**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**JUDICIAL REVIEW APPLICATION NO. 4 OF 2014**

**IN THE MATTER OF THE LAND ACT 2012**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT 2012**

**AND**

**IN THE MATTER OF LAND COMMISSION OF KENYA 2010**

**AND**

**IN THE MATTER OF OLENGURUONE SETTLEMENT SCHEME TITLE HOLDERS**

**APPLICATION FOR ORDERS OF PROHIBITION AND CETIORARI**

**BETWEEN**

**THE REPUBLIC ……...…….....APPLICANT**

**VERSUS**

**NATIONAL LAND COMMISSION ……..…..…… RESPONDENT**

**NJOKI MURAGE & 410 OTHERS ……..... EXPARTE APPLICANTS**

**RULING**

By way of a Notice of Motion application dated 20th February, 2014 the Ex Parte Applicants sought the following order

> ***"(a) THAT this Honurable Court be pleased to grant an order of PROHIBITION directed at the respondent prohibiting them from making a ruling regarding the applicants land in Olenguruone without giving them a hearing***
>
> ***(b) THAT costs be provided for"***

The application was supported by the statement of facts dated 3/2/2014, as well as the Verifying Affidavit

sworn by one **JONATHAN CHEROTICH** on 3/2/2014.

**BACKGROUND**

The 411 ex parte applicants claim that they are all registered land owners in **Chepakundi Settlement Scheme** (hereinafter referred to as **'the suit land'**), which they claim they purchased after the post-election violence of 1992. The Ex parte applicants allege that **THE NATIONAL LAND COMMISSION** (the Respondent herein), commenced investigations into the ownership of the suit land and indicated that it would render a ruling on 4th February, 2014.

The Ex Parte applicants are aggrieved by the fact that the Respondent did not grant them an opportunity to ventilate the claims they had to the suit land during its inquiries. Therefore they contend that any decision made by the respondent will be made in total disregard to the right to be heard under the Rules of Natural Justice. They pray that the respondent be restrained from rendering any decision until it has heard their views. The Ex Parte Applicants feel that as stakeholders of title to various plots within the suit land, the respondent is under an obligation to give them audience before making any recommendation in respect to the suit land. The Ex- parte Applicants are apprehensive that if the respondent proceeds to deliver its recommendations/ruling without taking their view then their right to be heard will have been breached.

On their part the Respondents filed a replying affidavit sworn by **MARGARET KAPTUIYA CHEBOIWO**, the Director of Legal Affairs and Enforcement Unit of the Respondent. In the affidavit she explained that the suit land is situated in the Mau Forest Complex and is one of the controversial excisions made by the government in the year 2001. There have been frequent conflicts among residents and land owners of the suit land. This led the respondent acting upon a request from the local leaders and in exercise of the powers conferred upon it by Articles 62, (2) and (3) and Article 67 (2) of the Constitution as well as Section 5 and 6 of the National Land Commission Act, 2012, to undertake an investigation into the controversy with a view to settling the residents of the suit land to other areas.

The Respondent in the course of its inquiries interrogated the local leaders and took on board their views. However due to the sensitive nature of the matter, no ruling/recommendation has yet been made by the Respondent. The Respondent contends that since no ruling has been delivered there exists no decision capable of being quashed. They contend that this suit has been filed in bad faith and ought to be dismissed.

The application was disposed of by way of written submissions and both parties did duly file their written submissions.

The Ex Parte Applicant submitted that the only matter for the determination of this court is whether the Respondent has jurisdiction to make any ruling and/or recommendation in respect of the suit land without first granting them a hearing. Such an action they submit, will contravene the rule of Natural Justice. The Ex Parte applicants finally submit that an order of prohibition is merited to prevent the Respondents from contravening the law in this matter.

In their submissions the Respondents contend that the Ex Parte Applicants have not made out a prima facie case meriting the issuance of prohibitory orders by this court. They further submit that the Ex parte applicants have no '**locus standi'** in the matter as they have not demonstrated that they stand to be directly affected by any decision made by the respondent. The respondents submit that the Ex parte applicants have failed to provide any evidence eg a Title Deed or an Allotment Letter, to prove their proprietary interest in the suit land, nor have they availed any proof that they are otherwise members of the Chepakundi Settlement Scheme.

