



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 18 OF 2018

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, MANDAMUS,
PROHIBITION**

AND A DECLARATION

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

IN THE MATTER OF: THE CIVIL PROCEDURE ACT, CAP 21 LAWS OF KENYA AND CIVIL PROCEDURE RULES,

2010 (ORDER 53)

BETWEEN

GAZI LIMITED.....APPLICANT

AND

NATIONAL LAND COMMISSION.....RESPONDENT

RULING

The Application

1. By the Notice of Motion dated 9th March, 2018 and pursuant to the leave granted by this court on 8th March, 2018, the Applicant prays for Judicial Review orders as follows:

(a) An order of certiorari be and is hereby issued to remove and bring to the High Court, for the purposes of quashing, the notice dated 19th January, 2018 which listed, among others, the parcel of land known as L.R.MN/1/1302 belonging to the Ex-Parte Applicant as having been illegally alienated from the Shimo La Tewa Prisons.

(b) A declaration be and is hereby issued that the *Ex-Parte* Applicant is the registered owner of the parcel of land known as L.R.MN/1/1302.

(c) An order of prohibition be and is hereby issued restraining the Respondent from making any administrative decision affecting the *Ex-Parte* applicant's legal right(s) the parcel of land known as L.R. MN/1/1302 unless the Respondent:

(i) Issues the *Ex-Parte* Applicant with a notice of the proposed administrative action over the parcel of land known as L.R. MN/1/1302 inviting the *Ex-Parte* Applicant to give its views;

- (ii) Considers all views submitted by the *Ex-Parte* Applicant in relation to the parcel of land known as LR MN/1/1302;
- (iii) Considers all relevant materials and facts;
- (iv) Gives reasons for the administrative decision taken;
- (v) Issues the *Ex-Parte* Applicant with a notice specifying the Respondent's internal appeal mechanism should the *Ex-Parte* Applicant wish to appeal; and
- (vi) Specifies the manner and period within which the *Ex-Parte* Applicant can lodge its appeal.

(d) An order of mandamus be and is hereby issued that in the event that the *Ex-Parte* Applicant's title has already been revoked, the Respondent be directed to reinstate the *Ex-Parte* Applicant's title in respect of the parcel of land known as L.R. MN/1/1302.

(e) That the respondent do bear the *Ex-Parte* Applicant's costs.

2. The motion is premised on the grounds set out therein and on the Statutory Statement dated 7th March, 2018.

3. The Applicant's case is that the Respondent has through the Daily Nation edition of 30th January 2018, advertised a notice dated 19th January 2018 (the "*Public Notice*") which listed, among others, the parcel of land known as L.R. MN/1/1302 (the "*Property*") belonging to the Applicant as having been illegally alienated from the Shimo La Tewa Prisons. In the said Public Notice, the Respondent demanded that:

(a) The Applicant submits its ownership documents to the NLC within 14 days of the Public Notice, pursuant to Section 6 of the NLC Act;

(b) The Applicant prepares to vacate the Property within 90 days of the Public Notice as required by Section 155 of the Land Act of 2012 and Section 152A, 152B and 152C of the Land Laws (Amendment) Act of 2016; and

(c) The Applicant's title shall be revoked as per Section 14 of the NLC Act and a single title to be issued for the prison land at Shimo La Tewa.

4. The Ex parte Applicant states that the Respondent did not make any inquiries from or afford the Ex parte Applicant an opportunity to be heard before the above demands were made. The Ex parte Applicant avers that the Respondent's decision leading to the issuance of the Public Notice was materially procedurally unfair, and its decision leading to the issuance of the Public Notice violates the Applicant's legitimate expectation of the right to be heard by the Respondent before any adverse decision touching on the Property is made. Consequently, the Respondent's administrative decision to issue the Public Notice is unfair and made in abuse of its powers. The Ex parte Applicant is consequently apprehensive that if this Court does not intervene, the Respondent will make good its threat of revoking its title to the Property without being afforded an opportunity to be heard. The Ex parte Applicant states that the Respondent will not be prejudiced at all if the orders sought in the Chamber Summons application are granted.

The Response

5. The motion was served upon the Respondent on 23rd March, 2018. There is no record of appearance by the Respondent. However, on 9th April, 2018 a Mr. Wahome, counsel, appeared for the Respondent and informed the court that he was yet to respond to the application and asked for fourteen (14) days to do so. The court granted the request and scheduled the matter for hearing on 30th April, 2018.

6. On 30th April, 2018 Ms. Onesmus appeared for the Ex parte Applicant. There was no appearance from the Respondent's advocates. Ms. Onesmus with the leave of the court prosecuted the application and the court reserved the Ruling for 28th June, 2018.

The Determination

7. I have considered the application together with the supporting documents. The application is not opposed. However, the court must still consider the same on its metis.

8. A brief history of the suit property as per the court record and Supporting Affidavit is as follows:

By an Agreement for Sale dated 19th May, 2011, the Applicant agreed to buy all that piece of land known as Land Reference Number 1302, Section 1, Mainland North Mombasa (the "*Property*") from Hemel Properties Limited for a consideration of Kshs. 55,000,000. The interest that was being sold was leasehold. (See annexure marked "**GY-1**" which is a copy of the Agreement for Sale dated 19th May, 2011). Before entering into the Agreement for Sale, the Applicant had conducted a Search at the Lands Registry and obtained a Certificate of Postal Search which showed that as at 24th March, 2011, Hemel Properties Limited was the registered owner. (See annexure marked "**GY-2**" which is a copy of the Certificate of Postal Search as on 24th March 2011). By 19th May, 2011, Hemel Properties Limited had cleared all the outstanding payment in respect of Rates over the Property and applied for and obtained a Rates Clearance Certificate from the Municipal Council of Mombasa. (See annexure marked "**GY-3**" which is a copy of the rates payment and the Rates Clearance Certificate). Similarly on the same day on 19th May, 2011, Hemel Properties Limited cleared all the outstanding rent in respect of the Property totaling to Kshs. 546,304. (See annexure marked "**GY-4**" which

is a copy of Pay-in Slip from the Kenya Revenue Authority and bank Pay-in Slips all dated 19th May, 2011). On 19th May, 2011, the Applicant and Hemel Properties executed a Transfer of Lease in respect of the Property. (See annexure marked “GY-5” which is a copy of the Transfer of Lease dated 19th May, 2011). On 23rd May, 2011, the Transfer of Lease was presented for registration at the Land Titles Registry – Mombasa. (See annexure marked “GY-6” which is a copy of an Application for Registration and Fee Receipt No. 2262488 from the Department of Lands both dated 23rd May, 2011). On the same day on 23rd May, 2011, the Applicant paid, via banker’s cheques, Stamp Duty for the purchase of the Property amounting to Kshs. 2,520,140. (See annexure marked “GY-7” which are copies of the Stamp Duty Declaration, Assessment & Pay-in Slip from the Kenya Revenue Authority, Banker’s Cheques from Habib Bank AG Zurich and Customer Transaction Vouchers from National Bank of Kenya). The Transfer of Lease was registered on 25th May, 2011 as evidenced by the Memorandum of Registration of Transfer of Lands bearing Serial No. 25th May 2011. (See annexure marked “GY-8” which is a copy of Memorandum of Registration of Transfer of Lands bearing Serial No. 40273). Subsequently, the Grant No. C.R. 34202 in respect of the Property at the Lands Registry was on 25th May, 2011 endorsed to show that it had been transferred to the Applicant. (See annexure marked “GY-9” which is a copy of the Grant No. C.R. 34202 bearing an endorsement that it had been transferred to the Applicant as at 25th May, 2011). The Applicant thereafter conducted a search at the Lands Registry which results as at 23rd June, 2011 showed that it was the registered owner of the Property. (See annexure marked “GY-10” which is a copy of the Certificate of Postal Search as on 23rd June, 2011).

9. The above notwithstanding, the Respondent, through the Daily Nation edition of 30th January, 2018, advertised a notice dated 19th January, 2018 (the “Public Notice”) which listed, among others, the Property as having been illegally alienated from the Shimo La Tewa Prisons. In the Public Notice, the Respondent demanded that:

- (a) The Applicant submits its ownership documents to the NLC within 14 days of the Public Notice, pursuant to Section 6 of the NLC Act;
- (b) The Applicant prepares to vacate the Property within 90 days of the Public Notice as required by Section 155 of the Land Act of 2012 and Section 152A, 152B and 152C of the Land Laws (Amendment) Act of 2016; and
- (c) The Applicant’s title shall be revoked as per Section 14 of the NLC Act and a single title to be issued for the prison land at Shimo La Tewa.

10. There is no evidence that the Respondent made any inquiries from or afforded the Ex parte Applicant an opportunity to be heard before the demands in the Public Notice were made. Article 47 of the constitution on the right to fair administrative action demands that the Respondent ought to afford the Ex parte Applicant an opportunity to be heard. Before an administrative action is made, an administrator ought to first afford an opportunity to be heard to any person(s) who is likely to be affected with any decision that may be made. Further, any representation made should be considered and written reasons for decision given. The right to be heard is at the heart of the right to a fair hearing and denial of the right to be heard is tantamount to denial of a fair hearing. In view of the foregoing, the Respondent’s decision leading to the issuance of the Public Notice was materially procedurally unfair and made in abuse of its powers. Revocation of the Applicant’s title to the property without being afforded an opportunity to be heard will greatly prejudice the Applicant which appears to have purchased the Property for value from Hemel Properties Limited.

11. By way of a letter dated 6th February, 2018, the Applicant through its Advocates on record demanded the Respondent to withdraw in writing the Public Notice failure to which the Applicant would proceed to file appropriate proceedings to protect its constitutional rights, but the Respondent has to date failed, neglected and/or ignored to comply with the demand. The court understands that the Applicant has reason to be apprehensive that if this Court does not intervene, the Respondent will make good its threat of revoking its title to the Property without being afforded an opportunity to be heard.

12. From the foregoing this court finds that the application for Judicial Review orders herein is legally well founded and that the application is merited. The application dated 9th March, 2018 is allowed as prayed with costs to the Applicant.

That is the Ruling of the court.

Dated, Signed and Delivered in Mombasa this 28th day of June, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Hamisi for Ex parte Applicant

Mr. Kaunda Court Assistant