



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
MISC. APPLICATION JR NO. 73 OF 2013

THE REPUBLIC..... APPLICANT

-VERSUS-

THE KILIFI LAND CONTROL BOARD

THE REGISTRAR OF TITLES, MOMBASA

THE COMMISSIONER OF LANDS

THE NATIONAL LAND COMMISSION

THE CAPITAL MARKETS AUTHORITY

THE REGISTRAR OF COMPANIES

THE CENTRAL DEPOSITORY & SETTLEMENT CORPORATION LTD.....RESPONDENTS

AND

REA VIPINGO PLANTATIONS LIMITED

R.E.A. TRADING LIMITED

CENTUM INVESTMENT COMPANY LIMITED..... INTERESTED PARTIES

EX-PARTE: OWEN YAA BAYA

RULING

INTRODUCTION

1. By CHAMBER SUMMONS dated 16th December 2013, the ex parte applicant who claimed to be a “resident of Kilifi town and secretary of the County Government of Kilifi, in whose name the present application is brought” sought orders for leave to commence judicial review proceedings against the respondents and stay as follows:

1. **THAT** this Honourable Court be pleased to grant leave to the Ex-parte Applicant to apply for

Orders of Prohibition to prohibit the 1ST, 2ND and 3RD RESPONDENTS from approving an Or any further transactions in such parcels of land as are at present held by the 1ST INTERESTED PARTY on a leasehold and/or freehold basis within the Republic of Kenya (hereinafter the “Property”) including but not limited to approval of transfer(s), sale(s), charge(s), mortgage(s), lease(s), sub-lease(s), license(s) and/or any dealing(s) in any manner whatsoever and howsoever with, and/or otherwise disposal of the Property by the 1ST INTERESTED PARTY or any person(s) litigating under the same title;

2. *THAT* this Honourable Court be pleased to grant leave to the Ex-parte Applicant to apply for Orders of Prohibition to prohibit the 5TH, 6TH and 7TH RESPONDENTS from approving any Or any further transactions in such shares and/or stocks in and of the 1ST INTERESTED PARTY as are currently and/or ordinarily listed and/or floated and/or available for sale and purchase on the Nairobi Stock Exchange (hereinafter the “Shares”) including but not limited to approval of transfer(s), sale(s), charge(s), mortgage(s), share swaps, options and/or future contract, creation of debentures thereover, and/or any dealing(s) in any manner whatsoever and howsoever with, and/or otherwise disposal of the Shares by the 1ST INTERESTED PARTY in such manner as may effectively result in a change of the legal and/or beneficial ownership of the 1ST INTERESTED PARTY as at present constituted;

3. ***THAT*** this Honourable Court be pleased to grant leave to the Ex-parte Applicant to apply for Orders of Mandamus to compel the 4TH RESPONDENT to enforce all relevant provisions of law and of the Constitution of Kenya (2010) governing the ownership of agricultural land by citizens and/or non-citizens vis-a-vis the ownership and/or intended transfer of the aforementioned Property by the 1ST INTERESTED PARTY;

4. ***THAT*** this Honourable Court be pleased to grant leave to the Ex-parte Applicant to apply for Orders of Mandamus to compel the 5TH, 6TH and 7TH RESPONDENTS to seek the approval of the 1ST, 2ND, 3RD and 4TH RESPONDENTS BEFORE proceeding to approve any Or any further transactions in the Shares including but not limited to approval of any transfer(s), sale(s), charge(s), mortgage(s), share swaps, creation of debentures thereover, and/or any dealing(s) in any manner whatsoever and howsoever with, and/or otherwise disposing of the Shares by the 1ST INTERESTED PARTY or any person(s) litigating under the same title Or by shareholders of the 1ST INTERESTED PARTY in such manner as may effectively result in a change of the legal and/or beneficial ownership of the 1ST INTERESTED PARTY as at present constituted;

5. ***THAT*** this Honourable Court be pleased to grant leave to the Ex-parte Applicant to apply for Orders of Certiorari to bring into this Honourable Court and to quash the decision by the 5TH, 6TH and 7TH RESPONDENTS to admit for consideration and approval the proposed acquisition and transfer for cash and/or other valuable consideration of more than fifty per centum (50%) of the Shares in and of the 1ST INTERESTED PARTY as are currently and/or ordinarily listed and/or floated and or available for sale and purchase on the Nairobi Stock Exchange by Or to persons who are not Kenyan citizens contrary to the provisions of the Land Control Act (Cap. 302) and the Constitution of Kenya (2010) And in such manner as may effectively result in a change of the legal and/or beneficial ownership of the 1ST INTERESTED PARTY as at present constituted;

