



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 32 of 2011

REPUBLIC.....APPLICANT

VERSUS

REGISTRAR OF TITLES.....RESPONDENT

EX-PARTE

KENYA SHELL LIMITED

JUDGEMENT

1. By a Notice of Motion dated 3<sup>rd</sup> March, 2011, the *ex parte* Applicant herein, **Kenya Shell Limited**, seeks the following orders:

a) An order of mandamus to compel the Registrar of Titles to cancel the grant registered in the registry of Titles at Nairobi as number I.R. 1995/1 in respect of all that piece of land situate in the city of Nairobi area of the republic of Kenya containing by measurements One Decimal Two Nine Seven Four (0.2974) of a hectare or thereabouts and known as Land Reference Number 209/405/8 and more particularly delineated and described on Deed Plan numbers 188820 and 188821, and described in the alleged Grant as Land Survey Plan Number 93000 together with any transactions registered against the said Grant.

b) An order of mandamus to compel the Registrar of Titles to cancel any Certificate of Title issued in respect of all that piece of land situate in the city of Nairobi area of the republic of Kenya containing by measurements One Decimal Two Nine Seven Four (0.2974) of a hectare or thereabouts and known as Land Reference Number 209/405/8 and more particularly delineated and described on Deed Plan numbers 188820 and 188821, and described in the alleged Grant as Land Survey Plan Number 93000 together with any transactions registered against any such Certificate of Title.

c) An order of prohibition to prohibit the Registrar of Titles registering any dealings or transactions against the title for L.R.No. 209/405/8 detrimental to the Applicant's rights and interests on L.R.No. 209/405/10 and L.R.No. 209/405/11, which are subdivisions of LR No. 209/405/8.

d) Costs be awarded to the Applicant.

EX PARTE APPLICANT'S CASE

2.The application is based on the Statutory Statement filed on 21<sup>st</sup> February, 2011 and a verifying affidavit sworn on the same date by **Steven Munyasya**, a retail property and projects manager of the *ex parte* Applicant and a further affidavit sworn on 2<sup>th</sup> January, 2012 by **Joseph Wambua Mulusya**, a land consultant. In a nutshell, the *ex parte* Applicant's case is that by dint of an indenture dated 24<sup>th</sup> October, 1963 between the Applicant, the Republic and the *ex parte* Applicant Kenya Shell Limited, *ex parte* the Applicant became the registered owner of two properties Land Reference Number 209/405/6 and Land Reference number 209/405/7 measuring 0.469 acres and 1.985 acres respectively. On 12<sup>th</sup> September, 1972 the *ex parte* Applicant obtained an approval to subdivide L.R. 209/405/7 giving rise to L.R. No. 209/405/8 and L.R. No. 209/405/9. In or about 1994, the *ex parte* Applicant obtained approval to subdivide L.R. No. 209/405/8 leading to L.R. No. 209/405/10 and L.R. No. 209/405/11. The *ex parte* Applicant states that sometimes in 2010, it became aware that: the Respondent had registered a grant in the registry of Titles at Nairobi as number I.R. 19995/1 more particularly delineated and described on Land Survey Plan Number 93000 in respect of L.R.No. 209/405/8 (hereinafter referred as the property) in the name of the City Council of Nairobi (hereinafter referred as the Interested Party); a lease dated 20<sup>th</sup> August, 2007 between the Interested Party and **Red Kaka Limited** was registered in respect to the property and the property was subsequently sold to Ayan Enterprises Limited and presentation No. 2010 registered on 21<sup>st</sup> July 2008. The Applicant avers that the alleged grant to the Interested Party and the subsequent dealings based thereon are purported to have been done under the **Registration of Titles Act** (RTA) while it still holds a title for the same property under the **Government Lands Act** (GLA). The Applicant applied but the Respondent refused to register a caveat against the grant issued as I.R. No 19995/1 and to cancel the grant/lease dated 20<sup>th</sup> August 2011. The Applicants avers that the said grant was registered illegally as it was registered under RTA system while the Applicant still holds a title for the same property under the GLA system. The *ex parte* Applicant avers that the Respondent acted *ultra vires* and in breach of section 14 RTA by registering the grant without obtaining proof of title and without calling for and retaining the documentary evidence of title which is in its possession. Further, the *ex parte* Applicant claim that the Respondent acted in breach of section 6 of the **Registration of Titles Act** when he received and acted on an application for registration over the property from a person(s) who is not entitled to such registration under the said section. The *ex parte* Applicant further contend that the Respondent acted against its legitimate expectation that the Respondent would not register any dealings inconsistent with the Applicant's existing property rights over that parcel of land and the Respondent would exercise all diligence prior to registering Grant number I.R. 19995/1. The *ex parte* Applicant further avers that the Respondent was unreasonable and irrational by purporting to issue a grant over the property and cause subsequent transactions under RTA system knowing that the property was registered under the GLA system and could not be converted to registration system under RTA unless on application of the proprietor (the *ex parte* Applicant) and with documentary proof of title. The Respondent acted unreasonably when he failed to exercise his powers under section 65(1) (f) RTA to register a caveat to prevent improper dealings on the property and further by failing to use his powers under section 60 to cancel the said grant and any certificate of title issued in respect of the property. The *ex parte* Applicant relied on **Council of Civil Service Unions –v- Minister for the Civil Service [1985] AC 374, Associated Provincial Picture House Ltd –v- Wednesbury Corporation[1984] 1 KB 223 at 229, Shoe –v- Poole Corporation[1926] ch 66 at 90-91 CA, Padfield –v- Minister of Agriculture Fisheries and Food [1968] AC 997, Civil Appeal Number 39 of 1997, Republic –v- The Commissioner of Co-operative Ex-parte Kirinyaga Co-operative savings & credit Society Limited, Civil Servants Union (CCU) –v- Minister for Civil service [1985] AC 374 and Judicial Review of Administrative Action, 5<sup>th</sup> Edition.**

