



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW NO.49 OF 2010

**IN THE MATTER OF: AN APPLICATION BY NYAMU FOUNDATION LTD FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ON THE NATURE OF AN ORDER OF PROHIBITION**

*AND*

**IN THE MATTER OF: ORDER LIII CIVIL PROCEDURE RULES, CAP 21 LAWS OF KENYA**

*AND*

**IN THE MATTER OF: THE LAW REFORM ACT CAP 26 AND ALL THE ENABLING PROVISIONS OF THE LAW**

*AND*

**IN THE MATTER OF: REGISTERED LAND ACT CAP 300**

*BETWEEN*

REPUBLIC.....APPLICANT

*-VERSUS-*

**1. THE DISTRICT**

**COMMISSIONER,**

**THIKA DISTRICT.....1<sup>ST</sup>RESPONDENT**

**2. W. G. NJENGA.....2<sup>ND</sup>RESPONDENT**

**EX-PARTE:**

**NYAMU FOUNDATION LTD**

**J U D G M E N T**

On 29<sup>th</sup> June 2010, the Exparte Applicant herein Nyamu Foundation Ltd filed a Chamber Summons application under Certificate of Urgency seeking *inter alia* leave to commence Judicial Review proceedings for orders of Prohibition and that leave if granted operates as stay restraining the Respondents and any of their servants or agents from entering upon or remaining on or trespassing into the Applicant's premises on Land Ref. No. Thika Municipality/Block 7/113.

The application was placed before my sister Hon. Justice Wendoh on 5<sup>th</sup> July 2010 who granted the two orders sought by the Applicant.

Pursuant to that grant of leave, the exparte Applicant (*hereinafter referred to as the Applicant*) filed the substantive motion for Judicial Review on 21<sup>st</sup> July 2010 seeking orders of Prohibition to prohibit the Respondents jointly or severally from entering into and or remaining or trespassing into the Applicant's premises on land Reference No. Thika Municipality/Block 7/113. Interestingly, even on the Notice of Motion filed after leave had been granted, the Applicant had an additional prayer duplicating Prayer 4 in the chamber summons application for leave praying that leave operates as stay.

This in my view appears to have been a mistake on the part of the Applicant since the Notice of Motion was filed after leave had already been granted and a similar prayer for leave to operate as stay granted by J. Wendoh on 5<sup>th</sup> July 2010.

The prayer is obviously misplaced and I will assume that it was included in the Notice of Motion by error and will proceed on the basis that only one prayer has been sought in the instant application namely Prayer 1.

The Notice of Motion was supported by the statutory statement of facts and depositions in the verifying affidavit sworn by Davis Nyamu Njoka on 28<sup>th</sup> June 2010.

It is based on 14 grounds which can be summarized into the following main grounds:

- 1) That the Respondents' decisions are unfair, discriminatory, arbitrary, irrational, unreasonable and capricious.
- 2) That the respondents' decisions are an abuse of power as they constitute illegal exercise of discretion and they violate the principal of legitimate expectation.
- 3) That the respondents conduct is unprocedural and *ultra vires* the provisions and procedures under the Registered Land Act, Cap 300 and the Constitution of Kenya.
- 4) That the respondents' decision has been made in breach of the rules of natural justice.
- 5) That the respondents' decisions are bad in law for failure to give reasons and/or sufficient reasons.

The application is opposed by the Respondents through a replying affidavit sworn by the 2<sup>nd</sup> Respondent filed on 24<sup>th</sup> September 2010.

In support of the application, the Applicant filed written submissions on 14<sup>th</sup> December 2011 which were highlighted by its Counsel Mr. Mogeni on the day that case was fixed for hearing. The Respondent did not file any written submissions but Mr. Mbitta learned State Counsel instructed by the Hon. Attorney General ably made oral submissions on the same date in support of the Respondent's case.

Before I delve into an analysis of the Applicant's case, I wish to first deal with a preliminary point on jurisdiction raised by Mr. Mbitta. It was the Respondents' case that this Court in the exercise of its Judicial Review jurisdiction has no jurisdiction to entertain the Applicant's Notice of Motion as the subject matter of the proceedings involves issues of trespass and a boundary dispute between two adjoining properties. Mr. Mbitta submitted that the claims of trespass and boundary disputes are civil

claims which ought to be adjudicated upon in the civil courts and not in Judicial Review proceedings. The basis of this submission was that Section 8 and 9 of the Law Reform Act which donates jurisdiction to this court clearly prohibits the court from exercising either civil or criminal jurisdiction. In the same breath, it was further submitted that the court cannot entertain the dispute regarding ownership of the parcel of land subject matter of the current proceedings. He also contended that the application was defective as it was allegedly filed in the name of the Applicant instead of the Republic.

In opposing that preliminary objection, Mr. Mogeni laid bare the Applicant's case which I must confess was difficult to grasp by just reading through the pleadings filed by the Applicant. This is because the Applicant on the grounds supporting the Judicial Review proceedings as stated in the Notice of Motion and statutory statement consistently referred to decisions made by the Respondent which were described as unfair, irrational, unreasonable, capricious among other descriptions without specifying what those decisions were and what they were about.

At the outset, Mr. Mogeni countered the claim that the application dated 21<sup>st</sup> July 2010 was defective as it was allegedly not filed in the name of the Republic as is the established practice by drawing the court's attention to the fact that the said application was as a matter of fact filed in the name of the Republic. I have looked at the said application and I confirm that it was indeed filed in the name of the Republic. The preliminary point raised in that regard by Mr. Mbita is not merited and is consequently laid to rest.

On the issue of jurisdiction and this is where the Applicant's case clearly emerged, Mr. Mogeni submitted that this Court has jurisdiction to entertain the Applicant's complaints since they have nothing to do with the claims of trespass, boundary dispute or ownership. Mr. Mogeni claimed that the Applicant had no problem with the Government house standing on Land Parcel No.162 but what the Applicant was contesting was the decision by the Government through the District Commissioner Thika to position armed Administration Police Officers on the access road to the applicant's parcel of land thereby denying the Applicant access to his land. It was further argued that if the Government had allocated parcel No.113 to the Applicant and had it registered in his name through the appropriate legal procedures, the 2<sup>nd</sup> Respondent cannot question that allotment of land unless the same is reversed through compulsory acquisition.

In conclusion, Mr. Mogeni invited the Court to quash the decision of the 2<sup>nd</sup> Respondent of positioning armed police officers on the Applicant's land since according to him it was illegal.

Having summarized what has been expressed to be the Applicant's case, let me now turn to the issue of jurisdiction raised by Counsel for the Respondent.

I wholly agree with Mr. Mbita's submission that jurisdiction under Section 8 and 9 of the Law Reform Act cannot be invoked to resolve civil or criminal disputes. There is a wealth of judicial decisions on this point which have held that the Judicial Review jurisdiction of the High Court is a special jurisdiction which is neither civil nor criminal but it is a jurisdiction described as *sui generis*. I will cite the Court of Appeal decision in Commissioner of Lands –Vs- Kuntse Hotel Ltd Civil Appeal No.234 of 1995, as an example of such authorities.

Looking at the pleadings filed herein, it is apparent that there is a dispute regarding ownership of Land Parcel known as Thika Municipality/Block 7/113. The Respondents are apparently claiming ownership of the said land yet it is registered in the names of the Applicant. The Respondents are questioning the Applicant's title to the said land and this may have informed the 2<sup>nd</sup> Respondent's decision to position armed guards on the access road with the aim of denying the Applicant access to his land. There is however no doubt that the Applicant is the registered owner of a leasehold interest in the land in question as evidenced by the Certificate of Lease exhibited and marked as DNNI.

Also looking at the averments in the verifying affidavit sworn by the Applicant particularly paragraphs 6, 7, 8, 10, 11 and 12, it is clear that the Applicant's complaints are grounded on claims that the Respondents have trespassed on his land thus violating his statutory rights as the registered owner of the property. This is also clearly demonstrated by the Applicant's prayer for order of Prohibition sought in

Prayer I. It cannot be denied and this was by implication admitted by Mr. Mogeni that actions based on trespass are basically civil actions which are in the ambit of private law which cannot be adjudicated upon in a court exercising Judicial Review jurisdiction. Judicial Review is purely a public law remedy.

Looking at the record, I note that the Court by consent of both parties invited surveyors to determine the boundaries between the plot owned by the Applicant and the adjoining plot on which a Government house was standing. Both the Government and the private independent surveyor filed their respective reports with their different findings.

The Applicant's plot is the one identified as Parcel No.113 while the adjoining plot on which a Government house stands is identified as Parcel No.162 on the reports and sketches submitted by the two surveyors.

Though the invitation to surveyors to determine the boundaries between the two plots does not of itself mean that this case involve a boundary dispute, it is my view that this is a relevant factor to consider when attempting to ascertain the real grievances behind the Judicial Review application.

Given my earlier finding that the complaints by the Applicant are centered on a claim of trespass to land which is a civil action and in view of the fact that the case appears to involve a challenge on Applicant's ownership of land in question, I find that the Applicant's complaints are in the province of private law and consequently this court in the exercise of its Judicial Review jurisdiction does not have jurisdiction to entertain the Applicant's Notice of Motion and the same should be struck out as prayed by the Respondent.

In the event that I am wrong in that finding, I now wish to consider the merits or otherwise of the Applicant's case.

The Applicant has sought for an Order of Prohibition to prohibit the respondents jointly or severally from entering into and or remaining thereon or trespassing into the applicant's premises on Land Ref. No. Thika/Municipality/Block 7/113. The prayer is based on claims that the Respondent has trespassed on the said parcel of land and has placed armed policemen on the access road leading to the applicant's premises thus denying him access to his land.

However, the report by the surveyors invited to determine the boundary between the two plots, that is, the one owned by the Applicant and the other Plot No.162 apparently owned by the Government read together with the sketches attached to their respective reports particularly the one submitted by the independent surveyor, shows clearly that the sentry box in which the said armed police officers are positioned is in the portion of Land shown to belong to Parcel No.162 not Parcel No.113 which is owned by the Applicant. The Gate blocking access to the Applicant's property is shown to have been installed at the start of the access road and/or road reserve. It is therefore very clear that the said armed police officers are not positioned in the Applicant's parcel of land as claimed by the applicant. There is also no claim that the Respondents have made any threats to unlawfully enter and remain in the applicant's parcel of land.

The foregoing removes in my view any basis for the Applicant's prayer that the Respondents be prohibited by an order of Prohibition from entering into or remaining or trespassing into the Applicant's aforesaid parcel of land.

Lastly, Mr. Mogeni in the course of his submissions invited the court to quash the decision of the 2<sup>nd</sup> Respondent of placing armed police officers allegedly on the Applicant's land blocking access to his parcel of land.

However, the Applicant had not sought the order of Certiorari in his Notice of Motion which is the only remedy that has the power to quash decisions of public officers or public bodies made contrary to the law where for example they are made without or in excess of jurisdiction or contrary to the rules of natural justice.

The law is that the court cannot grant orders which a party had not prayed for in its pleadings. In the circumstances, the court cannot issue orders of Certiorari in this case.

For all the foregoing reasons, I am satisfied that the applicant has not demonstrated that it is deserving of the reliefs sought in this case.

Consequently, I find no merit in the Notice of Motion dated 21<sup>st</sup> July 2010 and it is hereby dismissed. Considering the circumstances that necessitated the filing of these Judicial Review proceedings, I will make no order as to costs.

**Dated, Signed and Delivered** by me at Nairobi this 1st day of March, 2012.

**C. W. GITHUA**

**JUDGE**

***In the presence of:***

Florence – Court Clerk

Mr. Macharia holding brief for Mogeni for Applicant

N/A for Respondents