



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

JUDICIAL REVIEW NO. 5 OF 2015.

REPUBLIC..... APPLICANT

VERSUS

1. COUNTY GOVERNMENT OF BUSIA..... RESPONDENT

1. ROSE KAHAI LUHANGALA

2. JACKSON ALWENA LUHANGALA.....EXPARTE APPLICANTS

JUDGMENT

1. The exparte Applicants herein – ROSE KAHAI LUHANGALA and JACKSON ALWENA LUHANGALA – are the registered owners of land parcels BUKHAYO/MUNDIKA/5409 and BUKHAYO/MUNDIKA/2172, with ROSE owning the first two and JACKSON, the third. The respondent is **COUNTY GOVERNMENT OF BUSIA** and is brought to court because of creating a new road in the named parcels of land without the permission of Exparte Applicants.

2. The Exparte Applicants want two judicial review orders as follows:

Prayer 1: That an order of prohibition be directed against the respondent to stop the on-going road construction or rehabilitation in Samaki Estate, Busia town surrounding Exparte Applicant's parcel of land.

Prayer 2: That an order of mandamus be directed against the respondent to compel it to remove the road construction materials from the applicant's parcels of land and re- build and/or restore the hedges, fence or any other property belonging to the Exparte Applicant that was destroyed during the on-going road construction.

There is prayer 3 but it is not a judicial review order or prayer. It is as follows:

Prayer 3: That costs of this application be met by the respondent.

3. The Exparte Applicants aver that they live on their parcels of land. The respondent has created a new road that passes through that land .The road does not exist in the relevant land map of the area. And the road was created without any consultations with them. As a result of the respondents action, the exparte Applicants say that supply of water and electricity has been disrupted. The respondent is said to have created the new road knowing well that there exists roads of access that serve the area.

4. The Respondent responded vide a replying affidavit dated 15/2/2016. According to the respondent the allegations made by the Exparte Applicants are vague and ambiguous. The area is said to be a public

estate inhabited by thousands of people. These people are entitled to service and the Exparte Applicants are faulted for seeking to stop such service. It seems to be the respondents position that it is constructing a public road to serve the people of the area.

5. The respondent also averred that road construction is a public service which is a mandate of National Government and other government agencies. The Exparte Applicants are said not to have clarified who is carrying out the construction. According to the respondent, the function of road construction is yet to be devolved to the County Government. According to the respondent too the extent and dimensions of the encroachment are not given and this is what makes the suit ambiguous, vexatious and an abuse of the court process.

6. The suit was canvassed by way of written submissions. The submissions of the exparte Applicant reiterate what is stated in the application, the statement of facts, and the affidavit sworn in verification. According to the Exparte Applicants, the respondents act is in violation of both their constitutional and statutory rights. They assert that they were not given a hearing. They therefore want an order of prohibition and Mandamus. Damages are also asked for in the submissions in lieu of an order of mandamus.

7. The respondent's submissions were filed on 22/8/2016. The respondent faulted the exparte Applicant for bringing the matter by way of judicial review. According to the respondent, the matter requires canvassing of evidence and judicial review process does not allow for this. Even then, the respondent went ahead and submitted further that no evidence is availed to

show that the alleged road construction is taking place. The respondent is said not to have been shown to be responsible for such work and any loss or damage occasioned has also not been shown. The respondent submitted that the exparte applicants should have demonstrated any injury they have suffered.

8. The respondent makes a point that I agree with. It is doubtful whether the Exparte Applicants should have brought the matter by way of judicial review. The point is made that the Exparte Applicants own the parcels of land that the road has passed through. That point is well made; title deeds are availed. But what shows that a new road passes through the land? Nothing. It is not lost to the court that in the prayer for prohibition, the road is said to "surround", not pass through, the Exparte Applicant's parcel of land.

9. Then there is an obvious misunderstanding as to the way an order of Mandamus operates. The Exparte Applicants wants it issued to compel action meant to restore the parcels of land to their former state. An order of Mandamus issues to compel or enforce performance of a duty which is imperative, not optional or discretionary. In order for it to issue, the public body must have refused, failed or neglected to perform such duty. It must be a duty it normally performs in the discharge of its mandate.

10. It seems to me that the aim of mandamus is meant to compel performance of a public duty that a public body is normally expected to perform but which it has failed or refused to do. Restoring land is not one such duty. It is not a duty that is normally done by the respondent. It resulted from a single incident and it seems to me to be more suited to the application and use of injunctive relief. An order of mandamus is different from injunction.

11. But there are even more confusing things coming from the exparte Applicants. They would like damages as alternative to an order of mandamus. Such damages are not asked for in the suit. They only appear in the submissions. Such damages are not normally catered for in a judicial review matter. They require canvassing of evidence and that is more appropriately done in a different kind of suit. How would the court award damages not availed?

12. In my view, injunctive reliefs issued in an ordinary suit would be more effective. It is in such suit that a prayer for damages can be more suitably made. It is in such suit too that evidence can be availed demonstrating encroachment, damage or injury that may have resulted from the respondents action. And if one is tempted to belief that injunctive orders do not normally issue against government bodies, the holding in ***B vs Attorney General [2004] 1 KLR 431***, would dispel that. In the case ***OJWANG J*** (as he

then was) held that such injunction can issue in a proper case.

13. It is clear to me that the prayers sought in this matter are not the most effective way to redress the Ex parte Applicants problems. The suit itself, by its very nature and procedure, seems restrict or lock out relevant evidence that would be useful to court in arriving at a just determination.

14. The upshot, in light of the foregoing, is that the remedies sought cannot be granted in the circumstances of the case. I therefore hereby dismiss the application herein with costs.

A.K.KANIARU

JUDGE

DATED AND DELIVERED ON 9TH DAY OF NOVEMBER 2016.

IN THE PRESENCE OF;

APPLICANT.....

EX-PARTE APPLICANTS.....