



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL APPLICATION NO. 54 OF 2013

IN THE MATTER FOR AN APPLICATION BY JOYCE WANJIKU TO APPLY FOR JUDICIAL REVIEW FOR AN ORDER OF CERTIORARI TO REMOVE AND QUASH THE DECISION AND REPORT OF THE DISTRICT LAND REGISTRAR, KIAMBU AND DISTRICT SURVEYOR, KIAMBU MADE ON 29TH NOVEMBER 2012 RESPECTING TITLE NUMBERS KIAMBAA/KIHARA/1413, KIAMBAA/KIHARA 1265 AND KIAMBAA/KIHARA/1266

AND

IN THE MATTER OF AN APPLICATION BY JOYCE WANJIKU TO APPLY FOR JUDICIAL REVIEW FOR AN ORDER OF PROHIBITION TO PROHIBIT THE CHIEF MAGISTRATE'S COURT KIAMBU FROM RECEIVING OR ADOPTING THE DECISION AND REPORT OF THE DISTRICT LAND REGISTRAR, KIAMBU AND DISTRICT SURVEYOR KIAMBU

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

DISTRICT LAND REGISTRAR, KIAMBU.....1ST RESPONDENT

DISTRICT SURVEYOR, KIAMBU.....2ND RESPONDENT

CHIEF MAGISTRATES COURT, KIAMBU.....3RD RESPONDENT

AND

WICKS MWETHI NJENGA.....1ST INTERESTED PARTY

ELLYDON THIIRU MWETHI.....2ND INTERESTED PARTY

EX-PARTE: JOYCE WANJIKU

JUDGEMENT

Introduction

1. By a Notice of Motion dated 6th March, 2013 the ex parte applicant herein, **Joyce Wanjiku** seeks the following orders:

1. That this Honourable Court do issue an order of Judicial Review for an order of Certiorari to remove to this court and quash the decision and report of the District Land Registrar Kiambu and District Land Surveyor Kiambu dated 29th November 2012 setting out the boundaries and filing a report respecting those parcels of land known as Title Numbers Kiambaa/Kihara/1413, Kiambaa/Kihara/1265 and Kiambaa/Kihara/1266.

2. That this Honourable Court do issue an order of Prohibition, prohibiting the Chief Magistrate's Court, Kiambu from receiving and adopting the decision and report of the District Land Registrar, Kiambu and District Surveyor, Kiambu dated 29th November 2012 respecting the parcels of land known as Title Numbers Kiambaa/Kihara/1413, Kiambaa/Kihara/1265 and Kiambaa/kihara/1266 in Kiambu Civil Case No. 402 of 2000 Wicks Murethi Njenga & Ellydon Thiiru Mwethi –vs-Joyce Wanjiku.

3. Costs be provided for.

Ex Parte Applicant's Case

2. The application was supported by the affidavit sworn by the applicant on 12th February, 2013 and 7th February, 2014.

3. According to the applicant, she is the registered proprietor of that parcel of land known as Kiambaa/Kihara/1413 which property was initially part of title number Kiambaa/Kihara/1139, which parcel was later subdivided into title numbers Kiambaa/Kihara 1413 and Kiambaa/Kihara 1414.

4. It was deposed that in the year 2000, the Interested Parties herein **Wicks Mwethi Njenga and Ellydon Thiiru Mwethi** filed a suit, to wit Kiambu Civil Suit No. 402 of 2000 **Wicks Mwethi Njenga and Ellydon Thiiru Mwethi –vs- Joyce Wanjiku** alleging the applicant interfered with constructions on their land known as Kiambaa/Kihara/1266 and obtained an injunction restraining the applicant from trespassing in that parcel of land known as Kiambaa/Kihara/1266. But as she had not entered into the Interested Parties land, the applicant continued using her parcel of land. However, in May 2010, the Interested Parties applied to have the applicant cited for contempt and being unable to make a determination of the application as it could not establish where the boundaries of parcel numbers Kiambaa/Kihara/1266 (the Interested Parties land) and Kiambaa/Kihara/1413 (the applicant's parcel) lay, the court ordered that the Land Registrar Kiambu do ascertain the said boundaries and present a report to the Court and the Interested Parties lawyers and th applicant's lawyer agreed that the Land Registrar ascertains the boundaries and points out the parcels of land known as Kiambaa/Kihara/1413, Kiambaa/Kihara/1265 and Kiambaa/Kihara 1266.

