



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR ELC. MISCELLANEOUS APPLICATION NO. 295 OF 2014

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE LAW REFORM ACT

BETWEEN

REPUBLICAPPLICANT

VERSUS

THE NAIROBI COUNTY GOVERNMENT.....RESPONDENT

EX PARTE KUGURU FOOD COMPLEX LIMITED

JUDGEMENT

Introduction

1. By a Notice of Motion dated 7th August, 2014, the ex parte applicant herein, **Kuguru Food Complex Limited**, seeks an order of certiorari to quash an informal decision allegedly made by the Respondent to enter, encroach, take possession and/or interfere with the applicant's possession, ownership or control of land parcel known as LR No. 209/14686 Nairobi, measuring 0.9957 ha (hereinafter referred to as the suit property). The applicant also seeks an order of prohibition prohibiting the Respondent whether by itself, its agents, officers or whosoever from harassing, intimidating, arresting, and arbitrarily interfering with the applicant's quiet possession, ownership and control of the land parcel LR No. 209/14686 and/or undertaking any constructions on the said property. There is also a prayer seeking provision for costs.

2. According to the *ex parte* applicant, it is the registered proprietor of a lease from the Government of Kenya over land parcel known as LR No. 209/14686 Nairobi, measuring 0.9957 ha, of which the applicant has been and continues to be in possession.

3. However, on 28th July, 2014, the Respondent, with neither a colour of right or any valid notice thereof, through its agents, servants and/or employees purportedly from the "Wa Reuben Ward" entered into the Applicant's suit property, apprehended its employees and in a most callous and obnoxious manner, began measuring the premises supposedly for purposes of putting up constructions therein. It was the applicant's case that in so doing, the Respondent has arbitrarily interfered with the

Applicant's quiet possession and occupation of the suit property and is furthermore threatening to unlawfully and procedurally deprive the Applicant of the same, which conduct breaches Article 23(1) (b) of the **Land Act** as well as Article 40 of the Constitution of Kenya, 2010.

4. It was contended that the suit property is a private property and the respondent has neither challenged nor impeached the applicant's title documents and moreover has never been involved in any dispute with the applicant regarding the occupation of the suit property. To the contrary the applicant has diligently paid all land rates to the Respondent and has been up to date in payment thereof.

5. It was therefore the applicant's position that it is incomprehensible and abhorrent for the Respondent to interfere, destroy and cause general nuisance on the suit property. It was the applicant's averment that the Respondent's conduct was absurd, arbitrary, blatantly unlawful, capricious, unjust, unreasonable, irrational, ultra vires, abuse of power and in flagrant breach of the rules of natural justice.

6. The Respondent's action, it was contended was a serious travesty of justice and an infringement of the applicant's constitutional rights.

7. The application was not opposed as the Respondent did not file any documents in response to the application.

Determination

8. I have considered the foregoing. In the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, the Court citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479** held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

9. The *ex parte* applicant has exhibited a copy of the grant issued to it pursuant to the provisions of the **Registration of Titles Act** in September, 2010.

10. Article 40(3) of the Constitution provides:

The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest

in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

11. The said Article accordingly protects the right of any person to whom property vests. That Article must be read with the provision of Article 47 of the same Constitution which provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

12. From the foregoing provisions it is clear that the right to property and interest therein is constitutionally protected and a person can only be deprived of that right or interest as provided under the Constitution. Both under the Constitutional and the relevant statutory provisions a registered proprietor's title to land or interests therein cannot be arbitrarily infringed, abridged or abrogated without the proprietor being afforded an opportunity of being heard. Therefore a decision to excise a person's real property would fly in the face of the express constitutional provisions.

13. The *ex parte* applicant herein seeks an order of certiorari to quash an informal decision allegedly made by the Respondent to enter, encroach, take possession and/or interfere with the applicant's possession, ownership or control of the suit parcel.

14. Order 53 rule 7(1) of the *Civil Procedure Rules* provides:

In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.

15. As the decision sought to be quashed has not been exhibited as required hereinabove, there is nothing before the Court capable of being quashed. If, on the other hand, there was that decision but the *ex parte* applicant was unable to secure the same, it ought to have taken the advantage of the provisions of Order 53 rule 7(1) aforesaid and accounted to the satisfaction of the Court its failure to avail the same. This, it has not done and failure to do so renders the prayer for certiorari incompetent.

16. The *ex parte* applicant, however, seeks order of prohibition. Having found that the Respondent's action contravened the *ex parte* applicant's fundamental rights enshrined in the Constitution, this Court cannot countenance such action. Judicial review, it has been held, has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. See **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43.**

17. In the premises it is my view that the *ex parte* applicant is entitled to an order of prohibition.

Order

18. In the foregoing premises I hereby issue an order of prohibition directed to the Respondent

prohibiting the Respondent whether by itself, its agents, officers or whosoever from harassing, intimidating, arresting, and arbitrarily interfering with the applicant's quiet possession, ownership and control of the land parcel LR No. 209/14686 and/or undertaking any constructions on the said property without following the due process.

19.As the application was not opposed each party will bear own costs.

Dated at Nairobi this 8th day of April, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kiongera for Mr Kago for the Applicant

Cc Richard