### **RESPONDENTS' CASE**

3.In opposition to the application, **Mr. E.A. Riany**, a litigation counsel for the Attorney General filed grounds of oppositions and submissions on behalf of the Respondents on 28<sup>th</sup> October, 2011. The Respondent submitted on the authority of **Commissioner of Lands –v- Hotel Kunste Ltd CA 234 1995, Welamondi –v- The Chairman of Electro Commission of Kenya (2002) 1 KLR 487, Welamondi –v- The Chairman of Electral Commission of Kenya (2002) 1 KLR 487 and R –v- The Officer of G.K. Prison Eldoret ex parte David Kibiwott Civil Application No. 65 of 2006** that the prerogative orders sought by the *ex parte* Applicant are misplaced as the underlying dispute herein concerns ownership of

land which cannot be addressed by way of judicial review as the court would require *viva voce* evidence. The Respondent submitted that section 60(1) RTA confers it with sufficient powers to recall any title deemed to be defective or inappropriate for purposes of rectification hence its actions were within its mandate since the Applicant's title had been issued irregularly. As such, the Respondent views the application as incompetent and bad in law. It is further submitted that it is not in the public interest to grant the *ex parte* Applicant with the orders sought as the said property was acquired from the public irregularly. The Respondent contends that the public interest in this matter overrides private rights thus the application ought to be dismissed with costs to the Respondent. The Respondent also relied on **O'Relly –v- Mackman (1983) 2 AC 237, and Nyaga –v- AG Misc Application No.1732 of 2004.**

