IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 6 OF 2015

CONSOLIDATED WITH

CIVIL APPEAL NO. 366 OF 2014

BETWEEN

KENYA CIVIL AVIATION AUTHORITY....……..….1ST APPELLANT

KENYA AIRPORTS AUTHORITY ……..….2ND APPELLANT

VERSUS

TIMOTHY NDUVI MUTUNGI…….....……..…….. RESPONDENT

(Being an appeal from the judgment and order of the High Court of Kenya at Nairobi (Weldon Korir J.,) issued on 8th October, 2013

in

Judicial Review Case No. 105 of 2011)

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JUDGMENT OF THE COURT

[1] Two appeals were consolidated having emanated from the same judgment in High Court HC Misc. Application No. 105 of 2011 in which Timothy Nduvi Mutungi, (respondent) as the registered owner of Land Reference Number 25799/3 (suit premises) situated off Mombasa Road, sued the 1st and 2nd appellants. The genesis of the dispute started with a letter dated 2nd July, 2010 in which the respondent wrote to Kenya Civil Aviation Authority (1st appellant) seeking its consent/permission before he could commence construction on the suit premises. The 1st appellant in turn sought advice from the Kenya Airport Authority (2nd appellant) who stated that the suit premises fell within the approach funnel of the proposed second runway according to the Airport Master Plan and forms part of the JKIA land title. As a consequence and by a letter dated 11th April, 2011 the 1st appellant declined to issue the approval and reiterated the same reasons that the suit premises is within the approach funnel of the proposed parallel runway at JKIA. The respondent's appeal asking the appellants to reconsider their decisions fell to deaf ears.

[2] The respondent was of the view that refusal by the 1st and 2nd appellants to issue the requisite approval and/consent to develop the suit land was factually and legally wrong amounting to trespass of private land; it was unreasonable; unconstitutional, hence null and void; discriminatory as other adjacent land owners such as Kapa Industries and the Kenya Railways Corporation were issued with approvals to develop their parcels of land. The appellants were also faulted for lacking jurisdiction under **Section 9** and **10** of the Civil Aviation Act to deny the respondent the requisite approval and for acting against the rules of natural justice. On those grounds, the respondent filed a judicial review application on 10th June, 2011 seeking an order of mandamus compelling the 1st and 2nd appellants or their agents acting on their behalf to issue the respondent with approval/consent on the necessary height specifications of any buildings to be constructed by the respondent on the suit premises.

[3] The motion was opposed by the appellants; replying affidavits were sworn by Cyril Wayongó on 12th September, 2011 on behalf of the 1st appellant and for the 2nd appellant Joy Nyaga's replying affidavit sworn on 22nd September, 2011. Both deponents denied any wrong doing in declining to issue the approval/consent sought by the respondent and cited at length the provisions of the Kenya Airports Authority Act especially **Section 14(1) (b)** which provides that:

> **"14 (1) Any authorised employee of the authority may, for the purposes of this Act, enter upon any land -**
>
> > **b) To remove or cause to be removed any obstruction, materials, structures, or buildings including slaughterhouses which are likely to attract birds that may be hazardous to aircraft operations."**

Further under **section 15** of the Act, the 2nd respondent is specifically vested with power to move to court seeking a demolition order, where any person erects any building which in any way interferes with the operation of any services provided by the Authority under the Act,

> **"Unless such person has previously obtained the approval of the managing director to the erection of such building."**

[4] According to the appellants the 2nd appellant is vested with discretion, whether to grant or deny consent to an intended construction of any buildings, which obviously implies that a project-proponent within and around an airport is under an obligation to seek/obtain consent before commencement of construction and where such construction would interfere in any way with the operation of any services provided by the Authority, it was bound to be denied. In regard to the allegation of discrimination, the appellants contended that each application is considered on its own merits according to its own set of facts and as regards the approvals issued to Kapa Industries and Kenya Railways Corporation, they were issued as none of their buildings were near any airstrip approach funnel or was likely to interfere with the operations of the airport operation spaces.

[5] The motion fell for hearing before Korir J., who considered at some considerable length the powers given to the 1st respondent vide the Kenya Aviation Act that gives power to the Minister to give maximum heights of buildings in a declared area through a Kenya gazette. In this regard, the learned Judge found the respondent's suit premises fell under the declared area as per legal Notice No. 60 of 8th May, 1998. This is what the learned Judge concluded in a pertinent portion of the impugned ruling;-

> **"I therefore do not subscribe to the arguments by the *ex parte* applicant that the 1st respondent acted illegally by consulting and even taking the advice of the 2nd respondent before denying him approval to construct on his parcel of land. Even if the 1st respondent had granted consent to the applicant, the 2nd respondent was still entitled to move to the High Court and seek orders to pull down the building if it was of the view that it may interfere with air navigation.**

The unanswered question is whether the role of the 1st respondent is simply to provide height specifications. The ex-parte applicant argues that the 1st respondent has no option but to provide height specifications. The respondents however argue that the 1st respondent can refuse to approve development if it is of the opinion that the development may interfere with air navigation. According to Section 3A of the Civil Aviation Act, the objective of the 1st respondent is to 'plan, develop, manage, regulate, and operate a safe economical and efficient civil aviation system in Kenya in accordance with the provisions of the Act.' In reading the Act, one must bear the said objectives in mind. A plain reading of the Act clearly shows that the 1st respondent is under a duty to provide height specifications once an application is made. The height specifications should, however, not exceed the height specified by Minister in the Kenya Gazette. I do not think that Parliament intended to empower the respondents to complexly deny land owners development of their land. The ex parte applicant is therefore correct when he argues that the 1st respondent is under an obligation to provide him with the height his building should not exceed.

There were arguments that the land in question may belong to a third party and that the ex-parte applicant has not complied with the conditions attached to the lease by the local authority which gave him the lease. It is not for this court to determine the ownership of the land since the question placed before the court does not touch on the ownership of the land. In any case, there is no evidence that the respondents are holding brief for the alleged claimant to the *ex parte* applicant's land. There is also no evidence that the respondents have been instructed to act for the local authority so that they can be allowed to argue that the ex parte applicant has breached the conditions of the lease. Their arguments about the ownership of the parcel of land in question and the validity of the lease are therefore rejected.

In my view, this application should succeed but the same be tempered with the requirements of public interest. As such, the respondents are given 30 days from the date of this judgment to move to court and claim ownership of the land in question if indeed the land belongs to Kenya Airports Authority as alleged. If at the end of the said period the respondents will not have filed any case, then they will have 30 days within which to acquire the said land for their utilization using the mechanisms provided by the law. Only after the respondents fail to exercise the options above will the order of mandamus issue compelling the respondents to give the ex parte applicant height specifications. For avoidance of any doubt, the said order of mandamus shall come into force 60 days from the date of the delivery of this judgment. The respondents will pay costs of the application to the applications."

[6] The appellants were aggrieved by the said orders, and each filed an appeal which were consolidated for purposes of hearing and determination as they emanate from the same decision. The grounds of appeal raised in both appeals cut across the same issues thus, to avoid repetition we will summarize them as;-

The learned Judge erred in law and fact in;

1) Holding that the respondent was the "absolute and indefeasible" owner of the suit premises, when the 2nd respondent exhibited an alleged certificate of lease which itself was subject to a caveat and on order of restriction from the High Court.

2) Failing to distinguish the juridical distinction between absolute proprietorship and a grant from the government of Kenya for a term of years and subject to terms imposed.

In elaborating on these two grounds of appeal, counsel for the appellants emphasized in their written submissions that the learned Judge rightly concluded that it was not within his remit in a judicial review matter to determine the ownership of the suit land, he nevertheless went ahead to agree with the respondent's arguments of ownership by a side wind when he posited as follows in the judgment;-

"There were arguments that the land in question may belong to a third party and that the ex-parte applicant has not complied with the conditions attached to the lease by the local authority which gave him the lease. It is not for this court to determine the ownership of the land since the question placed before the court does not touch on the ownership of the land. In any case there is no evidence that the respondents are holding brief for the alleged claimant to the ex-parte applicant's land. There is also no evidence that the respondents have been instructed to act for the local authority so that they can be allowed to argue that the ex-parte applicant has breached the conditions of the lease. Their arguments about the ownership of the parcel of land in question and the validity of the lease are therefore rejected."

[7] Ground No 3; Condemning the 2nd appellant to costs when it was found to have committed any illegalities or breach of natural justice.

In arguing ground No 3, it was the appellants submission that the learned Judge having found as he did that the appellants did not act illegally by consulting amongst themselves and denying the respondent the approval to construct on the suit premises yet the Judge went ahead and condemned the appellants to pay costs. That is tantamount to the Judge exercising his discretion on the wrong principles against the provisions of **Section 27** of the Civil Procedure Act that provides that costs shall follow the event unless the court or Judge gives good reason. For this reason counsel for the appellant urged the order relating to costs be set aside.

[8] Ground No 4; Failing to appreciate the juridical distinction between the so called legitimate expectation and established legal right.

On the above ground of appeal, counsel made reference to the case of **Municipal Council of Kisumu – vs- Madowo** (1986-1984) E. A 362 and Halsbury's Laws of England 3rd Edition Vol 11 at page 104-105 where in both authorities it is emphasized that an order of mandamus should be sought to enforce existing rights but not to seek to determine whether rights exists. The respondent applied for approval/consent to develop his land. The appellants were vested with the power to prescribe the height and specifications and the Judge appreciated the relevant sections of the Civil Aviation Act that requires a land owner to seek approval. However, that approval cannot be issued automatically and the land owner cannot demand as of right that the approval must be given even if it compromises the security of the airport runways thus the remedy of mandamus was not available to the respondent as he did not have an existing right.

[9] Ground No 5; Giving the appellants only 30 days within which to establish its claim over land which is contrary to the period set under **section 7** of the Limitation of Actions Act which allows a party a period of 12 years.

On this, counsel cited the limitation period within which to bring an action to recover land is 12 years; see **section 7** of the Limitation of Actions Act. In the circumstances the directive by the learned Judge that the appellant should establish its claim within 30 days was a fundamental error of law which was a major departure from the law. The learned Judge failed to appreciate that the title of the suit premises was highly contested as there was a caveat and restriction registered against the title by the 2nd appellant. Judicial review forum was also not the best to determine issues of ownership and title but is only concerned with issuing orders to correct procedural errors and excess of exercise power or unreasonableness.

[10] Ground No. 7 and 8 Failing to appreciate the effects of the ruling would prejudice the safety of Civil Aviation and compromise the mandate under the Civil Aviation Act and the Kenya Airport Authority Act and finally, for depriving the appellants which are statutory bodies created by law, the authority and mandates that are expressly provided for in the Act.

These two grounds were presented together in that counsel for the appellants submitted that the learned trial Judge failed to appreciate the paramount and statutory duty vested on the appellants to uphold the safety of Civil Aviation in Kenyan airspaces. It was further submitted that the issue of security and safety of flight paths is a matter of immense public interest which the learned Judge ignored. In this regard, the

case of;- **East African Cables Ltd V Public Procurement & Another [2007] e KLR.** So was the case of; - **Kenya Airports Authority V Mitu-Bell Welfare Society & 2 Others** [2016] e KLR. In both cases, the Court of Appeal emphasized the need to consider the likely event of approving development on a flight path and the likelihood of compromised security and safety along the flight paths.

[11] On the part of the respondent, counsel filed written submissions that supported the judgment. According to the respondent, the judgment was based on sound interpretation of **section 9** of the Kenya Civil Aviation Act as the learned Judge appreciated the objectives of the Authority was to plan, develop, manage, regulate and operate a safe economical and efficient civil aviation system according to the Act. The respondent admits that the suit premises falls within a declared area as per Legal Notice No. 60 of 8th May, 1998. The Minister prohibited construction of any structure extending vertically 30 metres above existing ground level except with the approval of the Director of Civil Aviation; thus the 1st appellant had a duty to provide height specifications once an application was made. According to counsel for the respondent the provisions of **section 9** of the KCAA applied where there are existing structures and not in a case like the instant one where the respondent was seeking permission.

[12] Responding to the issue of security and safety within the flight paths; counsel submitted that whereas the suit property is within the approach tunnel of the proposed parallel run way at JKIA, and the area was so declared; the learned Judge considered all that and the fact that other properties were granted the necessary approvals and thereby concluded that the respondent was subjected to differential treatment contrary to the provisions of **Article 40** of the Constitution. The issue of public interest was also considered and hence the appellants were ordered to acquire the respondent's property within a period of 30 days from the date of judgment. Regarding the exercise of discretion in granting the order of mandamus, the appellants were compelled to issue the height specifications as provided for in the Legal Notice No. 61 of May 1998. Lastly on the issue of ownership of the suit property; a title that is registered in the name of the respondent cannot be challenged on the basis of a caveat; moreover the appellants did not claim ownership of the property and the only option was for them to grant the height specifications or acquire the suit premises in accordance with the law.

[13] When the appeal came up for plenary hearing, Mr Waweru Gatonye and Mr P. M. Kimani learned counsel appeared for the 1st and 2nd appellants respectively, while Mr. Mutinda learned counsel appeared for the respondent. Counsel relied on their written submissions and did not wish to make any oral highlights.

[14] On our part, we have gone through the respective written submissions by counsel, the impugned judgment and the record of appeal. In considering the issues that arose for determination, it is important to revisit the guiding principles that guide the High Court in its exercise of judicial review powers. It is trite in judicial review, the High Court is not concerned with the merits of the decision by a public or statutory body but rather undertakes a consideration of the procedures, processes that were undertaken to arrive at the decision that is under challenge. This much was stated in **Ransa Company Ltd vs. Manca Francesco & 2 others** [2015] e KLR -

> **"As we all appreciate, a court sitting on Judicial Review exercises a sui genesis jurisdiction which is very restrictive indeed, in the sense that it principally challenges the process, and other technical issues, like excessive jurisdiction, rather than the merits of the case. It is also very restrictive in the nature of the remedies or reliefs available to the parties."**

The said jurisdiction was further expounded by Lord Green M.R. in the often cited case of **Associated Provincial Picture House V. Wednesbury Corporation** [1914] 1 KB 222 as follows**:**

> **"Decisions of person or bodies which perform public functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the Court concludes that the decision is such that no such person or body properly directing itself on a relevant law and acting reasonably could have reached that decision."**

See also **Kenya National Examinations Council V. Republic *Ex parte* Kemunto Regina Ouru**

[2010] e KLR.

[15] It is common ground that the 1st and 2nd appellants are statutory bodies established under an Act of Parliament, being the Civil Aviation Act (Cap 394) and the Kenya Airport Authority Act, Cap 395. On the other hand the respondent claims to be the registered owner of the suit premises which falls within the gazetted flight paths and for any development to take place within the said area, it is necessary for one to obtain approvals regarding height specifications from the managing director of the 2nd appellant. The issues under contention in our view is the interpretation of the statutory mandate granted to the appellants and whether in declining to grant the approval sought by the respondent in regard to development of the suit premises, it was unreasonably withheld or the respondent was subjected to unfair and differential treatment. The second issue is whether in the circumstances of the issues raised by the 2nd appellant regarding the ownership of title to the suit premises, an order of mandamus could issue directing them to purchase the land by way of compulsory acquisition or issue the approval in 30 days.

[16] The 1st and 2nd appellants in execution of their mandates do exercise some discretion in determining whether to grant an approval or not in regard to developments of the properties falling within the gazetted area of flight pathways. Such discretion in our view ought to not to be exercised capriciously or arbitrarily. In **Associated Provincial Picture Houses Ltd. V. Wednesbury Corporation** (supra) Lord Green expressed thus-

> **"It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word 'unreasonableness' in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey these rules he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J., I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head."**

[17] Was the approval sought by the respondent unreasonably declined? In order to answer this question we have considered the relevant provisions *inter alia* of **Section 8** of the Kenya Airport Authority Act which generally provides the functions of the 2nd appellant as;

> **1)** Section 8 (1) (a) **"To provide by means of undertakings of the Authority, a coordinated system of aerodromes and facilities relating thereto.**
>
> **2) (b) to administer, control and manage aerodromes and any other property vested in it under the Act.**
>
> **3) (c) To provide, develop and maintain such services and facilities as are in its opinion necessary or desirable for the efficient operation of aircraft, excluding air navigation aids and other than visual aids to navigation except with the consent of the Minister."**

Section 14 (1) (b) gives KAA power to;

> **"Remove or cause to be removed any obstruction, materials, structures, or buildings including slaughterhouses which are likely to attract birds that may be hazardous to aircraft operations"**

Further the Authority is specifically given power to move the court, seeking a demolition order,

where any person erects any building which in any way interferes with the operation of any services provided by the Authority under the Act "Unless such person has previously obtained the approval of the managing director to the erection of such building."

[18] The above provisions have to be read together with the provisions of the Civil Aviation Act especially **Section 9** which restricts building in declared areas:

> **"Notwithstanding the provisions of any written law, or the terms of any deed, grant or lease concerning the us and occupation of land, the Minister for the time being responsible for matters relating to aerodromes may where he considers it necessary in the interest of the safety of air navigation, by order published in the gazette prohibit the erection within the declared area of any building or structure above a height specified in the order."**
>
> **…**
>
> **Any person who contravenes the provisions of an order made under subsection (1) shall be guilty of an offence and shall be liable to a fine not exceeding two million shillings or to imprisonment for a term not exceeding three years or to both such fine and imprisonment"**

[19] In considering the above sections of the law, the learned Judge posited that;-

> **"I do not think that Parliament intended to empower the respondents to completely deny land owners development of their land."**

As was held in the case of County Government of **Nyeri & Another V. Cecilia Wangechi Ndungu** [2015] e KLR this court differently constituted while relying on various judicial dicta and authoritative books emphasized on the need of adopting a purposive approach in interpretation of statutes and stated the following;-

> **"Alive to the fact that we are called upon to interpret the aforementioned provisions, we remind ourselves of the cardinal rule of construction of a statute; that is, a statute should be construed according to the intention expressed in the statute itself. Halsbury's Laws of England, 4th Edition (Reissue), Butterworths, 1995, Vol.44 (1), para 1372 provides;-**
>
> **The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore the object in constructing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context…**
>
> **It is one of the linguistic canons applicable to construction of legislation that an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the Act…"**

[20] A plain reading of the objectives of the two Acts constituting the appellants as Authorities is principally to ensure safety of the airports and that explains the discretion given to the Managing Director to grant or decline to grant approvals for development of land falling within the gazetted area. To us, it was not within the ambit of the court in judicial review proceedings to interrogate the merits of the decision or to assume the role of the decider, but to only examine the procedures and processes of exercise of the power to grant or not to grant the approval for development. In the instant case we agree the Judge misapprehended the intentions of the statutes. Secondly the functions, powers and duties imposed on the appellants to grant or decline approvals for development of land within the declared area was considered within the context that such development will not interfere with the operation of the services provided by the Authority. There was no evidence adduced to dislodge that fact.

[21] The respondent faulted the appellants, contending that under the Act, the managing director of the 1st appellant was obliged to grant permission as a matter of course as long as the building was within the specifications. Unlike the learned trial Judge, we find this was an exercise of discretion by the appellants which was within the framework of the Authority's mandate. The Authority can only be faulted if the Managing Director abused power, or was unreasonable in withholding the approval. The reasons why the respondent was not issued with the height specification was clearly contained in the letter dated 21st March, 2011 it was because the respondent's parcel of land "**is within the approach funnel of the proposed second runway according to the Airport Master plan and forms part of JKIA Land Title."** Thus, the question that needed to be answered is whether these reasons were within the powers of the appellants. The Authority has the discretion to issue the approval, it is not at all clear to us how the learned Judge arrived at the conclusion that the approval must be given as a matter of course. This was clearly an error as compelling the appellants to give approvals would conflict with their statutory mandate. Directing the appellants to issue the approval was tantamount to usurpation of powers vested in the appellants to approve developments on declared areas adjacent to the airport and the court therefore became the decider in the circumstances of this matter. See the case of: See Municipal **Council of Mombasa V. Republic,** ***Ex parte*** **Umoja Consultants Ltd.,** Nairobi Civil Appeal No. 185 of 2001, where this Court held as follows:

> **"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 decider; acting as an appeal court over the decider 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."**

[22] The next issue was whether the respondent's ownership of the suit premises was absolute in view of the caveat entered in the title and the allegations that the suit land originally belonged to the 2nd appellant. We decline to deal with this issue of ownership for the same reasons that judicial review forum, does not consider merits, save to emphasize that an order of mandamus should not be sought to determine rights but ought to be used to enforce existing rights. To this end, we recognize the learned Judge was conscious of the rights of an owner who cannot get approvals for development. We believe this is what motivated the Judge to order the appellants to initiate the process of compulsory acquisition of the suit land. We think even in this, the Judge erred because the appellants being public bodies have an established system of acquiring private land that is needed for further development. Purchasing land through sale or by way of compulsory acquisition by a public body has to follow certain legal procedures and we agree with the appellants the Judge erred by ordering the appellants to purchase the land in 30 days. The High Court is the proper forum where all the issues can be determined on merit.

[23] In the result, we find merit in this appeal, we allow the appeal, set aside the orders allowing the Notice of Motion dated 9th June, 2011 and substitute thereto with orders dismissing the same. Due to the public interest nature of this matter that involves the use of land falling within the airport flight funnels, we decline to award costs and direct each party to bear its own costs, both in this appeal and in the High Court.

Dated and Delivered at Nairobi this 10th day of November, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

…….

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR