



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

MISCELLANEOUS CASE NO. 153 OF 2010

IN THE MATTER OF: AN APPLICATION BY ESTHER NAFULA WEKESA,

PATRICK WESONGA AND ALI JUMA WEKITE

FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF: THE LAW REFORM ACT (CAP 26 LAWS OF KENYA)

AND

IN THE MATTER OF: ORDER LIII OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: THE LAND TITLE NO. BUNGOMA TOWN 847

AND

IN THE MATTER OF: BUNGOMA CMC CRIMINAL CASE NO. 948 OF 2010

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA

THE GOVERNMENT LANDS ACT (CAP 280 LAWS OF KENYA)

AND

THE REGISTERED LAND ACT (CAP 300 LAWS OF KENYA).

BETWEEN

REPUBLIC

APPLICANT

VERSUS

THE DISTRICT BUILDING SURVEYOR, BUNGOMA SOUTH DISTRICT1ST
RESPONDENT

THE CHAIRMAN, DISTRICT HOUSING ALLOCATION
COMMITTEE

BUNGOMA SOUTH DISTRICT 2ND
RESPONDENT

THE DISTRICT COMMISSIONER, BUNGOMA SOUTH DISTRICT 3RD
RESPONDENT

THE OFFICER COMMANDING BUNGOMA POLICE STATION 4TH
RESPONDENT

THE CHIEF MAGISTRATE, BUNGOMA LAW COURTS 5TH
RESPONDENT

THE DISTRICT LAND REGISTRAR BUNGOMA DISTRICT & MT. ELGON 6TH
RESPONDENT

EX-PARTE

ESTHER NAFULA WEKESA 1ST
SUBJECT

PATRICK WAFULA WESONGA 2ND
SUBJECT

ALI JUMA WEKITE 3RD
SUBJECT

AND

MICHAEL REUBEN WEKESA (the personal representative of the estate of ESTHER NAFULA
WEKESA

(deceased)..... 1st
SUBJECT

JUDGMENT

1. The exparte applicants commenced their suit by way of miscellaneous civil application under the provisions of order 53 of the Civil Procedure Rules. The applicants were granted leave to commence the proceedings on 27th September 2010. They filed the substantive motion on 15th October 2010 which is within the 21days that was provided. In the motion filed, the exparte applicants sought the following orders;

1. THAT this honourable court be pleased to grant the 1st subject/exparte applicant ESTHER NAFULA WEKESA an order of MANDAMUS directing the 1,2 & 3 respondents to forthwith jointly deliver up vacant possession of land parcel No. BUNGOMA TOWN/847 comprising the house previously known as BUNG/MG/4 opposite IIEC offices to the applicant ESTHER NAFULA WEKESA.

2. THAT the Honourable court be pleased to grant the 1st subject/exparte applicant ESTHER NAFULA WEKESA an order of prohibition during lease period of 99 years to forbid the 1,2 & 3rd respondents from dealing and interfering with the applicants proprietorship of land parcel no. Bungoma town/847 comprising the house previously described as BUNG/MG/4 opposite the IIEC offices during the period of the lease as if it is government property, and from allocating the said house comprised therein to any person and charging rent thereof.

3. THAT the Honourable court be pleased to grant the 1st subject/exparte applicant ESTHER NAFULA WEKESA an order of prohibition to prohibit the District Land Registrar from disseminating, publishing, placing advertisements, notification to the public in any form of media expressing, making representations and or verbal utterances to anyone in anyway or manner or at all of any matter or material which may be construed as being inconsistent or which is consistent with the legality of the registered proprietorship of ESTHER NAFULA WEKESA over land parcel no. BUNGOMA TOWN/847

4. THAT this honourable court be pleased to grant the 1st subject/applicant herein ESTHER NAFULA WEKESA an order of prohibition to forbid the District Land Registrar Bungoma and Mt. Elgon districts from recalling, canceling and or impeaching the Applicants title to land parcel NO. BUNGOMA TOWN/847 and or making any entry in the register in respect of land parcel no. BUNGOMA TOWN/847 and or making any entry in the register in respect of land parcel no. Bungoma Town/847 and or acting in any other way prejudicial to and inconsistent with the 1st applicant's registered proprietorship of land parcel no. BUNGOMA TOWN/847.