### **INTERESTED PARTY'S CASE**

4. The Interested Party filed a replying affidavit sworn on the 9<sup>th</sup> December, 2011 by **Joshua Aduma Oduor**, its Director Legal Affairs. He deposed that the matter herein is about ownership of the suit property and therefore cannot be addressed through of judicial review. He stated that the *ex parte* Applicant did not attach a copy of grant or Certificate of Title to prove ownership of the suit property. He disputes the *ex parte* Applicant's statement that the Interested Party approved any subdivision of the suit property and goes on to claim that the suit property is registered in the name of the Interested Party and so it could not have approved any sub division applied for by another party. He deposed that the affidavit by the *ex parte* Applicant's Steve Munyasya indeed confirms that no deed plan for the suit property has ever been presented to the surveys department of the Interested Party hence the Interested Party could not have approved sub division. He states that the Applicant has not proved any illegality in registration of the suit property in the name of the Interested Party. It was submitted on behalf of the Interested Party that the application is bad in law and fatally defective as the order 53 of the Civil Procedure Act requires that the decision sought to be quashed to attach to the Applicant's pleadings, something the Applicant has not done. Further, the Interested Party submits that the application is crafted with intention of avoiding the right procedure and that way the court will not have any means of ascertaining the real owner of the suit property as the issues raises the need of *viva voce* evidence. The Interested Party submits that the suit property is registered under the RTA and therefore the title cannot be cancelled unless it is proved that there was fraud or misrepresentation in registration and the 3<sup>rd</sup> party was privy to the fraud and misrepresentation therein. As such, *ultra vires* and illegality as pleaded by the Applicant are not grounds for cancellation of title under the law. The Interested Party further submits that the suit property has passed to a 3<sup>rd</sup> party purchaser in good faith for a consideration and so it cannot be deprived of it rights for a reason not known to it.

### **DETERMINATION**

5. It was submitted on behalf of the Interested Party that the current application is bad in law and fatally defective as order 53 of the Civil Procedure Rules requires that the decision sought to be quashed be attached to the Applicant's pleadings, something the Applicant has not done. Strictly speaking the provisions of Order 53 rule 7 only requires that the impugned decision be exhibited where the applicant seeks an order of certiorari. On my part, I am of the view that where the *ex parte* applicant for any reason is unable to exhibit the decision sought to be quashed, the he ought to satisfy the Court on his failure to exhibit the decision which decision is required to be verified by affidavit with the registrar. Failure to comply with this mandatory provision renders the application incompetent. In my view it is important to annex a copy of the impugned decision not only for the court to satisfy itself as to the time it was made and also to be certain that the decision actually exists.

6. Therefore on the face of the application before me in which the order of certiorari was not sought, it was not necessary that the impugned decision be exhibited. As to whether or not the orders sought could be granted without seeking an order of certiorari, is an issue which I will deal with presently.

7. 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 Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR** 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* compels 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. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”**

8.It is therefore clear that an order of *mandamus* cannot be sought in order to quash a decision. It cannot also be sought to compel the exercise of a discretion in a certain manner. Where a decision has already been made, unless that decision is quashed *mandamus* would not be an efficacious remedy. In other words in those circumstances an order of *mandamus* cannot stand alone without an order of *certiorari*. It is also my view that a party ought not to seek an order of *mandamus* in such a manner as to achieve what ought to have been sought by way of *certiorari* since the period for seeking the latter is restricted by statute. In the present case, the *ex parte* applicants seek orders compelling the respondent to cancel certain titles. Unless and until there is a finding that the issuance of the said titles was unlawful, there is no duty imposed upon the Respondent to do so. In other words, the legality of the issuance of the said titles must first be determined before an order of *mandamus* can properly be granted.

9.With respect to the prayer for prohibition, the said remedy can only prevent the making of a contemplated decision. In other words prohibition ought not to be issued in the nature of declaration but is directed at a contemplated action. Unless therefore the applicant shows that the Respondent contemplates an action in circumstances under which orders of judicial review may be granted the Court will not readily issue an order of prohibition.

