



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA KIAMBU

JUDICIAL REVIEW NO. 22 OF 2017

IN THE MATTER OF: AN APPLICATION SEEKING JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS

IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW REFORM ACT (CAP. 26) SECTIONS 4,7,6,8,9,10,11 OF THE FAIR ADMINISTRATIVE ACTION ACT (NO.4 OF 2015), ARTICLE 47 OF THE CONSTITUTION OF KENYA, 2010 AND ORDER 53 OF RULE 3 OF THE CIVIL PROCEDURE RULES, 2010

IN THE MATTER OF: SECTIONS 136,137 AND 138 OF THE REGISTERED LAND ACT (CAP. 300) (NOW REPEALED) AND SECTIONS 76, 77, AND 78 OF THE LAND REGISTRATION ACT (NO. 3 OF 2012)

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

THE ATTORNEY GENERAL.....1ST RESPONDENT

KIAMBU DISTRICT LANDS REGISTRAR.....2ND RESPONDENT

SALOME NJERI KARANJA.....1ST INTERESTED PARTY

IMMASTEL LIMITED.....2ND INTERESTED PARTY

***EX PARTE* APPLICANT**

CONCORDE CO-OPERATIVE SAVINGS, CREDIT & SOCIETY LIMITED

JUDGMENT

1. Based on the diverse provisions invoked on the face of the Motion filed on 19th May, 2017, it is difficult to categorise the Motion either as a conventional judicial review application under Order 53 of the Civil Procedure Rules, or as an action brought under the provisions of the Fair Administrative Action Act. The former would have required leave of the court, which, in this case was not sought.

2. Be that as it may, the hybrid Motion contains 4 prayers as seeking:

“1. An order of *Certiorari* bringing into this Honourable Court for purposes of quashing, the decision made by Kiambu District Land Registrar, the 2nd Respondent herein, that led to the registration of restrictions against the parcels of land known as L.R Nos. Sigona/1488 & Sigona/1489, (hereinafter referred to as “the suit properties”) on 18th August, 2016, presented by Salome Njeri Karanja, the 1st Interested Party herein, in whose name the suit properties are registered, and by which restrictions the 2nd Respondent restrained all dealings on the said parcels of land without permission of the 1st Interested Party.

2. An order of *Mandamus* compelling the 2nd Respondent to remove the restrictions dated 18th August, 2016, registered against the suit properties, from the land registers relating to the suit properties.

3. An order of *Mandamus* compelling the 2nd Respondent, and/or such designated officer, to register or to consider to register, upon presentation by the *Ex parte* Applicant, instruments of Discharge of Charge and Transfer of Land by Chargee

of the suit properties to **Immastel Limited**, the 2nd Interested Party herein, or to such other persons or entities in favour of whom, such instruments of Transfer may be made and executed.

4. That the 2nd Respondent and the 1st Interested Party be condemned to pay the costs of this application.”

3. The Motion is supported by the affidavit of **James Odera** who describes himself as the Chief Executive Officer of **Concorde Co-operative Savings & Credit Society Limited**, the *ex parte* applicant herein. The gist of the affidavit is that the 1st Interested Party was in the material period a member of the Applicant Society. In 2013 the 1st Interested Party obtained from the *ex parte applicant* a loan in the sum of Shs. 2 Million secured by a charge created over the 1st Interested Party's land parcels, namely **LR Nos. Sigona/1488 and Sigona/1489**. The charge was duly registered at the Kiambu District Lands Registry.

4. The 1st Interested Party however defaulted in making repayment at the agreed instalments, whereupon the *ex parte* applicant in exercise of its statutory power of sale sold the charged property by public action, on 15th July, 2015 to **Immastel Limited**, the 2nd Interested Party. The sale realized a sum of shs. 2,100,000/- per property. However, when the Discharge of Charge and Transfer of Land instruments in respect of parcel **LR no. Sigona/1489** were presented to the Kiambu District Land Registrar (2nd Respondent) the 2nd Respondent declined to register them for the reason that, the 1st Interested Party had lodged a restriction thereon.

5. A search by the *ex parte* applicant revealed that the said restrictions were lodged on 18th August 2016 and in respect of both properties. The *ex parte* applicant complains that the 2nd Respondent, did not comply with the provisions of section 136 of the Registered Land Act (repealed) and section 76 of the Land Registration Act, in so acting and was in breach of the requirements of Fair Administrative Action Act. Thus, the restrictions were unlawfully registered and the decision to register them ought to be quashed. Moreover, the *ex parte* applicant complains that a request for the removal of the restrictions was ignored by the 2nd Respondent and rejected by the 1st Interested Party.