5. THAT this honourable court be pleased to grant the 1st and 3rd Subjects/ exparte applicants herein an order of CERTIORARI to remove to this honourable court the charge sheet in BUNGOMA CMC CRIMINAL CASE NO. 948 of 2010 for purposes of quashing.

6. THAT this Honourable court be pleased to grant the 2nd and 3rd subjects/exparte applicants herein an order of prohibition to prohibit the 4th and 5th respondents from continuing to prosecute BUNGOMA CMC CRIMINAL CASE NO. 948 of 2010 against the 2nd and 3rd applicants herein or on a charge of trespass on land parcel NO. BUNGOMA TOWN/847.

7. Costs of this application be provided for.

2. The 1st exparte applicant deposes that she is the registered owner of a leasehold property known as Bungoma town/847 allotted to her in 1998. She paid the statutory charges as required in the letter of allotment. In paragraph 7, she deposes that the process that led to her registration was entirely lawful, transparent and constitutional. The 1st respondent informed her of a circular from Ministry of Housing that required her to pay 10% of the value of the house in Bungoma town/847. The 1st exparte applicant continued that she cannot improve the house as her workers are always threatened with arrests and prosecutions. Her rights to hold the property for the term of the lease is being violated with *“high handedness and impunity.”* That the 6th respondent has hinted to her that he has directives from the 3rd respondent to investigate her title and recall/cancel the same.

3. The motion is opposed by the respondents and a **Ms. Dorcas Songa Emali** has sworn a replying affidavit to that effect. She is the chief estates officer with Ministry of Housing – Bungoma. She deposes that there is a house on the land in question put up by the Government and which have previously been occupied by various public servants, including the 1st exparte applicant while she was a civil servant. The deponent states that if the 1st applicant became registered as owner of that land then the same was done irregularly. She deposed further that neither the District Housing Committee nor the Commissioner of Lands has the mandate to dispose of public housing property or confer title thereto. She concluded by saying she is advised by counsel that these proceedings are defective and misconceived as they have improperly invoked the jurisdiction of the court.

4. The parties filed written submissions to urge this motion. Mr. Kraido for the ex parte applicants relied on the evidence and the law in his submissions as filed. In referring to the law, the ex parte applicants have quoted section 24 and 26 of the Land Registration Act. They have also referred to article 64 (b) and article 40 of the Constitution. The respondent on his part submitted that this court has no jurisdiction to grant any orders of judicial review in favour of the 1st ex parte applicant as the dispute is strictly not of a public nature or interest. On prayers of 2nd and 3rd ex parte applicants, Mr. Ngumbi State Counsel submits that they should be dismissed as the criminal court will adjudicate fairly on the matter. They cited the case of **Eldoret HC Misc. Appl. No. 65 of 2006, R vs. Officer in-charge, G.K Prison Eldoret.**

5. Before considering the merits of this motion, this court will analyze situations when judicial review orders are available to parties and consider whether these applicants meet the set principles. This is because the respondents in their replying affidavit and submissions have alleged that the application is misconceived and the applicants have chosen wrong procedure to ventilate their claim. The respondents have also pleaded in the replying affidavit that this court lacks jurisdiction to entertain this matter yet jurisdiction is everything to a court. In the case of **Pastoli vs. Kabale District Local Government Council & others [2008] EA page 300**, the court held thus, **“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 the law or its principles are instances of illegality.”**

6. Further in the case of the **Commissioner of Lands vs. Hotel Kunste Limited [1995] LLR 2588 (CAK)** the court stated that judicial review is only concerned with the reviewing of the decision – making process. In the case of **Sanghani Investment Ltd vs. Officer in charge Nairobi Remand and Allocation Prison [2007] E A**, the court at paragraph 1 page 355 found that the underlying dispute was on ownership of land. It said that **judicial review proceedings is not a forum where such dispute can be adjudicated** and determined as there would be need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the name of the applicant. This was also the position taken by M.K. Ibrahim J in the case of **Republic vs. Officer in charge GK prison Eldoret supra.**