10.In this case, the land parcels the subject of these proceedings have already changed titles. Whether rightly or wrongly, those titles are yet to be cancelled. The cancellation of those titles will definitely necessitate an investigation as to the manner in which they were issued.In **Municipal Council of**

**Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the Court of Appeal held:

**“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”**

11. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See **Halsbury’s Laws of England 4<sup>th</sup> Edition Vol (1)(1) Para 60.**

12. Judicial review is, therefore, concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See **R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.**

13. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See **Chief Constable of the North Wales Police vs. Evans (1982) 1 WLR 1155.**

14. In my view for the Court to find that the respondent acted unlawfully in issuing titles under the Registration of Title Act, in light of the Respondent’s contention that the *ex parte* applicant secured the titles to the suit parcels unlawfully would require to make a determination on the process that led to the issuance of the present titles. Further, it is alleged that the properties in question are now registered in the names of a party, **Aryan Enterprises**, herein who would have to be heard before adverse orders can be made against it. As was held in **Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707**, where the decision being impugned has been implemented and third parties have come onto the scene the court should not intervene because speed and promptness are the hallmarks of judicial review hence hardship to third parties should keep the court away.

15. It is now a ‘cardinal principle that save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy or the decision of the court is likely to affect 3<sup>rd</sup> parties or buyer for value without notice and without affording such parties effective remedy. In **Re Preston [1985] AC 835 at 825D Lord Scarman** was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort. That was also the position in the English case of **R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 ALL E.R. 741, at 743, Lord Goddard C. J.** said

***“It is important to remember that “mandamus” is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. ”***

16. In **Ex parte Waldron [1986] 1QB 824 at 825G-825H, Glidewell LJ** observed that the court should

always interrogate relevant factors to be considered when deciding whether the alternative remedy would resolve the question at issue fully and directly. The issue of 3<sup>rd</sup> party buyers for value without notice was considered in **Birmingham City Council –v- Qasim [2009] EWCA Civ 1080; [2010] BGLR 253.**

17. Determination of the issues raised herein necessarily requires that oral and/or documentary evidence be adduced in the absence of which, it would be an exercise in futility for this Court to attempt a resolution of the dispute between the parties herein. However, that is not the jurisdiction of a Court exercising judicial review powers under sections 8 and 9 of the ***Law Reform Act*** Cap 26 Laws of Kenya.

18. Where the determination of the dispute before the Court requires the Court to make a resolution on conflicting issues of fact that is not a suitable case for judicial review since judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the Civil Procedure Act does not apply. It is governed by sections 8 and 9 of the Law Reform Act being the substantive law and Order 53 of the Civil Procedure Rules being the procedural law. 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. In order to determine the questions in this dispute, it is my view, that it would be necessary to make certain findings in the nature of declarations yet declarations do not fall under the purview of judicial review for the same reason that the court would require *viva voce* evidence to be adduced for the determination of the case on the merits before the rights of the parties herein. 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. Here, there are serious factual issues which require to be resolved and which go beyond the Court's jurisdiction in judicial review proceedings. See **Commissioner of Lands vs. Hotel Kunste Civil Appeal No. 234 of 1995.**

19. In **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209** it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and 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. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa HCMA No. 96 of 2000.**

20. As was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354:**

**“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 determination of 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.....Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a need for *viva voce* evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not. In cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation, and disposition, there would be need to allow *viva voce evidence* and cross-examination of the witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced.....It may indeed be true that the notice**

that is impugned is irregular or unlawful and an order of *certiorari* would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles.....So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of *certiorari* because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and *viva voce evidence* at another forum preferably the Civil Courts.”

21.To grant the orders sought herein will leave the serious conflicting issues of fact raised in these proceedings unresolved hence will be a source of future conflicts since as already stated judicial review applications do not deal with the merits of the case but only with the process. In other words in judicial review applications the Court’s jurisdiction is to determine whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters.

22.The foregoing determinations suffices to dispose of this matter and in order not to prejudice the determination of any future disputes that parties may wish to bring I will not go into the other issues raised.

### **ORDER**

23.The issues in this suit, not being proper candidates for determination by judicial review proceedings, the order that commends itself to me is that the Notice of Motion dated 3<sup>rd</sup> March 2011 fails and is dismissed but with no order as to costs since the merits of the *ex parte* applicant’s case has not been determined.

**Dated at Nairobi this 8<sup>th</sup> day of April 2013**

**G V ODUNGA  
JUDGE**

*Delivered in the presence of Mr Kiragu Kimani for the ex parte applicant*