



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 210 OF 2015

**IN THE MATTER OF AN APPLICATION BY KARIM SAIFUDDIN ANJARWALLA &
PARVENU ANJARWALLA FOR LEAVE FOR ORDERS OF MANDAMUS, CERTIORARI AND
PROHIBITION**

AND

**IN THE MATTER OF SECTIONS 5, 6 & 14 OF THE NATIONAL LAND COMMISSION ACT,
2012 OF THE LAWS OF KENYA.**

AND

**IN THE MATTER OF THE SECTIONS 3 AND 8 OF THE LAND ACT 2012 OF THE LAWS OF
KENYA.**

AND

IN THE MATTER OF TITLE NUMBER LR. NO. 17/408 PEPONI ROAD, NAIROBI

AND

IN THE MATTER OF THE REVIEW OF GRANTS AND DISPOSITION OF PUBLIC LAND

BETWEEN

KARIM SAIFUDIDN ANJARWALLA.....1ST APPLICANT

PARVEN ANJARWALLA.....2ND APPLICANT

VERSUS

THE NATIONAL LAND COMMISSIONRESPONDENT

THE NAIROBI CITY COUNTYINTERESTED PARTY

JUDGEMENT

1. By a Notice of Motion filed 8th October, 2014, expressed to be brought under Articles 22, 23 and 165 of the Constitution of Kenya, 2010 and Order 53 of the *Civil Procedure Rules, 2010*, the inherent

jurisdiction of the court and all other enabling provisions of law, the *ex parte* applicant herein, **Karim Saifudidn Anjarwalla** and **Parven Anjarwalla** seek the following orders:

1 An order of mandamus be issuing compelling the Respondent to serve on the Applicants a copy of the written complain allegedly made by the Interested Party, or any other complain made to the Respondent in relation to the Applicant's property being Title number LR17/408, Peponi Road situated in Nairobi (the Property) that was the genesis of the Public Notice issued by the Respondent in the Standard newspaper on Monday 19 Janaury2015 entitled "Review of Grants and Disposition of Public Land" listing the property as item 74 and naming the Applicants and the Interested Party (the Notice) and requesting written representations by Friday 23 January 2015 and attendance at a public hearing on 12 February 2015 at 10 am at ACK Garden Annex, Nairobi (the Review).

2 An order of certiorari removing to this honourable court the Respondent's decision to issue the Notice and/or conduct the review of the properly for the purposes of quashing such decision.

3 And order of prohibition directed at the Respondent prohibiting it from proceeding to act on the Notice or proceeding with the review in any manner howsoever affecting the property or an any other manner from interfering with the Applicant's lawful enjoyment of the property.

4 The cost of this application be borne by the Respondent.

Ex Parte Applicant's Case

2. According to the Applicants, they are the registered proprietors as joint tenants of a freehold title comprising 9.6821 hectares of and buildings known as LR 71/408 (original number LR 17/102/2), Peponi Road situated in Nairobi (the Suit property).

3. According to the applicants they were aggrieved by the public notice issue by the Respondent in the **Standard Newspaper** on Monday 19 January, 2015 entitled "Review of Grants and Disposition of Public Land" (hereinafter referred to as "the Notice") listing the suit property as item 74 and naming the applicants and the Interested Party and requesting written representations by Friday 23rd January 2015 and attendance at a public hearing on 12th February 2015 at 10 am at ACK Garden Annex, Nairobi. According to the applicants, the suit property was formerly part of a larger packed of 20/.3 acres of land know as LR 17/65 (ORIGINAL LR 17/11/3) the mother title that had been in private ownership since 1955 which mother title was subdivided into 3 portions in 1970.

4. According to the applicants, in 1971 a deed plan for the mother title was prepared for the surrender of 0.4932 hectares of land being LR 17/65/1 for the construction of Peponi Road. Between 1976 and 1996 one of the three portions of the mother title, being LR 17/65/2, was sold several times until it came into the ownership of **Insurance Company of East African Limited**, by which time it was known as LR 17/102. By a conveyance dated 8th July 2003 the applicants' predecessor in title, **Latif Karimjee**, together with **Alastair** and **Jenny Russel**, **Peter** and **Lolita Cheyney**, **Ian** and **Joanne Askew** and **One hundred and Two Peponi Road Limited**, a limited liability company bought LR 17/102 for Kshs.32 million and applied to subdivide it into 5 portions, with 1 portion being acres Peponi Road, a transaction in Messrs Kaplan & Stratton acted for the purchasers. On 4th December 2003 a deed survey plan was registered for the subdivision of LR 17/408-412 while on 30th January, 2004 a subdivision certificate was issued for 67 sub-plots to allow for the creation of a road reserve.

