



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW AND CONSTITUTIONAL DIVISION
MISC. APPLICATION NO. 255 OF 2016

**IN THE MATTER OF AN APPLICATION BY FELIX MUTHEMBA, JOSEPH NJUGUNA
(WHO ARE SUING ON THEIR OWN BEHALF AND AS THE OFFICIALS OF BALOZZY
WELFARE GROUP) FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND
PROHIBITION**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE INSPECTOR GENERAL OF POLICE.....1STRESPONDENT

ADMINISTRATION POLICE SERVICE.....2ND RESPONDENT

AND

MAVOKO TOWN BLOCK 12.....INTERESTED PARTIES

EX PARTE: FELIX MUTHEMBA AND JOSEPH NJUGUNA

(Suing as on their own behalf and as officials of Balozzy Welfare Group)

JUDGEMENT

Introduction

1. By a Notice of Motion dated 20th June, 2016, the filed in this Court on 20th January, 2009 the same day, the *ex parte* applicant herein, **Felix Muthemba** and **Joseph Njuguna**, seek the following orders:

- 1. That this honourable court be pleased to issue an order of certiorari to bring before the court and quash the respondents decision made on 12/5/2016 to evict the applicants in relation to all that parcel of land known as Land Reference Number 8529/1.**

2. That This honourable court be pleased to grant leave to the applicants herein to apply for an order of prohibition prohibiting the respondents whether by themselves or any of its officers, agents from proceeding with evicting demolishing houses, arresting, harassing, intimidating, compelling the attendance of, charging, interrogating, prosecuting and or instituting and sustaining criminal proceedings against the applicants and their members with any alleged criminal offence in relation to the dispute arising from the ownership of all that parcel of land known as LR No. 8529/1 situated along Kangundo Road.

3. That the costs of this application be in the cause

Applicants' Case

2. According to the applicants, **Balozy Welfare Group** (hereinafter referred to as "the Community") comprises of over one thousand three hundred and eight four (1384) members who live on all that parcel of land known as LR.No 8529/1 within Kangundo area with their families and have been living on the said land as squatters for the last twenty (20) years.

3. They averred that in the course of time they have exercised ownership over the suit property by carrying out the following activities:-

- i. Construction of both permanent and semi-permanent houses
- ii. Building of schools and churches
- iii. Constructing of roads
- iv. Rearing of livestock like cows, chicken, quail, goats, sheep within the said parcel of land
- v. Planting crops and trees

4. It was averred that there are however several disputes over the ownership of said parcel of land which are being reviewed by several state agencies including the National Land Commission. However, on or about 12th May 2016, without notice of the intended eviction or demolitions served on the applicants, the respondents and or its officers in the company of hired goons invaded the informal settlements and started indiscriminately demolishing houses and evicting members of the applicant as a result of which several members of the applicant were admitted into various hospitals with grievous bodily harm and are still undergoing treatment in several hospitals.

5. The applicants averred that the said evictions were inhuman, unnecessarily brutal and are calculated to cause maximum humiliation and indignity to the applicant's members and that despite reporting the same, the respondents have taken absolutely no action against the perpetrators. To them, the actions of the respondents are illegal, unconstitutional, inhuman and generally calculated to create the most harm and difficulty to the applicants.

Interested Party's Case

6. In opposition to the application, the Interested Parties averred that LR Nos. 8529/1, 7283/1 and 3673 originally belonged to Drumvale Farmers Co-operative Society Ltd and in 1995 the said properties were amalgamated by the Ministry of Lands to form the present Mavoko Town Block 12 which was subsequently subdivided and allocated to members of Drumvale Farmers Co-operative Society Limited and titles have since been issued to individual members.

7. It was therefore averred that here is no land referred to as LR No. 8529/1 within Kangundo area.

8. The interested parties further asserted that the applicants were misleading the Court about possession as there are no constructions, buildings or roads on the site and that the applicants have never lived on the

subject property at all.

9. The interested parties' case was therefore that this Court lacks jurisdiction to entertain grant the prayers sought in this application.

Determinations

10. I have considered the application, the affidavits both in support of and in opposition to the application.

11. According to *Judicial Review Handbook*, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

12. However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

13. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

14. Judicial review, it has been held time and again, is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See *R vs. Secretary of State for Education and Science ex parte Avon County Council* (1991) 1 All ER 282, at P. 285.

15. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See *Chief Constable of the North Wales Police vs. Evans* (1982) 1 WLR 1155.

16. In this case, the interested parties have asserted that the parcel of land which the applicants claim no longer exists as the same was subdivided and titles issued to individuals. That contention has not been controverted since the applicants squandered the opportunity given to them to file a further affidavit. Accordingly, based on the material before the Court, this Court can only rely on the fact that the suit property belongs to the members of the interested party. It would follow that the interested parties would be properly entitled to treat the applicants as trespassers in which event the respondent's action cannot be faulted.

17. In other words the applicants have not proved to my satisfaction that there exist grounds that would warrant the grant of the orders sought.

18. Apart from that it is stated in *Halsbury's Laws of England* 4th Edn. Vol. 1(1) para 12 page 270:

“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. 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. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow ‘contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.’”

19. In this case, the legal interest in the suit parcels of lands resides in the interested parties. To grant the orders sought herein would amount to a violation of their rights under Article 40 of the Constitution. The applicants if so minded are at liberty to challenge the interested parties' titles before the Environment and Land Court. By granting the orders sought herein this Court would under the guise of protecting the applicants' interests be violating those of the interested parties when no wrongdoing has been alleged against them.

20. In the premises I decline to grant the orders sought herein.

Order

21. Consequently, the Notice of Motion dated 20th June, 2016 fails and is dismissed but with no order as to costs as the Respondents did not oppose the application.

22. Orders accordingly.

Dated at Nairobi this 7th day of October, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Wangui for Mr Ndeda for the applicants

Mr Wachakana for the interested parties

CA Mwangi