



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 396 OF 2016

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS OF PROHIBITION AND CERTIORARI**

AND

IN THE MATTER OF THE LAW REFORM ACT, CHAPTER 26 LAWS OF KENYA

BETWEEN

CHARLES STEVEN MBINDYO.....APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

AND

AFRICAN INLAND CHURCH.....1ST INTERESTED PARTY

AGRICULTURAL DEVELOPMENT CORPORATION.....2ND INTERESTED PARTY

RULING

1. Vide a chamber summons dated 30th August 2016 and filed in court on the same day, the ex parte applicant Charles Steven Mbindyo seeks from this court orders:-

a. Spent

b. That the applicant be granted leave to apply for an order of certiorari to quash the decision of the respondent National Land Commission contained in its letter dated 9th August 2016 to conduct the title review hearing scheduled for 2nd d September 2016 at Nairobi in respect of the subject property being title number LR No. 9917/4 registered as IR 47655;

c. That the applicant be granted leave to apply for an order of prohibition to prohibit the respondent whether acting by itself, its agents, officers, servants or whosoever from conducting the review hearing scheduled for the 2nd September 2016 at Nairobi or at all in respect of the applicant's title LR No. 9917/4 registered as IR 47655.

d. That the leave so granted to apply for orders of certiorari and prohibition does operate as a stay of the decision of the respondent contained in its letter dated 9th August 2016 to conduct the title review hearing in respect of the subject property being title No. LR 9917/4 with the effect that the hearing scheduled for 2nd September 2016 at Nairobi be and is hereby stayed.

2. The chamber Summons is brought under the provisions of Order 53 Rules 1,2, and 3 of the Civil Procedure Rules and all other enabling provisions of Law. The said chamber summons is premised on 27 detailed grounds on the face of the application and supported by a statement of facts, affidavit verifying facts and exhibits annexed thereto.

3. The facts relied on which also form grounds of the application are that the applicant herein is the registered owner of the subject parcel of land described as LR No. 9917/4 registered as IR 47655 measuring 4,224.0 hectares situate in Konza area, within Machakos County having purchased it from Lands Limited, a subsidiary of Agricultural Development Corporation (ADC) the 2nd interested party in 1989 and the transfer thereof effected on 4th July 1989.

4. That in the early 1990's the applicant received attempts to coerce him to surrender a portion of the said land under dubious circumstances, which attempts he thwarted and continued to enjoy quiet possession but that in 2015 unknown people invaded the said land and purported to take possession which prompted the applicant to report the matter to the Directorate Investigations which found that one Justus Wainaina had purported to secure registration of some fraudulent subdivisions of the subject property LR No. 9917/5-13.

5. That the said Justus Wainaina purported to act on instructions of Cheptumo of Cheptumo & Company Advocates and he is now facing criminal charges vide criminal 539/2015 which is ongoing, which case is related to the said alleged subdivisions of the subject property.

6. That the firm of Cheptumo & Company Advocates have purported to act for African Inland Church the 1st interested party and vide their letter dated 21st April 2016 to the respondent National Land Commission, they seek to have the applicants title reviewed and even cancelled by the respondent under Section 14 of the National Land Commission Act.

7. That the full tenor and purpose of that letter is to seek to coerce the applicant to accede to some mutual understanding between ADC, the then commissioner of lands and the applicant to have 1588.4 hectares of land out of the subject land transferred to the 1st interested party, which arrangements the applicant is not party to.

8. That the applicant is aggrieved by the decision of the respondents to conduct a review hearing and he has written to them a letter of objection since the purported dispute is of private nature wherein the 1st interested party seeks to enforce a purported mutual understanding to have part of the applicant's suit property transferred to it.

9. That since the dispute is a private one the respondent National Land Commission had no jurisdiction to adjudicate and determine such private disputes relating to agreements and or mutual understanding as per the complaint letter dated 21st April 2016 by the 1st interested party.

10. That given the nature of the complaint there is no challenge to the manner in which the applicant acquired the suit property. That since the same dispute is subject of criminal proceedings pending against Justus Wainaina, the intended hearing smacks impropriety, is untoward, is in error of jurisdiction, unjust, unwarranted and highly prejudicial to him and the outcome of the said criminal trial.

11. That in any event the claim by the 1st interest party is statute barred since the applicant has been in actual occupation and possession of the suit property for the past 26 years and that there was no attempt to enforce any purported agreement for all those years.

12. That this court should intervene to grant the orders sought to prevent a hearing for review of the title by the respondent which is bereft of any jurisdiction.
13. That unless leave is granted, and to operate as stay, proceedings will be prejudice will be suffered and that the applicant has presented an arguable case to warrant leave sought to be granted to enable him file Judicial Review proceedings to serve the interests of justice.
14. The application was brought under certificate of urgency on 31st August 2016. I certified it as urgent and directed the applicant to serve the respondent and interested parties for interpartes consideration of the application for leave and for stay.
15. On 2nd September 2016 the 2nd interested party appointed Cheptumo & Company Advocates to represent it in the matter and a replying affidavit was filed. It is sworn by Anthony Ademba on 2nd September 2016 and filed the same day. The 2nd interested party in opposing the application for leave and stay contends that the applicant irregularly acquired the suit property measuring 4225 hectares after a transfer of the entire parcel was signed under a mistake of fact thereby conveying the entire land contrary to the allotment letter which only conveyed 2,4,28 hectares of land excluding the homestead.
16. That the applicant accepted the offer of 2,428 hectares of land as the portion he was allotted and the remainder he was to hold as custodian in trust for the 2nd interested party until further notice. That the applicant used his influence as the Permanent Secretary for Treasury to have the entire parcel of land transferred to him leading to negotiations for him to surrender back the excess land which the applicant agreed and he was given a credit note for the surrendered portion.
17. That the 1st interested party was then offered 4864 acres subject to payment of stamp duty and survey fees which it did pay and a consent to transfer that portion to the 1st interested party was granted by the 2nd interested party but that the applicant despite knowledge of all these refused to hand over documents prompting the Commissioner of Lands to issue another surrender of the portion of the land as agreed.
18. That those are the stated circumstances that prompted the dispute to be referred to National Land Commission which has the mandate to review dispositions of public land to establish their propriety or legality. That the invitation letter to the applicant by the respondent is simply to accord him a hearing to determine the legality of the suit title. That this matter is meant to frustrate the lawful inquiry into the legality and validity of the title and is prematurely before the court.
19. Finally, that the 2nd interested party is a stranger to criminal proceedings mentioned.
20. The 1st interested party and the respondent did not file any grounds of opposition or replying affidavit but they appeared by their legal counsels.
21. The application was orally canvassed before me on 7th September 2016 with Mr Kago appearing and submitting on behalf of the applicant; Mr Mbuthia acting for the 1st respondent whereas Mr Odhiambo represented the 2nd interested party. There was no appearance for the 1st interested party.
22. On behalf of the applicant, Mr Kago submitted, relying on the grounds, statement of facts, verifying affidavit and annexures that the applicant has an arguable case to warrant further interrogation at a substantive stage. That the applicant seeks to challenge the decision by the respondent to review title to his property since he believes that it has no jurisdiction to do so over private land as is in this case. Further, that there is a private dispute seeking to enforce a mutual understanding between the parties. That the review hearing is in bad taste and illegal, only seeking to create a cause of action for the 1st interested party hence the respondent must be stopped from assuming jurisdiction.

23. Further, that there is a pending criminal case cr No.539/2015 over the suit land hence the review of title will prejudice that case.

24. On whether leave once granted should operate as stay of review of title process, it was submitted by Mr Kago that it is in the discretion of the court to grant stay so as to preserve the substratum or subject matter of the suit and for the proceedings not to be rendered nugatory to the prejudice of the applicant who should have his day in court.

25. On behalf of the respondent, Mr Mbutia submitted that leave to apply for judicial review remedies is not a matter of course. That the respondent is simply exercising its constitutional and statutory mandate under Article 68 and Section 14 of the Constitution and the National Land Commission Act respectively hence it should be left to work as an independent constitutional commission.

26. That although the suit property is privately registered, it is subject to an inquiry by National Land Commission because the applicant acquired it from the 2nd interested party which is a public body.

27. Further that a notice to be heard is not a decision to be challenged and finally that criminal courts do not determine legality of titles to land.

28. Mr Odhiambo acting for the 2nd interested party submitted that the applicant is estopped from claiming that the suit land is private since he admits purchasing it from Lands Limited a subsidiary of Agricultural Development Corporation (2nd interested party) which a public state corporation.

29. Counsel for the 2nd interested parties adopted submissions by Mr Mbutia and added that there is no decision by the National Land Commission presented before this court capable of being challenged by way of Judicial Review. That the Section 14(3) of the National Land Commission Act mandates the commission to inform and or invite any party which it had done hence the commission should not be curtailed from doing its work.

