

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS CIVIL CASE NO 62 OF 1978
IN THE MATTER OF KISIMA FARM LTD

JUDGMENT

March 2, 1978, **Hancox J** delivered the following judgment.

This application by Kisima Farm Ltd for leave to issue an order of prohibition against the Commissioner of Lands from continuing the holding of an inquiry into claims for compensation by persons interested in two portions of land at Timau (land reference Nos 2812/R2812, which are farmed by the applicant company as one unit together with two other pieces of land, namely land reference Nos 72262 and 2811/R) arises out of two Gazette notices, Notices 3678 and 3679 of 1977 dated 20th December 1977. In the first of these Gazette notices the Commissioner of Lands gave notice that the Government intended to acquire these two pieces of land for a public purpose, under section 6(2) of the Land Acquisition Act; and, under the second, that the consequential inquiry into claims for compensation would be held by him pursuant to section 9(1) of the Act on the 8th February 1978. At that hearing, the continuance of which is now sought to be restrained, Mr Aronson of the plaintiff's advocates firm, handed in, *inter alia*, a letter emanating from himself, which apprised the commissioner that Kisima Farm was in the process of being sold, the purchasers being Katheri Farmers Co Ltd, who are represented by Messrs Guram & Alexander. Mr Mwirichia of that firm now, as I understand it, joins with Mr Couldrey, who appears for the applicant company, in making this application for leave to issue an order of prohibition.

Quite obviously if the inquiry is not concluded, no award of compensation can be made under section 10 of the Act, and the Commissioner may not take possession of the land under section 19(1). Thus it is a necessary step in the compulsory acquisition of the land, and amounts also to a condition precedent to it, which is sought to be prohibited. Mr Couldrey pointed out that, since an injunction cannot be granted against the Government, he will be driven to instituting a declaratory suit under proviso (1) to section 16(1) of the Government Proceedings Act. But for the moment he relies on section 75(2) of the Constitution, which provides for direct access to the High Court in cases of deprivation of property, and on section 84 thereof, under which the High Court has original jurisdiction to decide any such application. Section 29(1) of the Act, however provides that the access to the High Court envisaged by section 75(2) of the Constitution shall be by way of an appeal to that court. The vehicle he has chosen is, however, as I have said, the order of prohibition in respect of which leave is now sought.

I therefore come to the nature of the order, formerly the writ, of prohibition. According to *Halsbury's Laws of England* (4th edn) paragraph 128: The order of prohibition is an order issuing out of the High Court of Justice and directed to an ecclesiastical or inferior temporal court, or to the Crown Court, which forbids that court to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land.

According to the 1963 White Book, any body of persons is a court if it has legal authority to determine questions affecting the rights of subjects, and is under a duty to act judicially. For my part I would entertain the view that this expression clearly covers the Commissioner of Lands when he is acting in his capacity as a tribunal to determine compensation under section 9. 'Body' must include 'person' in the singular and this is supported by the passage in 1 *Halsbury's Laws of England* (4th edn) paragraph 83, which refers to 'bodies and persons other than courts'. Neither is the order confined to courts as such. As Bankes LJ said in *R v Electricity Commissioner, ex parte London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171, 193: Originally no doubt the writ was issued only to inferior courts, using that expression in the ordinary meaning of the word 'court'. As statutory bodies were brought into existence exercising legal jurisdiction, so the issue of the writ came to be extended to such bodies.

Next, is this the type of action against which prohibition will issue, bearing in mind that the inquiry by the Commissioner of Lands is merely a step in the process of acquisition and not the notice of intention to acquire or the acquisition itself? In *R v Electricity Commissioner's* the Attorney-General's contention that the application for prohibition must be either premature or too late, because of the necessity that resolutions should lie on the table for a certain period before becoming effective, was rejected. Again in *R v Local Government Board* (1882) 10 WBD 309, 321 (quoted in the *Electricity* case) Brett L said: ... my view of the power of prohibition at the present day is that the court should not be chary of exercising it, and that wherever the legislation entrusts to any body of persons other than the superior courts the power of imposing an obligation upon individuals, the courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament.

There have been subsequent attempts to explain the reference by Atkin LJ in the *Electricity* case to the duty of the body of persons in question to "act judicially", notably in *Ridge v Baldwin* [1963] 2 All ER 66 and *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 All ER 770, but the House of Lords in the former case made it clear that the duty of acting judicially was not one "superadded" to its ordinary duties, but was inherent therein, as it is, in my opinion, in the powers of the Commissioner of Lands in this case.

Finally, does the right of appeal under section 29 preclude recourse to prohibition, as it does in some of the other orders of this nature? I think probably not. In *Turner v Kingsbury Collieries Ltd* [1921] 3 KB 169, 174 McCardie J said "I myself think, however, that there is no absolute technical obstacle to the co-existence of both prohibition and appeal", though he went on to quote a passage to the effect that it was probable that the courts might be willing to grant prohibition in any matters which can be corrected on appeal. And in *R v North, ex parte Oakey* [1927] 1 KB 491 Bankes LJ was firmly of the opinion that a right of appeal to the Court of Appeal was no ground for refusing a writ of prohibition. There is equally no doubt, from a consideration of the authorities. I have referred to above, that the exercise of this power to grant prohibition is discretionary, and this discretion will be in the Court which subsequently decides the matter if leave is granted.

I would comment that there appear to me to be defects in the expression of the Commissioner of Lands' intention in the respective Gazette notices. For instance, section 6 requires that the minister shall be satisfied that the land in question is required for the purpose of a public body. No public body and no particular purpose is specified in Gazette Notice 3678.

Moreover, if the affidavit of Mr Powys is to be accepted, the Minister in question informed him that the land was "for the members of the Meru tribe". I agree with Mr Couldrey that this would not be a public body or purpose envisaged by the definition in the Act. In the circumstances (and leaving aside for the moment alleged inaccuracies in the acreage of the parcel of land (land reference no 2812) this prima facie seems to constitute an absence of jurisdiction to acquire the land, and, consequently, an absence of jurisdiction in the Commissioner of Lands to act in pursuance of a direction given in that behalf.

From what I have said above, it seems to me that grounds exist in this case for the granting of leave for an order prohibition, and for a direction that such grant shall operate as a stay of the proceedings now pending before the Commissioner of Lands until the court shall decide the matter.

During the course of the submission I was shown a copy of a letter from the principal State Counsel to Messrs Guram & Alexander stating that the notice of compulsory acquisition had been rescinded. Mr Couldrey stated that his clients had received no such letter and, accordingly, he pressed for leave as prayed in the chamber summons, which, for the reasons I have given, I am disposed to grant.

I have not made any order regarding the terms on which leave is granted. In any view the question of costs can be adequately dealt with by the court which hears the motion.

Order accordingly.

March 2, 1978

HANCOX J