



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JR CASE NO 83 OF 2013**

**REPUBLIC.....APPLICANT**

**VERSUS**

**CITY COUNCIL OF NAIROBI THRO'**

**DIRECTOR OF PHYSICAL PLANNING.....RESPONDENT**

**SIMON MBUGUA .....INTERESTED PARTY**

**EX-PARTE**

**GIKAI INVESTMENTS COMPANY LIMITED**

**JUDGEMENT**

The applicant Gikai Investments Company Limited through the notice of motion dated 1<sup>st</sup> March, 2013 prays for an order of mandamus **“directed towards the City Council of Nairobi compelling them to forthwith evict Simon Mbugua and/or Computer Learn and demolish the illegal structures erected on the land situate under power way-leave F.R. No 392/16 being adjacent to Land Reference Number 209/14577.”**

The City Council of Nairobi who is the respondent has been sued through the Director of Physical Planning.

According to the verifying affidavit sworn 27<sup>th</sup> February, 2013 by the applicant’s director James Mwai Kamotho and the statutory statement dated the same date, the applicant is the registered owner of L.R. No. 209/14577. It is the applicant’s case that the Interested Party Simon Mbugua who is also referred to as Computer Learn has occupied land lying under power way-leave F.R. No. 392/16 which is adjacent to the applicant’s land. The applicant’s case is that the Interested Party’s occupation of the said parcel of land is hinged on a forged Temporary Occupation Licence (TOL) purportedly granted to Computer Learn over Land Reference Number 209/14580.

The applicant asserts that the respondent has confirmed that it has no record of the alleged TOL and has also admitted in the media that it does not issue TOLs for private properties. Further, the applicant contends that the respondent issued an enforcement notice dated 17<sup>th</sup> April, 2012 against Computer Learn but has failed to enforce the notice.

In paragraph 10 of the verifying affidavit it is averred that:

**“10. The following uncontroverted letters confirm that the occupation is both unlawful and illegal.**

**(a) A letter from the Director of Surveys, Z.T. Kanunu to the Director, Gikai Investments Limited dated 7<sup>th</sup> August 2008 confirming that the land on which the purported TOL was issued is in fact located in Industrial Area and not Langata Road where the land is situated. Hereto attached and marked “JMK4”.**

**(b) The City Council of Nairobi vide the letter from the Chief Valuer, K.J. Ayiecho to Gikai Investments Limited dated 28<sup>th</sup> August 2008 that not only does the said TOL reference number VAL 63/SG/1/0/mnw not exist, but also that the City Council does not issue TOLs on private properties. LR No. 209/14580 is a private property. Hereto attached and marked “JMK 5”.**

**(c) The letter from the town clerk, P. T. Odongo dated 8<sup>th</sup> of March 2012 confirm that the occupation is both illegal and unlawful. Hereto attached and marked “JMK 6”.**

**(d) The letter from the Chief Valuer, Nyoike dated 7<sup>th</sup> of August 2012 confirm that the occupation is both illegal and unlawful. Hereto attached and marked “JMK 7”.**

**(e) Electronic evidence of an oral confirmation on 7<sup>th</sup> August 2012 by Mr. P. T. Odongo confirming that the occupation is illegal. Hereto attached and marked “JMK 8”.**

**A transcription of the said videographic evidence is as under:**

**“.....office activities that are taking place on a structure that has not been submitted to the city council for approval; so to that extent they stay, they remain unauthorized development.**

**Activities that are on this site do not meet the requirements of the Physical Planning Act.”**

**11.....”**

The applicant contends that the respondent has admitted that the occupation of the land by the Interested Party is based on a forged TOL since the same does not exist and that it does not permit erection of permanent structures on areas like that occupied by the Interested Party. The applicant therefore argues that the respondent’s actions of countenancing the illegal occupation is capricious, high handed, unlawful and an abuse of power and the Court should issue an order of mandamus to right such wrong.

According to the statutory statement the relief is sought on three grounds to wit:

**“1. The City Council’s omission to act to evict Simon Mbugua from the said way-leave despite their very clear indication that the occupation is based on a non-existent document which was moreover not authored or sanctioned by the Council is unlawful.**

**2. By the Council’s own admission, there exists sufficient and indisputable proof and evidence that Simon Mbugua is occupying the power way-leave adjacent to Land Ref. No. 209/14577 illegally and attributing their occupation to an illegal TOL and a non-related parcel of Land Ref No. 209/14580.**

**3. The City Council has admitted to the illegality of the occupation of Simon Mbugua on the way-leave but has not taken any measures to rectify the same.”**

The respondent opposed the application by way of grounds of opposition dated 19<sup>th</sup> August, 2013. According to the said grounds of opposition the respondent case is:

- “1. That the application as filed and presented is frivolous, vexatious, untenable, lacks merit, an abuse of the process of the Honourable Court and that the same is incurably defective for, inter alia want for form and procedure.**
- 2. That the Order sought by the applicant, being one of special jurisdiction, cannot properly be given by the Honourable Court given that the application has been brought in the name of the Applicant, instead of that of the Republic, Contrary to the law.**
- 3. That in addition, the Application is incurably defective for, *inter alia* failing to cite the appropriate provisions of Section 8 and 9 of the Law Reform Act, Chapter 26 of the Laws of Kenya.**
- 4. That the application does not raise any reasonable cause of action and/or fails to raise any reasonable grounds and, in any event, lacks the appropriate statutory basis for the Honourable Court to issue the Order of the nature sought herein by the Applicant.**
- 5. That in the circumstances, the application is both incompetent and misconceived in substance and suitable for being struck out and/or dismissed with costs to the Respondent.**

The respondent also opposed the application through the replying affidavit of the respondent’s Principal Valuer Githuku Thomas Waweru sworn on 26<sup>th</sup> November, 2013. It is pertinent to reproduce paragraphs 5 to 8 of the said affidavit in which the deponent avers:

**“5. That in any event, but strictly without prejudice to the foregoing, I am aware that our office at the Council does not possess any records of a Temporary Occupation License, Ref. No. VAL 63/sg/10/mnw dated 12<sup>th</sup> February, 1999, as alleged by the Petitioner or at all.**

**6. It is also my position that the City County of Nairobi (formerly the City Council of Nairobi) does not issue Temporary Occupation Licenses on private lands. It is therefore my understanding that if any Temporary Occupation License was issued herein, then the same was intended for neither the Petitioner’s nor the Interested Party’s portion of lands herein and that the designation thereof as for ‘L.R. 209/14580’ must have been out of inadvertence.**

**7. That I am also aware that whereas the Petitioner’s parcel of land Ref. No. 209/14577 along Lang’ata Road, Plot No. L.R. 209/14580 is situate in the Industrial Area, off Enterprise Road.**

**8. That whereas the suit property herein is under a power way leave, I am aware that the Respondent did not pursue the enforcement Notice since the suit property herein is a subject of pending legal proceedings in Nairobi Milimani CMCC No. 3279 of 2008 pitting the applicant herein and one, M/s Langata Road Motors Limited and that therefore the same cannot properly be adjudicated before the Honourable Court herein, lest the lower Court proceedings and outcome be prejudiced.”**

The Interested Party strongly opposed the application through a replying affidavit sworn on 4<sup>th</sup> June, 2013. His side of the story is that Computer Learn licensed the plot to Langata Road Motors Limited which is occupying the land lying under way-leave F.R. No. 392/16 situated along Langata Road in Nairobi under a TOL issued to it by the City Council of Nairobi on 12<sup>th</sup> February, 1999. Langata Road Motors Limited uses the parcel of land as a motor vehicle sales yard.

It is the Interested Party’s case that this application is an extension of a long-running dispute in which the applicant has been trying to evict Computer Learn from the parcel of land. The Interested Party states

that at one time the applicant deliberately and fraudulently misled Langata Road Motors Limited to believe that its boundaries extended to the area lying under the power way-leave although the applicant's plot did not extend to the way-leave.

The Interested Party's avers that the applicant, through an associate company had at one time attempted to grab the parcel of land sitting on the power way-leave and riparian reserve but the attempts had been repulsed by the Commissioner of Lands who proceeded to cancel the illegal allocation and also ordered the Director of Physical Planning to cancel a Part Development Plan (P.D.P.) No. 42.31.96.5 and also directed the Director of Survey to cancel the job leading to Deed Plan No. 249704.

The Interested Party exhibited a letter dated 19<sup>th</sup> September, 2008 from the Chief Valuer of the City Council of Nairobi in which the authenticity of the TOL issued to the Interested Party on 12<sup>th</sup> February, 1999 is confirmed. The said letter also confirms that the TOL granted to the Interested Party is for power way-leave and does not encroach onto property L.R. No. 209/14/14580. The letter copied to the applicant apparently rescinds the letter dated 28<sup>th</sup> August, 2008 in which the applicant had been informed that the office of the Chief Valuer had no records of the Interested Party's TOL Ref. VAL.63/5g/1/0/mnw dated 12<sup>th</sup> February, 1999. The letter also informs the applicant that TOLs are not issued on private properties. The letter dated 28<sup>th</sup> August, 2008 was exhibited in Court through paragraph 10 of the verifying affidavit sworn on 27<sup>th</sup> February, 2013 by the applicant's director.

Further, the Interested Party exhibited a letter dated 7<sup>th</sup> August, 2008 addressed to the applicant by the Director of Surveys informing the applicant that an earlier survey which had amalgamated the applicant's parcel of land L.R. No 209/14577 and part of the power way-leave had since been cancelled.

The Interested Party also exhibited among other documents a letter dated 30<sup>th</sup> November, 2012 from Mr. Nyoike N. I. the Chief Valuer of the City Council of Nairobi to the advocates of the Interested Party indicating that the area occupied by the Interested Party **"and operated as a motor vehicle yard/showroom falls within a power line way-leave and riparian way-leave and does not encroach on any property whatsoever"**.

Further, the Interested Party exhibited a letter addressed to his advocates on 16<sup>th</sup> April, 2013 by Kenya Power in which Kenya Power states that **"there is a car bazaar within the way-leave trace, the Bazaar owner does not claim ownership of the land other than operating on a temporary license issued by the Nairobi City Council and we have no objection to the arrangement."**

Another document produced by the Interested Party is a letter dated 7<sup>th</sup> May, 2013 addressed to the Commission on Administrative Justice (Office of the Ombudsman) in response to a complaint raised by the applicant. In that letter the Interim County Secretary intimates that the enforcement notice was not enforced after it became apparent that the applicant was trying to abuse the enforcement process in a dispute of a civil nature between it and the Interested Party.

It is the Interested Party's case that judicial review is not the most efficacious remedy in the circumstances of this case as the dispute between the parties is already pending before the Court in **Milimani Chief Magistrate Court's Civil Case No 3279 of 2008**. The Interested Party therefore concludes that the application should be dismissed with costs.

In response the applicant swore a further affidavit on 30<sup>th</sup> July, 2013 and insisted that the Interested Party's occupation of the land in question is illegal. The applicant denied that it tried to grab the parcel of land in question in 2004 and asserted that it was its complaint that led to the cancellation of the letter of allotment that had been issued for that particular piece of land. The applicant contends that the civil matter in Court is about encroachment of the land in question and payment of rent arrears but this case is based on the Physical Planning Act and the City Council of Nairobi by-laws. The applicant asserts that the respondent cannot be allowed to approbate and reprobate on the legality or illegality of the TOL by writing contradictory letters. It is the applicant's case that the respondent's action of itself calls for the

issuance of judicial review orders.

The applicant asserts that the respondent has no powers to issue TOL over land such as that occupied by the Interested Party. Sections 155 and 157 of the Land Act 2012 are cited in support of this argument. The applicant insists that there are ongoing constructions on the parcel of land in question but the respondent has refused and or neglected to stop such constructions. It is the applicant's case that the alleged ongoing construction is in clear breach of Sections 30, 33 and 38 of the Physical Planning Act.

The applicant's director introduced a new angle to the effect that the Interested Party is being investigated by the Criminal Investigations Department for forgery, perjury and uttering of false documents as confirmed by a letter from office of the Director of Public Prosecutions.

Having gone through the papers filed in Court, I form the opinion that the applicant is seeking an order directed at the respondent to evict the Interested Party or a company known as Computer Learn from parcel of land along Langata Road in Nairobi. The applicant's case is based on the ground that the Interested Party's occupation of the parcel of land in question is illegal and is based on a forged TOL. The applicant has produced several documents originating from the City Council of Nairobi and Nairobi City County in support of the application.

On his part the Interested Party asserts that he has not been licensed by Computer Learn to occupy the land in question. It is his case that Langata Road Motors Limited is the licensee and Computer Learn is the licensor in respect of the said parcel of Land. The Interested Party contends that the land in question is occupied under a TOL from the respondent. He has produced documents to support this position.

The respondent's position is neither here nor there. I have reproduced part of the respondent's replying affidavit and the same shows that the respondent denies issuing TOL Ref No. VAL. 63/sg/10 mnw dated 12<sup>th</sup> February, 1999 in respect of L.R. No. 209/14580 which is situated in the Industrial Area, off Enterprise Road since it is not its policy to issue TOLs on private land. It is the respondent's case that it did not execute its enforcement notice since the suit property is the subject of pending court proceedings in **Nairobi Milimani CMCC No. 3279 of 2008**. At the same time the respondent claims the Interested Party's TOL is genuine. The respondent's reply is therefore of no assistance to the Court.

In my view, there are two broad issues to be addressed in this judgment. The first question is whether there is a proper judicial review application before this Court. If the first question is in the affirmative then the second question is whether the order sought should be granted.

The respondent raised two points of law in support of its claim that this application is incompetent. In the first instance, the respondent asserts that Gikai Investments Company Limited is named as the applicant in place of the Republic as is the norm in judicial review applications. The decision of the Court of Appeal in **FARMERS BUS SERVICE & OTHERS v THE TRANSPORT LICENSING APPEAL TRIBUNAL [1959] E.A. 779** is cited in support of this proposition. I agree with the respondent's counsel that the application before this Court is indeed wrongly titled. Judicial review orders are issued in the name of the Republic and the Republic is the applicant and the person in whose interest the proceedings are commenced is the ex-parte applicant. In my view, the error is one of form and does not go to the substance of the application. After all, the Republic is a nominal party in the application and failure to cite it is an error that is curable by the application of Article 159(2)(d) of the Constitution which provides that justice should be done without undue regard to technicalities.

The second ground on which the application is faulted is that the applicant failed to cite sections 8 and 9 of the Law Reform Act Cap 26 being the cornerstone of judicial review applications. Again in my view, if this is an error, which I doubt, the same is curable by Article 159 (2)(d) of the Constitution. I therefore find that there is a proper judicial review application before this Court.

Should the orders sought be granted? The applicant claims that the occupation of the parcel of land in question by the Interested Party is illegal. The parties admit that there is a case pending in the magistrate's Court touching on the occupation of the said parcel of land. That is the best case to resolve

the dispute once and for all—see the judgment of W. Karanja JA in **FUNZI ISLAND DEVELOPMENT LIMITED & 2 OTHERS v COUNTY COUNCIL OF KWALE & 2 OTHERS [2014] eKLR**. The parties have already started that process and they should be allowed to complete it. They will have the opportunity of calling the authors of the documents they have exhibited in this matter. Such evidence will be subjected to cross-examination and the truth concerning the land in question will clearly come out so that the Court can make a fair determination.

A judicial review court will not have the opportunity of hearing witnesses testify. The applicant has indeed admitted that the case before the Magistrates' Court is about occupation of the parcel of land in dispute. It is therefore important for evidence to be adduced so that the facts can be established. It cannot easily be established from the material placed before the Court that the respondent acted illegally, unreasonably or in breach of the rules of natural justice.

It is also apparent that a company by the name Langata Road Motors Limited has an interest in the outcome of these proceedings. It ought to have been served with the application as required by Order 53 Rule 3(2) of the Civil Procedure Rules. It would be unjust to issue orders that will result in its eviction without giving it an opportunity to be heard.

For the reasons stated above, the application fails and the same is dismissed.

This case was about the utilization of public land which is a matter of public interest. I will therefore make no orders as to costs.

Dated, signed and delivered at Nairobi this 14<sup>th</sup> day of May , 2014

**W. KORIR,**

**JUDGE OF THE HIGH COURT**