7. In the decisions referred to above, it clearly comes out that there must be a decision made and which decision is ultra vires and against the rules of natural justice. The decision must also be made by public officer/body acting in such capacity. For instance in the case of **Republic vs. The Minister of Lands & Settlement ex parte Narankaik & ano (1988) KLR 693**, Tunoi J (as he then was) held that **“certiorari lies on the application of a person aggrieved to bring the proceedings of an inferior tribunal before the High Court for review so that the court can determine whether they should be quashed.”** It was thus imperative upon the ex parte applicants in the instant suit to demonstrate that they are challenging an ultra vires decision of a public officer (an administrative action) and strictly specify the decision being challenged.

8. In the application before me, the 1st ex parte applicant in prayer one seeks an order directed at the respondents to deliver up vacant possession of land parcel no. Bungoma Town/847, an order of prohibition forbidding the respondents from interfering with proprietorship of L.R. 847 and an order prohibiting the Land Registrar Bungoma and Mt. Elgon districts from recalling, canceling and or impeaching the Applicants title to land parcel NO. BUNGOMA TOWN/847 and or making any entry in the register in respect of land parcel no. BUNGOMA TOWN/847 and or making any entry in the register in respect of land parcel no. Bungoma Town/847 and or acting in any other way prejudicial to and inconsistent with the 1st applicant's registered proprietorship of land parcel no. BUNGOMA TOWN/847. She has not indicated **who and when the order in regard to the occupation of the house was made.** In any event, vacant possession is equivalent to eviction and there would be need to adduce evidence to prove she is entitled to the orders sought. She deponed in paragraph 16 of her supporting affidavit that the 6th respondent informed her of directives from the 3rd respondent to investigate and or cancel her title. This purely hearsay as no document was put before court of such an order/decision existing. It is

also not apparent whether the 6th respondent if he made such a statement, made it in an official or personal capacity. It is apparent this is a land ownership dispute which does not require granting orders of judicial review in nature but, require the applicant to prove by way of evidence on how she got title to this land and who was to give her possession.

9. In regard to the prayers sought by the 2nd and 3rd respondents, they have not indicated to this court why they are apprehensive not to get a fair trial before the respective court in which the trial is due to take place. In any event if such fears were to exist, then the motion should have been presented to court as a constitutional petition for violation of their rights. Criminal prosecutions do not fall under the ambit of the provision of the Law Reform Act. In the case of **Meixner & another vs. A.G [2005] 2 KLR 189**, the court stated thus;

“The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26 (8) of the Constitution). Indeed, the High court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution....” (underline mine)

10. The 2nd and 3rd ex parte applicants have not attributed any malice actuated by the 4th and 5th respondents. In paragraph 8 of their supporting affidavit, they depose that they were arrested again on 21st May 2010 and charged. They are advised that the charge against them is frivolous and an abuse of the court process because the 1st respondent failed to produce any document showing the property belongs to the Ministry of Housing. Whether a charge is frivolous is a matter to be determined by the court trying the matter and not challenged by way of judicial review as is in this instance. I find nothing that demonstrates the public officers sued made any decisions or took actions that were in excess of their powers which would require the intervention of this court issuing the judicial review orders as sought.

11. Consequently, I agree with the proposition put forth by the respondents that the 1st ex parte applicant's claim is a land dispute which require adduction of viva voce evidence. The same cannot be determined by way of judicial review as presented. I also find that the 2nd and 3rd ex parte applicants have not established any ultra vires acts of any of the public officers mentioned that would require the charge sheet to be quashed. The result is I find the notice of motion dated 15th October 2010 as incompetent for the reasons given in the body of this judgment and hereby dismiss it with costs to the respondents.

DATED, SIGNED and Delivered in Bungoma on 8th of July 2014.

A. OMOLLO

JUDGE.