IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 227 OF 2011

THE COMMISSIONER OF POLICE.....1ST APPELLANT

THE COMMISSIONER OF LANDS.....2ND APPELLANT

THE HON. ATTORNEY GENERAL.....3RD APPELLANT

BETWEEN

JOSEPH MBURU GITAU.....1ST APPELLANT

FELISTA WARIARA NDUKU.....2ND RESPONDENT

ISAACK MBURU NJUGUNA.....3RD RESPONDENT

KEZIAH MBURU NJUGUNA.....4TH RESPONDENT

CECELIAH WANJIRU GICHURU.....5TH RESPONDENT

GODFREY MINHANJI AJIAMBO.....6TH RESPONDENT

FLACIA NJOKI MUIRURI.....7TH RESPONDENT

CHRISTIAN MUNJANJI AJIAMBO.....8TH RESPONDENT

MARY WAMBUI KARARI.....9TH RESPONDENT

JOSPHAT NJUGUNA MWANGI AND 626 OTHERS

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi

*(**Nyamu, J**) dated 2nd May, 2008 in H.C. Misc. Application No. 673 of 2008)*

CONSOLIDATED WITH

CIVIL APPEAL NO. 179 OF 2019

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (**Nyamu, J**) dated 2nd May, 2008 in H.C. Misc. Application No. 673 of 2008)*

JUDGMENT OF THE COURT

[**1**] On 3rd March 2020, **Civil Appeals Nos. 227 of 2011** and **179 of 2019** came before this Court for hearing. We ordered the two appeals which involved the same parties and arose from the same judgment, consolidated and heard together. In both appeals the appellants are dissatisfied with the judgment of the High Court (**Nyamu, J**) (as he then was), delivered on 2nd May, 2008 in which the learned Judge granted orders of prohibition against the appellants as follows:

> **"That judicial review order of prohibition be and is hereby issued to prevent the Commissioner of Police, the Commissioner of Lands and the Hon. The Attorney General by themselves, or their agents from evicting or interfering with the applicants' quiet possession of LR. No. 209/14582-Nairobi South C".**

[**2**] The respondents' application for orders of judicial review was precipitated by the action of the appellants who through the Officer Commanding Police Division (OCPD) Langata Division, on 24th March, 2005 led a team of police officers to the parcel of land known as L.R. No 209/14582 (*the suit property*) and put up a sign post reading:

> **"This is the property of the Government/Police.**
>
> **Trespassers shall be prosecuted"**.

[**3**] The respondents who claimed ownership of the suit property were aggrieved as they contended that the appellants had invaded their property without any right and without following the law. Consequently, the respondents obtained leave from the High Court on 17th May, 2005 to apply for orders of judicial review against the appellants, then filed a Notice of Motion dated 25th May, 2005 under Order L111 rule 1 and 2 of the former edition of the Civil Procedure Rules, and under the Law Reform Act seeking orders of certiorari, mandamus and prohibition against the appellants.

[**4**] The substantive motion was supported by a statement of facts and a verifying affidavit sworn by the 1st respondent, **Joseph Mburu Gitau (Gitau)** on behalf of all the respondents and '626 others'. The respondents' position as stated in the affidavit of Gitau and the statement of facts, was that the respondents are members of Wilson Mutumba Women Group (**the Group**), an organization registered under the Ministry of Culture and Social Services (currently Ministry of Labour and Social Protection). On 1st November, 1990 the Commissioner of Lands who is the 2nd appellant, allocated the suit property which was undeveloped to the Group. The Group paid a sum of Kshs. 2,657,550 being allotment fees, after which the Group was issued with a lease for the suit property on 18th December, 1990. In 1991, the Group was in the process of putting up 300 residential houses through assistance from a donor when the project was abandoned midstream after a disagreement arose between the Government and the donor. Members of the Group then allocated themselves the incomplete houses. That was the position when on 24th March, 2005, the OCPD Langat'a division evicted the respondents from the premises claiming that the property belonged to the Government/the police department. The houses were then allocated to some police officers. The respondents and members of the Group were threatened with arrest when they tried to resist their eviction.

[**5**] Despite being served and being given time to file written submissions, the appellants did not file any response to the motion or written submissions. On 2nd May, 2008, when the motion came up for hearing, learned state counsel **Mr. Atanda** who was appearing for the appellants, indicated that despite his efforts to contact the Commissioner of Lands, he had not received any instructions, but he would be opposing the motion. **Mr. Mutua** who was then appearing for the respondents urged the court to grant the orders sought by the respondents, as the respondents were in physical possession and were the owners of the suit property. In response, Mr. Atanda maintained that the application lacked merit as there was no evidence of any decision having been made by the appellants, and that evidence of a mere billboard having been put on the property was not sufficient. In answer to a direct question put by the learned Judge as to whether the Government was claiming ownership of the suit property, Mr. Atanda responded in the negative but maintained that the respondents had not moved the court in the proper manner.

[**6**] In his short one-page judgment, the learned Judge found that the suit property was owned by the respondents, and that although the respondents had not established that there was any decision by the appellants to take possession of the suit property, there was some physical eviction exercise carried out by the police, and therefore it was appropriate that orders of prohibition should issue.

[**7**] On 27th October, 2011 the appellants filed **Civil Appeal No. 227 of 2011** against the judgment of Nyamu, J (as he then was). The appeal was anchored on a notice of appeal filed by the appellants on 7th July, 2009. This was after Githinji, JA granted orders on 17th June, 2009 allowing the appellants to file and serve the notice of appeal out of time. The appellants having discovered that that the notice of appeal was defective, filed another notice on 24th June, 2009. By a notice of motion dated 8th June, 2011, filed on 21st June, 2011 the respondent sought to have the notice of appeal dated 24th June, 2009 filed by the appellants struck out. For reasons which do not seem to be clear from the record, the respondents' motion has never been heard.

[**8**] On 3rd November, 2017 the appellants filed another application seeking an order for extension of time. This application was heard by Koome JA and orders made on 5th April, 2019 as follows:

> ***"1. The applicants shall lodge and serve on all the respondents its Notice of Appeal within seven (14) days of the date hereof. Alternatively, the Notice of Appeal filed on 24th June, 2009 shall be deemed filed and served.***
>
> ***2. Thereafter, the applicant shall lodge the Record of Appeal within thirty (30) days from the date hereof and serve the same on all the respondents within seven (7) days of its lodgment. Alternatively, the record of appeal filed shall be deemed as filed on time.***
>
> ***3. The 1st, 3rd and 5th respondents shall have the costs of this application."***

[**9**] Consequently, the appellants lodged a notice of appeal dated 5th April 2019, and this notice was served on the respondents on 12th April 2019, and a record of appeal duly filed on 3rd May 2019. It is this subsequent appeal that is; **Civil Appeal No.179 of 2019** which is for hearing as it would seem, **Civil Appeal No. 229 of 2011** was abandoned as the notice upon which it was anchored on was defective. The Court therefore deems Civil Appeal No. 229 of 2011 as withdrawn under Rule 83 of the Court of Appeal Rules.

[**10**] We proceed to consider Civil Appeal No 179 of 2019. In the judgment subject of the appeal the learned Judge concluded as follows:

> ***"I hold that the applicants are in the circumstances only entitled to the order of prohibition since the property is still registered in their name. Claim of ownership accompanied by physical acts over land where the government has no claim, is in the view of the court abuse of the power, amenable to this court's jurisdiction and interference".***

[**11**] This is the decision that led the appellants to file the appeal that is premised on seven grounds, namely, that the learned Judge erred in law and in fact in: issuing an order of prohibition when the facts of the case did not merit such an order; granting an order to the 10 named applicants "**and 626 others**" who were not named nor were they parties to the suit and thus rendering the judgment a nullity; issuing an order of prohibition as a private law remedy and not as a public law remedy which is a misdirection rendering the judgment a nullity; granting an order of prohibition against eviction when the respondents had admitted that their eviction had already taken place and hence the order was issued in vain; failing to appreciate that the suit property belonged to the Government and not to the respondents; and not appreciating that the use of judicial review proceedings as a means of claiming ownership of the land was an irregular procedure in law.

[**12**] During the hearing of the appeal, learned counsel, **Mr. Onyiso** from the Attorney General's office appeared for the appellants, while the 1st respondent appeared in person, Mr. Ashford Muguku appeared for all respondents except the 1st and 5th respondents, and Ms. Too held brief for Mr. Kamere for the 5th

respondent.

[**13**] Mr. Onyiso submitted that the learned Judge erred in issuing an order of prohibition despite the facts of the case not meriting the issuance of that order. This was because there were competing claims regarding the suit property as the respondents were claiming ownership, while the Government was also claiming ownership and alleging fraud on the part of the respondents. These claims should have been heard by the Environment and Land Court (ELC), and not by way of Judicial Review by the High Court.

[**14**] Counsel argued that the holding of the learned Judge that the State Counsel had conceded that the Government did not have any interest in the suit property was erroneous and a misrepresentation of facts as the suit property actually belonged to the Government, who was right in evicting the respondents. Counsel maintained that the respondents fraudulently acquired the lease over the suit property as the property belongs to the Government which has constructed 595 housing units for police officers.

[**15**] Mr. Onyiso pointed out that the learned Judge of the High Court conceded that the Judicial Review division was not the best suited court to handle the dispute as the respondents were no longer in possession of the land. Counsel argued that the learned Judge erred in issuing the prohibition order to '626 persons' who were not named as parties to the suit, and this rendered the judgment a nullity. On these grounds, Mr. Onyiso urged the Court to allow the appeal.

[**16**] Mr. Gitau who appeared in person, maintained that the learned Judge was right in granting the order of prohibition. He pointed out that he swore an affidavit in which he named all the 626 persons who were members of the Group, and that his affidavit was not challenged. He urged the Court to uphold the orders of Nyamu, J (as he then was) maintaining that the appellants were not serious about the appeal and were basically wasting the Court's time.

[**17**] **Mr. Ashford Muguku** appearing for the other respondents urged the Court to uphold the judgment of the High Court in accordance with the grounds for affirmation which the respondents had filed. In response to the grounds of appeal raised by the appellants, Mr. Muguku argued, first, that the learned Judge properly exercised his discretion in granting the order of prohibition as there was abuse of the court process, and an order of injunction would not have been appropriate. Secondly, that the respondents had not been evicted from the suit property and this was well captured in their statement of facts which stated that the respondents were in physical possession of the suit property. Thirdly, the respondents' physical possession was premised on the lease dated 10th December 1990, granted to them; and that this lease which was registered, confirmed that the respondents were the legal owners of the suit property, hence their possession was legal.

[**18**] Mr. Muguku added that the record of the proceedings revealed that the appellants' counsel had informed the High Court that the Government was not laying any claim to the suit property. The prohibition order was thus the proper remedy available to the respondents as their lease over the suit property had not been revoked. Counsel pointed out that the title purported to have been issued to the Government in 2011 was irregular, as it was issued by a Registrar of Titles who had no mandate to issue the title, as the mandate as at that time rested with the National Land Commission.

[**19**] Counsel urged this Court to disregard the submissions made by the appellants in regard to the criminal proceedings as no finding has been made by any court that the lease issued to the respondents was a forgery. He pointed out that the 2nd appellant who was the custodian of documents in the lands office, and was in a better position to prove the appellants' interest over the suit property, failed to provide any evidence of Government interest or to prove that there was misrepresentation of the appellants' interest in the suit property.

[**20**] In responding to submissions that the Government constructed on the suit property 595 units of houses for members of the police force, Mr. Muguku maintained that the respondents' statement of facts showed that the units in the suit property were constructed for them by a donor. He pointed out that the appellants never adduced any evidence of any tender awarded by the Government for the construction of the 595 units on the suit property. Counsel argued that the prohibition order was properly issued as there

was harassment and abuse of power by the appellants, when they attempted to have the respondents relinquish their ownership of the suit property.

[**21**] Finally, Mr. Muguku submitted that the judgment delivered by the learned Judge was not a nullity as the prohibition order was issued in favour of all members of the Group, and that the named respondents were only officials of the Group, while the rest were listed as members of the Group, and all the names were listed in a schedule. He urged the Court to dismiss the appeal.

[**22**] Ms. Too appearing for the 5th respondent submitted that the respondents were part of a group falling under the Ministry of Gender, Culture and Social Services, and registered under the Societies Act, Cap 486 of the Laws of Kenya. She maintained that the houses in the suit property were owned by the members of the Group as they were constructed by a donor who through the Government helped them put up the houses.

[**23**] The learned Judge was dealing with a judicial review application as stated by this Court in **Kenya Revenue Authority & 2 others vs Darasa Investments Limited [2018] eKLR;**

> ***"… judicial review orders are still discretionary by nature and whenever this Court is called upon to interfere with the exercise of judicial discretion, as in this case, it ought to be guided by the principles enunciated in Coffee Board of Kenya vs. Thika Coffee Mills Limited & 2 Others [2014] eKLR. The Court ought not to interfere with the exercise of such discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice."***

[**24**] Thus the learned Judge was exercising a discretionary power, and it is trite law that an appellate Court can only interfere with the exercise of such discretion if it is satisfied that the discretion was not exercised judicially. This was reiterated by this Court in **Maina vs Mugiria (1983) KLR 79** where it was held, *inter alia*, that:

> ***"The Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."***

[**25**] With the above in mind, this Court sitting on appeal in regard to discretionary orders made by the learned Judge, must move cautiously to ensure it does not interfere with the exercise of the discretion of the learned Judge unless it is satisfied that the discretion was not exercised judicially. In order to do this, the Court can only take into account relevant matters that the learned Judge took or should have taken into account in granting the order sought.

