



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**MISCELLANEOUS APPLICATION NO. 43 OF 2018**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF AN APPLICATION BY THE APPLICANTS TO APPLY FOR ORDERS OF  
CERTIORARI, MANDAMUS AND PROHIBITION AGAINST COUNTY GOVERNMENT OF  
KIRINYAGA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010, ARTICLES 2, 10,19,23,27, 43 (3), 47 AND 259**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT, 2015**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**COUNTY GOVERNMENT OF KIRINYANGA.....RESPONDENT**

**AND**

**JANE WANJIKU MUIRURI.....1<sup>ST</sup> APPLICANT**

**FRANCIS KARIUKI MAGATI.....2<sup>ND</sup> APPLICANT**

**ANTONY MBUTHI KABUI.....INTERESTED PARTY**

**RULING**

1. The ex-parte applicant filed a Notice of Motion Under Judicature Act Cap 8, The High Court ( Practice and Procedures Rules part 1 Rule 3, Articles 23 of the Constitution, Order 53 Rule 1 (2) of the Civil Procedure Rules and all other enabling provisions of the Law) seeking the following orders:

1. Spent.

2. That the Applicants herein be granted an order of Certiorari to move into this Honourable court for the purpose of being quashed a decision of the Respondent's Land, Housing and Urban Development Planning Committee made at its meeting held on 17<sup>th</sup> October, 2016 resolving to transfer PLOT No. 75 MAKUTANO from the Applicants, **FRANCIS KARIUKI MAGATI and JANE WANJIKU MUIRURI** to one **ANTONY MBUTHI KABUI**, the Interested Party herein.

3. **THAT** the Applicants herein be granted an order of Mandamus to compel the Respondent to rectify its records to reflect the

ownership of the property known as **PLOT NO. 75 MAKUTANO** to the status quo ante prior to implementing the decision of the Committee mentioned in 2 above.

4. **THAT** the leave granted herein continues to operate as Stay against the Respondent and the Interested Party from in any way dealing with the said Plot No. 75 by way of transfer and or lease or in any way alienate the said property.

5. **THAT** the costs of this application be provided for:

***The application is based on the following grounds;***

1. Natural Justice

Acknowledging the position that it is a well settled principle in law per ***Local Government Board -versus- Arlidge (1915) AC 120*** that where a statute authorizes a body to perform a particular task through a particular procedure of which the procedure is not followed then the execution of the task is bad in law hence null and void it is the applicant's claim that in registering the Interested Party as the owner of Plot No. 75, Makutano whereby the Respondent acted without consulting or otherwise communicating with the Applicants who were then the registered owners and were in possession of the said property constituted gross violation of the rules of procedural fairness.

2. Bad Faith

The Respondent acted in bad faith and with improper motive in its decision in that;

(i) It acted irrationally and without regard to the principles applicable to its decision making.

(ii) It did not consider that the Applicants were already registered as the owners and had developed the property after getting planning approval for the said development.

(iii) The Respondent clearly acted with mala fides.

(iv) That the Land, housing and Urban Development Planning Committee overlooked the provisions of natural justice as held **Maina -versus- Nairobi Liquor Licensing Court (1973) EA 319** where it was observed that “ the exercise of power requires strict compliance with the prescribed or implied procedures.”

3. Legitimate Expectation.

The actions and decisions of the Respondent violates the legal principle of legitimate expectation. The Applicant like every other member of the public had the following among other legitimate expectations;

**(i) The Respondent would not act in an unlawful manner.**

**(ii) The Applicants had legitimate expectation that no transfer of the said property could be effected without them being required to sign necessary instruments of transfer, such instruments being verified by a competent authority.**

**(iii) The Applicant shall rely on violation of the foregoing principles.**

**(iv) In the premises the Respondent's decision, and any other issue arising out of the said decision are a nullity and devoid of legal effect.**