6. ***THAT*** this Honourable Court be pleased to grant leave to the Ex-parte Applicant to apply for Orders of Certiorari to bring into this Honourable Court and to quash the decision by the 5TH, 6TH and 7TH Respondents to admit for consideration and approval the proposed renewal of the Certificate(s) of lease in respect of all those parcels of land comprised in the aforementioned Property to persons who are not Kenyan citizens contrary to the provisions of the Land Control Act (Cap. 302) and the Constitution of Kenya (2010);

The ex parte applicant also sought that leave so granted do operate as stay of the consideration and

approval of any applications by the Respondents in the same terms as in the prayers for leave, above.

2. The claim to the judicial review orders was as shown in the Statutory Statement filed in support of the application based on grounds set out in the **Grounds upon Which Relief is Sought**, as follows –

- i. *The 2nd and 3rd Interested Parties are trying to acquire all the publicly listed and traded ordinary shares of the 1st Interested party that they each respectively do not currently own, in a transaction conservatively valued at Ksh.3 Billion;*
- ii. *The value placed on the shares of the 1st Interested Party is based exclusively on the value of Leasehold interest held by the 1st Interested Party over diverse parcels of agricultural land all totaling seventy thousand acres (70000) or thereabouts, which leasehold interest is irregularly held by the 1st Interested Party, which is not a company wholly owned by Kenyan citizens as required by the Constitution of Kenya and the Land Control Act;*
- iii. *In the event that the validity of the aforesaid leasehold interest held by the 1st Interested Party is successfully impugned, numerous individual shareholders are likely to incur significant loss and damage and our capital markets brought into disrepute;*
- iv. *If this application is not heard and determined expeditiously both the Interested Parties herein and the general public are likely to suffer irreparable loss and damage and this suit might be rendered nugatory.*

3. Upon the presentation of the Chamber Summons at *ex parte* stage, the Court after hearing the counsel for the *ex parte* applicant directed that the application be served for hearing *inter partes* on an appointed date. The court did this on account of the applicant's case being supported largely by press reports of alleged takeover without any official documentation from the respondents. The provision for ***inter partes*** hearing of Order 53 applications was introduced by the 2010 edition of the Civil Procedure Rules, Order 53 Rule 1 whereof provides as follows:

1. (1) *No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.*
- (2) *An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.*
- (3) *The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.*
- (4) *The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:*

Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days. ”

4. The respondents and Interested Parties filed responses as shown below. The 1st and 2nd Interested Parties raised Preliminary Objections as to ***locus standi*** and jurisdiction of the Court. The Court considered that the proper course was for the preliminary points to be urged as submissions in reply to enable a global consideration of the matter and consequently listed the application for orders of leave to commence judicial review proceedings and for leave, if granted, operating as stay, for hearing ***inter partes***. This course of composite hearing of an application and preliminary objections thereto is to be

preferred in order to allow for once and for all consideration of the issues raised in an application, without the phased hearing that would become necessary upon rejection of Preliminary Objections heard separately in advance of the main hearing.

RESPONSES BY THE PARTIES

5. The Attorney General appeared for the 1st, 2nd, 3rd, 4th, and 6th Respondents filing an affidavit sworn by Paul Rotich, Assistant District Commissioner and Chairperson of the Kilifi Land Control Board on 21st January 2014 confirming that no application for consent had been made to the Board in respect of any transaction by the 1st respondent and that the Board handles freehold land transactions only. Grounds of Opposition dated 6th January 2014 were filed, principally, that the actions by the involved parties are proper and within their rights and mandate and that *“the issues for determination are purely of ownership rights and so far no rules of natural justice and or rights have been demonstrated to have been breached...”*

6. For the 5th Respondent an affidavit of Rose Lumumba, director and corporation secretary of 6th January 2014 maintained that the 5th Respondent had in the on-going process takeover of the 1st Interested party only exercised its mandate as an independent statutory authority responsible for regulating and maintaining an orderly, fair and efficient capital markets in Kenya pursuant to the provisions of the Capital Markets Act cap 485 of the Laws of Kenya and Capital Markets (Takeover and Mergers) Regulations 2002 made thereunder; that its mandate and jurisdiction has not been limited by the Land Control Act and that if there is any conflict between the Capital Markets Act cap 485A and the Land Control Act, the former would prevail in terms of section 37 thereof; that there is no restriction to owning shares by foreign investors in a listed company other than those set out under Regulation 3 of the Capital Markets (Foreign Investors) Regulations 2002 which stipulates that every issuer or listed company shall reserve at least 25% of its ordinary shares for participation by investment by local investors in the issuer or listed company; and that the grant of the orders would amount to a fetter on its statutory regulatory mandate as an independent authority under the Capital Markets Act as well as negatively impact the Kenya capital markets' ability to raise capital and investment.

