REPUBLIC .....APPLICANT

VERSUS

KENYA CIVIL AVIATION AUTHORITY .....1ST RESPONDENT

KENYA AIRPORTS AUTHORITY .....2ND RESPONDENT

EX-PARTE
TIMOTHY NDUVI MUTUNGI

JUDGEMENT

Timothy Nduvi Mutungi is the ex-parte applicant. Kenya Civil Aviation Authority and Kenya Airports Authority are the 1st and 2nd respondents respectively. The facts of this case as presented to the court by the ex-parte applicant are that he is the owner of Land Reference Number 25799/3 off Mombasa Road. Through a letter dated 2nd July, 2010 the ex-parte applicant applied for consent/approval from the 1st respondent to develop the said parcel of land. He paid a fee of Kshs. 6, 000/= and a customer service requisition form was issued to him. Thereafter the 1st respondent through a letter dated 8th July, 2010 referred the ex-parte applicant's said application to the 2nd respondent. By a letter dated 21st March, 2011 the 2nd respondent instructed the 1st respondent not to grant development approval to the applicant on the ground that the applicant's parcel of land was part of the land title of Jomo Kenyatta International Airport. Consequently on 11th April, 2011 the 1st respondent wrote to the applicant and denied him consent/approval to develop the said parcel of land.

On 2nd June, 2011 the applicant obtained leave to commence judicial review proceedings. Through the notice of motion dated 9th June, 2011 the applicant therefore seeks an order of mandamus directing the respondents to **"issue the applicant within 21 days after the issuance of this order with approval/consent to develop Land Reference Number 25799/3 and the necessary height specifications of any buildings to be constructed by the applicant on Land Reference Number 25799/3."**

Looking at the chamber summons application for leave, the statutory statement, the notice of motion, the various affidavits in support of the application and the annexures thereto it is clear that the decision by the respondents to deny the applicant consent/approval to develop his land is attacked on the ground that the applicant is the absolute owner of the land in question and there is no evidence that the same is part of Jomo Kenyatta International Airport land title as alleged by the respondents. The applicant argues that it is unreasonable to deny him approval on the ground that his parcel of land is situated within the approach funnel of a proposed parallel runway at Jomo Kenyatta International Airport because his title predates the proposed runway and other land owners bordering the applicant's parcel of land have been granted approval by the 1st respondent to develop their parcels of land. The applicant further argues that the denial to approve the development breaches his constitutional right to enjoy, use and develop the said parcel of land. The applicant finally argues that the denial is in breach of the provisions of sections 9 & 10 of the Civil Aviation Act since the 1st respondent's duty is limited to controlling the heights of building and has no mandate to deny approval. As for the 2nd respondent, the applicant argues that it has no mandate to

deny or oppose development and its purported advice to the 1st respondent is ultra vires its powers as provided by the Kenya Airports Authority Act.

The application is opposed by the respondents through the replying affidavits sworn on 12th September, 2011 by Cyril S Wayong'o on behalf of the 1st respondent and on 2nd September, 2011 by Joy Nyaga on behalf of the 2nd respondent. There are also further replying affidavits sworn on behalf of the respondents.

In my view the issues for determination are:-

1. Whether the applicant is the registered owner of L.R. No. 25799/3.

2. If the answer to (1) above is in the affirmative, whether the applicant's said title is indefeasible.

3. Whether the 1st respondent is justified in denying consent to develop the land.

4. Whether the 1st respondent's decision is ultra vires the Constitution, statutory provisions, against the rules of natural justice, discriminatory or unreasonable.

5. What is the role of the 2nd respondent in this matter?

6. Who will meet the costs of this application?

On the issue of ownership of the land in question the applicant annexed a copy of the lease to his application. He argues that the fact that he has the lease confers upon him absolute ownership of the title in question. The 2nd respondent through paragraph 4 of the further replying affidavit of Joy Nyaga the Acting Corporation Secretary/Chief Legal Officer states that the applicant's title is part of its parcel of land L.R. No. 21919. The applicant argues that his title predates that of the 2nd respondent. It is difficult for a court handling judicial review proceedings to make a final determination as to the ownership of a parcel of land. For the issue of ownership of land to be finally determined there is need to hear witnesses, peruse the original documents and have somebody from the office of the Registrar of Titles testify on the ownership of the parcel of land as per the official records. It would therefore be unwise for this court to issue orders that may end up determining the issue of ownership without hearing the evidence. It is however noted that the 2nd respondent only waited until the applicant applied for consent to develop the land in question before claiming ownership. At the end of this judgment, I will make appropriate orders on this issue.

The issue of indefeasibility of title is neither here nor there and will be addressed when the powers of the 1st respondent are considered later on in this judgment.

The 3rd and 4th issues will be tackled together. The applicant argues that the 1st respondent has a duty to provide building height specifications to any land owner whose land falls within 15 Km radius of any airport. The applicant submits that the 1st respondent has no discretion once a land owner asks for height specifications.

The respondents on their part argue that it is not automatic that height specifications will be provided upon application. The respondents argue that they can deny a land owner authority to construct if they are of the view that allowing construction may be detrimental to air safety.

The applicant's case is hinged on the provisions of sections 9 and 10 of the Kenya Civil Aviation Act Cap 394. I have looked at the said sections and I find that only Section 9 which I reproduce hereunder is relevant to this case. The said Section provides that:-

"9(1) Notwithstanding the provisions of any written law, or the terms of any deed, grant, lease or licence concerning the use and occupation of land, the Minister, may, where he considers it to be

necessary in the interests of the safety of air navigation by order published in the Gazette, prohibit the erection within a declared area of any building or structure above a height specified in the order.

