IN THE COURT OF APPEAL

AT NAKURU

(CORAM: AKIWUMI, PALL, JJ .A. & BOSIRE AG. J.A)

CIVIL APPEAL NO. 234 OF 1995

BETWEEN

THE COMMISSIONER OF LANDS ……APPELLANT

AND

KUNSTE HOTEL LIMITED ……..…….RESPONDENT

(Appeal from the orders of the High Court of Kenya at Nakuru (Mr. Justice D. M. Rimita) dated 20th September, 1995)

IN

MISC. CIVIL CASE NO. 79 OF 1995

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JUDGMENT OF THE COURT

On the motion by Kunste Hotel Limited, which was expressed to be brought under O. LIII rules 1 and 2 of the Civil Procedures Rules, and Section 8 of the law Reform Act Cap 26 Laws of Kenya, naming K & K Trading Limited, as the interested Party, the Superior Court (D. M. Rimita,J.) issued an Order of Certiorari quashing a decision by the Commissioner of Lands, dated 3rd May, 1995, allotting a plot of land known as Nakuru Municipality /Block 16, measuring 0.20 hectres to the interested party. This appeal is by the Commissioner of Lands challenging that order. A casual perusal of the grounds of appeal, prima facie, shows that the appeal has, in effect, been brought by the Commissioner of Lands on behalf of the interested party, but we are unable to appreciate why public funds and resources are being employed in the pursuit of private interests. Be that as it may, the grounds of appeal raise both points of fact and law.

The history of this matter dated back to 1976 when, upon application, one Stephen Kung'u Kagiri, presently the majority shareholders in Kunste Hotel Limited and its Managing Director, was allotted an unsurveyed plot of land known as Nakuru Municipality plot No. 451, which plot was later renumbered as Block 16/3, by the appellant. He had indicated in his application for a plot that, if allotted one he intended to put up a tourist hotel thereon. The plot which was allocated to him abutted the Nakuru – Solai road but not the Nakuru-Nairobi highway although the road was nearby. The subject plot was between his plot and that highway. After viewing the general area, Mr. Kagiri thought that it would be desirable that his intended hotel should be clearly visible from that highway. To obviate the plot between his and the highway being allotted to somebody else and fearing that whoever would be allocated the same would

develop it as to obstruct the view of the hotel from the highway, he addressed a letter to the appellant, dated 26th August, 1976, which, in pertinent part, read as follows:

> "I would like to request you……. That site "C' be left a road reserve and not for any future alienation or if that is not possible then "A", "B" and "C" be amalgamated into one plot and if it is felt very necessary the hotel boundary may leave out "B" so that, the hotel covers "A" and "C" only."

We do not have the plan which shows all the three plots clearly marked with the letters as stated in the letter, but what is clear is that Mr. Kagiri wanted his hotel to be clearly visible from both Nakuru-Solai road and Nakuru-Nairobi highway. The appellant replied to that letter by his dated 21st January, 1977, in pertinent part, as follows:

> "TOURIST HOTEL PLOT NAKURU I refer to your letter refer (sic) dated 26th August, 1976, addressed to me and copied to the Director of Surveys among other persons on the above subject and am pleased to inform you that a revised plan has been prepared and approved in accordance with your request. I am therefore making arrangement to issue you with a revised letter of allotment which be (sic) forwarded to you in due course….."

Indeed a revised letter of allotment was issued by the appellant to Mr. Kagiri which showed an enhanced acreage of the plot allotted with commensurate increased stand premium, land rent and other dues. Neither the appellant nor any of the other parties produced the revised plan of the plot to show its position in relation to its previous boundaries. What we, however, make out is that plot "C" was not consolidated with the plot, viz "A", "B" and "C" because if that were so, it would have meant, as Mr. Kagiri suggested, the hotel plot boundary would have extended to the Nakuru – Nairobi highway. We, however, now know that at present the hotel land does not abut that highway. That then leaves only one of the three alternatives which Mr. Kagiri had proposed to the appellant and which the latter accepted, namely that site "C" be left as a road reserve and "not for any future development." We say so advisedly. It should be recalled that Mr. Kagiri was desirous that the view of his intended hotel be unobstructed from Nakuru-Nairobi highway. We also observe that site "C" could not possibly have been between the hotel plot and Nakuru-Solai road. Had that been so Mr. Kagiri would not have stated in his letter to the appellant thus:

> "…. But if site "C" is built over then the plot will be hidden from the main Nairobi road thus the beauty of the hotel may not be appreciated from the main road……"

So the appellant's reply to Mr. Kagiri's letter must be looked at in light of the foregoing. He had accepted the request by Mr. Kagiri that site "C" be preserved as a road reserve. But Mrs Bomet Fraser, Counsel on record for the interested party, did not think that was so. In her view, if that was the intention of the appellant then a right over that plot in the nature of a restrictive covenant would have been created, which right is registrable. Having not been registered, she argued, then it can only mean that no such right was ever intended or created. We are unable to subscribe to that view. If the appellant did not intend to preserve site "C" as a road reserve, then it is not possible to discern which request Mr. Kagiri had made which the appellant accepted in his letter which we partly reproduced above.

Mr. Kagiri eventually built his hotel which he named Kunste Hotel Ltd. He transferred his interest in his plot, namely, Nakuru Municipality/Block 16/3, to the hotel. So presently and even as at the dated of the motion which originated the present proceedings, the hotel was the registered owner thereof. A stone wall was built along the perimeter boundary of the hotel plot. The hotel has been operating from some time now. The plot between it and the Nakuru – Nairobi highway remained unalienated until 3rd May, 1993, when by a letter of allotment of the same date, the appellant allotted the plot to the interested party. That provoked Kunste Hotel Limited to move the superior Court for an order of Certiorari, as we earlier on stated. The basis of Kunste's motion was basically that the appellant had earlier assured its predecessor in title that that plot would not be alienated, and that the appellant in allotting it to the interested party was, in effect, backtracking from that assurance; that it was neither consulted nor notified of the appellant's intention of alienating the plot prior to the allotment notwithstanding that the appellant was well aware that the allotment would adversely affect it, and also, notwithstanding that the appellant was aware that

the hotel had planted trees on the plot and had been mowing the grass on it. It was the hotel's case before the superior Court that permitting the interested party to develop the plot would adversely affect the beauty of the hotel, inhibit its visibility from the Nakuru-Nairobi highway and thereby affect the inflow of customers, and more particularly tourists, to the hotel and thus reduce not only the hotels income but also the foreign exchange earnings by the country. It was further its case that members of the public who presently use and enjoy the beauty of the plot as a road reserve will be denied the use and enjoyment thereof. We wish to observe at the outset that, in a suit strictly so called the hotel could only, properly, litigate on behalf of the general public with the written consent of the Attorney General in terms of s.61 of the Civil Procedure Act, Cap 21 Laws of Kenya. However, considering what we are going to say hereafter the issue does not arise for consideration here.

The appellant's case in the superior Court and also that of the interested party was, firstly, that the notice of motion is an action and that the Commissioner of Lands being a government servant notice under s.136(2) of the Government Lands Act and s.13A of the Government Proceedings Act, Cap 40 Laws of Kenya, should have been but was not given. Consequently, the notice being mandatory the action was incompetent. Secondly, that the plot respecting which the letters partly reproduced earlier were talking about is unascertainable from the available evidence, and that even if it was ascertainable the appellant had the right and took all the essential steps before allotting it to the interested party. Thirdly, that the subject plot had not been reserved for the development of a road or for planting trees thereon; nor was it set aside as a frontage to the hotel. Fourthly, that the subject land having been unalienated and vacant and in the absence of any registered restrictive covenant attached to it, the appellant was perfectly entitled to allot it to the interested party or any other person.

Rimita, J. after considering the rival arguments held that although there was no clear agreement between Mr. Kagiri and the appellant that the subject plot would be left as a road reserve, the conduct of the parties was such that it may be inferred that it was to be so left, that the hotel had been in occupation of the plot and had been caring for it, that although it was clear that several people and authorities were consulted before the plot was allotted to the interested party, it was clear that the hotel was improperly not consulted in that regard, that in allotting the plot the appellant was not performing a ministerial but a judicial act, and his decision was therefore subject to judicial review, that judicial review is a special procedure and, therefore, a notice under s.136(2), above, was not necessary and that the hotel had demonstrated it had sufficient interest in the allotment which, accordingly, entitled it to move the Court for the special remedy of an order of certiorari. He, therefore, proceeded to grant the order quashing the allotment of the subject plot to the interested party. That provoked this appeal.

Thirteen grounds of appeal are set out on the memorandum of appeal but we propose first, to deal with the first one, namely the legal effect, if any, of the failure to give a statutory notice under s.136(2) of the Government Lands Act, above and s.13A of the Government Proceedings Act, to these proceedings. S. 136 (1) and (2) of the former Act, provides as follows:

> "136 (1) All actions, unless brought on behalf of the Government, for anything done under this Act shall be commenced within one year after the cause of action arose and not afterwards.
>
> (2) Notice in writing of the action and the cause thereof shall be given to the defendant one month at least before the commencement of the action."

Neither the Government Lands Act, the Government Proceedings Act, nor The Civil Procedure Act, and Rules made thereunder, have a definition of the term "action". The term is defined under s.3 of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya, thus:

> "…..means any Civil proceedings in a Court and includes any suit as defined in section 2 of the Civil Procedure Act."

That definition without more does not tell us much. However, when looked at together with the provisions of s.8 of the Law Reform Act, Cap 26 Laws of Kenya, we are able to discern that an application for an Order of Certiorari or any of the prerogative orders is not an action. S.8(1), of that Act

provides as follows:

> "8(1) The High Court shall not, whether in the exercise of its Civil or Criminal exercise of its Civil or Criminal jurisdiction, issue any of the prerogative Writs of Mandamus, prohibition or Certiorari."

By virtue of the provisions of S.7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom, which is applicable in this country by reason of S.8 (2) of the Law Reform Act, prerogative writs were changed to be known as "Orders", except for the writ of habeas corpus. So S.8 (1) above denies the High Court the power to issue orders of mandamus, prohibition and certiorari while exercising Civil or Criminal jurisdiction. What that then means is that notwithstanding the wording of S.13A, above, which talks of proceedings, is exercising the power to issue or not to issue an order of certiorari the Court in neither exercising Civil nor Criminal jurisdiction. It would be exercising special jurisdiction which is outside the ambit of S. 136 (1) of the Government Lands Act, and also, S. 13 A of the Government Proceedings Act, which, had the matter under consideration been an action, would properly have been invoked to defeat the present matter. It should be noted that S. 13A, above, when read closely, its wording, clearly shows that a suit within the meaning of the term "Suit" in S. 2 of the Civil Procedure Act is envisaged. In the foregoing circumstances the cases cited to us, by Miss Kimani for the appellant, have no relevance to this matter.

Having come to the above conclusion the way is now paved for considering the remaining grounds of appeal which, in effect, attack each of the findings and holdings by the superior Court which we summarised earlier. But 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 v. Secretary of State for Education and Science ex part Avon County Council (1991) 1 ALL ER.282, at p. 285.). The Point was more succinctly made in the English case of Chief Constable of the North Wales Police v. Evans (1982) I WLR 1155, by Lord Hailsham of St. Marylebone, thus:

> "The purpose of judical review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment raches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court."

In our case, Kunste Hotel Ltd. Complains that the appellant decided to allot the subject plot to the interested party without giving it a hearing and in flagrant disregard of an earlier assurance that the plot would be a road reserve. The issue we are concerned with here, and which is the crux of the matter in this appeal, is not whether Kunste Hotel Ltd has any right to the plot, but whether its interest in the subject plot was sufficient and, in the circumstances of this case so obvious that the appellant was obliged to consult or hear it prior to his decision to allot the plot to the interested party.

There is a material on record to show that the appellant consulted various parties before he decided to allot the plot to the interested party. It was common ground before the superior Court, and even before, us that Kunste Hotel Ltd. was not one of the parties which were consulted. So the issue which immediately presents itself is whether it should have been consulted. The appellant's and the case of the interested party both in the Court below and before us is that Kunste Hotel Ltd, had no right over the subject property, the plot was vacant government land, and that it did not show that whatever assurance that may have been given was specifically in respect of that plot. But as we stated earlier the subject plot is clearly the one Mr. Kagiri had wanted, either to be allotted to him or to be left as a road reserve. It was common ground, and the evidence before us is clear on it, that between the hotel and the Nakuru-Nairobi highway there are only two plots. The first one is a petrol station and the second is the subject plot. So when Mr. Kagiri wrote his letter of 26th August, 1976, he could not have possibly intended that the petrol station plot be left as a road reserve. The subject plot having then been vacant and unalienated it is quite obvious that it was the one he meant and it was the one the appellant had in mind when he said in his letter we referred to earlier that he was "pleased" to revise the plans in accordance with your request."

The appellant was exercising his statutory powers under the Government Lands Act, when he decided to

allot the subject plot to the interested party. The exercise of that discretion clearly affected the legal rights of Kunste Hotel Ltd. The exercise of that power was therefore judicial in nature and he was therefore obliged to hear all those who were likely to be affected by his decision (see, Mirugi Karuiki v. A.G.) Civil Appeal No. 70 of 1991 (unreported). It is, therefore, our view and we so hold, that the appellant should have consulted the hotel along with the other parties before he decided to allot the plot to the interested party. He was aware of the request Mr. Kagiri had made in 1976. Consequently it does not lie in the appellant's or anybody else's mouth to argue, as counsel for the interested party sought to do, that in absence of registration the interest Kunste Hotel seeks to protect was non-existent, and it was, therefore, disentitled to a hearing before the plot was allotted to the interested party. Rimita, J. was therefore, right in the conclusions he came to, and we accordingly affirm his decision and dismiss this appeal with costs.

Dated and delivered at Nakuru this 14th day of March, 1997.

A.M. AKIWUMI

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

S. E. O. BOSIRE

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AG. JUDGE OF APPEAL