The Respondent also submits that no document signed by the 410 Ex parte applicants giving the 2nd Ex parte applicant authority to swear a supporting affidavit, verifying affidavit and statutory statement on their behalf has been exhibited. This was not deponed in the pleadings to be a representative suit, thereby dispensing with the need to annex a written authority to act on behalf of the other 410 Ex parte applicants.

As such the 2nd Exparte applicant could not purport to be acting for and on behalf of the other Exparte applicants.

The Respondents submitted that an order of Prohibition is only issued to prevent a public body acting beyond its power or in contravention of the law or to prevent such a public body from departing from the rules of natural justice. It was submitted that the respondent had the jurisdiction to investigate any disputes surrounding land within the Mau Complex pursuant to its constitutional mandate under Article 62 (2) (e) and (3) as well as Article 67 (2) of the Constitution of Kenya as well as Section 6 of the National Land Commission Act.

The respondent submitted that it was only in the preliminary stages of its investigations into the matter and had not yet convened any meeting to hear representations and/or claims and allegations from the various parties. The respondents argued that to date they had only conducted visits to the area in order to make a determination of which areas in the Mau Complex were affected before they embarked on the substantial task of fulfilling their constitutional mandate. The Ex parte applicants could not in the circumstances claim that they had been denied an opportunity to present their side of the story.

Finally the respondents submitted that the utterances allegedly made by the Deputy vice President inciting members of the public against the land owners were the subject of **Nakuru High Court Petition No. 49 of 2013,** which petition has been dismissed. The Ex parte applicants could not therefore rely on those alleged utterances in support of their case.

I have carefully perused and considered the submissions filed by both parties as well as the annextures thereto. This Judicial Review Application raises the following three issues for determination

(i) Whether the Exparte applicants have the requisite locus standi to institute these proceedings

(ii) Whether the current proceedings are competent

(iii) Whether the order of Prohibition being sought is merited

I will proceed to analyze each issue separately

**(i) LOCUS STANDI**

The Respondents in their written submissions had raised the question of whether the Ex parte applications had the requisite **'locus standi'** to bring this matter to court. In judicial review matters the question of **'locus standi'** is now well settled. One need not show a personal and direct interest in the matter. It is sufficient to show that there exists a threatened breach or contravention of law, which requires the intervention of the court. Further the court must be satisfied that the claim is not vexatious, or intended to stall the functions of the public body concerned. In other words the court must satisfy itself that the applicant is not acting in bad faith.

In **MUREITHI & 2 OTHERS (FOR MBARI YA MURATHIMI CLAN) Vs ATTORNEY GENERAL & 5 OTHERS NAIROBI HCMCA No. 158 OF 2005 [2006] 1 KLR 443** Judge Nyamu (as he then was) held as follows

> ***"The function of standing rules include: to restrict access to judicial review; to protect public bodies from vexatious litigants with no real interest in the outcome of the case but just a desire to make things difficult for the Government. Such litigants do not exist in real life – if they did the requirement for leave would take care of this; to prevent the conduct of Government business being unduly hampered and delayed by excessive litigation; to reduce the risk that civil servants will behave in over cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong' to ration scarce judicial resources; to ensure that the argument on the merit is presented in the best possible way, by a person with a real interest in presenting it (but quality of presentation and personal interest do not always go together); to ensure that people do not***

***meddle paternalistically in affairs of others …… judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a court of law ……. The other reason is that although initially it was feared that the relaxation of standing would open floodgates of litigation and overwhelm the courts this had in fact not happened and statistics reveal or show that on the ground, there are very few busybodies in this area. In addition, the path by eminent jurists in many countries highlighting on the need for the courts being broadminded on the issue …. Under the English Order 53 now replaced in that county since 1977 and which applies to us by virtue of the Law Reform Act Cap 26 the test of locus standi is that a person is aggrieved. After 1977 the test is whether the applicant has sufficient interest in the matter to which the application relates. The statutory phrase "person aggrieved" was treated as a question of fact – "grievances are not to be measured in pounds and pence"….. Although under statute our test is that of sufficient interest my view is that the horse has bolted and has left the stable – it would be difficult to restrain the great achievements in this area, which achievements have been attained on a case to case basis. It will be equally difficult to restrain the public spirited citizen or well organized and well equipped pressure groups from articulating issues of public law in our courts. It is for this reason that I think courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case. The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, of course, a mere busybody who is interfering in things that do not concern him but this include a person who has a genuine grievance because an order has been made which prejudicially affects his interests and the rights of citizens to enter the lists for the benefit of the public or a section of the public, of which they themselves are members. A direct financial or legal interest is not required in the test of sufficient interest …… in my view the courts must resist the temptation to try and contain judicial review in a strait jacket. Even on the important principle of establishing standing for the purposes of judicial review the courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them….."***

The Court of Appeal in **MUMO MATEMU Vs TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & OTHERS [2013] eKLR** held that courts should not place hurdles on access to the except when it is apparent that the litigation is hypothetical, abstract or an abuse of the court process-

***"Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process….***

***It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reason of poverty helplessness, disability or social-economic disadvantage, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Articles 22 and 258 of the Constitution".***

In **REPUBLIC Vs COUNTY GOVERNMENT OF MOMBASA, EX PARTE OUTDOOR ADVERTISING ASSOCIATION OF KENYA [2014]eKLR** the court also held thus on locus:-

***"On locus standi, as a constitutional principle of public law and for promotion of access to justice, the law makes generous provisions on standing over and above personal standing interest in interest of enforcement of public law duties. That is clear from Articles 22 and 258 of***

***the Constitution of Kenya. The Constitution thus recognizes the right of association to litigate questions of fundamental human rights, and interpretation of the Constitution on behalf of its members. It should not matter that such questions of fundamental rights or interpretation of the Constitution arise in judicial review proceedings. In these proceedings, the issue of the Ex parte applicant's constitutional right to fair administrative action is at the centre of its claim on legitimate expectation and right of being heard before the impugned decisions were taken".***

The Ex parte applicants on filing this matter allege that the respondent intends to make recommendations which will touch on the Titles of the persons who are in occupation and possession of the suit land, without seeking and/or hearing the views of those persons. It is alleged that such action on the part of the respondents will contravene Article 47 of the Constitution which guarantees to all citizens the right to fair administrative action.

The present application raises a substantive question of law regarding whether the respondent ought to take the views of the persons whom its decision is likely to affect before proceeding to make any decisions in respect of the suit land.

It is not in my view essential that the Ex parte applicants show proof of ownership or annex Title Deeds to enable them ventilate this matter. The respondent is a public body established under Article 67 of the Constitution and must exercise its mandate in accordance with the constitution and the relevant statute law. As such I am satisfied that the Ex parte applicants being citizens of this country have a vested interest in ensuring that the respondent properly and lawfully exercises its mandate. They therefore have the requisite locus standi to bring this suit.

Allied to the issue of locus standi, it was submitted for the respondent that the 2nd Ex parte applicant did not have proper authority to bring this suit for and on behalf of the other 410 Ex parte applicants.

The suit papers indicate that the suit has been filed by **"NJOKI MURUGE and 410 OTHERS"** all of who claim to have an interest in the Chepakundi Settlement Scheme. The verifying affidavit was sworn by one **JONATHAN ROTICH** on his own behalf and allegedly on behalf of the other 410 Ex parte applicants. The said **'Jonathan Rotich'** is also the deponent of all the other affidavits sworn in the matter.

However the said Mr. Jonathan Rotich has failed to annex to the pleadings any authority signed by the other Ex parte applicants giving their consent for him to act for and on their behalf. As rightly pointed out by the respondent it has not been averred that this was a representative suit in which case such written authority would not have been necessary. Order 1 Rule 13 of the Civil Procedure Rules provides

***(i) Where there are more plaintiffs than one, any or more of them may be authorized by any other of them to appear, plead or act for such other in any proceedings, and in like manner, where there are more defendants than one any one or more of them may be authorized by any of them to appear, to plead or act for such other in any proceeding.***

***(ii) The authority shall be in writing signed by the party giving it and shall be filed in the case.*** (own emphasis)

Therefore where one or more parties instructs another to appear, plead or act on their behalf the use of the word **'shall'** on Order 1 makes it mandatory that written authority to so act be filed in court. In **REPUBLIC Vs MUSANKA OLE RUNKES TARAKWA & 5 OTHERS EX Parte JOSEPH LESALO LEKITIO & OTHERS [2015]eKLR, Hon Justice Sila Munyao** held that

***"Authority in a case where there are several litigants is critical, for it is the only way that others can be bound by what one person files. It is not a matter to be taken casually. One cannot purport to bind others unless with their written authority"***

In **JOHN KARIUKI & 347 OTHERS Vs JOHN MUNGAI NJOROGE & 8 OTHERS HCCC No.**

**152 OF 2003** the court explained on the purpose behind this rule-

> ***"The mischief that the said rule was meant to address, in my humble view, is to prevent a situation where a party may become bound by a court decision without his having knowledge of the suit that led to the said decision. The court can envisage a scenario, where, lets say, after dismissal of a suit, such a plaintiff whose name has been included declines to settle the costs on the pretext that he did not authorize the suit to be filed in his name. in my considered view, this requirement is mandatory. A party cannot be condemned or enjoy a benefit a court process without his say so".***

Therefore without such clear and written authority the said Jonathan Rotich cannot purport to plead, act or appear on behalf of the other 410 Ex parte applicant. There is no evidence that they intended to be bound by or indeed to benefit from any orders the court may make in the matter. There remains real doubt whether the other 410 persons actually intended to participate in the suit. Therefore this matter shall only proceed henceforth in respect of **'Jonathan Rotich' ONLY**. Any claims relating to the other Ex parte applicants will not be considered by the court.

**(2) COMPETENCY OF THE SUIT**

The Respondent raised the objection that since no ruling/recommendation has been made in this matter there was effectively nothing to be challenged by the Ex Parte applicant in these proceedings. They submit that the present applicant is premature and should have awaited the pronouncement of a ruling by the respondent. The remedy of **'prohibition'** under judicial review was defined by The court in **KENYA NATIONAL EXAMINATION COUNCIL Vs REPUBLIC Ex Parte GEOFFREY GATHENJI NJOROGE & 9 OTHERS** where it was held

> ***"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice ….. Prohibition cannot quash a decision which had already been made; it can only prevent the making of a contemplated decision… Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or absence of it but also for a departure from the rules of natural justice".***

The same court relying on its above decision held in **TIMOTHY KAGONDU MURIUKI & 4 OTHERS Vs REPUBLIC & 3 OTHERS [2013] eKLR**

> ***"An order of prohibition is futuristic, it is pre-emptive and not retroactive. For an order of prohibition to issue the decision complained of must not be completed, it is a contemplated decision".***

The remedy of **'prohibition'** is intended to restrain a public body from acting or continuing to act in an unlawful manner. Hon Justice George Odunga in **NYANDO POWER TECHNIQUES LIMITED Vs NAIROBI CITY COUNTY & ANOTHER [2016]eKLR** stated as follows

> ***"Prohibition on the other hand is a means of preventing an order or decisions being made, which if made would be subject of an order of certiorari…. For prohibition to issue there must be an imminent threat of the respondent taking an action which constitutes grounds for the grant of judicial review relief. In other words where there is no such threat, an order of prohibition will not issue in vaccuo".***

The Ex parte applicant is apprehensive that the Respondent may make findings which would have an impact on his property rights within the area under investigation. As such the Ex parte applicant has sought orders of prohibition to restrain the Respondent from making any decision until the views of the persons likely to be affected by that decision have been sought and obtained. If the decision in question had already been made by the respondent, then an order of prohibition would not issue since prohibition

does not **"lie to correct the course, practice, or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings"** [see **Kenya National Examination Council Vs Republic Ex Parte Geoffrey Gathenji and 9 others** (supra)]

I therefore find that the prayer for orders of prohibition is in the circumstances competent and this limb of the Respondents objection to the present application is dismissed.

**(3) IS AN ORDER OF PROHIBITION MERITED**

Article 47 of the Constitution of Kenya 2010 provides that every person is entitled to administrative action that is expeditious, efficient, lawful reasonable and procedurally fair. Section 4(1) of the Fair Administrative Action Act, 2015 reiterates that right to fair administrative action Section 2 of the Act defined **"administrative action"** to include

> (i) The powers, functions and duties exercised by authorities or quasi judicial tribunal; or
>
> (ii) Any act or omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates

Section 3(1) of the Fair Administrative Action Act provides that the Act will apply to all state and non-state agencies including any person

> ***"(a) Exercising administrative authority***
>
> ***(b) Performing a judicial or quasi-judicial function under the constitution or any written law; or***
>
> ***(c) Whose action omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates"***

It is not in dispute that the respondent does have the power to investigate the status of the suit land, nor can there be any dispute that the Respondent also has powers to make any recommendations it may deem just and necessary

At paragraph 18 of its Replying Affidavit, the Respondent indicated that its intention was to settle residents living in the Chepakundi Area as per the recommendation of the Task Force on the Conservation of the Mau Forest Complex. Some of the recommendations in that Report were that title issued to land determined to be forest land and titles in other protected areas should be revoked and that such land should revert to the state. The report further recommended that the persons affected may or may not be compensated depending on whether they had obtained those titles irregularly.

It is therefore quite clear that the Respondent intended action would amount to **'administrative action'**. Such action would definitely affect the rights of the Ex parte applicant and others who occupy the Chepakundi Scheme. Such persons face the possibility of losing titles to their land, with or without compensation, and also stand to lose their rights to occupation of such land. Such affected persons are therefore entitled to fair administrative action as provided by Article 47 of the Constitution and Section 4 of the Fair Administrative Actions Act.

Procedural fairness means adherence to procedural rules as prescribed by the Constitution or by statute and observance of the Rules of Natural Justice. This was stated in the case of **PASTOLI Vs KABALE DISTRICT LOCAL GOVERNMENT COUNCIL & OTHERS [2008] E. A 300** where it was held

> ***"Procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules and 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".***

The right to be heard requires that any person who stands to be affected by any decision should be informed of the intended decision and must be given ample opportunity to present their views before any decision adverse to themselves is taken. In **ONYANGO OLOO Vs ATTORNEY GENERAL [1986-1989] E.A 456** the court held

> ***"The principle of natural justice applies where ordinary people would reasonable expect those making decision which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard".***

Similarly in **MSAGHA Vs CHIEF JUSTICE & 7 OTHERS [2006]eKLR** it was held

> ***"All that is fundamentally demanded of the decision maker is that his decision in its own context be made with due regard for the affected parties' interests and accordingly be reached without bias and after giving the party or parties a chance to put his or their case. Nevertheless some judges prefer to speak of a duty to act fairly rather than a duty to observe the rules of natural justice, often the terms are interchangeable. But it is perhaps now the case while a duty to act fairly is incumbent on every decision-maker within the administrative process whose decision will affect individual-maker within the administrative process whose decision will affect individual interests; the rules of natural justice apply only when some sort of definite code or procedure must be adopted, however, flexible that code may be and however much the decision-maker is said to be master of his own procedure. The rules of natural justice are generally formulated as the rule against bias (nemojudex in sua causa) and in respect of the right to a fair hearing [audi alteram partem]."***

The Fair Administrative Action Act provides that the intention of statute was not to set aside the requirements of the rules of natural justice but only to give furtherance to them. It is for this reason that Section 5 prescribes the manner in which the administrative body will achieve fairness when exercising its authority. It provides-

> ***5.(1)In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall-***
>
> ***(a) Issue a public notice of the proposed administrative action inviting public view in that regard:***
>
> ***(b) Consider all views submitted in relation to the matter before taking the administrative action;***
>
> ***(c) Consider all relevant and material facts; and***
>
> ***(d) Where the administrator proceeds to take the administrative action proposed in the notice***
>
> ***(i) Given reasons for the decision of administrative action as taken'***
>
> ***(ii) Issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and***
>
> ***(iii) Specify the manner and period within which such appeal shall be lodged.***

The Respondent has admitted that it did not hear views from the title holders or form the persons who were in occupation of the suit land. Being persons who were likely to be affected by the decisions/recommendations of the respondent the views of such persons were relevant and ought to have been sought and obtained. The respondent only invited view from the local leaders. In failing to hear the Ex Parte applicant, the Respondent contravened sections 4 and 5 of the Fair Administrative Actions Act

and also contravened Article 47 of the Constitution of Kenya. For the above reasons I hereby allow this application and direct that costs will be met by the Respondent.

Dated and Delivered in Nakuru this 28th day of March, 2017.

**Maureen A. Odero**

**Judge**