



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

ELC JR. CASE NO. 1 OF 2017

IN THE MATTER OF: THE CONSTITUTION OF KENYA – CHAPTER 4 THEREOF

IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT

IN THE MATTER OF: THE LAND ACT 2012 LAWS OF KENYA & THE PHYSICAL PLANNING ACT CAP 296

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO ISSUE TO FILE AN APPLICATION FOR JUDICIAL REVIEW IN FORM OF ORDERS OF MANDAMUS AGAINST THE COUNTY GOVERNMENT OF MOMBASA, MINISTRY OF LAND, THE PHYSICAL PLANNING DEPARTMENT & NATIONAL LAND COMMISSION

AND

IN THE MATTER OF: FAILURE BY THE COUNTY GOVERNMENT OF MOMBASA, THE PHYSICAL PLANNING DEPARTMENT AND THE NATIONAL LAND COMMISSION TO EXERCISE THEIR LEGAL MANDATE TO REMOVE THE 3RD RESPONDENT FROM THE ROAD RESERVE LEADING TO THE PETITIONER'S PLOT NO. 413/XVIII/MI

IN THE MATTER OF: PLOT NO. 556/XVIII/MI AND ROAD RESERVE THEREOF

THE REPUBLIC

-VERSUS-

THE MINISTRY OF LAND, SETTLEMENT & URBAN PLANNING COUNTY

GOVERNMENT OF MOMBASA.....1ST RESPONDENT

PHYSICAL PLANNING DEPARTMENT.....2ND RESPONDENT

AMARNATH ENTERPRISES LTD.....3RD RESPONDENT

THE NATIONAL LAND COMMISSION.....4TH RESPONDENT

AND

MOHAMED MOHAMED AL-HADI.....EXPARTE APPLICANT

JUDGEMENT

1. The exparte applicant moved this Court under his application dated 2nd March 2017 seeking the following reliefs:

1. Spent

2. Spent

3. That a mandatory injunction be issued mandating the 3rd respondent to demolish all the structures standing on Plot No. 556/XVIII/MI and blocking the service lane/road reserve leading to Plot No. 413/XVIII/MI and remove all the debris and scrap metal lying thereon.

4. That in the alternative a mandatory order be issued against the 1st, 2nd and 4th Respondent to perform their legal duties by demolishing all the structures standing on Plot No. 556/XVIII/MI and remove all the resultant debris and the scrap metal lying therein blocking the road of access to Plot No. 413/XVIII/MI.

5. That costs of this application be provided for.

2. The application is supported by the grounds listed on its face inter alia;

1. That there existed a service lane otherwise known as a road reserve leading up to the Plot No. 413/VXIII/MI.

2. That around the year 2002, without the knowledge and/or involvement and/or consultation of the owners of the neighbouring plots including the petitioner herein a Plot No. 556/XVIII/MI was created and or curved out of the service lane off Mazrui road thus blocking the access to plot No 413 & other surrounding plots.

3. That the District Surveyor wrote on 3/4/2007 to the Applicant's Advocate – A. A. Mazrui & Company confirming the obstruction to the Applicant's plot.

4. That on the 23/3/2007 the District Survey office in Mombasa wrote to the Director of Survey Nairobi requesting for the area Plan/Map to confirm whether the said Plot No. 556/XVIII/MI was obstructing Plot No. 413/XVIII/MI.

5. That on the 5/4/2007 the Director of Survey of Kenya wrote to the District Surveyor – Mombasa stating that there existed no records pertaining to the amendment of parcel No. 556/XVIII/MI and asked them to obtain the letters of allotment from the alleged owner.

6. That on 25/10/2007 the Director of Town Planning and Architecture Mombasa wrote to the Director Inspectorate confirming that he had conducted investigations which confirmed that Plot 556/XVIII/MI is a double registration, that the plot was curved out of a road reserve and that there was no clear information from the Commissioner of Lands office.

7. That the letter called for the demolition of the existing boundary wall to ensure that the plot reverts back to being a road reserve.

8. That the Applicant continued to pursue his rights and on 18/9/2015 the National Land Commission wrote a letter to the 3rd respondent notifying him to open up and vacate the road reserve within 14 days of the letter but which the 3rd respondent refused to comply.