5. It was averred that on 28th May, 2004 the applicants' said predecessor in title, **Latif Karimjee**, together with **Alastair** and **Jenny Russel**, **Peter** and **Lolita Cheyney**, **Ian** and **Joanne Askew** and **One hundred and Two Peponi Road Limited**, surrendered 0.2231 ha of land to the Government of Kenya for the road reserve adjacent to Peponi Road and the creation of an access road for the 4 subplots. It was

averred that since purchase of the suit property the applicants have not had any issues in relation to their title or boundaries.

6. However, on Monday 19th January 2015 the applicants started receiving a lot of phone calls from concerned friends, relatives, colleagues and other people known to them in relation to the said Notice inquiring into why the applicants had been adversely mentioned in relation to public land. The applicants contended that they were very shocked to be named as the subjects of a public hearing as to the review of grants and disposition of public land since according to them, their land was in no way the subject of a disposal of public and they did not know why the Interested Party was mentioned.

7. As a practicing advocate for many years and the managing partner of a large corporate/commercial law firm, the 1st applicant contended that being linked with potential irregular dealing with public land was a very serious allegation and a significance risk to his professional career and reputation, a concern which was shared by the 2nd applicant who is the 1st applicant's wife. The applicants immediately instructed the 1st applicant's firm to obtain details of the allegations made against them so that they could respond in good time as there was a very short deadline to make written representations which the said firm did on 20th January, 2015, 23rd January, 2015 and 6th February, 2015 requesting a summary of the allegations made against the applicants in order for them to decide how to respond to the same but there was no response. Accordingly, the applicants decided to file preliminary submissions setting out the conveyancing history to show that the property comprised of private land and challenging the Respondent's jurisdiction and the 1st respondent attended the review hearing with his litigation partner, **Aisha Abdallah**, before a panel made up of the vice chair **Abigail Mbagaya**, **Commissioner Emma Njogu**, Legal Affairs Director **Margaret Kaputiya**, Deputy Director **Brian Cole** and Director **Tom Kanyingi** at the NHIF building in Nairobi on 12th February 2015. However, the review hearing started late and was quite chaotic as there were a large number of parties, many of whom were not legally represented, and it was not clear what the order of events would be. A number of the advocates requested details of the complaints made against their clients so that they could file substantive responses. There were also a number of parties who were attending for the second or subsequent hearing. As there was no appearance by the Interested Party at the review hearing, the applicants have been unable to confirm whether indeed it made a complaint against them and, if so the basis of the same. At the said appearance, **Mrs. Abdallah** referred to the said preliminary submissions, pointed out that the property was private land and requested a copy of the complaint made against the applicants at which point the vice chair informed her that the Interested Party had complained that the applicants were blocking a public road and that she could obtain a copy of the complaint from the Secretariat. The legal affairs director **Margaret Kaptuiya** queried on what basis they had filed preliminary submissions if they were not clear about the substance of the allegations and **Mrs. Abadallah** explained that they were to show the conveyancing history and that it was private land and were filed on a without prejudice basis. It was averred that the secretariat was busy all day with the hearing and told the applicants to visit them the next day or the following week to obtain a copy of the complaint. Thereafter, the firm wrote a follow up letter to the Respondent on 13th February 2015 requesting a copy of the complaint and also sent one of their clerks **Pamela Ombok**, to follow up with the Respondent's secretary at Ardhi House but was informed that the file was missing and that there was difficulty in obtaining the complaint. Despite further follow up with regular visits to Ardhi House on the issue, no success was forthcoming even after sending a demand letter after more than 5 months of waiting..

8. According to the applicants, they continue to live in constant fear that any day now they shall be listed for a further hearing without any more information about the complaint made against them in order to enable them respond substantively and obtain a fair hearing, a situation which is causing enormous strain on their family and is continuing to damage the 1st applicant's professional reputation hence the decision to seek the reliefs sought herein. To the applicants, the Respondent should either furnish them with a copy of the complaint in a timely manner or it should withdraw the Notice against them. Alternatively, if indeed the Interested Party has filed a complainant against them, then it should furnish them with a copy of the same so that they can respond as it is unreasonable and unfair for the Respondent to keep them in suspense when they are seeking to clear their names of unknown allegations.

9. To the applicant, without sufficient information about the complaint against them, they are also unable

to ascertain whether the Respondent is exercising its jurisdiction lawfully in reviewing their property which property they duly acquired believe they are entitled to protection of their rights. It was their view that the Respondent is not treating them in an expeditious, efficient, lawful, reasonable or fair manner in the way it has gone about this review and given the unexplained delay in furnishing the alleged complaint, the lack of response to their letters from the Respondent and the non-appearance of the complainant at the review hearing, they suspect mischief by unknown persons.

Interested Party's Case

10. On behalf of the interested party it was averred that according to records held by the rating Department and City Planning respectively the Applicants herein **Karim Saifuddin Anjarwalla & Parveen Anjarwalla** are undisputed registered proprietors of all that property know as tilt no. LR No. 17/408 Peponi Road Nairobi.

11. The interested party confirmed that the basis of the judicial review proceedings is a notice in the **Standard Newspaper** of Monday January 2015 in which notice the **National Land Commission**, the respondent herein is purporting to review grants and disposition of Public land wherein LR No. 17/408 was included in a list of allegedly of public land, and cited as item No. 74 which notice called upon the Applicant and the Interested Party to give written representations by the 23rd January 2015 regarding a complaint allegedly filed by the Interested Party with the Respondent and also attend a review hearing on the 12th February 2015 at ACK Garden Annex. The interested party however averred that it has never raised any complaint against the Applicant's property and if there is any, then the same was raised by a different entity. In its view, constitutionally the Respondent mandate is to investigate grants and allocations of public land not private land and the suit property according to county records is private property and not public land and therefore the Respondent has no jurisdiction over the same.

12. The interested party explained that it only failed to attend the review hearing on the 12th February 2015 as it was not even aware or party to any complaint against the Applicants in relation to the suit property. It averred that the Respondent (National Land Commission) on inquiry has failed to disclose to the Interested Party the nature of the complain, identity of the officer who raised the complain and a copy if any of the complaint that emanated from their office to enable them make appropriate submission in this suit. On further inquiry, the Interested Party found out that no formal invitation has ever been sent by the Respondent to them asking them to attend any review hearing touching on the suit property.

13. The interested party therefore distances itself from this suit as it is being dragged into a matter it has no interest in or concern of. Further it is not aware of any public road purportedly blocked by the suit property at Peponi Road hence the purported complaint by the Interested Party which is the basis of this suit is best known by the Respondent itself.

14. The interested party therefore urged this Court to exercise its jurisdiction and issue orders appropriate to protect public good, for the interest of justice law and order.

Determination

15. Before dealing with the merits of the case, it is important to deal with the issue of intitlement of the application herein. In judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779.**

16. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

“This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners’ offices and in some registries of the High Court. The appellant’s advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such

orders must be intitled and served accordingly. The Crown cannot be both applicant and respondent in the same matter”.

17. In Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486 Ringera, J (as he then was) expressed himself as follows:

“Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intitled and accordingly, the orders of *Certiorari*, *Mandamus* or *Prohibition* are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is:-

“REPUBLIC.....APPLICANT

V

THE ELECTORAL COMMISSION OF KENYA.....RESPONDENT

EX PARTE

JOTHAM MULATI WELAMONDI”

18. It is clear from the title of the proceedings herein that the Motion herein is not an epitome of impeccable, elegant or paragon drafting. The applicants are indicated as individuals rather than the Republic.

19. However in Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005 the Court of Appeal stated:

“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court”.

20. It is therefore my view that whereas the failure by a party to properly intitle the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs, that blunder is not incurably defective and ought not on its own be the basis upon which an otherwise competent application is to be dismissed.

21. Having considered the foregoing it is clear that the factual basis of the ex parte applicant’s case is not challenged in light of the fact that the Respondents have opted not to controvert the same by way of affidavit evidence while the interested party which is alleged to be the complainant has distanced itself from the alleged complaint which complaint itself has neither been furnished to the applicant nor to the interested party by the Respondent.

22. *Halsbury’s Laws of England*, 5th Edn. Vol. 61 page 539 at para 639 states:

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests

of an individual may suffice itself to attract a duty to comply with this rule. Common law and statutory obligations of procedural fairness now also have to be read in the light of the right under the Convention for the Protection of Human Rights and Fundamental Freedoms to a fair trial which will be engaged in cases involving the determination of civil rights or obligations or any criminal charge.”

23. *Halsbury’s* (supra) adds that:

“Where however a general duty to act judicially is cast on the competent authority, only clear language will be interpreted as conferring a power to exclude the operation of the rule, and even in the absence of express procedural requirements fairness may still dictate that prior notice and an opportunity to be heard be afforded.”

24. The minimum ingredients of fair hearing are provided in Article 47 of the Constitution. I say the minimum because under Article 20 of the Constitution every person is entitled to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom and in applying a provision of the Bill of Rights, a court is enjoined *inter alia* to develop the law to the extent that it does not give effect to a right or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

25. Article 47 of the Constitution provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

26. Article 50(1) of the Constitution, on the other hand provides that:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

27. It follows that the Respondent is under the constitutional obligation to ensure that its proceedings meet the requirement of fairness. In **R vs. Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531, 560-G**, Lord Mustill held:

“Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.”

28. Similarly, in **Hoffmann-La Roche (F) & Co. AG vs. Secretary of State for Trade and Industry [1975] AC 295, 368D-E** it was held that the commissioners;

“...must act fairly by giving to the person whose activities are being investigated a reasonable opportunity to put forward facts and arguments in justification of his conduct of these activities before they reach a conclusion which may affect him adversely.”

29. For a hearing to be said to be fair under Article 47 as read with Article 50(1) of the Constitution, not only should the case that the respondent is called upon to meet be sufficiently brought home to him and adequate or reasonable notice to enable him deal with it given, but also the authority concerned ought to approach the issue with an unbiased disposition. In other words the authority ought not to be seen to be seeking representations from the respondent simply for the purposes of meeting the legal criteria. The fair hearing must be meaningful for it to meet the constitutional threshold. On this aspect, *Halsbury’s Laws*

of *England*, 5th Edn. Vol. 61 page 545 at para 640 states:

“The *audi alteram partem* rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing...The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases. This duty is not always imposed rigorously on domestic tribunals which conduct their proceedings informally, and a want of detailed specification may exceptionally be held immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the deficiency in the notice did not cause him any substantial prejudice...Notification of the proceedings or the proposed decision must also be given early enough to afford the person concerned a reasonable opportunity to prepare representations or put their own case. Otherwise the only proper course will be to postpone or adjourn the matter.”

30. What constitutes fair hearing has now been expounded in the *Fair Administrative Action Act, 2015*. Section 4(3) thereof provides:

(3) 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.

31. Similarly, section 14(3) and (8) of the *National Land Commission Act* Cap 5D of the Laws of Kenya provides that:

(3). In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.

(8). In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the Constitution.

32. In this case, the applicants contend that the notice appeared in the media and that they were not furnished with the complaint which they were to respond to. Despite their efforts to secure the same, the Respondent has not done so and their attempts to obtain the same have been met with a response that both the file and the complaint cannot be traced.

33. The Respondent has not disputed these facts which remain wholly uncontroverted. In my view this,

with due respect, is a very casual and callous way of dealing with such a serious subject as land, a very sensitive subject in this country. It is clear that the Respondent has not adhered to its Constitutional and statutory mandate of carrying out fair hearing in respect of the applicants' suit property.

Order

34. In the premises, I find merit in the Notice of Motion filed 8th July, 2015, and grant the following orders:

1. An order of mandamus compelling the Respondent to serve on the Applicants a copy of the written complaint allegedly made by the Interested Party, or any other complaint made to the Respondent in relation to the Applicant's property being Title number LR17/408, Peponi Road situated in Nairobi that was the genesis of the Public Notice issued by the Respondent in the *Standard Newspaper* on Monday 19th January, 2015 entitled "Review of Grants and Disposition of Public Land" listing the property as item 74 and naming the Applicants and the Interested Party and requesting written representations by Friday 23 January 2015 and attendance at a public hearing on 12 February 2015 at 10 am at ACK Garden Annex, Nairobi (the Review) within Fifteen (15) days from the date of service of this order.

2. In default of compliance with order (1) above, an order of certiorari shall issue removing to this court the Respondent's decision to issue the Notice and/or conduct the review of the properly pursuant to the said Notice which decision shall thereby be quashed.

3. Until the Respondent complies with order (1) above, an order of prohibition is hereby issued restraining the Respondent from proceeding to act on the Notice or proceeding with the review in any manner howsoever affecting the property or in any other manner from interfering with the Applicant's lawful enjoyment of the property.

4. In light of the improper intitlement of the application there will be no order as to costs.

Dated at Nairobi this 25th day of January, 2016.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ayisi for the applicant

Cc Patricia