



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 33 OF 2013

REPUBLICAPPLICANT

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITYRESPONDENT

CHINA WU YI COMPANY LIMITEDINTERESTED PARTY

EX-PARTE

FIZZ HOTELS & INVESTMENTS LTD

JUDGEMENT

The ex-parte Applicant Fizz Hotels and Investments Limited through the notice of motion application dated 5th February, 2013 prays for an order of prohibition directed to the Respondent restraining the Respondent from constructing a footbridge on Land Reference No. 209/2389/3. The Applicant also prays for costs of the application. The application is supported by three affidavits sworn by a director of the Applicant, Mr. Mohamed Shabir Kassam, annexures to the affidavits and the chamber summons application for leave.

The Respondent, Kenya National Highways Authority (KeNHA) and the Interested Party, China Wuyi Co. Ltd opposed the application.

In brief the Applicant's case is that it is the registered owner of L.R. No. 209/2389/3 on which it has put up a fuel depot. It is the Applicant's case that on 26th January, 2013 the Respondent through its contractor the Interested Party started excavation on its plot with the intention of constructing a footbridge. That is when the Applicant moved to this court to challenge the actions of the Respondent and the Interested Party. A summary of the grounds in support of the relief sought is that the Applicant had obtained permission from the City Council of Nairobi to carry out developments on its plot but the Respondent and Interested Party had trespassed into the plot without its authority.

Through the replying affidavit of Engineer Otieno Ogalo Oguta the Respondent denied trespassing into the Applicant's plot. It is the Respondent's case that the footbridge being constructed will be 4 metres from the Applicant's property.

The Interested Party through a replying affidavit sworn by Liu Hui on 15th April, 2013 informed the court that it was awarded the contract for the upgrading and rehabilitation of the Nairobi-Thika road and the

construction of the footbridge is part of the contract. It is the Interested Party's position that the construction of the footbridge is outside the Applicant's plot.

From the documents placed before the court, it is clear that the plot in question belongs to the Applicant. It abuts Muranga road which is part of the Nairobi-Thika Highway. It is admitted through paragraph 13 of Liu Hui's replying affidavit that the footbridge will obstruct the exit from the Applicant's petrol station. It is also clear from the documents availed to the court that the construction of the footbridge was approaching its completion stage at the time the Applicant came to court.

The issue therefore is whether the Applicant is entitled to the orders sought. An order of prohibition looks into the future and stops a public body from commencing or proceeding with unlawful action. It seeks to protect an applicant from being subjected to unlawful action. It cannot stop what has already happened. By the time the Applicant approached this court, what remained was the construction of the staircase. One can say that the construction was already completed. In the circumstances of this case an order of prohibition is no longer available to the Applicant.

Even if the Applicant had established that it was entitled to the orders sought, I am of the view that the application would not have succeeded. For judicial review orders to issue, one must show that a public body has acted illegally, unreasonably or unfairly. A look at the statutory statement and in particular the grounds in support of the application clearly shows that the Applicant has not laid any basis for the grant of any of the reliefs available in judicial review. The Applicant has not convinced the court that the orders sought should be issued.

That aside, it is also clear that the application is not based on a candid representation of facts. It has clearly emerged that the Respondent and Interested Party have not encroached on the Applicant's plot. The Applicant claimed that the footbridge was being constructed on its plot but from the evidence placed before the court it is clear that this is not true. In judicial review an applicant ought to place all the cards on the table. Failure to do so will result in the orders sought not being granted.

There is more to this case than meets the eye. Through paragraph 4 of the replying affidavit sworn on 18th February, 2013 Engineer Otieno Ogalo Oguta annexed a report by the City Planning Department titled: **PLANNING ISSUES IN THE FACE OF ROAD UPGRADING: A CASE OF MURANGA ROAD. EFFECTS ON ADJACENT PLOTS.** At pages 19 and 20 of the report proposals are made in respect of certain properties. In respect of the Applicant's property, it is proposed that:-

“9. Simba Petrol Station whose plot number is 209/2389/3 has also direct access to Murang'a road, it has no acceleration and deceleration lane hence should be closed. Change of use is recommended.”

The Respondent has cited this report to argue that the Applicant's access to Murang'a road ought to have been blocked and it is only due to its magnanimity that it has allowed the Applicant to continue operating the petrol station. The Respondent also indicated that the Applicant's property was not subject to acquisition and that the property could be accessed through Nyasi Lane. It is clear that although the footbridge is not constructed on the Applicant's land, it has blocked access to the plot. The Respondent should provide a solution to the Applicant's untenable situation. Although the application has not succeeded, the Respondent should find a lasting solution to the Applicant's predicament. Having said so, I find that this application has no merit and I dismiss it. Considering what I have stated in this judgement, I make no order as to costs.

Dated, signed and delivered at Nairobi this 3rd day of July, 2013

W. K. KORIR,

JUDGE