6. For her part, the 1st Interested Party swore a Replying Affidavit on 17th August 2017. Therein, she admits membership in the *ex parte* applicant, ownership of the subject land parcels and the fact of the charge created over the parcels of land registered in her name to secure a loan. She admits that having repaid some instalments, she defaulted and the properties were sold by the lender. However, she complains that the property was sold at a price below 75% of the market value in the material period, which she asserts to be a minimum of Shs. 5,700,000/- for both parcels. She takes issue with the documents in respect of the sale presented by the *ex parte* applicant and pin points alleged discrepancies in the amount realized through the sale and the proper date for reckoning the market value. Hence the restriction placed by the 2nd Respondent while rejecting her attempt to file a caution.

7. The 1st Interested Party alleges fraud against the *ex parte* applicant, based on the alleged sale below the market value which act was unlawful, in particular, for contravening Section 97 of the **Land Act**. Asserting willingness to a resale at current market value, the 1st Interested Party depones that any costs incurred thereby ought to be borne by the *ex parte* applicant.

8. The 2nd Interested Party through its director **Stephen Kinuthia Mburu** filed a Replying Affidavit in endorsement of the affidavit of **James Odera**. The *ex parte* applicant filed a further affidavit, erroneously intitled as a Replying Affidavit. Therein, the *ex parte* applicant depones that the subject property was valued by Crystal Valuers on 15th May, 2015, prior to the auction. That the forced sale value in respect of **Land parcel No. Sigona/1489 was Kshs. 2,100,000/-**. Further that the valuation report of June 2017 relied on by the 1st Interested Party, did not indicate the forced sale value of the property, and does not reflect the forced sale value as at May, 2015 when the auction was conducted. The affidavit attempts to counter allegations of discrepancies relating to the 2nd memorandum of sale, by auction, identity of purchaser and the amounts realized at the auction.

9. By a supplementary affidavit, described as a further affidavit, the 1st Interested Party reiterated her earlier affidavit. She swears that her valuation report annexed thereto was in respect of the market value as at June 2015 per the terms of reference. She further pokes holes in the *ex parte* applicant's valuation report and reiterates her assertion that the true value of the two properties was a sum of shs.5,700,000/-. Further, that the sale of one property sufficed to settle arrears due, which she states to stand at just over shs. 2 million as at October, 2014. She raises new issues concerning the market and forced sale values per notification for sale and valuation report exhibited by the *ex parte* applicant. And that, the sale was irregularly conducted as the purchaser did not participate in the auction, there being no agency agreement between the 2nd Interested Party and **Stephen Kinuthia Mburu**.

10. Taking issue with the amounts declared as realized from the auction, the 1st Interested Party points out that any fees payable to advocates and auctioneers from the proceeds of the sale were not disclosed and that, in any event, the charges, disclosed at present are excessive. The 1st and 2nd Respondents filed grounds of opposition on 7th September, 2017. The 1st and 2nd Respondents defend the actions of the latter as reasonable, just and legal under the Land Registration Act, in particular section 71 and 96 thereof, as to restrictions and notices in respect of the exercise of the statutory power of sale by a lender.

11. On 16th November, 2017 **Ngugi J** ordered that the Motion be canvassed by way of written submissions. The Respondents were absent at the time. During a further mention before the Judge on 28/2/18, the judge gave further directions in respect of submissions and directed that the Attorney General be served, for the further mention to be had on 23/5/18. A similar order for service on the Attorney General issued as the Attorney General was not represented. On the next following mention date, the 1st and 2nd Respondents were absent despite having been served *vide* the affidavit of service filed on 13th June 2018. Service was effected on 29th May, 2018. On 20th June 2018 when the judgment date was taken, only the *ex parte* applicant and the 1st Interested Party had filed submissions, on 19th February 2018 and 8th May, 2018 respectively.

12. The *ex parte* applicant's submissions open with a restatement of its material proffered by way of affidavits. The *ex parte* applicant

anchors its submissions on the provisions of Section 90, 96 and 101 of the Land Act concerning the chargee's right to exercise the statutory power of sale upon default, in payment of the loan amount by a chargor. And that at any rate, the manner by which the right was exercised in this case was not amenable to judicial review. They rely on the decision of **Odunga J in Republic v Land Registrar & Another Ex parte Eco Bank Kenya Limited & Another (2018) eKLR** wherein the Judge restated the delineation of the scope of judicial review in **Municipal Council of Mombasa v Republic and Umoja Consultants Limited, Civil appeal no. 185 of 2001**. To the effect that, judicial review concerns itself with the decision making process and not the merits of the decision.

13. The *ex parte* applicant argues that before the Land Registrar can exercise the power to order a prohibition of dealings in any land, he must cause enquiries to be made, notices to be served and accord a hearing opportunity to such persons as he considers fit. Reliance is placed on the decision in **Matoya v Standard Chartered Bank (k) Ltd and others (2003)1 IEA 140**, as cited by **Odunga J in Ezekiel Musango Mutisya v National Land Commission and 6 others (2014) eKLR**. And as to the exercise of the Land Registrar's discretion as to the parties to accord a hearing, the Registrar must take into account relevant provisions of the law, in particular Section 87 of the Land Registration Act regarding the import of the words "*opportunity to be heard*", and the protection of the right to a hearing as a component of fair administrative action as provided for in Article 47 of the Constitution and Section 4 of the Fair Administrative Action Act and Common Law.

14. On the latter, the *ex parte* applicant cites the audi *alteram partem* rule as stated by **Mason J** in the Australian case of **Kioa v West (1985) HCA 81, (1985) HCA 81, (1985) 159CLR550**. The *ex parte* applicant also relied on other decisions of the High Court touching on procedural fairness, for the proposition that any person likely to be prejudiced by decider's action/decision ought to be heard before such decision is made. (see **Fahim Yasin Twaha and another v District Land Registrar Lamu (2010) eKLR**). The *ex parte* applicant asserts that neither were notices served on it nor was it accorded a hearing before restrictions were registered against the charged properties. Whereas it stood as a person likely to be affected by the decision of the 2nd Respondent.

15. Thus, the decision of the 2nd Respondent, is tainted with procedural impropriety. Moreso, as the 2nd Respondent eschewed its opportunity in the case to file a Replying Affidavit to shed light on the circumstances in which the restrictions arose. The court was therefore urged to grant the order of *certiorari*, based on the provisions of Section 65 and 98 (3) of the Land Registration Act, and to issue the order of *mandamus*, sought in the application against the 2nd Respondent to compel him to execute the statutory duty owed to the *ex parte* applicant. As to the efficacy of the order of *mandamus*, the applicant relies on the decision of the Court of Appeal in Kenya **National Examination Council v Republic Ex parte Geoffrey Gathenji Njoroge and 9 others (1997) eKLR**.

16. The 1st Interested Party's submission state that the restriction was properly registered in exercise of discretion granted to the 2nd Respondent by section 76 of the Land Registration Act, and pursuant to information presented by the 1st Interested Party. The purpose of the Registrar's power under the section being the prevention of fraud and improper dealings in respect of land, as stated in **John Kamau Kinyanjui v Thika District Land Registrar (2017) eKLR**.

17. Moreover, that notice of a restriction order is only due to the proprietor of the land under restriction the proprietor enjoying superior rights as stated in the **Musango** case. That in light of evidence of "*irregularity on the part of the ex parte applicant*" the 2nd Respondent acted properly to pre-empt the completion of the sale to the 2nd Interested Party. Further, and for the same reason, the *ex parte* applicant has come to equity with unclean hands and the restrictions ought to be left in place until the *ex parte* applicant gives a satisfactory account in respect of the disputed "fraudulent" dealings.

18. Regarding the scope of the province of judicial review the 1st Interested Party relies on the decision in **Pastoli v Kabale District Local Government Council and Others (2008)2EA300** and **Rahab Wanjiru Muguna v Inspector General of Police and Another (2013)eKLR**. The 1st Interested Party argues that based on the provisions of section 4(6) of the Fair Administrative Actions Act, the 2nd Respondent was entitled to apply what she calls, the "alternative procedure" prescribed in Section 76 of the Land Registration Act, and to determine who should be accorded a hearing prior to registering the restrictions.

19. The 1st Interested Party argues further that the *ex parte* applicant was not owed any duty to be heard, being the "fraudulent party" in the transaction leading to the impugned decision, and attempt by the Interested Party to file a caution against the property and that, the *ex parte* applicant cannot benefit from its own illegalities. Thus in her view, the present action has no basis and the restrictions ought to be left in place for the intended purpose. Laying the blame at the feet of the *ex parte* applicant, the 1st Interested Party asserts that the application ought to be dismissed with costs to the 1st Interested Party.

20. The court has duly considered the material canvassed by the parties in respect of the Motion before it. As earlier observed, the 1st and 2nd Respondents did not file a Replying affidavit or submissions. The 2nd Interested Party did not file submissions but had filed a Replying Affidavit.

21. The basic facts leading to this case can be stated briefly. The 1st Interested Party was in the material period the registered owner of two land parcels **LR Nos. Sigona 1488** and **Sigona 1489** (the suit property). In October 2013, the Interested Party created a charge in favour of the *ex parte* applicant over the two parcels of land as security for a loan in the sum of shs. 2,000,000/- which was to be repaid by 36 monthly instalments. The 1st Interested Party defaulted in repayments and the *ex parte* applicant sold the property by way of a public auction to the 2nd Interested Party. As declared, the sale realized a total sum of shs. 4,200,000/-. Subsequent attempts by the *ex parte* applicant to complete the sale were declined by the 2nd Respondent, who had registered restrictions against the suit properties in August 2016.

22. The 1st Interested Party admits that she had attempted to lodge a caution against the property after the public auctioning of the property. Because, in her view, the sale to the 2nd Interested Party was fraudulent and irregular, for several reasons enumerated in her affidavits, including the under valuation of the property at the time of the auction.

23. The scope of judicial review simpliciter or under Article 47 of the Constitution and the Fair Administrative Action Act is primarily limited to the process used in arriving at a decision but not the merits of a decision. This court is not concerned with the question whether the auctioning of the property of the 1st Interested Party was justified or not nor whether the decision of the 2nd Respondent was justified. In **Municipal Council of Mombasa v Republic and Umoja Consultants Limited Civil Appeal no. 185 of 2001; (2002)eKLR**, the Court of Appeal, reiterating its decision in the **Kenya National Examination Council (Ex parte Gathenji) (supra)** observed that:

“(A)s the court has repeatedly said, judicial review is concerned with the decision – making process, not with the merits of the decision itself

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 power, i.e the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision-maker take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of Judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider. Acting as a court of appeal over the decider would involve going into the merits of the decision 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.”

24. The rationale underlying judicial review as envisaged in Article 47 and the Fair Administrative Action Act, is to secure fair treatment of individuals so that public bodies clothed with administrative power do not usurp or abuse that power. That is to say that, the decision made with regard to individuals is not only consistent with the relevant law but is also arrived at through a lawful process. The gist of the *ex parte* applicant’s complaint is that the 2nd Respondent in exercising the statutory power donated to him under sections 76-78 of the Land Registration Act did not order for an inquiry to be conducted; that the 2nd Respondent did not accord a hearing to the *ex parte* applicant as required by the law, before making the decision to register the restriction complained of. Further than no notice of the matter was served on the *ex parte* applicant.

25. There is no dispute as to the purpose of the provisions of Section 76 of the Land Registration Act. It is for the prevention of fraud and improper dealings in land. Section 76(1) of the Land Registration Act provides as follows:

“76. (1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.”

26. Under this Section, the Registrar may move himself or be moved by a party interested in the land, lease or charge. It is clear from the section however that the Registrar is required to first direct that inquiries be made notices be served and hearing be accorded to “*such persons as the Registrar considers fit*” before making an order restricting dealings. Thereafter, notice of the restriction order is to be served on the proprietor as provided under section 77. In the **Fahim Yasin Twaha** case the court quoted with approval a portion from a treatise by **David Foulkes “Introduction to Administrative Law” 4th Edition (Butterworths)** to the effect that:

“in a number of cases, Lord Denning has suggested that whether or not a person is entitled to a hearing depends on whether or not he has some right, interest or legitimate expectation of which it would not be fair to deprive him without hearing what he has to say.”

27. Such is the essence of section 4(3) of the Fair Administrative Action which provision binds public authorities in the exercise of administrative power or discretion. The section states:

“Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

- (a) Prior and adequate notice of the nature and reasons for the proposed administrative action;**
- (b) An opportunity to be heard and to make representations in that regard;**
- (c) Notice of a right to a review or internal appeal against an administrative decision, where applicable;**
- (d) A statement of reasons pursuant to section 6;**
- (e) Notice of the right to legal representation, where applicable;**
- (f) Notice of the right to cross-examine or where applicable; or**
- (g) Information, materials and evidence to be relied upon in making the decision or taking the administrative action.”**

The Fair Administrative Action Act is designed to give effect to Article 47 of the Constitution which binds all public officers in the execution of their duties. The article guarantees the right to fair administrative action.

28. Thus, I am unable to follow the 1st Interested Party's argument that Section 76 of the Land Registration Act provides an alternative procedure distinctly separate from that set out in Fair Administrative Action Act and the implied assertion that the 2nd Respondent was under no obligation to accord a hearing to the *ex parte* applicant therefore. Rather, the provisions of the Fair Administrative Action Act and the Land Registration Act reinforce each other in conformity with the Constitution to guarantee the right to fair administrative action, in particular the right to a hearing. Section 12 of the Fair Administrative Action Act is pertinent here. It provides that:

“This Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice.”

29. It appears from the affidavits and arguments of the 1st Interested Party that the 2nd Respondent made his decision based on “evidence” supplied by the 1st Interested Party regarding the alleged irregular actions (read auction) by the *ex parte* applicant. The 2nd Respondent avoided the opportunity to explain to the court the process by which he arrived at the decision to order restrictions placed on the subject properties.

30. There is no material to controvert the *ex parte* applicant's assertion that it was not heard. It is true that the Land Registrar had the discretion to decide who to accord a hearing. In my own view, in the admitted circumstances of this case, it is difficult to think of any person, other than proprietor, who stood more likely to be affected by the decision than the party in whose favor a charge had been created over the titles; the *ex parte* applicant. More over a complaint having been made against the said lender by the borrower, it became imperative that the chargee's side of the story be heard before the impugned decision was made.

31. As stated in **Kioa v West**:

“It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it”

32. It is not clear therefore how the Land Registrar in this case satisfied himself as to the propriety of his decision, without hearing a party against whom accusations had been made, and who evidently stood to be prejudiced by the decision. On the contrary, it appears that the 2nd Respondent concluded that there was a risk of fraud or improper dealings to be pre-empted by the registration of restrictions. But this without first making any inquiries, serving notices or hearing the necessary parties as required of him by the provisions of section 76(1) of the Land Registration Act. The repeated assertion by the 1st Interested Party in this case that the *ex parte* applicant is guilty of fraud or irregularity is not a matter for investigation by this court, as it touches on the merits of the Registrar's decision which was essentially in favor of the admitted defaulter.

33. Based on the foregoing, the impugned decision cannot be allowed to stand. The order of *certiorari* is the most efficacious remedy in the circumstances of this case, and prayer 1 of the Motion is granted. Equally, for the same reasons prayer 2 is granted. Concerning the 3rd prayer, it is not the duty of this court to make decisions on behalf of public authorities. However, the court will issue appropriate orders where a public authority fails or neglects to carry out a statutory duty. This was eruditely stated by the Court of Appeal in the **Kenya National Examination Council** case where the court observed that:

“To conclude this aspect of the matter, an order of mandamus compels the performance of public duty imposed by statute where the person or body on whom the duty is imposed by statute fails or refuses to perform the same”

34. Prayer 3 will be granted in terms that, an order of *mandamus* is issued to compel the 2nd Respondent and/or such designated officer to consider the registration, of instruments of Discharge of charge and Transfer of Land by Chargee in favour of the 2nd Interested Party, upon their presentation by the *ex parte* applicant and to render a decision in that regard within reasonable time, in any event not exceeding 21 days since presentation of the said instruments by the *ex parte* applicant.

The costs of the Motion are awarded to the *ex parte* applicant against the Respondents and the 1st Interested Party.

Delivered and signed at Kiambu this 27th Day of July, 2018.

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C. MEOLI

JUDGE

In the presence of:

For the *ex parte* applicant Ms Wambui holding brief for Mr. Mbugua

For the 1st Respondent: No-appearance

For the 2nd Respondent: No-appearance

For the 1st Interested Party: Ms Mweni Nyokabi

For the 2nd Interested Party: No-appearance

Court Assistant: Nancy/Kevin