**Republic v Kenya National Highway Authority; Shayona Timber Limited (Exparte) (Judicial Review E005 of 2023) [2024] KEELC 1324 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1324 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**JUDICIAL REVIEW E005 OF 2023**

**FM NJOROGE, J**

**MARCH 14, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**KENYA NATIONAL HIGHWAY AUTHORITY ..... RESPONDENT**

**AND**

**SHAYONA TIMBER LIMITED ..... EXPARTE**

## JUDGMENT

1. By a notice of a judicial review notice of motion application dated 26th June 2023, the ex parte Applicant sought orders that:

    i. An order of *mandamus* do issue compelling the respondent herein to issue approval for construction of an access to plot no LR No 9950/8- Nakuru East Municipality;

    ii. The costs of this application be provided for.

2. The grounds for the application is in the supporting affidavit sworn by the Applicant on 26th June 2023. The Applicant averred that it is the registered owner of the land known as LR No 9950/8- Nakuru East Municipality situate along the Nakuru-Eldoret road (hereinafter "the suit land") on which it constructed a commercial development; that the road concerned is under the control of the respondent; that on 14/12/21 the applicant vide an online application applied for approval for construction of an access to the construction works at the suit land; that subsequently the road asset and corridor management committee approved the said application and the applicant was informed that it would be informed when to collect the approval; that the applicant was later informed that the deputy director general had refused to sign the access road approval on the basis of an alleged ownership dispute regarding the suit land; that the ownership dispute had however been resolved in ELC Case

No 149 of 2012 On 1/10/2019 whereby the applicant was declared the rightful owner of the suit land; that the respondent lodged an appeal against that decision vide Civil Appeal No 156 of 2020; that however there was no application for stay made by the respondent and hence it lacks sufficient basis for denying approval for an access road; that the applicant has no other way of accessing its land which is situate along the highway; that no viable explanation has been issued by the respondent for its refusal and that it had violated the rules of natural justice with regard to the applicant. The applicant avers they are suffering economic loss for lack of access.

**The Response**

3. On 27/9/2023, the respondent filed a notice of preliminary objection and a replying affidavit on 2/10/2023 stating that motion breached section 57(ii) of the *Kenya Roads Act* 2007 and section 16 of the *Public Roads and Roads of Access Act* cap 399, and that the court lacks jurisdiction to hear and determine this matter by virtue of section 9(2) of the *Fair Administrative Action Act* No 4 of 2015.

4. In the replying affidavit it was also averred that no proper claim has been placed before the court; that the access sought by the applicant can not be constructed under the provisions of Section 56(i) of the *Act* where in the opinion of the respondent the same prevents or obstructs the proper operation of the road or where the owners or occupiers of the land or their predecessors have received an agreed compensation in consideration of such works not being constructed or maintained. The respondent further states that the respondent compulsorily acquired the suit land in 2009 from the former owner /occupier of the suit land one Richard Ingram Crawford as part of the road expansion and as such no accommodation in the form of an access road was necessary owing to such acquisition and compensation made to the said Richard Ingram, and the *ex parte* applicant's request is barred by the provisions of Section 56(1) (i)(b) of the *Kenya Roads Act*. Further the ownership of the land is the subject of the appeal afore mentioned and the appeal is still pending, and even the provisions of Section 57 of the *Kenya Roads Act* can not compel the approval of the application since ownership of the land is in dispute yet that section, according to the deponent only allows an owner of the premises adjacent to land on which a road is constructed to seek the respondent's permission to construct inter alia an access road. The deponent further states that Section 10(3) of the *Public Roads and Roads of Access Act* permits the respondent to refuse to approve an application for consent to construction of access roads on reasonable grounds including where in the respondent's opinion the proposed access would constitute a danger to traffic or that there is a reasonable alternative means of access. The same section allows the respondent to suggest access to the public road be given in a different manner or at some different point or defer the approval to a future date under Section 10(3) and therefore no duty to the applicant has crystallized. It is also stated that the applicant failed to follow the proper application procedure in that it never attached the appropriate documents in accordance with the Respondent's Guidelines for Roadside Development Control/Wayleave Online Applications to enable the respondent consider the application. it states that no title deed has been supplied in proof of the claim of ownership by the applicant yet the respondent is mandated to ascertain ownership under Section 57; respondent stated that it has demonstrated reasonable and legal justifications in its letter dated 22/5/2023 to the applicant. It is denied that the applicant has demonstrated a violation of rules of natural justice, and that the applicant has failed to follow the procedure that requires that a dispute such as the present be submitted first before the Cabinet Secretary for determination. The deponent avers that there is apprehension that the approval obtained by the applicant while the civil appeal is still pending would further build legitimacy to the applicant's alleged ownership of the suit land.

**Submissions**

5. It was ordered that the judicial review motion be canvassed by way of written submissions which the ex parte applicant filed on 11/8/2023. I have perused the court record and I have not found any submissions filed on behalf of the respondent.

**Analysis and Determination**

6. The issues that arise in the application and the response are as follows:

    a. Should an order of *mandamus* issue compelling the respondent to issue an approval for construction of an access to the suit property?

    b. Who ought to meet the costs of these proceedings?

7. The application before court is brought under the *Law Reform Act*. It is the grounds in the statement of facts that are relied on by the court in such a judicial review application. In the instant case the grounds in the statement of facts dated 13/6/2023, in so far as they are relevant to the motion at hand are that the respondent has violated the applicant's right to natural justice. This is not expressly so stated in the statement of facts but must be extrapolated from the contents of the only plausible paragraph that is paragraph 19. That paragraph reads as follows:

> "That the respondent has not given any viable explanation warranting the denial of the approval and the same is unreasonable and tainted with ill will and malice."

8. First it is admitted by the applicant that an explanation has been given to it by the respondent. Secondly, it is contended that the explanation given is unreasonable and tainted with ill will and malice.

9. Is there evidence of unreasonableness on the part of the respondent's conduct?

10. The letter by the respondent dated 22/5/2023 reads as follows:

    Ref: KeNHA/06.C/RSD4/Vol.15/21

    Mr. Dodhia Motichand

    Managing Director

    Shayona Timber Limited

    Box 876-200100

    Nakuru.

    Re: Dispatch and Collection of Access Approval for Improvement of Existing Access to a Proposed Shayona Commercial Development at Mwariki Area In Nakuru on Parcel No. 9950/8 Along Nakuru-eldoret (A8) Road

    Reference is made to your letter Ref. No. STL/Access-Road/Mwariki-1 dated 16th May 2023 on the above subject matter.

    Please note that Kenya National Highways Authority (KeNHA) has never issued an approval for construction of access to Plot LR No. 9950/8 East of Nakuru Municipality.

    The Kenya National Highways Authority (KeNHA) is currently in dispute with Shayona Timber Limited on the ownership of the above referenced parcel of land and the case is in the Court of Appeal (Appeal to Nakuru HC Civil Suit No. 149 of 2012).

Therefore, until the Court of Appeal renders its verdict on the ownership of the above parcel of land, the Authority shall not consider any application for construction of access road to the above parcel of land.

Eng. Stanley Mwawasi

For: Director General

Cc: Corridor Director (Corridor Management –B)"

11. It is common ground that there is a pending appeal. The contents of the letter are therefore linked to real proceedings over an ownership dispute which are pending between the applicant and the respondent in the Court of Appeal. The applicant's assertion is that the respondent can not peg its refusal on the said litigation as there is no stay granted by any court. The respondent on the other hand avers in its replying affidavit that as the matter is still pending, it is apprehensive that any approval would only purport to cement the applicant's claim to ownership of the suit land.

12. All that is relevant is that the respondent admits that its stance in the matter is that since the appeal is pending, the application has not been and will not be considered on its merits.

13. It is clear from a reading of the provisions of Section 10(3) of the *Public Roads and Roads of Access Act* that, besides confirmation of ownership under the Respondent's Guidelines for Roadside Development Control/Wayleave Online Applications, there are other technical considerations involved in assessing the merits of the application for approval of an access road. The respondent has relied on those provisions to state, inter alia, that it is mandated under statute to consider and reject an application for such consent as the applicant seeks on the basis that, for example, in the respondent's opinion the proposed access would constitute a danger to traffic or that there is a reasonable alternative means of access.

14. There is therefore no need in this case to search for any evidence of unreasonableness of a decision made by the respondent based on substantive merits because it is now obvious no merit assessment of the applicant's application has been undertaken. Besides, the letter in question gave the applicant reasons as to why the respondent could not consider its application. no process of approval had therefore commenced.

15. Judicial review is only concerned about the process by which a decision of a public authority has been arrived at and not the merits. In the case of *Republic v Ministry of Roads & another Ex-Parte Vipingo Ridge Limited & another* [2015] eKLR it was held as follows:

> " 29. It is trite law that judicial review does not deal with the merits of the decision but the decision-making process. In Judicial Review by Peter Kaluma, cited by the counsel or the 2nd Respondent at p.47, the learned author, sets out a statement of the Supreme Court Practice on the nature and scope of judicial review as follows:
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> > "The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. 'It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or individual judges for that of the authority constituted by law

> to decide the matters in question' (*Chief Constable of North Wales Police v. Evans* (1982) 1WLR 1155), page 1160; [1982] 3 ALL ER 141, page 143, per Hailsham, LC). Thus a decision of an inferior court or public authority maybe quashed (by an order of certiorari made on an application for judicial review) where the court or authority acted without jurisdiction, or exceeded its jurisdiction, or failed to comply with the rules of natural justice in a case where those rules are applicable, or where there is an error of law on the face of the record, or the decision is unreasonable in the Wednesbury's sense. The Court will not, however, on a judicial review application act as a 'Court of Appeal' from the body concerned; nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body's jurisdiction, or the decision is Wednesbury unreasonable. The function of the Court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law, the court would, under the guise of preventing the abuse of power be guilty of usurping power.""

16. From a reading of the respondent's letter of 22/5/2023, the only conclusion this court arrives at is that the respondent is yet to conduct a merits assessment of the applicant's application save from the perspective of the very basic and preliminary issue of ownership dispute pending in court. Its decision has only been deferred on the basis of the ownership dispute raging in court. Despite the applicant's assertion that the Road Asset and Corridor Management Committee sat over and approved its application, no evidence has been presented of such sitting in the verifying affidavit attached to the application for leave. In those circumstances, there is therefore no process whatsoever that has been undertaken, which can be subjected to this court's scrutiny for reasonability or violation of the rules of natural justice or otherwise.

17. For the reason that there is an admission by both sides that the application for approval of access has not been considered and there is thus no process to be subjected to scrutiny for its probity, I must not delve further into any other matters, legal or factual, raised by the parties. I must proceed to examine the structuring of the prayers in the substantive judicial review notice of motion. *Mandamus* can only issue where there is a duty imposed on a public officer or a body to do something. The law does not impose on the respondent a legal duty to approve the application but only to consider it and issue its decision on the merits in accordance with the law. However, the applicant seeks that an order of *mandamus* do issue to compel the respondent herein to issue approval for construction of an access to plot no LR No 9950/8- Nakuru East Municipality. I have already stated that without evidence that the application has been considered on its merits and rejected on unreasonable grounds, the instant application is lacking in merit.

18. Perchance it is assumed that the letter of 22/5/2023 is a denial and not deferment of issuance of approval, its contents must be taken into consideration by court in determining if it was unreasonable or it breached the applicant's rights to natural justice. First, after the lodging of the application, verification of ownership is only a threshold issue preparatory to the actual process of assessment on merits. Ownership of the land is still in dispute in the court of appeal. I find that it was reasonable and in accordance with the rules of natural justice for the respondent first, to write the said letter to the applicant instead of leaving the applicant in the dark, and secondly, to give the reason why the applicant's application would not be considered. The reasonableness or otherwise of the respondent's

perception that there is a pending appeal and that its approval for the access road, perchance it is granted, may further enhance legitimacy regarding the applicant's alleged claim to ownership of the suit land, is not relevant at the moment as that was not a merit decision on the application.

19. Since I find there was no process embarked on or completed, I also need not consider the respondent's objection stating that the application is fatally defective for the reason that the dispute should have been first submitted before the Cabinet Secretary for determination.

20. Lastly, the reality of litigation pending in the Court of Appeal and the apprehension expressed by the respondent are sufficient to make me believe that there is no ill will or malice on the part of the respondent.

21. In the upshot the application dated 26/6/2023 lacks merit and it is hereby dismissed. However, each party shall bear its own costs of these proceedings.

**DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT ON THIS 14TH DAY OF MARCH, 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**