3. The affidavit sworn by the applicant in support of the motion annexed the title for plot No MSA/BLOCK XVIII/413 showing the applicant as the registered owner. The applicant also annexed several correspondences exchanged between the 1st Respondent and the Director of Surveys over the disputed plot No 556/XVIII (annexures 2 – 6). The applicant further annexed the 1st Respondent's letter addressed to the 3rd Respondent and dated 3rd November 2015 under reference of construction of an illegal structure on a service lane. The 1st Respondent in this letter asked the 3rd Respondent to demolish the structure built on the service lane within 14 days of the letter. In default, the 1st Respondent stated that it would enter the land and execute the requirements and recover its costs from the 3rd Respondent. The applicant had earlier instituted a suit vide RMCC 627 of 2010 which was struck out to allow the applicant invoke the remedies provided under the Land Act, the Land Registration Act and the 3rd Defendants' by – laws (**annex MMA – 7**). Lastly the applicant also annexed photographs of the alleged offending structures. The applicant thus urged this Court to grant the orders sought.

4. The application is opposed. The 1st Respondent filed grounds of opposition dated 9th May 2017 stating that the applicant has not demonstrated any legal breach perpetrated by the 1st Respondent. Secondly that the applicant is a self – confessed trespasser who cannot avail himself the drastic orders sought. That the application as taken out is misconceived and frivolous and a gross abuse of the Court process. Lastly that the applicant has acted in bad faith and has misled the Court by seeking orders based on affidavits and photographs.

5. The 3rd Respondent also filed a replying affidavit dated 28th June 2017 in opposition to the application. The replying affidavit sworn by Dorawe Amarnath is very detailed. He deposed that he is a director of the 3rd Respondent who owns plot No MSA/Block XVIII/556 and not Plot No 556/XVIII/MI indicated in the application. That the 3rd Respondent got this plot for a consideration of Kshs 1.6 Million. The 3rd Respondent deposes that judicial review orders can only issue to compel the performance of a public duty imposed by statute while in this case the 3rd Respondent is a private company. The 3rd Respondent denies blocking the access road instead stating that it is the ex parte applicant who has blocked one of his two access roads by putting a large red metal gate so that he can use one end for himself.

6. The 3rd Respondent continued that all the correspondences annexed by the applicant were obtained at his behest without any input of the 3rd Respondent thus contravening the rules of natural justice. The 3rd Respondent proceeded to annex copies of proceedings in cases filed by the applicant touching on the same subject matter to wit:

i) RMCC 627 of 2010

ii) Case before NEMA

iii) HCC No 223 of 2012 between EACC & 3rd Respondent

iv) ELC 103 of 2013 between Zifra Investments and 3rd Respondent

7. That the applicant wants the Court to order the 3rd Respondent to demolish structures standing on a registered title without challenging the title itself. Further that the 3rd Respondent had obtained approvals for its structures (page 60 – 63 of the Replying affidavit). The 3rd Respondent also annexed a lease agreement dated 18th July 1997 between the Municipal Council as it then was and Shariff Ali Shekue over the suit plot. The 3rd Respondent concluded that this application is an abuse of the Court process and at best usurpation of public law litigation to advance narrow partisan interests. He urged the Court to dismiss the application with costs.

8. The exparte applicant responded to the 3rd Respondent's affidavit via the supplementary affidavit sworn on 16th November 2017. The Applicant deposed that he has included the 3rd Respondent merely as an interested party for him to have a say during this hearing. That other parties have also sued for re – opening of the road but the applicant is not a party in those proceedings. That the existence of an alternative road is no excuse to block a road. That the T. O. L the 3rd Respondent is making reference to has been revoked by letters issued by the physical planning. That in response to paragraph 10 of the Replying Affidavit. NEMA came to do its work and made its recommendations and that the applicant was never a party in CMCC 632 of 2009 to air his views. The applicant denied any powers to direct EACC to file any case and is only following laid down channels in enforcing his rights.

9. The parties then argued the application by filing written submissions and annexing the respective case law in support thereof. The applicant in his submissions dated 15th May 2018 stated that he included the 3rd Respondent to grant him a hearing and allow him implement the Court Order by himself. That the documents annexed show Plot No 556/XVIII/MI does not exist. That in the event the 3rd Respondent does not demolish the structures, the alternative in prayer 4 of the application allows the 1st, 2nd and 4th Respondents to perform their legal duties by demolishing all the structures standing on plot No 556/XVIII/MI to open the access to plot No 413/XVIII/MI. That the existence of the other cases is not a bar for the 1st, 2nd & 4th Respondents to execute their mandate.

10. The 1st, 2nd & 4th Respondents did not file any submissions but the 3rd Respondent filed his on 18th May 2018. The 3rd Respondent first summarized the facts contained in his replying affidavit. He relied on the case of **Jocinta Wanjiru Raphael vs William Nangulu – Divisional Criminal Investigation Officer & 2 others Nairobi JR No 438 of 2013** where it was held that judicial review is available only as against a public body or a person in public office. Secondly in the case of **Antony Dickson & Others vs Municipal Council of Mombasa HCMA No 96 of 2000** stated that where there is alternative remedy, the Court ought to exercise discretion by disallowing the orders sought. That all the issues raised here are active in Courts of equal jurisdiction and the current application is an attempt at usurpation of the powers of the Courts currently dealing with the matters before them. He urged the Court to dismiss the suit.

11. I have considered the issues raised in the pleadings and the submissions and frame the following questions for determination:

- (i) Whether the orders of judicial review are available to the applicant and the status of the 3rd Respondent's title.**
- (ii) Whether the applicant has alternative remedies to ventilate his claim.**
- (iii) Who bears the costs of this suit.**

12. The applicant has sued 4 Respondents. The 1st & 2nd Respondents fall under one Institution i.e. the County Government of Mombasa. The 4th Respondent is a public body created under the Constitution of Kenya and subsequently by an Act of Parliament i.e. the National Land Commission Act. The roles of the County Government and National Land Commission are set out by the respective statutes. The 3rd Respondent is described as a private entity.

13. In the grounds in support of the application the applicant pleaded that the 3rd Respondent's plot was obstructing access to his plot No 413/XVIII/MI. The applicant pleaded further that plot No 556/XVIII/MI was a phantom thus a grabbed part of the road reserve. The applicant proceeded to annex several letters to demonstrate his averment that plot no 556/XVIII/MI is part of a road reserve therefore the structures standing on it should be demolished.

14. The purpose of judicial review orders is meant to serve and/or challenge the decision – making process of a public body or person in public office where due process is not followed thus arriving at an unlawful or irregular decision. The applicant in this case did not specify to this Court the decision – making process that he was challenging. Instead it appears from his pleadings that he is challenging the authenticity/validity of the 3rd Respondent's title.

15. Under the law, the validity or otherwise of a title can only be challenged under the procedure set out under section 26 of the Land Registration Act. All the documents annexed by the applicant intended to show this Court that the 3rd Respondent's title was irregularly acquired. This Court cannot by way of judicial review proceedings make a finding that the 3rd Respondent's title was irregularly acquired and proceed to cancel it. Infact there is no prayer for cancellation of the 3rd Respondent's title. This means the structures standing on it cannot be deemed as illegal and be ordered to be demolished since such an order would contradict the provisions of section 25 of the Land Registration Act which bestows on a registered owner quite possession and occupation until the contrary is proved and a determination made.

16. In light of the provisions of the Land Registration Act on the validity of a title deed, I find that the orders of judicial review cannot issue as against the 3rd Respondent's plot No 556/XVIII/MI unless there is an order cancelling that title obtained under the procedure provided in the law.

17. Further, it is rightly submitted by the 3rd Respondent that judicial review orders can only issue against public persons and or bodies. If

the applicant wanted to have orders issued in terms of prayer 3 of the motion as against the 3rd Respondent then he ought to have filed a suit. It is fool hardy for the applicant to state that he only joined the 3rd Respondent as an interested party to enable him have a say during this hearing. Yet the 3rd Respondent sued as an interested in these proceedings have substantive prayers sought against him. The applicant is thus approbating and reprobating at the same time.

18. Finally on whether the orders in terms of prayer 4 can issue, the role of the 4th Respondent is clearly set out under article 67 of the Constitution of Kenya 2010 inter alia to manage public land and use of natural resources and make recommendations to the appropriate authorities. There is no specific provision cited by the applicant that it also deals with issues to do with road reserves/access roads within the jurisdiction of the counties. On whether the 1st & 2nd Respondents can demolish structures existing on the 3rd Respondent's "land" before the said title is cancelled, would be using a short cut to cancel the 3rd Respondent's title which is the same as perpetuating an illegality. The order as sought in prayer 4 therefore cannot issue in judicial review proceedings.

19. Does the Applicant have alternative remedy if the present suit is dismissed? My answer is yes. Let the applicant file a suit under the Civil Procedure Act and Rules and/or the relevant statutes to be able to prove his claim as against the Respondents. The orders in the circumstances of this case sought cannot be granted in the form the Court has been approached.

20. In conclusion, I do hereby dismiss the motion dated 2nd March 2017 for being misconceived and an abuse of the Court process. The costs of the suit is awarded to the 1st, 2nd and 3rd Respondents.

Dated, signed & delivered at Mombasa this 28th February 2019

A. OMOLLO

JUDGE