Republic v Principal Secretary, State Department of Housing and Urban Development & 6 others; Settlement Executive Committee (Interested Party); Menga & 11 others (Exparte Applicant) (Environment and Land Case Judicial Review Application E002 of 2021) [2024] KEELC 1137 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1137 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION E002 OF 2021

SO OKONG'O, J

FEBRUARY 29, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE PRINCIPAL SECRETARY, STATE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ..... 1ST RESPONDENT

THE PRINCIPAL SECRETARY, STATE DEPARTMENT OF LANDS AND PHYSICAL PLANNING ..... 2ND RESPONDENT

KISUMU COUNTY DIRECTOR OF SURVEY ..... 3RD RESPONDENT

KISUMU COUNTY DIRECTOR OF PLANNING ..... 4TH RESPONDENT

REGISTRAR OF LANDS, NYANDO ..... 5TH RESPONDENT

THE OFFICER COMMANDING STATIONMUHORONI POLICE STATION ..... 6TH RESPONDENT

THE ATTORNEY GENERAL ..... 7TH RESPONDENT

AND

SETTLEMENT EXECUTIVE COMMITTEE ..... INTERESTED PARTY

AND

WYCLIFFE OTIENO MENGA & 11 OTHERS ..... EXPARTE APPLICANT

JUDGMENT

1. Pursuant to the leave granted on 26th January 2021, the Ex parte Applicants, Wycliffe Otieno Menga, Lucy Atieno Juma, Joyce Akinyi Oluoch, Anna Okwaro Okello, Joyce Atieno Miruka, Risper Achieng Okoth, Dorine Nyaboye Machuki, Daniel Owino Odundo, Lucas Okwirry Ywaya, Philemon Onyango, Walter Onyango and Richard Ochieng Ongira (hereinafter referred to only as "the Applicants") brought this judicial review application by way of Notice of Motion dated 23rd February 2021, seeking the following orders;

    1. An order of Certiorari to remove to this court and quash all the decisions and/or orders made to demarcate, divide and/or allocate parcels of land in the informal settlement of Shaurimoyo in Muhoroni Sub-County within Kisumu County by the 1st to 6th Respondents by themselves or through their servants and/or gents pursuant to the Kenya Informal Settlement Improvement Project.

    2. An order of Prohibition to prevent any further demarcation, division and/or allocation of parcels of land in the informal settlement of Shaurimoyo in Muhoroni Sub-County within Kisumu County by the 1st to 6th Respondents by themselves or through their servants and/or gents pursuant to the Kenya Informal Settlement Improvement Project.

    3. An order of Mandamus directed at the 1st to 6th Respondents compelling them to conduct a proper and transparent process of demarcation, division and/or allocation of parcels of land in the informal settlement of Shaurimoyo in Muhoroni Sub-County within Kisumu County as required by the law.

    4. An order of Prohibition to prevent the 6th and 7th Respondents by themselves or through their agents from arresting, and/or physically harming, injuring and/or hurting the applicants as a result of any issues arising from demarcation, division and/or allocation of parcels of land in the informal settlement of Shaurimoyo in Muhoroni Sub-County within Kisumu County pursuant to the Kenya Informal Settlement Improvement Project.

    5. The costs of the application be provided for.

2. The Applicants' application was based on the grounds set out on the face thereof and on the supporting affidavit of Wycliffe Otieno Menga sworn on 23rd February 2021. The Applicants averred that the Ministry of Transport, infrastructure, Housing & Urban Development together with development partners such as the World Bank initiated the Kenya Informal Settlement Improvement Project (hereinafter referred to only as "KISIP"). The applicant averred that KISIP was intended to implement the National Government Slum Upgrading Program which was established in 2003 and was domiciled in the State Department of Housing and Urban Development. The Applicants averred that KISIP was being undertaken in 15 towns in Kenya which included Kisumu. The Applicants averred that KISIP in Kisumu was being undertaken in among others, Shaurimoyo Informal Settlement in Muhoroni Sub-County (hereinafter referred to only as "Shaurimoyo"). The Applicants averred that KISIP established a committee at Shaurimoyo to conduct an aerial survey and demarcation of land. The Applicants averred that the said committee illegally and/or irregularly proceeded to demarcate and/or subdivide the parcels of land that had been occupied by the Applicants for a long time thereby rendering the Applicants homeless and destitute.