7. For the 7th Respondent, a replying affidavit by Ms. Hilda Njeru, the Legal and Compliance Manager sworn on 21st January 2014 was filed opposing the application on the primary grounds that the Central Depository and Settlement Corporation Limited was approved by the Capital Markets authority to establish and operate a system for the central handling of deliveries and settlement of securities in the Capital Markets of Kenya basically playing the role of facilitating holdings of shares in electronic accounts opened by shareholders and managing the process of transferring shares trade at the stock Exchange with no control over the transfers; that the company is not mandated to deal with the sale or transfer of land in the scope of its operations; and that, in any event, that Article 165 (1) does allow a non citizen to own land for a leasehold term not exceeding 99 years.

8. For the 1st Interested Party an affidavit by its Director, Stephen Njoroge Waruhiu of 15th January 2014 in which he raised preliminarily the issue of *locus standi* of the ex parte applicant or of the County Government of Kilifi which he purported to represent to commence these proceedings; and opposed the grant of leave to file judicial review proceedings on the grounds that the offers made for the sale of shares had nothing to do with the underlying assets of the 1st Interested party; that in any event the 1st Interested party had obtained presidential exemption from the provisions of the Land Control act at the time of its acquisition of the properties it presently owned; that the 1st Interested Party as a public company listed on the Nairobi Securities exchange, the sale of its share were exempt from the provisions of the Land control act; that the applicant had not disclosed the provisions of law breached or threatened to be breached by the 5th 6th and 7th respondents to attract the order of prohibition sought; that the land the subject of the suit was private and not public land, and the applicant had not shown any specific provision of the Constitution or legislation which permits the County Government of Kilifi or the National land Commission from investigating the 1st Interested party's title there was no basis for the order of Mandamus to compel the 4th Respondent to enforce such provisions; that the applicant had not shown the

provisions of law which required the 5th 6th and 7th Respondents to seek the approval of the 1st 2nd 3rd and 4th respondents before proceeding to approve the sale of shares in the first interested party by its shareholders and the County Government had no constitutional oversight of private individual transaction relating to their property moveable or immovable; and that the grant of the orders sought would accordingly violate the shareholders' fundamental rights to freely transact on their personal property as well as undermine the investor confidence in acquisition and disposal of shares stocks, bonds and other financial instruments in the Kenya Money Market. The 1st Interested Party concluded that "the timing of this application appears to be an attempt by the ex parte Applicant and the County Government of Kilifi to unlawfully and illegally expropriate what the ex parte Applicant believes is foreign owned. Such an attempt is not only a gross abuse of the court process but could have serious ramifications on Kenya's International relations and lead to withdrawal of support by other international financial institutions such as the International Monetary Fund."

9. For the 2nd Interested Party, a notice of Preliminary Objection was given dated 4th February 2014 principally that no statutory powers had been breached, or statutory duties unperformed, by the respondents to attract judicial review orders of certiorari, prohibition and mandamus; the application related to the private law matters of transactions relating private rather than public land between private persons, and judicial review remedies did not lie in the circumstances. Skeleton arguments dated 23rd May 2014 were also filed for the 2nd Interested Party highlighting the non-applicability of the section 6 of the Land Control Act to the Takeover Transaction of a publicly listed company; there was not shown the specific decisions made and statutory duties breached or threatened or neglected by the respondents to justify orders of certiorari, prohibition and mandamus; leave should not be granted where there is no prima facie case for judicial review; and judicial review does not concern itself with private law rights noting the special jurisdiction of Judicial Review.

10. There was no appearance for the 3rd Interested Party.

SUBMISSIONS BY THE PARTIES

11. Counsel for the parties – Mr. Kithi for the Ex parte applicant; Mr. Eredi for the 1, 2, 3, 4 and 6 Respondents; Mr. Juma for the 5th Respondent; Ms. Muriithi for the 7th Respondent; Mr. Gachuhi for the 1st Interested Party and Mrs. Otaba for the 2nd Interested Party - made their respective oral submissions, and ruling was reserved for the 3rd July 2014. On account of heavy workload in the Constitutional and Judicial Review Division of the Court at Mombasa where I have served single-handedly, it has not been possible to earlier deliver this ruling and the delay is greatly regretted

ISSUES FOR DETERMINATION

12. The issues for determination are as follows -

- a. Whether the ex parte applicant has *locus standi* to file suit on behalf of the County Government of Kilifi;
- b. What are the principles for the grant of leave to commence judicial review proceedings;
- c. Whether the applicant has demonstrate a case for the grant of leave to file judicial review proceedings and, if so whether leave granted should operate as stay.

DETERMINATION

Whether the ex parte applicant has locus standi

13. A County Government, such as Kilifi County Government on whose behalf the ex parte applicant purports to litigate, is a constitutional organ and one of the levels of the devolved system of Government

under the Constitution of Kenya 2010 two in the Constitution Article 176 as follows:

“176. (1) There shall be a county government for each county, consisting of a county assembly and a county executive.”

It is a corporate body with power to sue and be sued as provide under section 6 (1) of the County Governments Act NO. 17 of 2012 as follows:

6. Powers of county governments

(1) As an entity exercising constitutional authority, a county government shall be a body corporate with perpetual succession and shall have all the powers necessary for the discharge of its functions.”

14. The ex parte applicant did not demonstrate authority from the executive authority of the County Government to institute the proceedings in the name of the County as he professed but never did file in the name of the County. The proceedings are filed in the name of the ex parte applicant as an individual.

15. However, for seeking to enforce the observance of the law by the respondent public bodies the court would grant standing to any public spirited tax-payer consistently with the modern day thought on the right to approach the court for redress in public law. Lugakingira, J. In the Tanzania decision, **Mtikila v. AG**, High Court of Tanzania at Dodoma, Civil Case No. 5 of 1993 noted the developments in the law on standing in administrative and constitutional law cases as follows:

*“The status of a litigant in administrative law is a crucial factor and it has assumed an added dimension in constitutional law in the wake of written constitutions. In the English common law the litigant’s locus standi was the handmaid of judicial review of administrative actions. Whenever a private individual challenged the decision of an administrative body the question always arose whether that individual had sufficient interest in the decision to justify the court’s intervention. Hence, it is stated in **Wade and Phillips, Constitutional Law** (1965 : 672):*

In administrative law it is necessary for a complainant to have a peculiar grievance which is not suffered in common with the rest of the public.

*The turning point in England came with the procedural reforms in judicial review vide s. 31 of the Supreme Court Act, 1983, which was to lead in the course of the 1980s to the recognition of the existence of public law as a distinct sphere from private law. In other parts of the Commonwealth, notably India and Canada, a similar but imperceptible development came to manifest itself in the doctrine of public interest litigation. Traditionally, common law confines standing to litigate in protection of public rights to the Attorney General and this was reaffirmed by the House of Lords in **Guriet v. Union of Post Office Workers** (1978) AC 435, and the Attorney General’s discretion in such cases may be exercised at the instance of an individual. But before even the enactment of the Supreme Court Act, a liberal view on standing was already taking shape and a generous approach to the issue was already considered desirable. This is illustrated by these words of Lord Diplock in **IRC v. National Federation of Self-Employed and Small Businesses Ltd.** (1981) 2 A11 E.R. 93, 107:*

It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation or even a single spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the a [sic] court to vindicate the rule of law and get the unlawful conduct stopped.”

See also the English **Blackburn** cases.

16. As the ex parte applicant sought to enforce the observance of the rule of law in relation to the transactions the subject of the proceedings, the court will grant him standing notwithstanding any lack of

personal interest as a shareholder of the 1st Interested Party or the County Government's lack of interest in what is private land of the company. The Preliminary Objection as to locus standing of the ex parte applicant is rejected.

Principles for the grant of leave to commence judicial review

17. There was little controversy that the applicant was required to show a case for the judicial review orders sought to justify the grant of leave to commence the judicial review proceedings. Although some old decisions expressed the test for the grant of leave for judicial review applications as requiring 'prima facie' case, as in the case of *Nyakeriga & 8 Ors v. UNHCR*, Misc. Civil Application No. 638 of 2001 [2001] LLR 1310, it is now accepted that an applicant for leave to file judicial review proceedings needs only to demonstrate an arguable case rather than a 'prima facie' case. See *Meixner v. AG* (2005) 2 KLR 189. I understand that to mean that the court ought to grant leave where an applicant demonstrates that there are serious questions to be put before the court for investigation relating to a matter to which judicial review orders are available. Leave should not be granted where what is sought to be tried belongs to another forum as where the judicial review in an application challenging criminal prosecution, leave granted would cause the judicial review court to embark upon an appraisal of the evidence of witnesses with a view to show their innocence.

Whether the applicant has demonstrated an arguable case for the grant judicial review

18. The judicial review court is not entitled to investigate the merits of the decision or to deal with the private rights of parties to a dispute as recently observed by the Court of Appeal, (Okwengu, Makhandia and Sichale, JJA.) in *Makupa Transit Shade Ltd & Anor. v Kenya Ports Authority* [2015] eKLR of 12th March 2015 on an application by the applicant for mandamus directing the respondent to grant it a lease on a property:

"In Commissioner of Lands v. Kunste Hotel Limited (1997) eKLR this court held that:

"But it must be remembered that judicial review is concerned not with private rights or merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he is subjected."

See also *Meixner v. AG*, supra.

19. Is the court being invited to facilitate investigation in private rights of the parties or to delve into the arena of the disputed merits of the case both which are outside the purview of judicial review? The applicant gives a veiled intent of taking further proceedings in pursuit of a judicial finding that the ownership of the agricultural land by the 1st respondent which it considered foreign owned was illegal and the present proceedings were therefore of a conservatory to preserve the status quo to avoid loss and damage for shareholders of the 1st Interested Party in the event the sale went through only to be nullified upon the finding of illegal holding of the land on account of the foreign ownership. Significantly, the ex parte applicant gave as one the grounds upon which relief were sought as –

"In the event that the validity of the aforesaid leasehold interest held by the 1st Interested Party is successfully impugned, numerous individual shareholders are likely to incur significant loss and damage and our capital markets brought into disrepute"

20. It is doubtful whether the challenge would be successful in view of the provisions of Article 65 of the Constitution which allows foreign ownership of interest in land to a maximum of leasehold of 99 years as follows:

"65. (1) A person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety-nine years."

(2) *If a provision of any agreement, deed, conveyance or document of whatever nature purports to confer on a person who is not a citizen an interest in land greater than a ninety-nine year lease, the provision shall be regarded as conferring on the person a ninety-nine year leasehold interest, and no more.*

(3) *For purposes of this Article—*

(a) a body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens; and

(b) property held in trust shall be regarded as being held by a citizen only if all of the beneficial interest of the trust is held by persons who are citizens.

(4) *Parliament may enact legislation to make further provision for the operation of this Article.”*

Application calls for determination of the merits of the decision

21. An investigation of the nature suggested by the applicant into validity the 1st Interested Party's title and whether the respondents should grant their approvals for the takeover transaction in view of alleged requirement for consent of the Land Control Board are clearly matters going to the merit of the decisions of the respondents taken or to be taken upon the consideration of the Interested Parties proposal for the takeover of the shares in the 1st Interested Party. As held in numerous court decisions, some of which are cited above, the Judicial Review Court will not be drawn into the merits of the case but is only concerned with the legality of the decision making process. I do not see how the applicant could make a case for the judicial review orders sought in these circumstances. The dispute falls to be canvassed and determined in other fora as observed above.

22. It was not shown by the applicant that the respondents had in any way made a decision or threatened to make a decision outside their statutory powers or in breach of statutory provisions. The principal participants in the sale of shares of the 1st Interested Party were all acting within their mandate which it was shown they had breached in any way. There was no transaction for the sale of land and therefore the requirement for consent of the Land Board under section 6. (1) (a) did not arise; the Capital Markets Authority was acting under its statutory powers under the Capital Markets Authority Act; the Central Depository and Settlement Company merely facilitates the transaction of the sale of shares in electronic format; and the National Land Commission would not be involved in private land.

23. The leasehold interest held by the 1st Interested Party over the agricultural land, the subject of the proceedings can only be '*successfully impugned*' in suitable proceedings brought in a competent court for order of declaration. Unlike under the English system of Judicial Review following the 1977 Reforms, Declarations are not available in Kenya under the Order 53 procedure for Judicial Review. Declarations in the circumstances of this case may only be granted in an ordinary civil suit in the Environment and Land Court established under Article 162 of the Constitution or by the High Court under a constitutional petition for enforcement of the Bill of Rights pursuant to Article 23 of the Constitution.