This is supported by the affidavit of **JANE WANJIKU MUIRURI** sworn on the 6<sup>th</sup> day of August, 2018 the applicant she contends that the applicants were allocated plots number 75 Makutano by virtue of a resolution by the works town planning markets and house committee of the then county council of kirinyaga at a meeting held on 18<sup>th</sup> July 2007. The applicants were then granted the approval for the construction of a building by county council of Kirinyaga in 2011. They proceeded and constructed a storey commercial cum residential building. Later on 19<sup>th</sup> of April, 2018, we went to Kerugoya for the purpose of paying the rate for the plot only to be informed that it is now owned by Anthony Mbuthi Kabui who had already paid the said rates. On inquiry she discovered that the property had been transferred to the said Anthony Mbuthi Kabui by a virtue of a resolution of Urban and Housing Planning Committee of Kirinyaga County at its meeting ostensibly held on 17<sup>th</sup> October, 2016 at Sports view hotel at Karasani Nairobi from the extracts of the meeting it was shown that the applicants are the ones who had applied to the county government to transfer the said to Anthony Mbuthi Kabue whereas they had at no time made such an application or signed documents consenting to or authorizing transfer of the said property to the said Anthony Mbuthi Kabue or anybody else.

In absence of involvement of the applicants it is inexplicable how the County Government caused the transfer to be registered unless the proper process for the registration which would include but not limited to the applicants identifying themselves before a credible person or institution were completely ignored.

That the transfer to the best of her knowledge is Marlafid and bad in law.

That the court should protect them from the action of the County Government which has unlawfully and fraudulently deprived them of the

property which they legitimately held and developed at a considerable cost.

The applicant further depones that she is advised by her advocate Mr. John Lewis Onkendi that it is the duty of the court to curb excess of officials and bodies who exercise administrative measures and she believes that the case has merit and calls for such intervention.

That the court to consider their prayers for orders of Certiori, Mandamus and prohibition as set out in the statement of facts under the relief sort.

That it is in the interest of justice that leave granted herein continue to act as stay against any further action relating to the property.

The respondent opposed the application and filed a replying affidavit sworn by Stephen Wambugu the County Surveyor with the County Government of Kirinyaga. He deposes that after checking the scrolling the records concerning plot number 75 and A75 Makutano he wishes to respond that according to the record plot number 75 Makutano belonged to one Joseph Mwaniki Muchira who later transferred it to Mr. Goeffrey Gathara Kiara on 18<sup>th</sup> July, 2007.

That contrary to the applicant assertion the minutes of min: no. **Wtpm** and H93207 lands up to minute number 58 and there is no minute number 62 as alleged by the applicant.

That contrary to the applicants assertion the County approved, transfer of plot number A75 Makutano based on the transfer application forms, signed and executed by the applicants in favour of the interested party thereto.

He is further contending that annexed minutes dated 18<sup>th</sup> July, 2017 for plot number 75 Makutano and yet they were transferring plot number A75 Makutano to the interested party.

He further depones that the applicants had sworn an affidavit and presented it to the county indicating the loss of title deed ( sic) minute number: Wtpm and H93207 of plot number 75 Makutano could not be traced.

That the applicants have been paying rates for plot number A75 Makutano and not plot number 75 Makutano.

He further depones that the county approved the sale and transfer of plot number A75 for the applicants' to the interested party based on information and pursuant to documents produced or supplied by the applicants and the interested party hereto and they include:-

**(i) Sale agreement dated 2<sup>nd</sup> September, 2016**

**(ii) Colour photographs and copy of the identity cards of the applicant**

**(iii) Application form for sale/ transfer/ withdrawal of ownership dated 2<sup>nd</sup> September, 2016.**

**(iv) The interested party pin certificate dated 31<sup>st</sup> December, 2011.**

**(v) The 1<sup>st</sup> applicant pin certificate dated 31st February/2/ 2011 (sic).**

That it is clear from the foregoing that the respondent never acted out of malice or Mali fids nor does it have personal interest in the suit plots, but acted on information documents, instructions and/or request from the applicant and the interested party.

It cannot be faulted for doing what it is mandated to do by the law.

He finally depones that the remedy been sort by the applicant are not available to him going by the available record which they have attached and urges the court to dismiss the application.

On his part the interested party Anthony Mbuti Kabui opposed the application and filed a replying affidavit, and he depones that he is the registered allottee of Plot Number. 75 Makutano which he had bought from Francis Kariuki MAGati and Jane Wanjiku Muriuri vide the sale a greement dated 20<sup>th</sup> September, 2016 and the plot was transferred to him by the county government of Kirinyaga vide the extract of minutes dated 20<sup>th</sup> September, 2016 and the minutes were verified on 21<sup>st</sup> April, 2018.

That he has been paying land rates, ground rates for plot number 75 Makutanto.

He further depones that after he bought the plot he notified the tenants of the new arrangement and they have been their rents to the new account in Equity Bank.

That he is surprised that the 1<sup>st</sup> and 2<sup>nd</sup> applicants claiming the ownership of Plot Number. 75 Makutano when they are fully aware that they sold and transferred the plot to him. That he had entered the agreement with the applicant without any duress, compulsion or force but at the free will of the vendors.

That the applicants' are harassing his tenants by asking them to pay the rent to themselves, intimidating them and yet the premises are his

after he genuinely bought them from the applicants.

The parties filed submissions for the applicants, it is submitted that there was injustice in the transfer of Plot Number 75 Makutano.

They submit that the applicant were allocated Plot Number. 75 on 18<sup>th</sup> of July, 2007.

He applied and wre granted approval for the construction of a building by the County Council of Kirinyaga. Later on 19<sup>th</sup> April, 2018 when the 1<sup>st</sup> applicant went to Kirinyaga for paying the 2018 rates they were informed that plot number 75 was now owned by one Anthony Mbuthi Kabui the interested party herein.

That they also learned that the plot had already been transferred to Anthony Mbuthi Kabui the Interested party by virtue of a resolution of the land housing and urban development planning committee of the County government of Kirinyaga at its meeting held on 17<sup>th</sup> September, 2016 at Sports view hotel Kasarani in Nairobi.

That the applicants' never knew of the meeting and they never attended meaning the minutes could have been fraudulently made or forged.

That although the minutes show that it is the 1<sup>st</sup> and 2<sup>nd</sup> applicants' who had applied for the transfer of the plot to the interested party they had at no time made such agreement, nor had they been informed.

He submits that in the absence of involvement of the 1<sup>st</sup> and 2<sup>nd</sup> applicant it is inexplicable how the county Government caused the transfer to be registered unless proper process for the registration which would include but not limited to 1<sup>st</sup> and 2<sup>nd</sup> applicants clearly identifying themselves before a credible person or institution were completely ignored and were not privy to the transfer as alleged.

The applicants further submits that there was breach of duty to act fairly.

He submitted that the respondent owes a duty to act fairly and partially (sic) to everyone it serves. In this case it is worth noting that failure to involve and failure to inform the 1<sup>st</sup> and 2<sup>nd</sup> applicants of the meeting and transfer of plot number 75 is a breach to both. It is statutory and common law duty and their decision is thus irrational. They have relied on; **Republic -versus- Minister for Home Affairs and others, ex Parte Sitamze Nairobi High Court civil case number 1652 of 2004 ( HCK) 2008 ( 2E.A 323)**

“Respondent’s jurisdiction can only be interfered with where it is shown that

- (I) it is being abused
- (II) it is being exercised for an improper purpose,
- (III) the decision maker is in breach of the duty to act fairly
- (IV) the decision - maker has failed to exercise statutory discretion reasonably.
- (V) the decision – maker acts in a manner to frustrate the purpose of eh legal instrument donating the discretionary power.
- (VI) the decision maker fetters the discretion given
- (VII) the decision maker fails to exercise discretion
- (VIII) the decision maker is irrational and unreasonable

This is further supported by **Section 7 (2)** of the **Fair Administrative Action, Act, 2015** which provides that;

(2) A court or tribunal under sub section (1) may review an administrative action or decision, if:

(a) ***The person who made the decision,***

- (i) Was not authorized to do so by the empowering provision
- (ii) Acted in excess of jurisdiction or power conferred under any written law,
- (iii) Acted pursuant to delegated power in contravention of any law prohibiting such delegation
- (iv) Was biased or may reasonably be suspected of bias, or
- (v) Denied the person to who the administrative action or decision relates, a reasonable opportunity to state the person’s case.

- (b) A mandatory and material procedure or condition prescribed by an empowering provision was not complied with
- (c) The action or decision was procedurally unfair
- (d) the action or decision was materially influenced by an error of law
- ( e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the Applicant
- (f) The administrator failed to take into account relevant considerations.
- (g) The administrator acted on the direction of a person or body not authorized or empowered by any written law to give such directions.
- (h) The administrative action or decision was made in bad faith
- (i) The administrative action or decision is not rationally connected
  - (i) The purpose for which it was taken,
  - (ii) The purpose of the empowering provision
  - (iii) The information before the administrator, or
  - (iv)The reasons given for it by the administrator
- (j) There was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law,
- (k) The administrative action or decision is unreasonable
- (l) the administrative action or decision is not proportionate to the interests or rights affected.
- (m) The administrative action or decision violates the legitimate expectations of the person to whom it relates,
- ( n) The administrative action or decision is unfair, or
- ( o) The administrative action or decision is taken or made in abuse of power.

It is further submitted that the Respondent herein acted irrationally, unfairly, contrary to the legitimate expectation, in bad faith and unjustifiably thus its fair for this court to review such.

In conclusion he submits that the applicant has demonstrated that the respondent has used its powers excessively, unfairly, irrationally without considering the effects of their actions and the decisions.

The respondent, it is submitted that the applicants' have filed an application for Judicial Review wherein they are seeking to oust the jurisdiction of the County Government of Kirinyaga from its administrative functions in managing the plots with its jurisdiction in the form of transfer and other administrative functions.

In the other hand the interested party, filed an application seeking an order for injunction against the applicant in dealing with plot number 75 Makutano.

It is submitted that the County Government of Kirinyaga formerly County Government of Kirinyaga acted within its powers, jurisdiction and authority while transferring the said plot number 75 Makutano from the applicants to the interested party.

It is submitted that the respondent which is a public body had power and authority to transfer the said plot, and the applicants contention is that the body acted in bad faith. It is his submission that the suit for Judicial review before the Honorable court is misconceived bad in law and an buse of the court bad in process as the remedy sort herein is not available to the applicants. The applicants ought to have filed an action for fraud against any party, they honestly perceived to have defrauded them of their suit property and not judicial review suit against the respondent.

It is further submitted that in the spheres of natural justice, rules of equity comes into play. It is a cannon rule of equity that whoever comes to equity must come with clean hands.

He relies on; **JABHAHY -VERSUS- CASSIM ( 1939) AD 537 -551** where the court explicitly held that on this maxim that:-

**“ .....all writers upon our law agree in this nor polluted hand shall touch the pure fountains of justice.....”**

It is further submitted that it is a rule of common practice that whoever alleges must prove as provided as under **Section 107 of The Evidence Act Cap 80 Laws of Kenya.**

He urges the court to be fully guided by the annexures attached by the respondents attached affidavit aforementioned in deciding the ownership of Plot 75 Makutano market which outlines the legal owner of the plot

He finally submits that the respondent herein is maliciously prosecuted in this suit, and the same act as a scape goat while an adverse party in this suit to cover his own acts.

He prays that the Judicial Review suit be dismissed. The applicant ought to have sought a remedy in Civil proceeding in an action for fraud not Judicial Review.

For the interested party it is submitted that the Judicial Review seeks to oust the jurisdiction of the County Government of Kirinyaga formerly County council of Kirinyaga from its administrative actions of managing the plots within the jurisdiction in form of a transfer and other administrative functions.

That the motion is brought in bad faith by the 1<sup>st</sup> and 2<sup>nd</sup> applicants, who have a duty to disclose the truth and facts of this case, that they have deliberately chosen to mislead this court for their selfish reasons.

They submit that the document produced and filed before this court by the interested party speaks volumes as to who is the owner of Plot No. 75 Makutano market.

That the minutes of 17<sup>th</sup> October, 2019, the sale agreement entered too pursuant to the minutes extracts and dated 20<sup>th</sup> September, 2016 is prove enough to show who is the registered allottee of the plot.

He submits that the 1<sup>st</sup> and 2<sup>nd</sup> applicant knew what they were doing when getting to sale agreement with the interested party and cannot again go back to their words and put the blame to the County government of Kirinyaga when it is they themselves who presented to the committee charged with the issue of transfer within the former Council of kirinyaga now the County Government of Kirinyaga.

That though the 1<sup>st</sup> and 2<sup>nd</sup> applicant has brought all manner of claim to defeat justice and trample on the rights of the interested party, there is nothing that has been produced in this court to deny their signature and thumb print in the sale agreement dated 20<sup>th</sup> September, 2016.

That the 1<sup>st</sup> and 2<sup>nd</sup> applicant are people with insatiable desires and they have released that the property of the Interested party has appreciated and want to benefit from the property once more.

That the applicants have disregarded the order of this court issued on 17<sup>th</sup> June, 2019 which directed that all rents is to be deposited in court.

The applicants do not deserve any audience by the Court.

#### **ANALYSIS AND DETERMINATION**

- **I have considered the application and the arguments made by the parties in their submissions.**

- It has been held that the principles of natural justice applies where ordinary people would reasonably expect those making decisions that will affect others to act fairly. See the case of; **ONYANGO OLOO -VERSUS - ATTORNEY GENERAL ( 1986 - 1989) E.A 456.**

- **Further under Article 47 (1) of the Constitution**

**“ every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”**

- The issues which arise for determination is whether the respondents, acted ultra-venous their powers, by allocating the plot number 75 to the Interested party.

- Whether the applicant is entitled to the remedies he is seeking.

- The role of this court in applications of this nature is that the court's jurisdiction particularly when any violation of the Constitution and statutory provision by a public body is alleged, which invokes the court jurisdiction under article 165(6) of the Constitution to intervene and protect the rights of the affected party.

- Under article 165 (6) of The constitution the High Court has supervisory jurisdiction over the sub-ordinates courts, persons, body or authority exercising a judicial or quasi –judicial function. The applicants have come to this court asking the court to exercise its supervisory jurisdiction to review the decisions of the respondents.

- The court will exercise Judicial review where the decision affects an individual's interest and arises out of the exercise of a public function in order to qualify as a quasi – judicial function. In the present case the decision by the respondent affects the rights of the applicants to own property and it is the duty of the court to ensure that the exercise of such powers is legal, rational and compliant with the principle of natural justice.

- In this case the applicant is challenging the exercise of the administrative functions of managing the plots within its jurisdiction in the form of transfer and other administrative functions.