(2) For the purposes of this section "declared area" means any area adjacent to or in the vicinity of an aerodrome which the Minister may by notice in the Gazette declare to be a declared area.

(3) ....."

A reading of the above section shows that the Minister will give the maximum heights of buildings in a declared area through the Kenya Gazette. In the case before me it is agreed that the applicant's land falls under a declared area as per Legal Notice No. 60 of 8th May, 1998. In relation to that area north and south of Jomo Kenyatta International Airport within a radius of 15 Km from the Aerodrome Reference Point (ARP) the Minister prohibited construction of any structure extending vertically 30 metres above existing ground level except with the approval of the Director of Civil Aviation.

Through the letter dated 11th April, 2011 the 1st respondent denied the applicant consent to develop the land in question on the ground that:-

"Analysis of the proposed development has indicated that the site is within the approach funnel of the proposed parallel runway at JKIA and the development is therefore not approved."

In reaching this conclusion, the 1st respondent had sought the comments of the 2nd respondent. The second respondent had through the letter dated 21st March, 2011 advised the 1st respondent that:-

"We wish to advise that the above parcel of land is within the approach funnel of the proposed second runway according to the Airport Master plan and forms part of JKIA land title. The proposed development is therefore not approved."

The applicant argues that the 2nd respondent had no role to play in the approval of the development and its purported advice to the 1st respondent is therefore unlawful. It must be appreciated that the 1st and 2nd respondents must coordinate their activities in order to achieve their core objective of air transport safety. In fact Section 3B (2) of the Civil Aviation Act clearly provides that:-

"The Authority shall discharge its functions without prejudice to the functions of the Kenya Airports Authority."

The Authority referred to in the said Section is the 1st respondent. The 2nd respondent may appear not to have any role in the granting of development approvals but a reading of the Kenya Airports Authority Act Cap 395 which creates the 2nd respondent clearly shows that the 2nd respondent has a say about structures, trees and any obstructions near an airport. In fact it can pull down structures in certain circumstances. A reading of Section 15(3) of the Kenya Airports Authority Act Cap 395 shows that a land owner requires the approval of the managing director of the 2nd respondent. The said subsection provides that:-

"where any person erects any building which in any way interferes with the operation of any service provided by the Authority under this Act, the Authority may, unless such person has previously obtained the approval of the managing director to the erection of such building, or has modified it to the satisfaction of the managing director, apply to the High Court for an order for demolition or modification of such building, or, as the case may require, for the payment to the Authority of the cost incurred in the resetting or replacement necessary to prevent such obstruction or danger and the court at its discretion may grant such order as it may deem it fit as to the payment of compensation and costs."

I therefore do not subscribe to the arguments by the ex-parte applicant that the 1st respondent acted illegally by consulting and even taking the advice of the 2nd respondent before denying him approval to construct on his parcel of land. Even if the 1st respondent had granted consent to the applicant, the 2nd respondent was still entitled to move to the High Court and seek orders to pull down the building if it was of the view that it may interfere with air navigation.

The unanswered question is whether the role of the 1st respondent is simply to provide height specifications. The ex-parte applicant argues that the 1st respondent has no option but to provide height specifications. The respondents however argue that the 1st respondent can refuse to approve development if it is of the opinion that the development may interfere with air navigation. According to Section 3A of the Civil Aviation Act, the objective of the 1st respondent is to **"plan, develop, manage, regulate, and operate a safe, economical and efficient civil aviation system in Kenya in accordance with the provisions of this Act."** In reading the Act one must bear the said objectives in mind. A plain reading of the Act clearly shows that the 1st respondent is under a duty to provide height specifications once an application is made. The height specifications should, however, not exceed the height specified by Minister in the Kenya Gazette. I do not think that Parliament intended to empower the respondents to completely deny land owners development of their land. The ex-parte applicant is therefore correct when he argues that the 1st respondent is under an obligation to provide him with the height his building should not exceed.

There were arguments that the land in question may belong to a third party and that the ex-parte applicant has not complied with the conditions attached to the lease by the local authority which gave him the lease. It is not for this court to determine the ownership of the land since the question placed before the court does not touch on the ownership of the land. In any case there is no evidence that the respondents are holding brief for the alleged claimant to the ex-parte applicant's land. There is also no evidence that the respondents have been instructed to act for the local authority so that they can be allowed to argue that the ex-parte applicant has breached the conditions of the lease. Their arguments about the ownership of the parcel of land in question and the validity of the lease are therefore rejected.

In my view this application should succeed but the same must be tempered with the requirements of public interest. As such the respondents are given 30 days from the date of this judgement to move to court and claim ownership of the land in question if indeed the land belongs to Kenya Airports Authority as alleged. If at the end of the said period the respondents will not have filed any case, then they will have 30 days within which to acquire the said land for their utilization using the mechanisms provided by the law. Only after the respondents fail to exercise the options above will the order of mandamus issue compelling the respondents to give the ex-parte applicant height specifications. For avoidance of any doubt the said order of mandamus shall come into force 60 days from the date of the delivery of this judgement. The respondents will pay costs of the application to the applicants.

Dated and signed at Nairobi this **8th** day of **October** , 2012

W.K. KORIR, J.