3. The Applicants averred that the Respondents illegally destroyed the Applicants' property thereby causing them loss and damage. The Applicants averred that the Respondents reallocated some of the land that belonged to the Applicants to third parties and strangers. The Applicants averred that without consultation, the Respondents identified third parties and strangers for compensation for alleged loss of land and property at Shaurimoyo. The Applicants averred that they were threatened with forceful eviction from their properties and were subjected to harassment including arrests by the 7th Respondent and his agents and/or servants for opposing the said illegal activities.

4. In their supporting affidavit, the Applicants averred that Shaurimoyo was an informal settlement scheme whose residents traced their occupation of the area as far back as the 1950s. The Applicants averred that the parcels of land within the scheme had remained unregistered and that the residents were holding beacon certificates marking the boundaries of their parcels of land. The Applicants averred that the Applicants had over the years promptly paid ground rent for the parcels of land they owned within the scheme to the County Government of Kisumu. The Applicants averred that KISIP was established in 2011 and its objectives were; to improve the living conditions of the residents of the informal settlements, strengthen the security of tenure of the residents of such settlements, and invest in infrastructure in consultation with the residents of the settlements.

5. The Applicants averred that in September 2017, the 1st and 2nd Respondents through their agents and/or servants convened a meeting with the residents of Shaurimoyo to inform them of their intention to demarcate, subdivide and register the land at Shaurimoyo so that the residents could be issued with titles for their parcels of land. The Applicants averred that the process was to involve an aerial survey of the parcels of land concerned to establish their boundaries. The Applicants averred that they were assured that they would be fully involved in the entire process, particularly in the establishing of the boundaries. The Applicants averred further that they were assured that there would be no interference with the existing boundaries save in cases of legitimate need for public amenities such as roads and related services.

6. The Applicants averred that the meeting resolved to create a Settlement Executive Committee (hereinafter referred to only as "the Committee") made up of the representatives of the residents of Shaurimoyo and the local administrators. The Applicants averred that the mandate of the said Committee was to represent the interests of the residents who included the Applicants. The Applicants averred that the work of the Committee did not extend to reallocation of parcels of land to the residents. The Applicants averred that the Committee's mandate was limited to demarcating existing boundaries and creating room for public utilities. The Applicants averred that the Committee was to ensure that there was minimum interference with the existing boundaries. The Applicants averred that based on the said assurances by the Respondents and the understanding by the residents that the exercise involved merely the identification of the existing boundaries to enable registration of the parcels of land within the scheme, the Applicants submitted to the process in the hope that they will be issued with titles for their respective parcels of land.

7. The Applicants averred that the Committee exceeded its powers and proceeded to survey the parcels of land in Shaurimoyo without involving the Applicants in the process. The Applicants averred that the survey exercise resulted in mass shifting of boundaries and displacement of some of the residents. The Applicants averred that the members of the Committee also took advantage of the exercise and allocated themselves, their friends and relatives land that did not belong to them before the exercise to the great disadvantage of the Applicants and other residents of Shaurimoyo. The Applicants averred that in further usurpation of their mandate, the Committee purported to reduce the sizes of land occupied by the Applicants resulting in unlawful deprivation of land.

8. The Applicants averred that on the completion of the purported survey exercise, the Committee issued notices requiring those affected by the survey to vacate the affected parcels of land with immediate effect. The Applicants averred that the 4th Respondent issued a notice in the Kenya Gazette of completion of the development plan for the project and called for objections. The Applicants averred that the Respondents and the Committee neglected, failed or refused to issue a report on the results of the purported survey exercise to the Applicants. The Applicants averred that as a result of the purported survey exercise, some of the Applicants had lost their parcels of land completely while others had been ordered to move to less prime areas and their original parcels taken over by members of the Committee. The Applicants provided the names of the members of the Committee whom they alleged to have illegally allocated themselves land at Shaurimoyo. The Applicants averred that the residents of Shaurimoyo complained to KISIP about the said illegal activities of the Committee and a task force was formed to consider the same. The Appellant averred that the said task force became rogue and ignored the residents' complaints. The Applicants averred that the members of the task force also started to illegally allocate themselves, their friends and family members land within Shaurimoyo. The Applicants provided the names of the members of the task force who were alleged to have illegally allocated themselves land. The Applicants averred that the Respondents failed to address the concerns that were raised by the Applicants on how the survey was conducted and the illegal land allocations. The Applicants averred that the residents petitioned the County Government of Kisumu and urged it to look into the said issues.