- This is a function and power that is not only amenable to Judicial review but also justifiable and therefore within the jurisdiction of this court. In the case of ; **Municipal Council of Mombasa -versus- Republic and Umoja consultant limited Nairobi ( Civil Appeal No. 185 of 2001)** Court of Appeal stated that;

**“ 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, that is the jurisdiction to make it, whereas the person affected by the decision had 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? This are the kind of questions a court hearing a matter by way of Judicial review is concerned with, and such a 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 merit of decisions 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.”**

It is therefore clear from the above decision that Judicial review is supposed to provide remedy rising from the treatment given by the authority which he/she has been subjected and it is not meant to give the alternative opinion or decision in **The Republic -versus - Kenya Revenue Authority Ex-parte Yaya Towers Limited ( 2008) eKLR**. It was stated that Judicial review is concerned with reviewing but not the merits of the decision which the application for Judicial review is made but the judicial making process itself.

The court of appeal in the case of; **SUCHAN INVESTMENT LTD -versus - MINISTRY OF NATIONAL HERITAGE & CULTURE & 3 OTHERS (2016) KLR** stated that: “ **while article 47 of the Constitution while read with the grounds for review provided by Section by 7 of the Fair Administrative Act reviewed an explicit sheet of judicial review to include aspects of merit, review of the administrative action. The reviewing court has no mandate to substitute its own decision or that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated under Section 11 of The Act.”**

**In this case in determining the application by the applicants, I wish to refer the Ugandan case in: Per story –versus - Kabare District Local District council and others (2008) 2EA 300 and page 303 where it was stated in order to succeed in an application for Judicial review the applicant has to show that the decision or act complained of is tainted with illegality, irrationality or procedural impropriety, See council of: Civil Service Union -versus- Minister for the Civil Service (1985) AC 2 and also **FRANCIS BAHIKIRWE MUNTU & OTHERS -VS- KYAMBOGO UNIVERSITY HIGH COURT KAMPALA Mis. Application 643 of 2005 ( UR)** illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act the subject of the complaint. Acting without jurisdiction or ultraveous or contrary to the provisions of a law or its principles are instances of illegality.**

Irrationality is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority addressing itself to the fact or the law before it would have made such a decision.

Such a decision is usually in defiance of logic and acceptable moral standards, Re - an application by: **Bukoba Gymkhana Club 1963 (EA at Page 478 at Page 479 paragraph e.**

Procedural impropriety is when there is failure to act fairly in the decision making authority in the process of making a decision. the unfairness maybe in the non-observance of the rules of natural justice or to act with procedural fairness towards one to be affected by the decision.

It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision (AL - Mehdawi -versus- Secretary of State for the Home department (1990) A.C 876)”

I will now turn to consider the issue for determination in this application. In this case the applicant has stated that the plot was transferred to the interested party vide a meeting of the land, urban development committee held on 17<sup>th</sup> October, 2016 when they have not made such an application or signed documents consenting to or authorizing the transfer to Anthony Mbuthi Kabue and the absence of the involvement of the applicants' it is inexplicable how the county government cause the transfer to be registered unless the proper process were completely ignored.

The respondents has shown that it approved the transfer of Plot No. A75 based on application form signed and executed by the applicants in favor of the Interested party. And though the applicants are claiming Plot number 75 they had been paying rates for Plot Number A 75. The county approved the sale and transfer of plot number A 75 to the applicants and the respondents has proved that plot number 75 was sold to him by the applicants and they entered an agreement which the applicants' signed and the plot was transferred to him by the County Government of Kirinyaga the extracts of minutes dated 17<sup>th</sup> October, 2016.

There is no evidence that the respondent acted out of malice or malifids. They have performed their function as required by effecting the transfer based on all the required documents. In a sitting of a committee which is authorized to transact the business of transfers/ withdrawal

of names in various markets within the County. The respondent did not act. The action of the respondent was not ultraveous.

I therefore find that this application is without merit, the remedy for the applicant if any does not seem to be in an application for Judicial Review.

There was no prove of illegality, irrationality or unfairness. In the circumstances, I dismiss the application with costs.

**Dated, Signed at Kerugoya this 29<sup>th</sup> day of MAY, 2020**

**L. W. GITARI**

**JUDGE**