



Republic v National Land Commission; Kanyari & 6 others (Exparte Applicants); County Government of Nyandarua (Interested Party) (Environment & Land Miscellaneous Case 18 of 2023) [2023] KEELC 22033 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEELC 22033 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT & LAND MISCELLANEOUS CASE 18 OF 2023**

YM ANGIMA, J

NOVEMBER 30, 2023

(FORMERLY NYAHURURU ELC MISC. NO. E005 OF 2022)

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL
REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF NOTICE OF INTENTION TO RE-ALLOCATE UNS. RESD PLOT NO. 46 GATHANJI TOWNSHIP, UNS. CHURCH PLOT GATHANJI TOWNSHIP, UNS RESD. PLOT NO. 50 GATHANJI TOWNSHIP, UNS. RESD A 33, UNS. RESD A 36, UNS. RESD A 35 AND UNS. RESD A 34 CONTAINED IN THE NOTICE DATED 24TH DECEMBER, 2021 ISSUED BY THE NATIONAL LAND COMMISSION

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT (CAP.26)

BETWEEN

REPUBLIC APPLICANT

AND

NATIONAL LAND COMMISSION RESPONDENT

AND

FRANCO NDERITU KANYARI EXPARTE APPLICANT

BETH WANJA GACHERU EXPARTE APPLICANT

GOD WORD CHURCH EXPARTE APPLICANT

FELISTA WANJIKU GICHURU EXPARTE APPLICANT

DUNCAN KIMANI KIMANI EXPARTE APPLICANT



JOSEPH MUCHEMI MAIRU EXPARTE APPLICANT
FRANCISCA WANGUI MAINA EXPARTE APPLICANT
AND
COUNTY GOVERNMENT OF NYANDARUA INTERESTED PARTY

JUDGMENT

A. Introduction

1. Vide a chamber summons dated 14.03.2022 brought under Order 53 Rule 1 of the Civil Procedure Rules, 2010 and Sections 8 and 9 of the Law Reform Act (Chapter 26) and all other enabling provisions of the law the ex parte Applicants (the Applicants) sought leave of court to file an application for judicial review orders of certiorari and prohibition against the Respondent (National Land Commission). They also prayed for an order that such leave once granted do operate as stay of the impugned decisions.
2. The said application was based upon the Applicants' statutory statement dated 14.03.2022 and the verifying affidavit sworn by the 5th Applicant, Duncan Kimani Kimani on his own behalf and on behalf of the rest of the Applicants. The Applicants exhibited various copies of letters of allotment, provisional letters of allotment, minutes of a plot allocation meeting, and the notice by National Land Commission (NLC) to allocate the disputed plots to squatters.
3. The record shows that vide an order dated 27.04.2022 the leave sought was granted and the Applicants were granted 21 days within which to file and serve their substantive application for judicial review. The record further shows that vide a chamber summons dated 07.11.2022 and amended on 09.11.2022 the Interested Party sought leave of court to be joined in the proceedings. The said application was allowed on 27.04.2023 without any objection by the Applicants.

B. Application for Judicial Review

4. Vide a notice of motion dated 12.05.2022 under Sections 8 & 9 of the Law Reform Act (Cap. 26), Order 53 rules 3 & 4 of the Rules, and all other enabling provisions of the law, the Applicants sought the following orders:
 - a. That an of certiorari to remove to this court for purposes of quashing the decision of National Land Commission contained in its notice dated 24.12.2021, to re-allocate the Applicants' parcels of land known and described as Uns. Resd Plot No. 46 Gathanji Township, Uns. Church Plot Gathanji Township, Uns. Resd. Plot No. 50 Gathanji Township, Uns. Resd A 33, Uns. Resd A 36, Uns. Resd A 35 and Uns. Resd A 34.
 - b. That an order of prohibition be issued prohibiting the National Land Commission from re-allocating the Applicants' parcels of land known and described as Uns. Resd Plot No. 46 Gathanji Township, Uns. Church Plot Gathanji Township, Uns. Resd. Plot No. 50 Gathanji Township, Uns. Resd A 33, Uns. Resd A 36, Uns. Resd A 35 and Uns. Resd A 34.
 - c. That any other consequential orders and directions that this Honourable Court may deem fit to grant.



- d. That the costs of the application for leave and the substantive motion be borne by the Applicants herein.
5. The application was based upon the grounds set out in the Applicants' statutory statement and verifying affidavit together with the annexures thereto. The gist of the application was that the Applicants were allottees of the various plots the subject of the application (the suit properties) hence entitled to exclusive use and enjoyment thereof and that the NLC was acting unlawfully in seeking to re-allocate the suit properties to purported squatters without following due process.
6. The Applicants contended that 3 among them had formal letters of allotment from the Commissioner of Lands dated 24.08.1995 whereas the rest held temporary letters of allotment from the District Plot Allocation Committees issued between 2010 and 2014. They contended that they had been in actual possession of the suit properties for a long time and that the notice dated 24.12.2021 seeking to reallocate the same to squatters was unlawful since their allocations had never been revoked and they were not accorded an opportunity of being heard before the said decision was reached. As a result, they sought the two orders of judicial review.

C. Respondent's Response

7. Although the NLC filed a memorandum of appearance dated 19.09.2022 it did not file any response to the application for judicial review.

D. Interested Party's Response

8. The Interested party filed a replying affidavit sworn by Eunice Wairimu Kamau on 15.06.2023 in opposition to the application for judicial review. She denied that the Applicants were legitimate and absolute allottees of the suit properties and responded to the application as follows:
 - a. That the Applicants had a pending court case being Nyahururu CM ELC No. 356 of 2018 over the suit properties.
 - b. That the Applicants did not follow the legal process of obtaining a valid allocation of the suit properties.
 - c. That there were no letters of application by the Applicants for allocation of the suit properties.
 - d. That there were no minutes of the plot allocation committee demonstrating the purported allocations.
 - e. That the minutes exhibited by the Applicants relate to allocation to squatters and that in any event they are not accompanied by a PDP and relevant maps.
 - f. That the letters of allocation dated 1995 were not genuine since they bore a citation NYA/C.1129 which is for Geta Trading Centre and not NYA/C.1127 which is for Gathanji plots the subject of the suit.
9. The Interested Party stated that the suit properties were actually allocated to squatters in conjunction with the NLC way back in 2017 and it would be prejudicial to annul those allocations whereas the affected squatters were not party to the application for judicial review. It was contended that it was the responsibility of the NLC to undertake resettlement programs for squatters hence it was within its mandate to allocate the suit properties for that purpose.



E. Directions on Submissions

10. When the matter was listed for directions, it was directed that the application for judicial review shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Applicants' submissions were filed on 14.08.2023 whereas the Interested Party's submissions were filed on 14.09.2023. There is, however, no indication of the Respondent having filed any submissions in the matter.

F. Issues for Determination

11. The court has perused the application for judicial review as well as the Interested Party's replying affidavit in opposition thereto. The court is of the view that the following issues arise for determination herein:
- a. Whether the Applicants have made out a case for the grant of the judicial review orders sought.
 - b. Who shall bear costs of the application.

G. Analysis and Determination

- a. Whether the Applicants have made out a case for the grant of the judicial review orders sought
12. The court has considered the material and submissions on record on this issue. The Applicants submitted that being the lawful allottees of the suit properties, the NLC had no power to re-allocate the same. It was submitted that NLC was acting ultra vires since the initial letters of allotment have never been revoked or withdrawn hence the suit properties are not available for a second allocation. The Applicants relied, inter alia, upon the case of Gerishon Ndege Erima -vs- Trans-Nzoia County Land Adjudication & Settlement Officer & Another [2020] eKLR; Robins Nyangau Mosongo -vs- Ngoitoi Leiyen & Another [2021] eKLR and Peterson Ndegwa Wachira -vs- Christopher N Kiboi and Others [2013] eKLR in support of that position.
13. The Applicants further submitted that they were not afforded an opportunity of being heard before NLC made the decision to re-allocate the suit properties. It was thus contended that there was a violation of the rules of natural justice by the Respondent which entitled them to the judicial review orders sought. The Applicants relied upon the case of Peter Maina Chege t/a Smart Choice Electronic Company -vs- National Land Commission and Others [2020] eKLR in support of that submission.
14. The Interested Party on its part submitted that the nature of the dispute before court did not warrant the application for judicial review. It was contended that the legality of the initial allocation was contested and that there was a pending civil suit over the allocation of the suit properties. The Interested Party contended that judicial review is only concerned with the decision-making process and not the merits of the decisions under challenge. The Interested Party relied upon the case of Republic -vs- Railways Corporation ex-parte Flamingo Paints Limited & Another [2021] eKLR in that regard.
15. It was further submitted that there was no violation of the rules of natural justice since the NLC had in fact, published a notice to the general public on the intended allocation to squatters on 24.12.2021 and invited comments on the matter within 30 days from the date of publication of the notice. It was thus submitted that the Applicant had an opportunity to make their views known to the NLC. The rest of the Interested Party's submissions were on the legality and merits of the allocations which does not belong to the province of judicial review.



16. The court has noted that the Applicants' initial allocations are seriously contested by the Interested Party as being unprocedural, illegal and void. It was even contended that some of the letters of allotment were mere forgeries since some of them bore references for Geita Centre instead of Gathanji where the suit properties are situated. The Interested Party further contended that the Applicant's purported allocations were not even supported by an approved PDP and minutes of allocation by the proper organs of government. The court is of the opinion that all those are matters which deal with the legality and validity of the Applicants' allocations. They are not suitable for adjudication in judicial review proceedings as the dispute would require interrogation of the contested matters of fact which can only be conclusively and effectively investigated and determined in a civil suit.
17. In the case of Nyahururu ELC JR. E001 of 2020 – Republic -vs- Land Registrar Nyandarua & Samburu Counties & Another and Ex parte Ann Wanjiru Irungu & 7 Others this court held as follows in a judicial review application concerning disputed allocations:

“The court is of the opinion that the nature of the dispute herein goes beyond resolution of mere inaction on the part of the 1st Respondent to register the leases for the suit properties or to issue certificates of official search for some of them. It raises the deep issue of the legality of the allocation of the suit properties to the Applicants and whether due process was followed by the concerned parties. It would appear that multiple green cards were opened for most of the suit properties with some having up to 6 sets for a given parcel. The court is thus of the opinion that such disputes can only be effectively and completely resolved through a normal civil suit where the concerned parties can adduce evidence and have it tested through cross-examination rather than on affidavit evidence alone.”

18. The court is thus inclined to agree with the Interested Party's submissions that the nature of the dispute among the parties does not render itself to a conclusive resolution through judicial review proceedings. The validity and legality of the Applicants' allocations can only be thoroughly and effectively interrogated in a normal civil suit. The material on record reveals that the Applicants had, in fact, commenced such civil proceedings way back in 2017 and the suit was still said to be pending in court. It is, therefore, not clear why the Applicants decided to file the instant application instead of prosecuting the earlier suit to its logical conclusion.

d. Who shall bear costs of the application

19. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287. The court finds no good reason why the successful party should not be awarded costs of the action. Consequently, the Interested Party shall be awarded costs of the application for judicial review.

H. Conclusion and Disposal Order

20. The upshot of the foregoing is that the court finds and holds that the Applicants have not made out a case for the grant of the judicial review orders sought. As a result, the Applicants' notice of motion dated 12.05.202 is hereby dismissed in its entirety with costs to the Interested Party. However, the Applicants are at liberty to prosecute their pending civil suit to its logical conclusion.

It is so decided.



**JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 30TH DAY OF NOVEMBER, 2023
AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Mr. Nderitu Komu for the Applicants

N/A for the Respondent

Mr. Mbiyu for the Interested Party

C/A - Nyagah

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Y. M. ANGIMA

JUDGE