9. The Attorney General on behalf of the 1st, 2nd, 3rd, 5th, 6th and 7th Respondents filed a response to the Applicants' application for leave to operate as a stay. I have not seen any response by the Attorney General to the Notice of Motion dated 23rd February 2021. I will take the Attorney General's said response to the Applicants' application for leave to operate as a stay as its response to the judicial review application. The Attorney General filed grounds of opposition dated 10th February 2021 and a replying affidavit sworn by Charles M. Hinga on 9th February 2021. The Attorney General averred that the application was an abuse of the process of the court and that the same had been overtaken by events since the titles for the parcels of land in dispute had been processed. In his replying affidavit, Charles M. Hinga the then Principal Secretary for the State Department for Housing and Urban Development stated that one of the mandates of his Department was to facilitate access to adequate housing and related infrastructure across the country. He stated that in the execution of that mandate the Department was running various projects one of which was KISIP. He stated that KISIP was being undertaken through funding from World Bank and the Government of Kenya. He stated that the aim of KISIP was to improve the living conditions in the informal settlements through regularisation of land tenure to ensure tenure security to bona fide beneficiaries, and infrastructure upgrading. He stated that KISIP operated through a three tier structure headed by the Project Coordinating Team at the National level. He stated that below it was the Project Implementation Team at the County level and the Settlement Executive Committee (the Committee). He stated that the Committee comprised of individuals elected by the community members to represent their interests in the project.

10. He stated that the Shaurimoyo community agreed to support the project whose main activity in Shaurimoyo was land tenure regularisation. He stated that they conducted social economic survey, environmental and social impact assessment of the project and prepared a base map. He stated that they also prepared a resettlement action plan in which the project affected persons were identified together with their respective entitlements. He stated that the preparation of Shaurimoyo Local Physical Development Plan was carried out in full compliance with the law and in a participatory manner. He stated that the said Development Plan was approved. He stated that after the completion of the Development Plan, all the grievances that had arisen were addressed and resolved by the Committee

and the community task force that was set up for that purpose. He stated that all KISIP activities were being carried out on public land and the Shaurimoyo project was not an exception.

11. The Principal Secretary stated that there was no illegality or irregularity in the manner in which the tenure regularisation exercise was undertaken at Shaurimoyo. He stated that all the persons who were affected by the project were identified and facilitated to move their structures to the plots that were assigned to them. He stated that no single member of Shaurimoyo community was displaced from the settlement. He stated that a list of beneficiaries showing their plot allocations was generated and validated by the community before it was forwarded to the relevant department for title processing. He denied that the Applicants' parcels of land were reallocated to third parties or strangers. He stated that all the grievances that arose during the planning process were resolved as already stated. He stated that facilitation was only being given to those who were affected by the project and to no one else. He stated that the planning and survey was completed in June 2018. He stated that the plans had been approved, the Registry Index Map amended and the processing of titles was underway. He stated that the Applicants' application was actuated by malice and the same had been overtaken by events. He stated that the Applicants were among those who were affected by the project and to whom facilitation was given to enable them to move to the plots that were assigned to them. He stated that the application was brought in bad faith and was intended to deny the other residents of Shaurimoyo the benefit of security of tenure for their plots.

12. The Applicants filed a further affidavit on 18th February 2021 sworn by Wycliffe Otieno Menga in which they responded to the issues raised in the Attorney General's replying affidavit aforesaid. The Applicants contended among others that the tenure regularisation exercise at Shaurimoyo was marred with fraud and lack of transparency. The Applicants averred that the titles that were being processed following that exercise were illegitimate, null and void.

13. The Interested Party was joined to the suit on 24th November 2021 and was granted leave to file a replying affidavit in response to the Applicant's application within 14 days of the joinder. I have not seen on record any replying affidavit by the Interested Party.

14. On 3rd July 2023, the court directed that the Applicants' application dated 23rd February 2021 be heard by way of written submissions and gave timelines within which the parties were to file their respective submissions. The Applicants filed submissions dated 28th July 2023. The Respondents and the Interested Party did not file submissions.

Analysis and determination

15. I have considered the Applicants' application together with the affidavit filed in support thereof. I have also considered the statutory statement and the affidavit that was filed in support of the application for leave. Finally, I have considered the grounds of opposition and replying affidavit filed by the Attorney General and the submissions by the Applicants. The issue arising for determination in the application before me is whether the Applicant has made a case for the grant of the orders of judicial review sought. In summary, the Applicants are seeking to set aside all the decisions that were made by the 1st, 2nd, 3rd and 4th Respondents during the implementation of KISIP at Shaurimoyo in Muhoroni Su-County, Kisumu County so that the project can be undertaken afresh. As explained in the affidavit of Charles M. Hinga, the then Principal Secretary for the State Department for Housing and Urban Development, the main activity carried out under KISIP at Shaurimoyo involved land tenure regularisation which entailed surveying and demarcating the land, preparing a part development plan and then processing titles for the residents. The Applicants have contended that the project though well intended was marred with several irregularities committed by the people who were responsible for its implementation. The Applicants have accused the Committee that was put in place

to protect the interest of the residents of Shaurimoyo in the project of fraud, corruption, nepotism, lack of consultation and acting in excess of its mandate. The Applicants have also contended that a task force that was put in place to investigate and resolve the grievances that they had against the said Committee also turned rogue and chose to indulge in the same illicit activities that the Committee was involved in. The Applicants have contended that they risk being disposed of their parcels of land.

16. The Respondents through the Attorney General have denied the Appellants' claims. They have contended that the project was successfully executed in accordance with the law. They have denied all the accusations directed by the Applicants against the Committee and the task force. The Respondents have contended that the Applicants were involved at every stage of the project and that all the complaints that were raised at the planning stage were heard and determined.

17. In Municipal Council of Mombasa v Republic & another [2002] eKLR the Court of Appeal stated as follows concerning judicial review:

> "...And as the Court has repeatedly said, judicial review is concerned with the decision-making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decision; acting as an appeal court over the decision would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review..."

18. In OJSC Power Machines Limited, Trans Century Limited, and Civicon Limited (Consortium) v Public Procurement Administrative Review Board Kenya & 2 others NRB CA 28 of 2016, [2017] eKLR, the Court of Appeal stated as follows:

> "The law on the jurisdiction of the High Court to entertain judicial review proceedings are encapsulated in several decisions, some of which were cited before us while the learned Judge applied others in his judgment. The law, from these decisions is to the following effect; That the purpose of judicial review is to ensure that a party receives fair treatment in the hands of public bodies; that it is the purpose of judicial review to ensure that the public body, after according fair treatment to a party, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court in a judicial review proceeding. Put another way, judicial review is concerned with the decision making process, not with the merits of the decision itself. In that regard, the court will concern itself with such issues as to whether the public body in making the decision being challenged had the jurisdiction, whether the persons affected by the decision were heard before the decision was made and whether in making the decision, the public body took into account irrelevant matters or did not take into account relevant matters".

19. In the book, H. W. Wade and C. F. Forsyth, Administrative Law, 10th Edition, the authors have stated as follows at page 509 on the remedies of Certiorari and Prohibition:

> " The quashing order and prohibiting order are complementing remedies, based upon common law principles .... A quashing order issues to quash a decision which is ultra-vires. A prohibiting order issues to forbid some act or decision which will be ultra-vires. A quashing order looks to the past, a prohibiting order to the future."

20. In Kenya National Examination Council v Republic, Ex-parte Geoffrey Gathenji Njoroge & 9 others[1997]eKLR, the court stated as follows on the scope and efficacy of remedies of Prohibition and Certiorari:

> " .... prohibition is an order from the High Court directed to an inferior tribunal or body which prohibits that tribunal or body to continue proceedings in excess of its jurisdiction or in contravention of the laws of the land....Only an order of Certiorari can quash a decision already made and an order of Certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons."

