



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 1748 of 2004

REPUBLIC.....APPLICANT

AND

THE ATTORNEY-GENERAL.....RESPONDENT

Ex-parte

SAMUEL KAMAU MACHARIA

JOSEPH GILBERT KIBE

SCENERIES LTD

JUDGEMENT

The ex parte applicants herein, **Samuel Kamau Macharia, Joseph Gilbert Kibe and Sceneries Ltd**, by a Notice of Motion dated 4th February, 2005 seek the following orders:

- 1. An order of certiorari to bring up into the High Court the Report of the Commission of inquiry into the illegal/irregular allocation of public land popularly known as the Ndungu Report, and quash the decisions at pages 83 – 85 of the said Report, that the 3rd applicants sale of LR. No. 12236, Karura (wrongly described in the said Report as LR No. 216/8, Karura) to Kenya Re-insurance Corporation in 1996 be nullified and the possession of the letter be interfered with , that 1st and 2nd applicants be investigated by the state’s investigatory agents and be charged with offences under the penal code, and that the Kenya Anti-corruption Commission and or any other state agency do institute against the applicants proceedings to recover from them Kshs. 550 million, the purchase price paid by the said Kenya re-insurance corporation.**
- 2. An order of prohibition to restrain the respondent from nullifying the 3rd applicant’s sale to Kenya Re-insurance Corporation in 1997, of LR No. 12236 (wrongly described in the said report as LR. No. 216/8, Karura), and interfering with the latter’s possession of the same, to restrain the respondent himself, and other state’s investigatory agencies from investigating the 1st and 2nd applicants in connection with their sale of the said LR. No. 12236, Karura, and prosecuting them in accordance with the Penal Code, and to restrain the respondent, through the Kenya-Anti Corruption Commission or any organ of state, from instituting recovering proceedings against the applicants, for Kshs. 550 million, the purchase price of the said LR. No. 12236.**
- 3. An order of mandamus to compel the respondent to expunge the portions of pages 82-83 of the said report of the Commission of inquiry into the illegal/irregular Allocation of Public Land which**

are defamatory of 1st and 2nd applicants and publish, under section 7 of the Defamation Act read together with section 79 of the Constitution, a correction or contradiction in the E.A. standard.

4. Costs of this application be provided for.

The Motion is based on the following grounds:

(a) The respondent, through the Commission of inquiry into the illegal/irregular Allocation of Public Land, violated rules of natural justice by receiving information adverse to the reputations of 1st and 2nd applicants, their liberty and property rights protected by sections 79, 72 and 75 of the constitution, and failing to summon or require the applicants to state the truth about that information and as a result published defamatory statements about the 1st and 2nd applicants, and made decisions adverse to the property rights of the applicants.

(b) The respondent, through the commission of inquiry into the illegal/irregular Allocation of Public Land, contravened section 3(3)(a)(i) & (ii) of the Commissions of inquiry Act in that being aware of adverse evidence to the 1st and 2nd applicants put before it, failed to warn them of it and afford them opportunities to cross-examine those adducing it and also an opportunity to contradict the adverse evidence with the result that the constitutional rights of the applicants under sections 72, 75 and 79 of the Constitution have been contravened.

(c) The right to good reputation under section 79 of the constitution includes a right of the defamed person to compel the person who has defamed him/her to publish a correction or contradiction.

(d) The respondent has defamed the 1st and 2nd applicants.

(e) The respondent has taken decision which contravene their property rights which are protected by section 75 of the constitution.

The said Motion is supported by the Statutory Statement, the affidavits of **Joseph Gilbert Kibe** and the joint affidavit of **Joseph Gilbert Kibe** and **Samuel Kamau Machari** filed herein.

According to the ex parte applicants, the 1st applicant bought LR No. 12236, Karura from the estate of the late President Jomo Kenyatta in 1988 in the sum of Kshs 21 million. The said parcel of land was as a result of consolidation of LR No. 216/8 and 12261, Karura though the conveyance was faulty and made reference to LR No. 216/8 Karura. In 1997, the 3rd applicant sold the said land to Kenya Re-Insurance Corporation in the sum of Kshs 550 million and gave possession to the buyer and since then the said buyer has been in possession and the applicants have no claim thereto. On 30th June 2003, the President appointed a Commission of Inquiry into the illegal/irregular allocation of public land (hereinafter referred to as the **Ndungu Commission**) which Commission released its recommendations on 10th December 2004 whose contents were summarised by the East African Standard Newspapers. When the applicants got hold of the report of the said **Ndungu Commission** they discovered that certain defamatory material was published therein and they contend that the said publication exposed the 3rd applicant to further harm and as a result the 1st applicant has suffered damage to his reputation. According to the advice from the applicants' legal advisers where a commission of inquiry violates the rules of natural justice and makes adverse findings against a person, these findings are null and void and will be quashed by the Court on an application of a person adversely affected and further that a Commission of Inquiry is under legal duty to warn a person of any evidence adverse to him and afford him/her an opportunity to cross-examine the person giving adverse evidence and also to offer his own explanation of the evidence. Hence the Court has the jurisdiction to grant the reliefs sought herein.

