



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW JR. APPLICATION CAUSE NO. 213 OF 2014**

**IN THE MATTER OF AN APPLICATION BY ONGATA RONGAI ENVIRONMENTAL  
DEVELOPMENT ORGANIZATION FOR ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE PHYSICAL PLANNING ACT CHAPTER 286**

**AND**

**IN THE MATTER OF THE MINISTER FOR LANDS**

**AND**

**IN THE MATTER OF THE DIRECTOR OF PHYSICAL PLANNING DEPARTMENT AND  
NATIONAL LAND COMMISSION**

**AND**

**COUNTY GOVERNMENT OF KAJIADO**

**REPUBLIC.....APPLICANT**

**AND**

**HON. ATTORNEY GENERAL.....1<sup>ST</sup>  
RESPONDENT**

**THE MINISTRY OF LAND, HOUSING & URBAN DEVELOPMENT.....2<sup>ND</sup>  
RESPONDENT**

**THE DIRECTOR IN-CHARGE OF THE DEPARTMENT OF PHYSICAL PLANNING  
IN THE MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT.....3<sup>RD</sup>  
RESPONDENT**

**THE NATIONAL LAND COMMISSION.....4  
RESPONDENT**

**COUNTY GOVERNMENT OF KAJIADO.....5<sup>TH</sup>  
RESPONDENT**

**EX PARTE:**

**MARISI OLE PAKINI TENKEYE**

**JACOB WANGORA**

**(SUING AS OFFICIALS OF ONGATA RONGAI/ENVIRONMENT DEVELOPMENT ORGANIZATION)**

**JUDGEMENT**

**Introduction**

1. This judgement arises from a Notice of Motion dated 1<sup>st</sup> August, 2014 by which the ex parte applicants herein seek the following orders:

**1. That an order of prohibition do issue to prohibit the Ministry of Land, Housing and urban Development and the National Land Commission from issuing leases without following the Ole-Kasasi Trading Centre Physical Development Plan No. KAJ-1170.00.1 Approved by the Director of Physical Planning on 25/10/2002 and approved by the Ministry of Lands on 16/7/2002 and adopted by the County Council of Olkejuodo on 9/6/2011.**

**2. That an order of Certiorari do issue to quash all allocation of plots done by County Council of Olkejiado of Ole-Kasasi Trading Centre without following the Ole-Kasasi Trading Centre Physical Development Plan No. KAJ. 1170.00.1 Approved by the Director of Physical Planning 25/10/2000 and approved by the Ministry of Lands on 16/7/2002 and adopted by the County Council of Olkajido on June 2011.**

**3. That an order of Mandamus do issue to compel the County Government of Kajiado to repossess all Public utility plots in Olkejiado Trading Centre irregularly allocated to Private Develop without following the OLE-KASAI Trading Centre Physical Development Plan No. KAJ-1170.00.1 Approved by the Director of Physical Planning on 25/10/2002 and approved by the Ministry of Land on 16/7/2002 and adopted by County Council of Olkejuodo on 9/6/2011.**

**4. Such further and other reliefs that the honourable court may deem just and expedient to grant.**

**The Applicant's Case**

2. According to the Applicant, Director of Physical Planning developed a Physical Development Plan for Olekasasi Trading Centre being Olekasasi Trading Centre Physical Development Plan Number KAJ. 1170.001.1 which was approved by the Director of Physical Planning on 25<sup>th</sup> October 2000 and approved and signed by the Minister of Lands on 16<sup>th</sup> July 2002.

3. It was averred that the said Plan was adopted by the County Council of Olekejuado on 9<sup>th</sup> June 2011 without any amendments and in the said Physical Development Plan, were Public Utility Facilities such as a Christian and a Muslim Cemeteries, Nursery Schools, Public Schools, Stadium, Slaughter House, Rabaria Reserves, Jua Kali Workshops, Social Hall and Public Park. However, the Olkejuado County Council, the predecessor of the County Government of Kajiado irregularly allocated some of these properties to Private Developers who erected buildings in the area in complete disregard of the purposes they were originally meant for.

4. It was the applicants' case that these developments have interfered with the Development Plan and they have denied the Public to access to this Public Utility Plots and thus causing difficulties and hardships to

the Local Communities.

5. It was disclosed that the then Ministry of Local Government by a circular dated 14<sup>th</sup> April 2003, had directed all Town Clerks and County Clerks to repossess all Public Utility Plots irregularly allocated but this was never been done at Olekasasi Trading Centre. According to the applicants, those who were irregularly allocated Public Utility Plots have formed an Association calling itself Olekasasi Plot Owners Association and are agitating for the issuance of Leases to their Plots without regard to the Physical Development Plan for the Area. In the applicants' view, if the Leases are issued without regard to the Olekasasi Physical Development Plan Number KAJ. 1170.00.1, which created The Public Utility Plots, then the Community will suffer irreparable loss and damage as they will miss the benefits of those Plots.

6. It was therefore the applicants' case that all the issuance of Leases on the Plots be stopped forthwith and that the County Government of Kajiado should move with speed to repossess all the irregularly allocated plots and the said plots be reverted back for the purposes they were originally meant for. They sought that the Leases be issued following strictly the Olekasasi Physical Development Plan No. KAJ. 1170.00.1 Approved by the Directors of Physical Planning on 25<sup>th</sup> October 2000 and signed and adopted by The Council on 9<sup>th</sup> June 2011 without any amendments.

7. In the applicants' contention, all the irregular allocations by the Council be revoked before the Leases can be issued, otherwise the Leases will go to the wrong hands. The applicant went further and sought that they be granted the role to monitor and safeguard all Public Utility Plots for and on behalf of The National Land Commission.

### **Determinations**

8. It is clear that the ex parte applicants are aggrieved by the decision of the Olkejuado County Council, the predecessor of the County Government of Kajiado to irregularly allocate some of the subject properties to Private Developers in complete disregard of the purposes they were originally meant for. In other words the applicants are contending that the Olekasasi Trading Centre Physical Development Plan Number KAJ. 1170.001.1 as prepared by the Director of Physical Planning and approved by the Minister concerned has been contravened in the process of allocation of the land in the area.

9. Article 165(3) of the Constitution provides as follows:

***(3) Subject to clause (5), the High Court shall have—***

***(a) unlimited original jurisdiction in criminal and civil matters;***

.....

***(e) any other jurisdiction, original or appellate, conferred on it by legislation.***

10. Article 165(5)(6) and (7) thereof on the other hand provides:

***(5) The High Court shall not have jurisdiction in respect of matters—***

***(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or***

***(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).***

***(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.***

***(7) For the purposes of clause (6), the High Court may call for the record of any proceedings***

***before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.***

11. The Courts contemplated in Article 162(2) are those with the status of the High Court to hear and determine disputes relating to employment and labour relations; and the environment and the use and occupation of, and title to, land. Parliament was donated the power to establish the said Courts and determine their jurisdiction and functions by the same Article.

12. It is now trite law that the High Court in the exercise of its judicial review jurisdiction exercises neither a criminal jurisdiction nor a civil one since the powers of the High Court to grant judicial review remedies is *sui generis*. See **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1.**

13. Therefore in exercising its judicial review jurisdiction the High Court does not exercise the powers conferred upon it under Article 165(3)(a) but rather the powers conferred upon it under Article 165(3)(e) as read with Article 165(6) and (7) of the Constitution.

14. However, the High Court's power and authority is derived from the Constitution and where the Constitution limits the jurisdiction of the High Court, that limit is legal and proper. In my view by specifically creating the Courts with the status of the High Court to deal with employment and labour relations disputes on one hand and environment and land disputes on the other, the people of Kenya appreciated the importance of these specialised Courts.

15. Under Article 165(5)(b) of the Constitution this Court has no power to determine issues which ***fall within the jurisdiction of the courts contemplated in Article 162(2)*** aforesaid. Pursuant to the powers conferred upon Parliament under Article 162(3) of the Constitution to “*determine the jurisdiction and functions of the courts contemplated in clause (2)*”, Parliament did enact ***The Environment and Land Court Act, 2011*** which Act commenced on 30<sup>th</sup> August 2011. Section 13 of the said Act provides as follows:

***(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.***

***(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—***

***(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;***

***(b) relating to compulsory acquisition of land;***

***(c) relating to land administration and management;***

***(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and***

***(e) any other dispute relating to environment and land.***

***(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.***

***(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of***

*matters falling within the jurisdiction of the Court.*

*(5) Deleted by Act No. 12 of 2012, Sch.*

*(6) Deleted by Act No. 12 of 2012, Sch.*

*(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—*

*(a) interim or permanent preservation orders including injunctions;*

*(b) prerogative orders;*

*(c) award of damages;*

*(d) compensation;*

*(e) specific performance;*

*(g) restitution;*

*(h) declaration; or*

*(i) costs.*

16. It is therefore clear that the Court with the jurisdiction to determine questions respecting **land use planning** is the Environment and Land Court and not this Court. The ELC has the power to issue orders in the nature of prerogative writs which is what the applicants seek in this case.

17. In **Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Limited [1989] KLR 1 Nyarangi, JA** expressed himself as follows:

**“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.**

18. Similarly in **Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367** the same Court expressed itself as follows:

**“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity**

and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.”

19. Lastly, on the same issue, the Supreme Court in the case of Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011, observed that:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings... Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

20. It is therefore my view that these proceedings ought to have been instituted before the Environment and Land Court.

21. Apart from that the decision whether or not to grant judicial review reliefs is no doubt exercise of discretion. As is stated in *Halsbury’s Laws of England* 4<sup>th</sup> Edn. Vol. 1(1) para 12 page 270:

“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow ‘contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.’ [Emphasis added].

22. In this case the persons mentioned by the applicants as having been irregularly allocated the properties in the said area are not parties to these proceedings and are not before me. To issue the orders sought herein would have the effect of violating the rules of natural justice. To do so would be to engender and abet an injustice and as has been held before, a court of justice has no jurisdiction to do injustice. See M

**Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000 and Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**

23. For the foregoing reasons this application cannot be allowed and in the premises I decline to grant the orders sought herein.

**Order**

24. In the result, Notice of Motion dated 1<sup>st</sup> August, 2014 fails and is dismissed but with no order as to costs.

**Dated at Nairobi this 14<sup>th</sup> day of December, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Odhiambo for Miss Chimau for the Respondent***

**CA Ooko**