[**26**] In the first ground of appeal, the appellants claim that the order of prohibition was not merited as the facts of the case did not support it. In **Kenya National Examination Council vs Republic Ex Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR**, this Court stated as follows in relation to the circumstances in which an order of prohibition may be granted:

> ***"… it is said prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision….***
>
> ***What does an ORDER OF PROHIBITION do and when will it issue? It is an order from***

> ***the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY'S LAW OF ENGLAND, 4th Edition, Vol.1 at pg.37 paragraph 128……The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition."***

[**27**] We reiterate the position that an order of prohibition cannot be issued against a decision that has already been made. Therefore, the question that we must address in considering whether the learned Judge properly exercised his discretion is whether the prohibition was issued against a contemplated action or decision of the appellants, or whether it was issued against a decision that had already been made or executed by the appellants.

[**28**] The respondents' motion dated 25th May, 2005, which resulted in the impugned order that was issued by the learned Judge, sought orders of certiorari, prohibition and mandamus. The orders of certiorari and mandamus were not granted and are therefore not in issue. The order of prohibition was sought in the following terms:

> **"That judicial review orders of prohibition do issue to prevent the Commissioner of Police, the Commissioner of Lands and the Honourable the Attorney General by themselves or their agents from evicting or interfering with the applicants' quiet possession of LR. No. 209/14582-Nairobi South C."**

[**29**] Thus, the application before the High Court was for an order of prohibition to prevent the appellants from evicting the respondents or interfering with the respondents' quiet possession of the suit property. In the verifying affidavit at paragraph 9, Gitau stated as follows:

> **"That on 24th March, 2005 the OCPD Lang'ata Division led a team of police officers who evicted the applicants from the premises and put up a sign post reading: 'THIS IS THE PROPERTY OF THE GOVERNMENT/POLICE. TRESPASSERS SHALL BE PROSECUTED'.**
>
> **Annexed and marked JMG 7 & 8 is a photograph of the sign post and newspaper report on the eviction."**

[**30**] Looking at the verifying affidavit and the annextures to the affidavit, it is evident that the submissions made in this appeal by the respondents' counsel that the respondents were not evicted from the suit property and that they are still in physical possession, is a clear departure from their position in the High Court which was that they had been evicted from the suit property on the 24th March, 2005.
[**31**] In his judgment, the learned Judge noted as follows:

> **"However there is no decision to take possession by the respondents. At least none has been exhibited. However, the court has seen exhibits pointing to some physical eviction or exercise of power by the police. While the court was initially tempted to refer the applicants to the private law courts, any unlawful exercise of power should be the concern of the court. Since the State counsel has stated in court that the government does not lay any claim to the property, I hold that the applicants are in the circumstances only entitled to the order of prohibition since the property is still registered in their name."**

[**32**] The above shows that the learned Judge recognized that there had been a physical eviction exercise by the police which in his view was unlawful exercise of power that called for the court's intervention.

The order that was made by the learned Judge was directed towards the unlawful exercise of power by the police. Paragraph 9 of the verifying affidavit sworn by Gitau on 25th May, 2005, shows that the respondents were evicted from the premises on 24th March, 2005. This was consistent with the extract from the Daily Nation newspaper of Friday, 25th March, 2005 that was annexed to the affidavit, and which contained an article reporting that more than 200 families were evicted on 24th March, 2005 from their flats, by a contingent of police officers led by Lang'ata police boss Joshua Omukata.

[**33**] The information laid before the learned Judge revealed that the respondents were complaining about an action that had already taken place on 24th March, 2005 when the respondents were evicted from the suit property by the police officers. The action complained of was not a contemplated future action, but an action that had already taken place and which could not be stopped through an order of prohibition.

[**34**] In addition, the grounds upon which the respondents relied on as stated in the motion were, that the appellants (who were the respondents in the motion) had:

> **"(a) …. claimed ownership of LR. No. 209/14582 without any right whatsoever.**
>
> **(b) ….. purported to acquire LR. No. 209/14582 without following the law especially the law on compulsory acquisition of land.**
>
> **(c) … breached the rules of natural justice.**
>
> **(d) LR. No. 209/14582 is private property which is sacrosanct."**

[**35**] These grounds show that the respondents were apprehensive that the appellants would interfere with their title to the suit property, and completely divest them of their right to ownership of the suit property. The grounds also support a claim regarding a dispute over land ownership and the learned Judge appears to have appreciated that fact hence his statement:

> ***"while the court was initially tempted to refer the applicant to the private law courts, any unlawful exercise of power should be the concern of the court."***

[**36**] We have perused the record of appeal, and do appreciate the frustrations of the learned Judge, who was faced with; a dispute over land ownership by the respondents; the bureaucratic inertia displayed by the appellants and the evident desire of the Judge to assert the rule of law. The respondents had exhibited a title to the suit property issued to them under the Registration of Titles Act. That Act is now repealed but was applicable at the time the learned Judge made his ruling. Section 23 of that Act stated as follows:

> **"23. (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.**
>
> **(2) A certified copy of any registered instrument, signed by the registrar and sealed with his seal of office, shall be received in evidence in the same manner as the original."**

[**37**] In accordance with the above provision, the certificate of lease exhibited by the respondents was *prima facie* evidence of ownership of the suit property. The appellants had not filed any response to the respondents' motion and therefore, the respondents' complaint stood unchallenged. Moreover, Counsel appearing for the appellants confirmed to the learned Judge that the appellants were not laying any claim to the suit property. Notwithstanding the proper procedure was not employed, it would appear, at the back of the Judge's mind, he was convinced an action of evicting the appellants in total disregard to the existence of a certificate of title which was not challenged was an affront to the rule of law. Nevertheless,

the High Court sitting as a judicial review court was not called upon to determine who the rightful owner of the suit property was, nor was the order of prohibition as sought, appropriate to address the concern of the respondents regarding their title. The police whose action the respondents complained of, had no power to issue or cancel title. That was the power which was reserved to the Registrar of Titles under the Registration of Titles Act. Moreover, as observed by the learned Judge, there was no evidence placed before the court of any decision or threatened decision concerning the title, upon which the court could have acted.

[**38**] Like the learned Judge, we discern an element of abuse of power in the action taken by the police in evicting the respondents from the suit premises, in total disregard to the title that the respondents were holding. This was compounded by the total impunity of the appellants in not even bothering to justify that action when the matter came up for hearing before the court. The appellants have since filed applications in which they challenge the respondents' title contending that it was fraudulently obtained. We wonder why that information was never placed before the learned Judge. The learned Judge could only act on what was before him. Likewise, in determining this appeal, we can only consider the evidence that was before the learned Judge when he made the impugned orders.

Clearly, the order of prohibition was not appropriate in the circumstances in which it was issued and we have no option but to set that order aside. [**39**] We must add our disappointment and concern at the manner in which this matter was handled. Both the appellants who are Government agents in the legal sector and the Attorney – General who represented them behaved in a manner that depicted little respect for the legal process. We reiterate what Koome JA stated in extending time for the appellants to file this appeal that:

> ***"…the lethargy displayed by state counsel from the office of the Attorney General is appalling to say the least. The office of the Attorney General is a Government Law Firm like any other and the AG being the titular head of the Bar should set high standards of professionalism even to be emulated by other law firms. The state counsel from the AG's office have conducted this matter most slovenly."***

[**40**] Notwithstanding the conduct of the appellants and the AG's office, it is apparent that judicial review proceedings against the appellants were not the appropriate forum for the respondents' grievances concerning the threat to its title. It is now almost a settled principle that disputed facts of allocation of public land and issuance of title to land are not matters that can be resolved in proceedings under judicial review realm of the law. This explains why at one stage the learned Judge stated in his short ruling that he contemplated referring the matter to private law. See the case of **Redclif Holdings Ltd vs Registrar of Tittles and 2 Others** [2017] e KLR where this Court expressed as follows regarding disputed facts in matters of allocation of public land to private entities;**"To us, we see many contested issues in the above averments; the respondents are alleging irregular and illegal allocation of public land reserved for a Government Ministry and failure to follow the proper procedure in allocation of public land. On the other hand, the appellant claims there was no other body or party who had been allocated the same land. Bearing in mind the issue was not double allocation but whether the land was available for allocation for private development, we find ourselves agreeing with the learned trial Judge that the contested issues could not have been determined through judicial review proceedings but before the Environment and Land Court."**

[**41**] We think that what we have stated is sufficient to dispose of this appeal. For the reasons that we have given, we allow this appeal, set aside the judgement and order of prohibition that was made by the learned Judge. Given the circumstances of this case, we do not find it appropriate to award any costs. Each party shall therefore bear their own costs.

Dated and delivered at Nairobi this 7th day of August, 2020.

M. K. KOOME

JUDGE OF APPEAL

HANNAH OKWENGU

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR