



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Miscellaneous Civil Application 364 of 2005

**IN THE MATTER OF: AN APPLICATION BY KARIOBANGI SOUTH CIVIL SERVANTS WELFARE
ASSOCIATION FOR MANDAMUS, CERTIORARI, PORHIBITION AND STAY**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA ACT NO. 5 OF 1969

**THE REGISTRATION OF TITLES ACT (CAP. 282) THE REGISTERED LAND ACT (CA.300) THE
COMPANIES ACT CAP. 486.**

BETWEEN

KARIOBANGI SOUTH CIVIL SERVANTS WELFARE ASSOCIATION THROUGH

1. JARVIS NJOROGE- CHAIRMAN

2. J.K KHALAI - AG. SECRETARY

3. LT. COL. A. LUBANDI-

TREASURER.....APPLICANT

VERSUS

**DICKSON D.M WANGAI.....1ST
RESPONDENT**

**NAIROBI CITY COUNCIL.....2ND
RESPONDENT**

**DIRECTOR OF CITY PLANNING.....3RD
RESPONDENT**

**COMMISSIONER OF LANDS.....4TH
RESPONDENT**

**DIRECTOR OF PHYSICAL PLANNING.....5TH
RESPONDENT**

DIRECTOR OF SURVEY.....6TH
RESPONDENT

CHIEF MAGISTRATE MILIMANI COMMERCIAL COURTS.....7TH
RESPONDENT

RULING:

By a Notice of Motion dated 6th April 2005 brought under the inherent jurisdiction of the Court the 1st Respondent prays for the following orders.

1. That the Honourable Court be pleased to dispense with the service of this Application in the first instance owing to the urgency hereof.
2. That this Honourable Court be pleased to set aside or discharge the ex parte leave granted to the Applicant on the 22nd March 2005 for judicial review orders of Mandamus, Certiorari and Prohibition and all other consequential orders made as prayed for in the Applicant's ex parte chamber summons with costs.
3. That the costs of and/or occasioned by this Application be borne by the Applicant in any event.

The Application is premised on the grounds that the orders sought are statute barred; that there is no jurisdiction to grant an injunction in judicial review.

The Application is supported by the affidavit of Dickson D.M. Wangai, the 1st Respondent. He depones that he was allotted a piece of land known as Plot No. 39 Kariobangi South (Civil Servants Estate) by City Council of Nairobi on 18th January 1999 and was subsequently issued with a certificate of lease. That he has development plans duly approved by the City Council of Nairobi. That he filed a suit CMCC No. 262 of 2005 against the Applicants. That the orders sought cannot issue. That the leave was granted in error. That the court has no jurisdiction to grant an injunction order in judicial review. That the order staying proceedings in CMCC No. 262 of 2005 was granted in error as a result of concealment of material facts.

The Ex-parte Applicants have filed grounds of opposition to the Application. In the grounds the Ex-parte Applicant states that the allegations of incompetence of the Applicant's chamber summons is unsupported; that the issue of limitation of time does not arise; that the court has jurisdiction to deal with the Application. That the Application is abuse of the court process. The ex-parte Applicant has also filed a replying affidavit sworn by Jarvis Njoroqe where he depones that the legal issues raised are not tenable; that the Applicant is not aware of the alleged concealment; that the Respondent is afraid of the other Respondents being served as some of them have already claimed that the documents exhibited by him in this court and the lower court are forgeries.

In summary the Ex-parte Applicants presented this judicial review Application on the 14th March 2005 seeking various judicial review orders of Mandamus, Certiorari and prohibition against the Respondents. Leave was granted to the ex-parte Applicant on the 22nd March 2005. The Application is with regard to a parcel of land known as NAIROBI/ BLOCK 16/316 which the ex-parte Applicant claims to be a public access from the Estate to the main Komorock Road forcing the residents to walk for almost a kilometer

to access the road. The ex-parte Applicant pursuant to the leave granted has filed their Notice of Motion Application on the 11th April 2005 with three substantive prayers as follows:

1. That an order of mandamus do issue compelling both the Nairobi City council and the commissioner of land to cancel and revoke the lease given by them to the 1st Respondent; and compel the director of city planning and director of physical planning to cancel the permission granted to the 1st Respondent to build on the suit land.

2. That an order of certiorari to issue to remove to this Hounarable court and be quashed Milimani Commercial Court CMCC No. 262 of 2005.

3. An order of prohibition to issue prohibiting the commissioner of lands to allow any dealing or transaction involving NAIROBI/ BLOCK 96/316.

On the 6th April 2005 the 1st Respondent filed the instant Application.

The parties' advocates presented their oral arguments with respect to the 1st Respondent's Application before the Court.

Learned Counsel Mr. Mungala submitted that the order of certiorari is aimed to quash the decision to issue the certificate of lease occurred outside the 6 months. That section 9 of the Law Reform Act provides for absolute limitation. That this Limitation applies across the board. Counsel cited in support the authorities in **RE AN APPLICATION BY GIDEON WAWERU (1962) E.A 523** and **JOSEPH NJERU KOMBO VS. D.C MBEERE & 3 OTHERS MISC APPL NO. 5 OF 2001.**

Counsel argued that the piece of land in dispute belongs to the 1st Respondent and he has title for it. That an objection was raised and the Commissioner of Lands said that the allocation was proper. That under the Registered Land Act the ex-parte Applicant can only challenge the title through a plaint for revocation. That there is decision for the court to revoke and the court therefore lacks jurisdiction.

Counsel submitted that the order of Mandamus cannot command performance of duty in a particular manner.

On the order of certiorari counsel submits that the same is statute barred. In support of this argument counsel cited the authority of **Mobrama Gold Corporation Ltd Vs. Minister for Water, Energy and Minerals & others (1995-1998) 1 EA 199 CAT.** He argued that the limitation applies to all orders of judicial review. That the certificate of lease was issued on 25.6.2002. This was over 3 years ago and the leave was granted in error.

He further argued that the stay of proceedings in CMCC No. 262 of 2005 was granted in error as the suit is yet to be heard. That the order was speculative. That the dispute is of commercial nature and not appropriate for judicial review. He prays for the leave to be discharged.

Learned counsel for the ex-parte Applicant presented his oral arguments. Counsel begun by giving background of the facts of this case. He submitted that the Applicants are registered as a Welfare Association. They are the beneficiaries of the Civil Servants Housing Company Limited incorporated in September 1997. That the company is wholly owned by the Civil Servants Union. It was incorporated to buy some land from the Government to benefit its members. That the Government availed grant No. L.R 12562 on the 1st July 1978 for a lease of 99 years. The grant was to the company. That the Company developed the land with 282 houses.

That all these facts were known to the Commissioner of Lands and the Nairobi City Council. That when the 1st Respondent applied to the Town Clerk, the town clerk replied that the land was private land. Counsel referred to JN5 of the ex-parte Applicant's documents.

That the Commissioner of Lands also wrote similar letters previous dated 27th October 1994, refer to JN6 of the ex-parte Applicant's documents.

Counsel submitted that when on the 18.1.1999 the Town Clerk and the Commissioner of Lands purportedly granted a lease to the 1st Respondent they were fully aware that they had no powers to do so as the land belonged to another party.

Counsel submitted that under section 62 of RTA any person aggrieved may apply to the court for an order of mandamus. Counsel argued that they had asked for the cancellation of the certificate of lease, it was illegal. That the issues raised are public law in nature, public officers have breached the law and have not followed due process. That the court has power to direct the registrar through an order of mandamus to cancel the title. Counsel in support referred to the authority of ***Paul Gachanga Ndarua Vs. R and Kipngeno Arap Ngeny Misc Civil Application No. 508 of 2001.***

Counsel submitted that judicial review is the most appropriate for public law rights.

On the issue of whether the Application is statute barred counsel submitted that the Applicant only came to be aware of the documents when they were exhibited in the Milimani case in 2005. He submitted that the limitation will not apply. In support counsel cited the authority of ***A.G Vs. K. Biwott.***

Counsel argued that prohibition will prevent the Respondent from dealing with the suit property.

On mandamus counsel submitted that the actions of Nairobi City Council and the Commissioner of Lands were clearly illegal, and the order will apply to compel public officers to exercise statutory power in accordance with the law.

Lastly counsel stated that there was no non-disclosure at the time of getting leave to commence the judicial review action.

In reply counsel for the 1st Respondent argued that even under the provisions of section 62 RTA an order of mandamus will be subject to the 6 months limitation. That the land was converted to RLA and provisions of RTA do not apply.

Counsel also stated that the Applicants were aware of the allocation and there was a complaint to the Commissioner of Lands. He referred to the letter dated 22.1.2002.

Counsel further submitted that you cannot prohibit in the interim. That the order of prohibition is not envisaged under order 53 and there is no substantive order of prohibition. He urged the court to set aside the grant of leave and dismiss the Application.

I have carefully considered the Application, and the rival submissions by counsel.

The central theme of the 1st Respondents Application is that the judicial review Application herein is time barred having been brought more than 3 years after the event complained of happened. Reliance is placed on the provisions of the Law Reform Act Section 9 as adopted by the provisions of Order 53 of the Civil Procedure Act. Rule (2) provides "leave shall not be granted to apply for an order of certiorari to

remove **any judgment, order, decree, conviction or other proceeding** for purposes of it being quashed, unless the Application for leave is made not later than six months after the date of the proceeding..”

The 1st Respondent contends that the above provision “other proceedings” is open ended and engulfs all actions that are to be quashed and should not be applied *eiusdem generis*.

I would like to point out that this matter raises very weighty issue of public interest. The Ex-parte Applicants have submitted that the actions of the 2nd and 4th Respondents were illegal and they had no powers to issue the title to the 1st Respondent. That as a consequence of their action 284 families have been cut off access to the road and have to walk 1 km to access the road. The Court has been referred to correspondence from both the 2nd Respondent and the 4th Respondent affirming that plot 39 was not available for allocation. The letter dated 23rd November 2001 from the Town Clerk Marked as JN5 in the Ex-parte Applicant’s documents is addressed to the 1st Respondent. It states in part

“...we are also investigating the basis of the allocation, since the land in question was originally private and not council land”.

There is also a letter by the Commissioner of Lands dated 7.2.2005 to the chairman Kariobangi south civil servants welfare Association referenced: PUBLIC OPEN SPACES AND ROADS OF ACCESS WITHIN NRB/BLOCK 96- KARIOBANGI SOUTH CIVIL SERVANTS ESTATE:

It states “our records indicate that Plot Numbers Block 96/313 &314 were planned and allocated on an area initially set aside as public open spaces. Block 96/316 was planned and allocated on an area set aside as a public road of access”.

In the case of **Republic Vs. The Judicial Commission of Inquiry into the Goldenberg Affairs Ex-parte Jackson Mwalulu & others Misc Civil Application No. 1279 of 2004** the court was faced with similar issues.

The Court held in this case that a careful scrutiny of the section 9 of the Law reform Act pursuant to which Order 53 was formulated in particular rules 2 and 7 which contend to deny the court jurisdiction to grant orders of certiorari outside 6 months reveals that only formal judgments, orders, decrees, conviction or other proceedings of an inferior court or tribunal fall within the 6 months period stipulated.

The Court was of the opinion that nullities are not covered by the six months limitation both on the wording of the rules and as a matter of principle due to the nature of nullities.

The Court stated

“we find that it would be serious abdication of the jurisdiction and powers of this Court if we were to shy away from quashing a nullity because in essence the doctrine of ultra vires permits the courts to strike down decisions or acts made or done by bodies exercising public functions which they have no power to make. The courts have specific mission and a duty to uphold the rule of law. Indeed the doctrine of ultra vires was one of the original pillars upon which judicial review was founded”.

I take the same view of the court above that the 6 months limitation does only apply to judgments, rulings, orders, decrees and other proceedings and this will be construed *eiusdem jeneris*. The judicial review Application herein challenges actions of the Respondents which if the ex-parte Applicant proves

its case will be a nullity.

I am not persuaded that the leave granted was granted in error. I will not set aside the grant of leave. The Application before the Court should be decided on its merits.

Consequently I dismiss the Notice of Motion Application dated 6.4.2005 with costs to the ex-parte Applicant.

DATED AND SIGNED AT NAIROBI ON THIS 21ST DAY OF AUGUST 2012

M. K. IBRAHIM

JUDGE

DATED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF OCTOBER 2012

W. KORIR

JUDGE

In the presence of:



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