



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 224 OF 2011 (JR)

**IN THE MATTER OF AN APPLICATION BY KORIOW NUR, SIMON KIPRONO LABOSO,
MACDONALD LIJOODI MARAKA AND NOOR MOHAMED HASSAN FOR JUDICIAL
REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF THE LAND ACQUISITION ACT CAP 295 LAWS OF KENYA

AND

**IN THE MATTER OF THE KENYA GAZETTE NOTICE NO. 5608 AND 5609 DATED THE
10TH MAY 2011 AND PUBLISHED ON THE 27TH DAY OF MAY 2011**

AND

**IN THE MATTER OF THE CIVIL PROCEDURE RULES, 2010, ORDER 53 OF THE CIVIL
PROCEDURE RULES**

REPUBLICAPPLICANT

VERSUS

THE COMMISSIONER OF LANDS.....1ST RESPONDENT

THE DIRECTOR GENERAL,

KENYA URBAN ROADS AUTHORITY2ND RESPONDENT

THE PERMANENT SECRETARY,

MINISTRY OF ROADS.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

TULIP PROPERTY LTD.....5TH RESPONDENT

EX PARTE

MOHAMED KORIOU NUR

SIMON KIPRONO LABOSO

MACDONALD LIJOODI MARAKA

NOOR MOHAMED HASSAN

JUDGEMENT

1. By a Notice of Motion dated 7th October 2011 filed on 10th October 2011, the *ex parte* applicants herein, **Mohamed Koriow Nur, Simon Kiprono Laboso, Macdonald Lijoodi Maraka** and **Noor Mohamed Hassan** seek the following orders:
 1. **That an order of certiorari do issue to remove into this court and to quash forthwith the Commissioner of Lands Kenya Gazette Notices No. 5608 and 5609 dated the 10th May 2011 and published on the 27th day of May 2011 to the extent that it seeks to acquire land reference number 14277 situate along Mombasa Road-North Airport Road and effect compensation to the Tulip Properties Ltd the entity referred to in the said Notices.**
 2. **That an order of prohibition prohibiting the respondents from compensating or making payments to the 5th Respondent pursuant to the Gazette Notice No. 5608 and 5609 dated the 10th day of (sic) 2011 and published on the 27th day of May 2011.**
 3. **An order that the costs of this application be in favour of the ex parte applicants.**

EX PARTE APPLICANTS' CASE

2. The application is based on the Statement filed on 16th September 2011 and a verifying affidavit sworn by **Simon Kiprono Laboso**, one of the applicants herein on 16th September 2011 and filed with the Chamber Summons seeking leave the same day.
3. According to the deponent, the 5th Respondent instituted a suit to wit **NAIROBI HIGH COURT ELC NO. 1403 OF 2008** seeking *inter alia* a declaration that the grant issued to the applicants on the 12th August, 1998 be declared null and void and for orders of eviction and injunction against the applicants. The applicants in due course filed a defence and other pleadings and the plaintiff in the said case and now 5th the respondent has prosecuted and closed their case and the matter is now schedule for mention on the 6th October, 2011 for courts directions as to the further hearing. The said dispute, according to the deponent, revolves around the ownership of L.R NO 14277. However, despite the fact that the 1st respondent is joined to the suit as the 3rd defendant and despite the fact that he is aware of the facts and the status of the proceeding it has nevertheless gone ahead and caused to be published in the Kenya Gazette a notice of intention to acquire L.R. NO. 14272 via a Kenya Gazette Notice No. 5608 of 10th May, 2011 pursuant to which the 1st respondent has commenced inquiry proceedings which proceedings shall lead to compensation of persons and/or entities whose properties will be acquired pursuant to gazette notice no. 5608 of 10th May, 2011. According to the deponent, the effect of the notices and their subsequent execution would be to oust the High Court's jurisdiction in entertaining and determining the proprietary rights of the parties in Nairobi High Court No. 1403 of 2007. In the deponent's view, it appears that the 1st respondent has recognized and/or identified the 5th respondent as the registered owner of L.R No 14277 and yet the applicants are the registered proprietors as tenants in common and we have been paying rent/rates from 1st November 1989. By publishing the notices and commencing inquiries the commissioner of lands, according to him intend to pave way for the 2nd 3rd and 4th respondent to compensate the 5th respondents for the land acquired without the taking into consideration the interest of the ex-parte applicants. In the event that the said action is taken,

it is averred that the subsisting suit being **Nairobi High Court No. 1403 of 2007** shall be rendered nugatory as it will have been overtaken by events. It is further averred that the inquiry proceedings are at an advanced stage and the 5th respondent may receive compensation by the 13th September 2011 going forward in respect of property worth well over Kshs 1,000,000,000/= and hence the applicants stand to suffer great loss and damage without being heard. To the deponent, the 1st Respondent is acting in bad faith, arbitrarily and *ultra vires* his statutory powers by unilaterally usurping the jurisdiction of the court. Further the 1st Respondent's publication of notices and his failure to deal with all the parties is a breach of the cardinal principle and rules of natural justice and should not be allowed to stand hence these proceedings since implementation of the Kenya Gazette numbers 5608 and 5609 to the extent that it touches on LR No. 14277 will substantially defeat the applicants' proprietary rights in Nairobi High Court ELC No. 1403 of 2007 between **Tulip Properties Limited –vs- Mohammed Koriow Nur, Simon Kiprono Laboso, Macdonald Lijoodi Maraka, Noor Mohamed Hassan, The Commissioner of Lands and The Registrar of Titles** in which the ownership of LR No. 14277 is in dispute. Apart from that it is averred that there is a dispute over the ownership of L.R NO. 14277 being Nairobi High Court ELC No 1402 of 2007 **Tulip Properties Limited –vs- Mohammed Koriow Nur, Simon Kiprono Laboso, Macdonald Lijoodi Maraka, Noor Mohamed Hassan, The Commissioner of Lands and The Registrar of Titles** and therefore until the said suit is heard and determined no party can be validly be compensated pursuant to the Kenya Gazette Notices number 5608 and 5609 of 10th May, 2011. The deponent contends that despite the fact that the 1st Respondent is a party to Nairobi High Court ELC No 1403 of 2007 **Tulip Properties Limited –vs- Mohammed Koriow Nur, Simon Kiprono Laboso, Macdonald Lijoodi Maraka, Noor Mohamed Hassan, The Commissioner of Lands and The Registrar of Titles** and despite the fact that the 1st respondent is aware of the facts and the status of the case it has nevertheless proceeded to deal with the subject matter of this suit in a manner that amounts to determining the dispute thereby ousting the jurisdiction of the court .

4. It is the applicants' case that the 1st respondent is acting *ultra vires* by exercising its statutory powers in a matter pending before the High Court and in a manner that is in favour of a party to the dispute and that by receiving representations from one of the parties the 1st respondent is bias, unreasonable, capricious and is in violation of rules of natural justice. Further, the 1st respondent by causing publication in Kenya Gazette Notices No 5608 and 5609 of 10th may, 2011 is exercising its statutory authority in bad faith and in manner that is inconsistent with the due process of the law which exercise will cause the 2nd 3rd and 4th respondents to exercise their administrative and/or statutory authority in a manner that is prejudicial to the applicants and against the principles of rules of natural justice. The deponent avers that there are two titles to the suit property (L.R. No. 14277) one issued to the Tulip Properties Limited and a grant number 89556 dated the 12th august, 1998 issued by the Government to the applicants and unless and/or until the parties to the dispute agree an/or the court makes direction on the acquisition and compensation of L.R No. 14277, it will not be in the interest of justice for the respondents to deal with only one of the parties to the detriment of the other parties.

5TH RESPONDENT'S CASE

5. In opposition to the application, the 5th respondent filed an affidavit sworn by its advocate, **Virinder Nath Goswami** on 22nd November 2012.
6. According to the deponent, the Advocates for the Ex-parte applicants have been dealing with his firm in ELC 1403 of 2007 since 29th November, 2010 and are fully aware that his firm has represented the 5th Respondent since the year 2004 when it filed the suit yet the said advocates have not served the application dated the 7th October, 2011 on the 5th Respondent or on his firm. According to the deponent, the registered office of tulip Properties Limited is at L.R 1870/1/248 Mwanzi lane, Westlands and Nairobi and it has no place for business. According to the information received from the deponent's court clerk **Josephine Amara** in the court file have been filed two Affidavits of Service purportedly on the 5th Respondent yet there is no return of

service from the Ex-parte applicants regarding the service of the Notice of Motion dated 7th October, 2011.

7. The deponent avers that in ELC 1403 of 2007, pursuant to a Court Order, **Zablon Agwata Mabea** the Commissioner of Lands has filed an affidavit to show the **TWO TITLES** to suit property in the name of the Ex-parte applicants are forgeries hence the Commissioner of lands does not recognize the purported titles in the hands of the Ex-parte applicants and the application for an Order of Certiorari should not be granted. To him the said Gazette Notices No. 5608 and 5609 dated the 10th May, 2012 should not be the subject of an Order of Certiorari as the 5th Respondent is entitled to be paid compensation for the compulsory acquisition of a portion of its land by the Commissioner of Lands.

DETERMINATIONS

8. The parties herein filed written submissions in prosecution and opposition of the application herein.
9. I have considered the application, the verifying affidavit and submissions made on behalf of the applicants.
10. In my view the dispute herein revolves around the determination of who between the ex parte applicants and the respondents are entitled to be compensated as a result of the compulsory acquisition of the suit land.
11. 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 Civil Appeal No. 266 of 1996** 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. 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.”

12. However judicial review proceedings do not deal with the merits of the decision but by the decision making process. 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.”

13. 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 4th Edition Vol (1)(1) Para 60*.

14. It must be remembered that judicial review is 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**.

15. 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) I WLR 1155**.

16. In my view for the Court to find that the action of compensating the 5th respondent is unlawful would require the Court to make a determination on the ownership of the disputed land which determination necessarily requires that oral and/or documentary evidence be adduced more so the evidence of the Land Registrar. In the absence of such evidence, 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 jurisdiction under sections 8 and 9 of the **Law Reform Act** Cap 26 Laws of Kenya.

17. It follows therefore that where the determination of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. 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 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 between the applicants and the 5th respondent is entitled to be compensated. 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.**

18. 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.”

19. To grant the orders sought herein will leave the serious conflicting issues of fact raised in these proceedings unresolved. Since the issue is ownership of the suit parcel of land, it would be prudent for the applicants to urge their case before the Court dealing with the issue as that Court is better placed to resolve the conflicting issues of facts and pending the resolution of that issue the applicants may seek appropriate conservatory orders from that Court.

20. 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. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts with an intention of securing a determination on the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.

21. It follows that in light of existing suits in which the ownership of the suit land is in issue judicial review remedies being discretionary are not the most efficacious remedies in the circumstances of

this case.

ORDER

22.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 7th October 2011 fails and is dismissed with costs to the Respondents.

Dated at Nairobi this 5th day of July 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Goswami for the 5th respondent, Ms Chege for Mr Kiage for the 4th Respondent