sought in those cases were different.

46. In *Daniel Otieno Miganga & 3 others v Kasarani Mall Limited & another [2015] eKLR*, the Plaintiffs vide an Originating Summons dated 6th November 2013 sought orders to be declared as entitled to the property **Land Reference No. 5875/2** situated in Roysambu in Kasarani by way of adverse possession. Further, the Plaintiffs sought that vesting orders be issued vesting the suit property to the Plaintiffs free from all encumbrances; and the costs of the suit. In their defense, the Defendants highlighted that the Plaintiffs made misrepresentations to the court by their failure to disclose that there is further litigation between other plaintiffs and the Defendants in court namely:

1. *HCCC No. 495 of 2011 Kasarani Mall Limited versus Daniel Otieno Miganga, David J. Kollal, Gilbert Thou Macharia and Roysa Community Self Help Group.*
2. *HCCC No. 47 of 2011 Richard Ochilla, David Ochieng, Kennedy Otieno Onyango (suing as officials of Roysambu Shell Youth Self Help Group) versus Uchumi Supermarkets Limited, Jacob Meshamur Samuel, Raphael Jacob Samuel and Kasarani Mall Limited.*

The Court relying on the precedent of *WAMBUGU VS NJUGUNA (1983) KLR 173*, held:

“... it is quite clear that the issue of possession of the suit property is key in determining whether or not the Plaintiffs have proved their case of having acquired the suit property by way of adverse possession. From the affidavit evidence supplied by the Plaintiffs, there is little or no support to their assertion that they have dispossessed the Defendants of the suit property or that the Defendants have discontinued their possession of the suit property for the statutory period. In fact, the only assertion the Plaintiffs made is that they have put up structures on the suit property which they use as an office from which they run the

affairs of the Group. A photo showing an incomplete mabati structure was produced but there was no proof that this structure is on the suit property and it is doubtful that any activities are indeed carried out in that structure. And even if it was on the suit property, there was no proof to indicate the length of time that the Plaintiffs could have been in possession thereof. On the other hand, the Defendants asserted that the suit property is actually fenced and vacant. The Defendants asserted that when the Plaintiffs sought to take possession of the suit property, they were repulsed by the Defendants and an injunction order was issued by Justice Ougo on 24th February 2012 preventing the Plaintiffs from entering the suit property. In light of this, my overall impression is that the Plaintiffs have not been able to demonstrate having dispossessed the Defendants of the suit property for the statutory period of 12 years. On that count, the Plaintiffs claim for adverse possession of the suit property must fail... [Emphasis added]

47. In *Kasarani Mall Ltd v Daniel Otieno Miganga & 3 others* [2017] eKLR, Kasarani Mall Ltd brought a claim seeking a permanent injunction against the Defendants whether by themselves, their employees, servants or agents or any of them or whomsoever purporting to be a member of the 4th Defendant (**Roysa Community Self Help Group**) and any of them from trespassing on the **Land Reference LR.5875/2**. Further, they sought general damages for trespass and costs. Plaintiff alleged that it was the registered proprietor of all that piece of land known as LR.No.5875/2, located in the *Kasarani Area, Thika Road Nairobi*, measuring about **6.944 Hectares** and that it got registered as the proprietor of the land on **20th March 2001**. The Defendants denied all the allegation made in the Plaint whereas 1st, 2nd and 3rd Respondent only admitted to being officials of **Roysa Community Self Help Group**.

The Court pointed out several undisputed facts:

“... There is no doubt that LR.No.5875/2, is registered in the name of Kasarani Mall Limited as from 20th March 2001, which is evident from the Certificate of Title attached to the Plaintiff’s bundle of documents. There is also no doubt that the said suit property was initially granted to Solio Construction Company Limited as from 1st July 1999. There is also no doubt that the Defendants are also claiming ownership of this parcel of land LR.No.5875/2, having been conveyed the same by Meshumor Jacob Samuel vide a conveyance dated 5th March 1990.

There is also no doubt that Kasarani Mall Limited is a subsidiary of Uchumi Supermarket Limited, as confirmed by the Registrar of Companies vide a letter dated 21st April 2015. There is also no doubt that this suit property was a subject of various correspondences among different Government offices. In particular is the letter dated 30th April 2008, from Director of Public Prosecutions (DPP), which made various conclusions. Among the conclusions made are that the land in question LR.No.5875/2, was procedurally applied for and allocated to M/S Solio Construction Company Limited. Further that Solio Construction Company Limited acquired a valid title to the said land which it later sold to Kasarani Mall Limited (A subsidiary of Uchumi Supermarket Ltd) in 2001, on a willing buyer willing seller basis...” [Emphasis added]

48. Having keenly perused all those cases referred herein, the court finds that there is a nexus in that all those cases relate to **L.R No 5875/2**, the suit property herein. The Exparte Applicant cannot reopen this matter in the instant application for judicial review. Their remedy lies in appealing and or seeking for review of the orders and judgment delivered in respect to the other court cases. As such this court finds the issues in the current suit is moot by dint of being *res judicata* having been determined in the aforementioned cases.

Issue No 3 – Whether the Exparte Applicant has made out a case for grant of judicial review orders sought,

49. It is elementary law that Judicial Review is ill equipped to deal with disputed matters of fact where it would involve fact finding on an issue which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation. For the above facts to be proved or disapproved, there is need for direct evidence to be adduced and tested through cross-examination of witnesses before the court can make conclusions. This position has been upheld by our superior courts on numerous occasions. In *Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo* [2015] eKLR where it was held:-

“... where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits”

50. Judicial review looks into the legality of the dispute not contested matters of evidence. To reconcile the diametrically opposed positions presented in this case, it is necessary for the court to hear oral evidence, which is outside the scope of judicial review jurisdiction. Further, as stated later, determining the said issues will involve a merit review, a function that is outside the purview of Judicial Review jurisdiction.

51. The exparte applicant is simply inviting this court to determine contested issues of facts without hearing evidence. This court cannot do so. It is a dangerous invitation to this court to determine a strictly civil dispute without hearing evidence. An application for judicial review is normally commenced by a party seeking leave to file a substantive motion to apply for the respective judicial review remedies that they are seeking. In the instant case, the Exparte Applicant never disclosed to the Court during leave stage and even during the substantive motion that there had been previous litigation in respect to the suit property. The Court was able to peruse the cases that were referred to by the Respondent. In respect to the same, this Court is of the view that had the information been availed earlier then leave to institute judicial review proceedings ought not to have been granted. In the circumstances the Exparte Applicant has not made out a case for grant of judicial review writ of mandamus.

52. Further this Court was not informed on whether or not the title in respect to **L.R No. 5875/2** in the names of **Kasarani Mall Limited** was either cancelled or withdrawn and as such granting the orders of mandamus compelling the Chief Lands Registrar to process and issue a certificate of titles and certificate of leases over the same property to a different entity the Exparte Applicant herein will be akin to depriving

the right to property and condemning the registered owner of the suit property without being given an opportunity to be heard, noting that they were not a party to this proceeding.

53. For the reasons set out above, it follows that the writ of mandamus cannot issue in the circumstances of this case. Accordingly, I dismiss the application dated 21st May 2021 with an order that each party to bear its own costs of the Application.

54. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF DECEMBER 2021.

E. K. WABWOTO

JUDGE

In the Virtual Presence of: -

Mr. Yogo appearing with Mr. Athouk for the *Exparte* Applicant.

Ms. Fatma Ali for the 1st, 2nd and 3rd Respondents.

Court Assistant: Caroline Nafuna