30. In addition, it was submitted that it is not disclosed how the notice and the intended hearing is unlawful, *ultra vires* or biased against the applicant and that no prejudice has been expressed.

31. That under Section 9(2) of the Fair Administrative Action Act, a party must exhaust all the available avenues before coming to court. That in this case, the applicant should appear before the National Land Commission to make a representation and only approach the court after a hearing. Mr Odhiambo urged this court to dismiss the application for leave with costs.

32. In rejoinder, Mr Kago submitted that the letter JMM7 inviting the applicant for a hearing is a resolution by the commission hence a decision to review the applicant's title since the commission in so doing is invoking its powers under Section 14 of the National Land Commission Act, which is the subject of these proceedings.

33. Further, that the respondent cannot be allowed to conduct its affairs *cata Blanche* as it is subject to the law. Further, that the court should determine at this stage whether there is jurisdiction to determine disputes between private individuals on enforcement of mutual agreements.

34. In addition, it was submitted that there is no estoppel because Lands Limited is a private company. That there is a jurisdictional error, irrationality, failure to adhere to rules of natural justice which are relied on by the applicant and that there is the potential mischief inherent in the intended review process hence this court process is timely since jurisdiction which has been raised goes to the root of everything. On prejudice, it was submitted that as long as there is no jurisdiction then any proceeding by the National Land Commission is a nullity.

35. Further, that Section 14 of the National Land Commission Act does not give the commission omnibus powers but that the section should be read in the context of Articles 63,64 and 68 of the

Constitution. Mr Kago urged that this is a matter which requires to be interrogated and that to do justice, the applicant should not be shut out of the legal process.

Determination

36. I have carefully considered the application by the applicant and all the supporting documents which include statement of facts, verifying affidavit and the exhibits annexed thereto.

37. I have given equal consideration to the replying affidavit filed by the 2nd respondent and its annexures. I have also considered the oral submissions by the respective parties' advocates.

38. There are 2 issues for determination in this application namely:

1. Whether the court should grant leave to the applicant to institute Judicial Review proceedings and
2. Whether, if leave is so granted, it should operate as stay of the decision by the respondent to review the applicant's title.

39. The requirement that leave to apply for Judicial Review orders must be sought and obtained is first intended to exclude vexatious and frivolous applications which may prima facie appear to be abuse of the process of the court, or those applications which may be statute barred. However, the court should exercise its discretion and grant leave to apply if on the material available the court considers, without delving into the matter in depth, that there is an arguable case.

40. At this stage where leave is being sought, the role of the court is to filter the material placed before it for purposes of weeding out hopeless cases at the nascent initial stages in order to save the time for the court and for the parties by ensuring that futile claims do not find their way into the court process and also, that public bodies are not paralyzed from exercising their public statutory or constitutional mandates because of pending frivolous claims before courts of law. This principle was enunciated in the case of **Matiba V Attorney General Nairobi HCC Miscellaneous Application 790/1993. Republic V the Permanent Secretary Ministry of Planning and National Development Exparte Kaimenyi [2006] 1 EA 353.**

41. Waki J in **Republic V County Council of Kwale & Another Exparte Kondo & 57 Others Mombasa HCC Miscellaneous Application 384/95** stated that:

“ The purpose of application for leave to apply for Judicial Review is firstly to eliminate at an early stage any application for Judicial Review which are either frivolous or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for Judicial Review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for Judicial Review of it were actually pending even though misconceived. Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant, the test being whether there is a case fit for further investigation at a full interpartes hearing of the substantive application for Judicial Review. It is an exercise of the court's discretion but as always it has to be exercised judicially.”

42. In **Mirugi Kariuki V Attorney General Civil Appeal No. 70/91 [1990- 1994] EA 156** the court stated that :

“ The law relating to Judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised in justiciable, that is to say if it is a matter on which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power.....the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter. It is not the absoluteness of the discretion nor the authority of exercising it that matter but whether in its exercise, some of the person’s legal rights or interests have been affected. This makes the exercise of such discretion justiciable and therefore subject to Judicial Review. In the instant appeal it is of consequence that the Attorney General has absolute discretion under Section 11(1) of the Act if in its exercise of the appellant’s legal rights or interests were affected. The applicant’s complaint in the High Court was that this was so and for that reason he sought leave of court to have it investigated. It is wrong in law for the court to attempt an assessment of the sufficiency of an applicant’s interests without regard to the matter of his complaint. If he fails to show, when he applies for leave, a prima facie case, on reasonable grounds for believing that there has been a failure of public duty, the court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of legal process. It enables the court to prevent abuse by busy bodies, cranks and other mischief makers.....In this appeal, the issue is whether the appellant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under Section 11(1) of the Act was brought into question. Without a rebuttal to those allegations, the appellant certainly disclosed a prima facie case.

For that, he should have been granted leave to apply for the orders sought.”

43. Again, in **CA 175/2000 Republic V Communications Commission of Kenya & 2 Others Ex parte East African Television Network Ltd (2000) KLR 82** the Court of Appeal held that leave to apply for Judicial Review Orders should be granted if, on the material available, the court considers without going into the matter in-depth, that there is an arguable case for granting leave.

44. Further in **Re Bivac International SA (Bureau Vevitas) [2005] 2 EA 43**. The High Court stated that:

“Applications for leave to apply for orders of Judicial Review are normally ex parte and such an application does restrict the court to threshold issues namely, whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas Judicial Review remedies are at the end of the day discretionary, that discretion is a judicial discretion and for this reason a court has to explain how the discretion if any was exercised so that all the parties are aware of the factors which led to the exercise of the court’s discretion. There should be an arguable case which without delving into details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the Judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of Judicial Review and perhaps give an applicant his day in court instead of denying him.....like the biblical mustard seed which a man took and sowed in his field and which the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stemmed from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the

most powerful tools against abuse of power and arbitrariness. One can safely state that the growth of Judicial Review can only be compared to the never ending categories of negligence after celebrated case of Donohue Vs Stephenson in the last century. Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Meggany J in the case of John Vs Rees [1970] ch 345 Page 402 that in the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration.”

45. From the above authoritative decisions, which I find good law, it clearly emerges that it is not a mere formality that leave to apply for judicial review remedies shall be granted. There are several factors which a court has to take into account. On the other hand, the burden of proof lies on the applicant to demonstrate to the satisfaction of the court that he had a prima facie arguable case for leave to be granted.

46. In other words, in order to invoke the discretion of the court in his favour, an applicant must show that the application is, after all not frivolous, vexatious or abuse of court process. The application must also be made within six months of the date when the decision sought to be challenged was made.

47. Article 67 of the Constitution establishes the National Land Commission (NLC). Among the functions of the National Land Commission is, subject to Article 68 c (v) of the Constitution and pursuant to Section 14(1) of the National Land Commission Act No. 5 of 2012 to:

“.....on its own motion or upon a complaint by the National Government or County Government a community or an individual; review all grants or dispositions of public land to establish their propriety or legality”

(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 of disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.

(4) After hearing the parties in accordance with Subsection (3) of the commission shall make a determination.

(5) Where the commission shall direct the Registrar to revoke the title.

(6) Where the commission finds that the title was irregularly acquired, the commission shall take appropriate steps to correct the irregularity and may also make consequential orders.

(7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.

(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.

48. From the above provisions of the law, it is clear that any person can lodge a complaint to the National Land Commission or the Commission can on its own motion review all grants or dispositions of public land to establish their propriety or legality. But before carrying out the review, the commission is mandated to serve notice upon the affected persons and to give them a fair hearing, in accordance with Article 47 of the Constitution and now the Fair Administrative Action Act, 2015 which implements Article 47 of the Constitution.

49. On 9th August 2016, the respondent National Land Commission issued a notice to the applicant informing him that the commission had received a complaint from Cheptumo & Company Advocates acting for the 1st interested party African Inland Church, which complaint relates to a dispute that had persisted since 1993 on the subject of submission of LR 9917/4 and allocation of LR No. 9917/8

portion to African Inland Church – Review of grant registered as 47655/1.

50. The said notice called upon the applicant to attend a hearing on 2nd September 2016 Friday at 10.00a.m. at ACK Garden, Annex 7th Floor Boardroom next to Ardhi House. The notice also asked the applicant to send five copies of his representation and reminded him that he could send a representative.

51. Upon receipt of that notice, the applicant on 16th August 2015 instructed his advocate Mr H. Kago to respond to the notice, giving reasons why he would not attend the hearing of review of grant and he has persisted to date that he will not attend that hearing hence, this application for leave.

52. Among the reasons for his persistent refusal to participate in the review process given by the applicant is that the land is private land and not public land. Secondly, that the dispute is of a private nature between him and Agricultural Development Corporation for the benefit of African Inland Church and that he cannot be compelled to enforce a mutual understanding or an agreement to surrender part of the land. Finally and more importantly, that the commission has no jurisdiction to hear that dispute which is subject of a criminal case pending in court, and that he has been in occupation of the suit property for over 26 years hence any claim over that land is statute barred.

53. On the other hand, the respondent and the 2nd interested parties contend that the respondent is simply exercising its constitutional mandate under Articles 67 and 68 of the Constitution and statutory powers under Section 14 of the National Land Commission Act to carry out an inquiry to determine the legality or propriety of the suit title, since the transfer of the whole land to the applicant by Lands Limited, a subsidiary of Agricultural Development Corporation which is a public corporation, was by mistake and that the applicant had owned up to that mistake and accepted to rectify by surrender of the excess acreage, to enable the 2nd interested party effect a transfer of the said parcel to the 1st interested party.

54. Whereas I have no doubt in my mind that the National Land Commission has a constitutional and statutory mandate to review all grants and dispositions to public land, and whereas I do not agree with the applicant's contention that the land in issue is private land and not public land for reasons that the land previously belonged to the public(Agricultural Development Corporation) and therefore the commission has power to investigate how that land was converted from public to private land and acquired by the applicant who was in authority at the material time; I am persuaded that there is an arguable issue for consideration at a full hearing among others, that of whether or not the respondent has jurisdiction to review grant over land which the applicant has held and occupied for a period of over 26 years.

55. The issue for jurisdiction goes to the root of the matter and it is only fair and just that the applicant has his day in court as contemplated in Article 50(1) of the Constitution which stipulates ***that (i) 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.***

56. In my view, upon the court resolving all issues relating to jurisdiction which are quite broad, it can still refer the matter for adjudication to another court or independent tribunal or body, including the respondent herein. I do not find any merit in the respondent insisting that it must hear the dispute at this stage where serious issues of jurisdiction of the commission have been raised, and warranting a further in-depth investigation.

57. Accordingly, I am satisfied that the applicant has established a prima facie arguable case which warrants grant of leave.

58. In the end, I hereby grant to the applicant herein Charles Steven Mbindyo leave to apply for Judicial Review Orders of certiorari and prohibition as prayed for in prayers No. 2 and 3 of the chamber summons dated 30th August 2016. The substantive motion to be filed and served within 21

days from the date of this ruling.

59. On whether or not to grant stay of hearing for review of the grant until the hearing and determination of the main motion, it is my view that where it is shown that failure to grant stay will render the substantive motion if determined in the applicants favour nugatory, it is appropriate to grant stay so as to preserve the subject matter. In this case, the resolution by the commission to review the grant is a decision that is reached by the commission and therefore capable of being implemented by hearing the complaint for review even in the absence of the applicant.

60. In **Taib A. Taib V The Minister for Local Government & Others Mombasa HC Miscellaneous Application 158/2006** Maraga J (as he then was) stated that:

“As injunctions are not available against the Government and public officers, stay is a very important aspect of the Judicial Review jurisdiction.....in Judicial Review application the court should always ensure that the ex parte applicant’s application is not rendered nugatory by the acts of the respondent during the pendency of the application and therefore where the order is efficacious the court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited. The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implantation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompassed the administrative decision making process being undertaken by a public body such as local authority or the minister and the implantation of the decision such a body if it has been taken. It is however not appropriate to compel a public body to act. A stay order framed in such a way to compel the respondents to reinstate the applicant before hearing the respondent cannot be granted.”

61. In this case, I am persuaded that the manner in which the application is framed, if a stay of review hearing is not granted, then the outcome of the substantive motion if successful may be rendered nugatory and therefore an academic exercise.

62. In addition, it is not appropriate to have two parallel legal processes going on simultaneously, that of hearing for review of the grant and the one challenging that review process.

63. Accordingly, I hereby order that the leave herein granted shall operate as stay of hearing of review of the grant of the subject property registered as IR 47655 until the substantive motion if filed is heard and determined or until further orders of this court.

64. I make no orders as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 22nd day of September 2016.

R.E. ABURILI

JUDGE

In the presence of

Mbuthia for the Respondent and h/b for Mr Odhiambo for 2nd interested party

Mr Mathini h/b for Kago for the ex parte applicant

CA: Adline