21. In Halsbury's Laws of England, 4th Edition Volume 1 at page 111 paragraphs 89 and 90, the authors have explained the nature and mandate of an order of mandamus as follows:

> " The order of mandamus is of most extensive remedial nature and is in the form a command issuing from the High Court of justice, directed to any person, cooperation or inferior tribunal requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy defect of justice (and accordingly it will issue, to the end that justice may be done, in all cases where there is specific legal right and there is no specific legal remedy for enforcing that right) and it may issue in cases where although there is an alternative remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute which imposes a duty leaves discretion as to the mode of performing the duty in the hand of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

22. In the book; Public Law in East Africa published by Law Africa, the author Ssekaana Musa has stated as follows at page 250:

> " Judicial review is a discretionary jurisdiction. The prerogative remedies, the declaration and the injunction are all discretionary remedies with exception of habeas corpus which issues ex debito justitiae on proper grounds being shown. A court may in its discretion refuse to grant a remedy, even if the applicant can demonstrate that a public authority has acted unlawfully."

23. In Republic v Cabinet Secretary, Ministry of Interior & Co-ordination of National Government & 2 others Ex-Parte Kisimani Holdings Ltd. [2015] eKLR, the court stated as follows:

> " 26. As was held in Sanghani Investment Limited v Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354:

"Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application...Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not. In cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation, and disposition, there would be need to allow viva voce evidence and cross-examination of the witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced...It may indeed be true that the notice that is impugned is irregular or unlawful and an order of certiorari would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles.....So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of certiorari because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and viva voce evidence at another forum preferably the Civil Courts."

27. To grant the orders sought herein will leave the serious conflicting issues of fact raised in these proceedings unresolved hence will be a source of future conflicts since as already stated judicial review applications do not deal with the merits of the case but only with the process. In other words, in judicial review applications the Court's jurisdiction is to determine whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts with an intention of securing a determination on the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits."

24. In Republic v National Land Commission Ex-Parte Ephrahim Muriuki Wilson & others [2018] eKLR) the court stated as follows:

> In this regard, it is important to mention that what emerges is that there is a land dispute, and this Court cannot allow itself to be used to resolve a land dispute disguised as a Judicial Review application. Behind the curtain of these Judicial Review proceedings is the real dispute, namely, ownership, use and or occupation of land. These questions call for the need for this Court to exercise caution, care and circumspection. First, there is the question of jurisdiction discussed earlier. Second, there is a real danger of this Court rendering a decision that will have the implication of determining ownership of the disputed land. I decline the invitation to venture into this forbidden territory."

25. I am at a loss as to why this suit was brought by way of an application for judicial review. The 1st, 2nd, 3rd and 4th Respondents were implementing KISIP at Shaurimoyo. The project had several components and actors. Decisions were made at various stages of the project by various actors. The Applicants have not pointed out a specific decision that was made by the Respondents or any of them that can be said to have been ultra vires their powers or was arbitrary or unreasonable in the circumstances. The evidence before the court shows that the Applicants were engaged before the commencement of the project and that they approved the same. It is also common ground that the Applicants were involved in the project implementation decision-making through their representatives. If their representatives did not protect their interests, I cannot see how that becomes a judicial review issue. The Applicants have also not convinced me that there were specific guidelines or statutory provisions on how KISIP was to be implemented and that the 1st, 2nd, 3rd and 4th Respondents acted outside those guidelines or provisions of the law. In my view, the Applicants' dispute with the Respondents was over ownership of land. The Applicants are aggrieved that the persons they consider as outsiders or third parties have been allocated land at Shaurimoyo at their expense and that some of them have even been moved from the prime parcels of land they have occupied for several years to create room for these outsiders and third parties who are said to be members of the Committee and the task force, their friends and relatives. The Applicants have blamed fraud and corruption for their tribulations. These issues cannot be determined in a judicial review application. The court cannot determine on contested affidavit evidence whether strangers or third parties who are not even parties to this suit benefited from the Shaurimoyo land. The court cannot also determine issues such as fraud and corruption on affidavit evidence. I am of the view that the Applicants should have brought their claim as a normal civil suit.

Conclusion

26. For the foregoing reasons, it is my finding that the Applicants have not established a case for the grant of the orders of judicial review sought in the Notice of Motion application dated 23rd February 2021. The application lacks merit. The same is dismissed with each party bearing its costs.

Delivered and Dated at Kisumu on this 29th day of February 2024

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Dr. Paul Ogendi for the Applicants

**Mr. Tanui h/b for Ms. Essendi for the Respondents

N/A for the Interested Party

Ms. J. Omondi-Court Assistant

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