5. It was deposed that on 6th November 2012, the Land Registrar Kiambu and District Surveyor Kiambu went to the applicant's land using a Mutation which had been rejected by the Director of Surveys and purported to pint out and identify the boundaries of the title number Kiambaa/Kihara/1266 and proceeded to place beacons thereon. The 1st Respondent herein then proceeded to prepare a report.

6. According to the applicant, the 1st and 2nd Respondents reliance on the mutation report was erroneous in that:

i. The mutation indicates that Title Number Kiambaa/Kihara/1266 was excised from the Title Number Kiambaa/Kihara/1413.

ii. The previous holder of the office of District Land Registrar Kiambu had, by a letter dated 14th August 2000, indicated that the amendment to the Registry Index Map on Kiambaa/Kihara/1414, should not have been done on the said parcel, but rather on Kiambaa/Kihara/1414.

iii. The Director of Surveys had by a letter dated 15th August 2000 confirmed that the subdivision on Title Number Kiambaa/Kihara/1413 was null and void.

7. In support of her case the applicant exhibited Green Cards with respect to Title Numbers Kiambaa/Kihara/1265 and Kiambaa/Kihara/1266 (the interested parties parcel) evidencing that the same emanated from Title Number Kiambaa/Kihara/1414 and not Kiambaa/Kihara/1413.

8. It was the applicant's case that the decision and report prepared by the District Land Registrar and District Land Surveyor Kiambu, having been based on an erroneous mutation, the same should be quashed by this Honourable Court and that the Chief Magistrates Court, Kiambu be prohibited by an order of prohibition from receiving and adopting the Report of the District Land Registrar Kiambu and the District Land Surveyor Kiambu in Chief Magistrate Civil Case No. 402 of 2000 **Wicks Mwethi Njenga and Ellydon Mwethi Njenga –vs- Joyce Wanjiku.**

9. According to the applicant, prior to the District Land Registrar and District Land Surveyor, both of Kiambu, visiting the suit land, she had in November 2013, requested for a subdivision map from the Survey of Kenya which however does not reflect the existence of any subdivision of the parcel of land known as Title Number Kiambaa/Kihara/1413.

10. According to the applicant, though the District Surveyor admits that their office made a mistake she does not explain why the said Survey Office has refused to follow the direction given by the Director of Surveys dated 15th August 2000 and by the District Land Registrar, Kiambu dated 14th August 2000 in which it was expressly stated that no subdivision should be effected on land parcel No. Kiambaa/Kihara/1413 and that the correct subdivision of parcel number Kiambaa/Kihara/1139 created two parcels, to wit parcel number 1413 and 1414. In the said letter by the Director of Surveys, the parcels numbers Kiambaa/Kihara/1265 and Kiambaa/Kihara/1266 were ordered to be removed from the Registry Index Map and hence the interested parties claim to Kiambaa/Kihara/1266 has no basis.

11. On behalf of the applicant it was submitted that the Court has power to inquire into whether there had been sufficient evidence to justify the findings made by an officer acting on powers donated to him by statute.

Respondents' Case

12. In opposition to the application, a replying affidavit was filed sworn by **Mary Kamunyu**, the Government Surveyor in charge of Kiambu, Kiambaa, Kikuyu, Limuru, Lari and Githunguri subcounties of Kiambu County on 13th January, 2014.

13. According to her following her posting to the Kiambu station in January 2008, she came to learn about this matter after the Director of Criminal Investigation, Nairobi requested for certified copies of documents related to this case in August 2010.

14. She deposed that the sub-division of Kiambaa/Kihara/1139 appears in their records as having been done in 1982 and later in 1984 long before she was posted in the Kiambu station. From the said records, in 1982 parcel 1139 was sub-divided into 1265 and 1266 and in 1984 parcel 1139 was again sub-divided into 1413 and 1414. However, the mutation 1139 into 1265 and 1266 was not registered immediately. Later, the mutation for 1139 into 1413 and 1414 was registered and amended on the Registry Index Map though page 1 and page 3 has a mix-up where in page 1, parcel 1413 has 0.40 Ha while in page 3 it has 0.05 Ha. On 2nd April 1996, the New Numbers register shows that parcel 1265 was issued with new numbers 2372, 2373 and 2374 but it was later cancelled to read 1414 and its acreage shown as 0.797 Ha does not equal the total of the sub-plots acreages.

15. In her view, since a mistake occurred especially due to not registering the first mutation immediately hence causing a lot of inconsistencies, she recommend that a re-survey be done for the whole parcel, original number Kiambaa/Kihara/1139 and thereafter the acreage obtained can then be compared with

what is being claimed hence assisting in getting to a conclusion of the matter.

16. It was submitted on behalf of the Respondents that since the matter herein does not fall within the ambit of judicial review since the issues require adducing of evidence and examination of mutation, , the Court should always interrogate relevant factors to be considered when deciding whether he alternative remedy would resolve the question at issue.

Interested Parties' Case

17. As for the interested parties, it was submitted that the issues being raised herein ought to be raised in the case before the Magistrates' Court and not in this application.

Determinations

18. Having considered the foregoing, the submissions made on behalf of the parties and the authorities cited, this is the view I form of the matter.

19. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others** (supra) in which the said Court held *inter alia* as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied

with or for such like reasons.”

20. In Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, the Court while 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.....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.”

21. However the grounds upon which the Court exercises its judicial review jurisdiction are incapable of exhaustive listing. As was stated by Nyamu, J (as he then was) in Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998:

“Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief.....The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket.....Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.....Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them.....Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis.....The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society.”

22. Similarly in Bahajj Holdings Ltd. vs. Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998 the Court of Appeal held that the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions while in Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47, Nyamu, J (as he then was) held the view that while it is true that so far the jurisdiction of a judicial review court has been principally based on the “3I’s” namely illegality, irrationality and impropriety of procedure, categories of intervention by the Court are likely to be expanded in future on a case to case basis.

23. Again in Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69 the Court expressed itself as follows:

“So long as the orders by way of judicial review remain the only legally practicable remedies

for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions....This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit.”

24. This is in tandem with the holding in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** that like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and 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. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of **Donoghue vs. Stephenson** in the last century.

25. In this case it is crystal clear that the records of the 2nd Respondent are anything but perfect. It is admitted that there are certain mistakes in the records kept by them relating to the suit parcels that need to be corrected. Yet it is the very same records which are meant to be the basis upon which the 1st Respondent is supposed to prepare a report for presentation to the 3rd Respondent. In my view it would be grossly unreasonable to allow the 2nd Respondent to prepare a report based on admittedly erroneous records which report the 3rd Respondent is meant to rely on in arriving at its determination. It must be remembered that a report prepared by the 2nd Respondent in respect of a boundary dispute is not just a formality since it is that office that is legally empowered to determine boundary disputes. That report may have serious ramifications with respect to determination of the dispute before the Court. It ought not to be treated as a mere recommendation as such.

26. 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.**

27. 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.

28. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal

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 the taking into account of 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.**

29. It is therefore my view that the conduct of the 1st and 2nd Respondents in failing to take the course of reconciling their records in respect of the suit parcels of land in order to arrive at an informed decision when preparing their reports was unreasonable in the circumstances and cannot be allowed to stand. The Respondents ought to have adhered to the provisions of Article 47 of the Constitution which enjoins administrative bodies to ensure that their actions and decisions are reasonable.

30. This Court cannot countenance a situation where a Respondent intends to proceed with a course which it admits may not be fair based on improper record keeping by itself.

31. In the premises I find that the 1st and 2nd Respondents' decision is irrational.

Order

32. In the premises I find merit in the Notice of Motion dated 6th March, 2013 and grant the following orders:

1. An order of Certiorari removing into this court for the purposes of being quashed the decision and report of the District Land Registrar Kiambu and District Land Surveyor Kiambu dated 29th November 2012 setting out the boundaries and filing a report respecting those parcels of land known as Title Numbers Kiambaa/Kihara/1413, Kiambaa/Kihara/1265 and Kiambaa/Kihara/1266 which decision is hereby quashed.

2. An order of prohibition, prohibiting the Chief Magistrate's Court, Kiambu from receiving and adopting the decision and report of the District Land Registrar, Kiambu and District Surveyor, Kiambu dated 29th November 2012 respecting the parcels of land known as Title Numbers Kiambaa/Kihara/1413, Kiambaa/Kihara/1265 and Kiambaa/Kihara/1266 in Kiambu Civil Case No. 402 of 2000 Wicks Murethi Njenga & Ellydon Thiiru Mwethi –vs- Joyce Wanjiku.

3. As the 1st and 2nd Respondents readily conceded their mistake the Applicant is awarded half the costs to be borne by the 1st and 2nd Respondents.

33. As a parting shot the 1st and 2nd Respondents may well be advised to put into motion the appropriate legal machinery to correct the mistakes which have been identified by them so as to avoid unnecessary disputes in future and put their record straight.

Dated at Nairobi this day 15th day of October, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Maina for the Applicant

Miss Chege for the Respondent

Miss Odari for Mr Mairaria for the Interested Parties