



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

JUDICIAL REVIEW CASE NO. 1 OF 2019

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION
AGAINST THE COUNTY GOVERNMENT OF KISUMU**

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT 2015

AND

**IN THE MATTER OF: NOTICE OF DEMOLITION AGAINST APPLICANT FOR AN ALLEGED OBSTRUCTION OF PUBLIC
ROAD CORRIDOR**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF KISUMU.....RESPONDENT

AND

TRANSMATTRESS LIMITED.....EXPARTE APPLICANT

JUDGEMENT

Trans-mattresses Ltd hereinafter referred to as the (*exparte Applicant*) has come to this court against the county government of Kisumu (*hereinafter referred to as the respondent*) with an application for judicial review for an order of *Certiorari* to quash the notice by the respondent dated 31/10/2018 addressed to the exparte applicant's tenant in respect of premises situate on Kisumu Municipality Block 9/24 and an order of *Prohibition* prohibiting the respondent from carrying out and or acting upon its threat to demolish the exparte applicants building structures and or premises on the suit property. The judicial Review application is based on grounds that he is the registered proprietor of Kisumu Municipality Block 9/24 which he acquired legally, took possession, developed and has been paying land rates and rents to the respondent. The suit land has been the subject for litigation being Kisumu H.C.C.C NO 80 of 2011. The exparte applicant obtained a temporary injunction on 28/09/2011 restrictions to Municipal council of Kisumu from interfering with the exparte applicant's quiet possession of the suit land.

Ultimately a consent was entered between the parties to the effect that the exparte applicant was declared the owner of the suit property and that the respondent was restrained from interfering with the applicants use of the suit property.

However the respondent demolished the wall surrounding the suit land claiming to have been constructed on an access road. The exparte applicant involved the surveyor who did a resurvey of the suit land and established that the exparte applicant's developments fell within the suit land.

In the replying affidavit of Kevin Ajul the acting Civil Engineer for the respondent, he states that the structures done by the exparte applicant lie on a road of access thus the Family Planning – Naselica road reserve. The respondent issued notice to remove the structures but did not contact the ownership of the suit land.

The respondent contends that the court order was done without its authority. The respondent states that what was issued was a notice to remove structures and was not an administrative action and therefore not subject to the province of judicial Review. The respondent believes that some of the structures are on the road reserve. Moreover, that the wall has been demolished and therefore an order of prohibiting cannot

be issued after the event as it is futuristic.

I have considered the application, responses by the respondent and do find that the dispute between the ex parte applicant and the respondent is boundary between the access road, if it exists, and the suit land. Section 18 of the Land Registration act provides.

“18. (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.

(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:

Provided that where all the boundaries are defined under section 19 (3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act, Cap. 299.”

This court finds that it is the Land Registrar Kisumu County and the Land Survey who can make a determination of the boundary between the road of access and the suit land.

This dispute does not lie within the ambit of Certiorari and Prohibition. in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001:**

“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.”

The respondent issued a notice to the ex parte applicant that part of their structures was on a road reserve that was to be expanded. The notice gave the applicant 21 days to demolish failure of which the same was to be demolished at his costs. It is the said notice that is being challenged by way of judicial review. This court finds that the notice was not an administrative action capable of being quashed by judicial review. The notice is not part of a decision making process.

Moreover, the suit filed earlier was based on ownership of the suit land and was settled by consent of the parties. However, the boundary between the suitland and the alleged road of access was not an issue in the suit and therefore was not determined. An order of Prohibition cannot be issued after the event as the wall has been demolished. Furthermore, prohibition just like Certiorari and Mandamus, can only be issued to challenge a decision making process where there is **illegality, irrationality and procedural impropriety. The applicant has failed to demonstrate these grounds in his application for judicial review.** The upshot of the above is that the application is dismissed with costs.

DATED, DELIVERED AND SIGNED THIS 28th DAY OF APRIL, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15TH March 2019 and with the consent of the parties.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE