



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, G.B.M KARIUKI & J. MOHAMMED JJ.A)

CIVIL APPEAL NO. 183 OF 2011

BETWEEN

REPUBLIC.....APPELLANT

AND

COMMISSIONER OF LANDS.....1ST RESPONDENT

KENYA AGRICULTURAL RESEARCH INSTITUTE..2ND RESPONDENT

EX PARTE.....RENEGE PROJECT LTD

(Being an appeal from the ruling of the High Court of Kenya at Nairobi (Mboghli Msagha, J.) dated 9th March 2011 in JR Misc Application No. 28 of 2010)

JUDGMENT OF THE COURT INTRODUCTION

1. This is an appeal from the ruling of Mboghli Msagha, J. who dismissed the Ex parte applicant’s application seeking judicial review and made a finding that he had no jurisdiction to entertain a land ownership dispute within a judicial review application.
2. Renege Project Limited, the Ex parte applicant in the High Court (the appellant herein) by way of notice of motion dated 20th May 2010, sought orders of certiorari, mandamus and prohibition against the decision of the Commissioner of Lands (1st respondent) and Kenya Agricultural Research Institute (2nd respondent) in respect of allotment of the land identified as LR 22426(the suit property) measuring approximately 20.5 hectares.
3. The application was premised on the grounds that the 1st respondent had illegally and/or mistakenly allotted to the 2nd respondent the suit property despite the appellant being its registered owner. It was the appellant’s contention that the 1st respondent abused the power accorded to his office by allotting the appellant’s private property to the 2nd respondent. The appellant sought the intervention of the Court from the 1st respondent’s decision by way of judicial review in JR Misc Application No 28 of 2010.
4. The 1st respondent filed grounds of opposition to the application dated 24th January 2011 primarily on the ground that the appellant’s remedy lies in private law as opposed to public law.

5. The 2nd respondent filed a replying affidavit sworn by Dr. Geoffrey K. Muttai, the Managing Director of KenyVeterinary Vaccines Production Institute (KEVEVAPI), wherein he claimed ownership of the suit property. He refuted claims that the appellant had been in possession of the suit property from the date of its purchase in 1996. He averred that during the time of the purported purchase, KEVEVAPI was in possession of the suit property which status remains to date.

6. The High Court identified the genesis of the application as a dispute regarding the ownership of the suit property. The learned Judge found that it was clear from the material before him that there existed competing interests in respect of the suit property. He therefore held that the issues raised before him could only be properly ventilated and addressed in a full hearing via private law forum and not one of public law. Subsequently, he dismissed the application.

7. Aggrieved by that decision, the appellant preferred this appeal which is predicated on 9 grounds of appeal contained in his memorandum of appeal. The appellant contended that the learned Judge erred in law and fact;

a. in failing and/or neglecting to determine the dispute which was fully argued before him.

b. in holding that the only issue to be decided was that of jurisdiction notwithstanding that each party had presented the case fully and required the dispute to be determined effectually.

c. in considering that since two parties had

“competing interests in respect of the suit property”, that the situation was an impediment to the issuance of the orders sought in the Superior Court.

d. in holding that the Appellant’s acquisition of the title under the Registration of Title Act was in conflict with Section 35 of the Government Lands Act.

e. in holding that the supposed conflict averred to in paragraph 5 hereinabove coupled with the submission that “both parties had title to the suit property” made the matter a dispute regarding the ownership of the suit property.

f. in holding that the order sought could not

“be advanced by way of judicial review.”

g. in considering, of his own motion, that parties required to call evidence so as to ascertain the truth notwithstanding that neither party had made any such request.

h. in deciding that the Appellant’s remedy was in private law and not in public law.

i. in not appreciating sufficiently or at all the legal nature of the suit before him and the evidence which had been tendered by the parties.”

8. The Appellant applied for the following orders:

“(a) That the appeal be allowed.

b. That the ruling given in the High Court by the Honourable Mr. Justice Msagha Mbogholi on the 9th March 2011 in Judicial Review Misc. Application No. 28 of 2010 be quashed and/or set aside and be substituted with the order allowing the Appellant’s motion as prayed.

c. That costs of the appeal and the costs in the High Court be to the Appellant.”

9. By consent of the parties, the appeal was disposed of by way of written submissions with brief oral

highlighting. Learned counsel Mr. Gichuhi represented the appellant while the Attorney General represented the 1st respondent and Mr. Mbabu represented the 2nd respondent.

10. Counsel for the appellant submitted that judicial review has expanded in scope, in view of the enactment of the Fair Administrative Action Act, 2015 as well as Article 47(2) of the Constitution. Counsel referred to the case of **Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others [2016] eKLR** for the interpretation of these laws; that if the learned Judge had doubts as to his jurisdiction, he ought to have made the determination at the preliminary stage and not after receiving evidence and arguments from the parties; that the learned Judge erred in that his decision was not based on law but on factual assertions made by the respondents; that the learned judge failed to appreciate the real dispute and the appellant's legal title over the property leading to the perpetuation of an illegality and abuse of power by the 1st respondent's decision; that the learned judge erred in partially determining the merits of the case by acknowledging that the 1st respondent allocated title of the suit property to the 2nd respondent after the appellant's acquisition of the same.

Counsel urged us to allow the appeal.

11. Counsel for the 1st respondent opposed the appeal supporting the decision of the High Court to down its tools upon reaching the conclusion that it had no jurisdiction in the matter. The Court was referred to **Owners of the Motor Vessel „Lillian S? v Caltex Oil (Kenya) Ltd [1989] KLR 1**; that the dispute being essentially a land ownership dispute could not be adjudicated by way of judicial review since affidavit evidence was not sufficient to prove ownership of the suit property.

12. Counsel for the 2nd respondent opposed the appeal and submitted that the central issue for determination is whether the subject matter in the suit was amenable to judicial review proceedings; that the subject matter of the suit was not amenable to judicial review on the grounds that there is a dispute as to the ownership of the suit property between the appellant and the 1st Respondent; that there is a dispute regarding which party is in possession of the suit property and the legality of the title documents held by both parties; that in view of the contested nature of the facts as to ownership, possession and legality of the title to the suit property, the scope of the subject matter is beyond a Judicial Review application which is a specialized sui generis proceeding under the Law Reform Act to deal with issues of procedure and want of authority in making administrative decisions; that Judicial Review proceedings are confined to the process of decision making and the fact that a public body has made a decision does not necessarily or by itself entitle a party affected by the decision to the remedies under Judicial Review; that where an applicant brings judicial review proceedings with a view to determining contested matters of fact 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. Counsel urged us to dismiss the appeal with costs.

DETERMINATION

13. We have perused the record of appeal and given due consideration to the submissions made by the parties. This being a first appeal the Court is minded in its duty to reconsider the evidence, evaluate it itself and draw its own inferences and conclusions as expounded in **Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123 (CAZ)**.

14. It is the appellant's contention that the learned Judge should have made a determination on jurisdiction, or lack thereof, at the first instance, before the case was made for and against the application. The 1st and 2nd respondents both contend that the learned Judge was right in holding as he did that he had no jurisdiction to deal with the matter as it pertained to a dispute in relation to land.

15. It is not contested that jurisdiction is everything and where lacking, a court must down its tools. In the oft cited case of **Owners of the Motor Vessel „Lillian S? v Caltex Oil (Kenya) Ltd [1989] KLR 1** referred to by counsel for the 1st respondent it was held that:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the

earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

16. The learned Judge held *inter alia*:

“... I have read the material before and consider that the basic issue that must be determined at this stage is that of jurisdiction. I say so because, the respondents have submitted that the applicant’s cause of action lies in private law as opposed to public law.”

and proceeded to hear all the parties and did not make a finding on jurisdiction at the preliminary stage. The learned Judge erred by ruling on the matter of jurisdiction after hearing all the parties and in not making a finding on jurisdiction at the preliminary stage. Further, the learned Judge having heard evidence and arguments by both parties, should have made a determination on the dispute.

17. Counsel for the appellant highlighted the fact that judicial review has expanded in scope in light of the enactment of the Fair Administrative Action Act 2015 (the Act).

Section 5(2) of the Act provides:

“(2) Nothing in this section shall limit the power of any person to-

a. challenge any administrative action or decision in accordance with the procedure set out under the Commission on Administrative Justice under section 55 of the Commission on Administrative Justice Act;

b. apply for review of an administrative action or decision by a court of competent jurisdiction in exercise of his or her right under the Constitution or any written law; or

c. institute such legal proceedings for such remedies as may be available under any written law.

The suit before the learned Judge revolved around the issue of ownership and possession of the suit property and the legality of the title in respect of the suit property. The suit therefore disclosed substantive and rivalled facts.”

18. The suit before the learned Judge revolved around the issue of decision by the 1st respondent to allocate the applicant’s land to the 2nd respondent. The respondents introduced the issue of ownership and possession of the suit property and the legality of the title in respect of the suit property. The suit therefore disclosed substantive and rivalled facts.

19. The learned trial Judge in his ruling stated:

“I am of the strong view that parties herein must call evidence which should be subjected to cross examination to find the truth behind the dispute. Therefore, the remedy of the applicant lies in private law and not public law which it has invoked.”

20. The learned Judge erred in finding as he did in view of the fact that the mere fact that he found that the applicant’s remedy lay in private law was not sufficient for the court to down its tools and fail to consider the merits of the Judicial Review Application. At any rate, the issue whether a public officer such as the 1st respondent could allocate land that is privately owned was in public law as opposed to private law.

21. Guided by the case of **Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others (2016) eKLR** where the appellant successfully overturned a High Court decision denying him the writ of certiorari against the decision of the Minister for Heritage and Culture declaring its property a historical monument without giving it audience and reason thereto as required by law. This Court held as follows:

“Under Article 47(2) of the Constitution as read with the provisions of the Fair Administrative Action Act of 2015, the common law position that there is no duty to give reasons for administrative decision is no longer a general principle of law in Kenya. A shift has taken place and there is requirement to give reasons for administrative decisions...”

The mere fact that other causes of action are available to a party is no bar to seeking judicial remedies. Article 47 of the Constitution as read with the provisions of Section 5(2) of the Fair Administrative Action Act establishes a non-exclusive approach to challenge of administrative action.”
[Emphasis supplied].

22. The upshot of what we are saying is that we find merit in this appeal. We hereby allow it. Accordingly, we set aside the ruling and consequential orders made by the High Court on 9th March 2011 and substitute therefor an order allowing the Appellant’s Notice of Motion dated 20th May 2010 as prayed. We award the costs of the appeal and of the JR proceedings in the High Court to the appellant.

23. This judgment has been signed under Rule 32 of this Court’s Rules as the Hon. Mr Justice G.B.M. Kariuki, SC had retired before the delivery of the judgment.

Dated and delivered at Nairobi this 26th day of January, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a copy of the original.

DEPUTY REGISTRAR