In opposition to the application the respondent filed the following grounds of opposition:

a. That the application has pleaded matters of facts and evidence concerning a cause of action of

defamation which is not amenable to judicial review.

b. That the orders sought for militate against public interest and hence cannot be issued.

c. That all the principles of natural justice and the law were complied with in arriving at the decision.

d. That the court cannot issue orders against the performance of statutory functions which are consistent with the Constitution.

The application was prosecuted by way of written submissions. According to the applicants, there is a requirement under section 3(3) of the Commissions of Inquiry Act that persons who are likely to be affected by the evidence to be adduced at the Inquiry are required to be given prior warning of the general nature of the said evidence and that the person to be affected is to be given an opportunity to be present and cross examine the witness adducing the said evidence and adduce rebuttal evidence. In this case, it is submitted that the Commission collected and received the information that would affect the company and its directors yet the Commission went on with its task without summoning the ex parte applicants and made prejudicial decisions that the company's property be taken away and that the 1st and 2nd ex parte applicants be investigated and charged with a criminal offence. The applicants have also relied on **R vs. Judicial Commission of Inquiry into the Goldenberg Affair, High Court Miscellaneous Application No. 1279 of 2004, B Surinder Singh Kanda vs. Government of Malaya [1962] AC 322, Regina vs. Huntington District Council Ex Parte Cowan & Another 1 WLR 501.**

In support of their submissions the applicants have further relied on **Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji & 9 Others Nairobi Civil Appeal No. 266 of 1996; Halsbury's Laws of England, Vol. 11, 2nd Edn. At page 134 para 251; Republic vs. Attorney General Ex parte Biwott [2002] 1 KLR 668** and submitted that the Commission was a body with legal authority to look into the allocations and thereafter come up with recommendations and as the Commission never gave the applicants an opportunity of being heard, its decision can be and should be an object of an order of judicial review hence this is a proper case for the order of certiorari. Based on the same decision of **Kenya National Examinations Council vs. Republic** (supra) it is submitted that an order of prohibition may similarly issue not only for excess of jurisdiction or absence of it, but also for a departure from the rules of natural justice but does not lie to correct the course, practice, or procedure of an inferior tribunal, or wrong decision on merits of proceedings. Since the decision was arrived at in contravention of the rules of natural justice, it is submitted that this is a case in which such an order may issue as it flows from the order of certiorari. Following from the said orders, it is submitted that the respondent will be under duty and the applicants will have a right to have the offending sections of the report expunged. Further as the material is defamatory, it is submitted that the respondent is under a duty under section 7 of the ***Defamation Act*** to publish a correction or contradiction in the dailies.

It is therefore submitted that the Court has power to issue the orders of certiorari, prohibition and mandamus in regard to the recommendation/findings made by the **Ndungu Commission**. Since the Commission has already handed over its report to the President, the said Commission has become *functus officio* hence the Attorney General is the correct respondent.

On behalf of the respondent it is submitted that the Commission invited public participation and verified the same with documents from the land registry hence there was a fair hearing and the respondent relies on **Kenya National Examinations Council vs. Republic Ex parte Kemunto Regina Ouru [2010] eKLR** to the effect that public interest ought to supersede the right to be heard directly. In the present case it is submitted that the nature of the terms of reference to make recommendations for further investigations and the nature of the fact of public documents in form of the land transactions done justified the ouster of direct hearing and that no individual was accorded direct hearing. Since under the terms of reference of the Commission it was meant to make recommendations for criminal investigation or prosecution of, and any other measures to be taken against, persons involved in the unlawful or irregular allocations of such land in the future and hence the decision was a mere recommendation meant that the rules of natural justice were not to be strictly complied with. The respondent relies on ***Halsbury's***

Laws of England, 4th Edn. Vol. 1 page 175 and R vs. Permanent Secretary Ministry of Regional Development Authorities, Ex parte Eng. Charles Mwanda Civil Case No. 236 of 2011.

It is further submitted that the basis upon which the orders are sought being defamation, malice and alleged breach of the rules of natural justice, these are matters of evidence and facts which are not amenable to judicial review application. Since judicial review orders are discretionary in nature it is submitted on the authority of **Republic vs. Kenya National Commission on Human Rights ex parte Uhuru Muigai Kenyatta; Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203 at 219; Republic vs. Kenya National Commission on Human Rights ex parte William Ruto [2010] eKLR**; and *Halsbury's Laws of England 4th Edn. Vol. II page 808 para 1508* that since the report has already been released to the public, public interest mandates that the same not be recalled. Issuing the order of prohibition, it is submitted will amount to a gag order and interference with the mandate of the investigatory agencies as recommended by the Commission which is an affront to the principle of separation of powers between the executive and the judiciary hence the application ought to be dismissed.

Suffice it to say that in the supplementary submissions filed on behalf of the applicant attempt was made to distinguish the authorities relied upon by the respondent.

I have considered the foregoing.

In **Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenga Filing Station Civil Appeal No. 45 of 2000**, the Court of Appeal expressed itself as follows:

“We are certain that the issue of the procedure used does not arise inasmuch as the applicant has not ruled out the possibility of the bulk of the products containing the chemical used only in the products meant for export. That much is clear from some of the matters in the Statement accompanying the application for leave, which the Judge in his ruling, despite the statements purportedly of facts being worthless, appear to put a lot of faith in. The learned Judge decided the application for judicial review on the basis of inadmissible matters. We would observe that it is the verifying affidavit not the Statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1(2) of Order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7:

‘The application for leave “By a statement” – The facts relied on should be stated in the affidavit (see R v. Wandsworth JJ. ex p. Read [1942] 1 KB 281). “The statement” should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.’

At page 283 of the report of the case of R v. Wandsworth Justices, Viscount Caldecote CJ said:

‘The Court has listened to argument on the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction.’ ”

I have gone through the affidavits sworn in support of the application herein. Nowhere in any of the said affidavits do the ex parte applicants allude to the denial of the opportunity to be heard. Instead the allegation appears in the Statement. Based on the above authority which authority binds me it is clear that the allegation of denial of the opportunity to be heard by the applicant as contained in the said Statement is of no evidential value. It therefore follows that the submissions made on behalf of the ex parte applicants based on the allegation of the denial of the right to be heard similarly carry little, if any,

weight. When the allegations made by the ex parte applicants are ignored, what remains, in my view, is a mere shell since the fulcrum of the ex applicants' case hinges on the said issue. However, I will proceed to deal with the other issues.

Apart from the foregoing, it is not disputed that **Ndungu Commission** was tasked with making an Inquiry into the illegal/irregular allocation of public land. At conclusion of the said inquiry the Commission was obliged to present the report to the President who would decide the next step to take thereon. In fact to date no step has been taken thereon. Clearly therefore the said report was not binding on the President. If the President decided to implement the recommendation of the said Commission it was expected that due process would be followed and any person adversely mentioned therein would not be condemned unheard. In other words the Commission did not have the final word on the matter. In *Halsbury's Laws of England* (supra) it is stated that:

“The rule generally applies, at least with full force, only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be found.”

In **Sanghani Investment Limited Vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** the Court stated:

“The notice that is under challenge in these proceedings gave the applicants 14 days to vacate the disputed land. The letter (Notice) was written based on the findings of the Ndungu Report on land whose recommendations have not acquired any statutory form. They are mere recommendations and have no force of law and it is doubtful whether the said Report can be a basis for issuance of such notice as the one under attack in this application.”

Apart from the foregoing in **Riachand Khimji & Co. vs. Attorney-General Civil Appeal No. 49 of 1972 [1972] EA 536** the East African Court of Appeal held *inter alia* that the High Court's supervisory powers over administrative and quasi-judicial tribunals are discretionary and should only be used in exceptional cases, for instance if there has been a failure of justice or want of good faith. Similarly in **Republic vs. The Commissioner for Co-Operative Development & Kariobangi Housing & Settlement Co-Operative Society Limited Ex Parte David Mwangi & 15 Others Nairobi HCMCC No. 805 of 1990** it was held that *certiorari* is a discretionary remedy which a Court may refuse to grant even when the requisite grounds for its grant exist since the Court has to weigh one thing against another whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the Court being a judicially must be exercised on the basis of evidence and sound legal principles. In **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA NO. 96 of 2000** it was held that the court exercises a discretionary jurisdiction in granting prerogative orders and can withhold the gravity of the order where among other reasons there has been delay, where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised.

In this case the impugned report has already been submitted to the President and is now in the public domain. The same report has not been implemented as yet and no one knows when, if at all, it will ever be implemented. When and if it is sought to be implemented the ex parte applicants will have an opportunity of being heard thereon since the same cannot be a basis of a conviction. The ex parte applicants will therefore have an opportunity of challenging its veracity based on the grounds that are being advanced herein. I have also considered the fact that the suit parcel of land had already changed hands at the time of the said recommendation and hence there is no immediate threat to the ex parte applicants' interests until the transfer by the 3rd ex parte applicant is reversed. In my view the grant of supervisory orders in the circumstances of this case are not the most efficacious remedies.

With respect to the prayer for publication of a correction or contradiction in the dailies under section 7 of the Defamation Act, the issue whether or not the tort of defamation has been committed cannot be

determined in these proceedings as that would call for consideration of facts. As already determined hereinabove the affidavits filed herein are bereft of the necessary facts. As was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison** (supra):

“Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the determine the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application.”

In **The Republic vs. The Rent Restriction Tribunal and Z. N. Shah & S M Shah Ex Parte M M Butt Civil Appeal No. 47 of 1980** the Court of Appeal held that if there is an equally convenient, beneficial and effective remedy available a Court will generally decline to exercise its discretion in favour of an applicant for a prerogative order. In this case there is an equally convenient, beneficial and effective remedy under the tort of defamation through which the ex parte applicants may, if successful, achieve the remedy under section 7 of the Defamation Act.

In the result the order that commends itself to me is that the judicial proceedings herein lack merits and are hereby dismissed with costs to the respondent.

Dated at Nairobi this 7th day of March 2013

G V ODUNGA

JUDGE

Delivered in the absence of parties