24. The ex parte applicant sought to place reliance on the provisions of the Constitution of Kenya in his judicial review application. As has been severally observed by court decisions, it is improper to pursue causes of action based on the Constitution in view of the special jurisdiction of the judicial review. In ***Makupa Transit Shade Ltd v. KPA***, supra, the Court of Appeal held as follows:

“Finally, we would observe that Judicial Review Jurisdiction is a special Jurisdiction that it is neither criminal nor civil. It operates within narrow confines of the Law Reform Act and order 53 of the Civil Procedure Rules. As it is narrow, it should never be mixed or combined with other Jurisdictions. In this appeal we note that though the appellants came to Court specifically seeking Judicial Review orders, they also wittingly or unwittingly roped in Constitutional Jurisdiction. We

do not think that this was proper or appropriate. The two are different jurisdictions that should not be mixed. We appreciate that under Article 23 of the Constitution that deals with authority of courts to uphold and enforce the bill of rights, the Court may grant many reliefs including an order of Judicial Review. However, this can only happen where a party has properly invoked the Constitutional Jurisdiction of the Court. One cannot come to Court vide Judicial review proceedings and expect to be granted Judicial Review orders on the basis of an infringement of a constitutional right. A party should make an election.”

No substratum to the application for judicial review

25. As regards the sale of shares in the takeover - which is the true cause of action before the court - I have established as I researched in preparation of this ruling, that the applicant relied on a repealed provision of law section 6 (1) (c) of the Land Control Act to support his case that the sale of shares in a private company or cooperative society was a controlled transaction for which the Land Control Board Consent was necessary. Indeed counter-arguments were made by the parties on the basis that the said provision existed with distinctions being made as to the meanings of private company, public company and whether a company listed at the Stock Exchange was a public company. According to the 2010 edition of the Land Control Act cap. 302, the subsection 6 (1) (c) of the Act was still existent in the Statute providing as void for all purposes without the consent of Land Control Board for the area –

“(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or cooperative society which for the time being owns agricultural land situated within a land control area.”

26. However, the 2012 edition of the Land Control Act contains revisions showing that the subsection providing that the sale of shares in a private company or cooperative society was long in 1987 amended by repeal, as shown below:

6. Transactions affecting agricultural land

(1) Each of the following transactions that is to say—

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of

(c) Deleted by Act No. 22 of 1987, Sch.

is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) ACT, 1987 No. 22 of 1987 amending the section 6 (1) of the Land Control Act cap 302 was Assented to on 30th December, 1987 and came into force on the 31st December, 1987.

27. This suit was filed in 2013 long after the repeal of section 6 (1) (c) but taking into account the fact that all counsel made submissions on the basis that the section was still in force is a testimony of the impact of lack of prompt legislation revision for which the applicant cannot be blamed. Act No. 22 of 1987 in its Schedule amended the Land Control Act cap 302 by repeal of the subsection 6 (1) (c). Accordingly, the sale of shares in a company whether private or public – whatever the meaning is ascribed to public company [‘private company’ is defined under section 30 of the Companies Act] is not a controlled transaction under section 6 of the Land Control Act, cap. 302 Laws of Kenya and, therefore, the sale of shares in 1st Interested Party, whether it be considered a private or public company, does not require the

consent of the Land Control Board.

28. The whole substratum of the ex parte applicant's case accordingly collapses and the applicant has, therefore, no arguable case for the orders of judicial review sought. Moreover, the provisions of Article 65 of the Constitution authorizing the holding of interest in land for leasehold terms of not more than 99 years also take away the cogency of the applicant's complaint. Furthermore, the applicant's case being based on private rights of the parties involved in the sale transaction is not suitable for invocation of public law jurisdiction and remedy.

29. In these circumstances, grant of leave to commence judicial review proceedings would be without legal basis; a complete waste of judicial time; and, I daresay, without jurisdiction.

CONCLUSION

30. The central case for the ex parte applicant was that the 1st Interested Party was contrary to provisions of the law owned by foreigners and the transfer of its shares to foreign owned companies would further breach the law set out in the Land Control Act prohibiting under section 6 (1) (c) of the Act any transaction involving the sale of shares in a private company which owns agricultural land without the consent of the Land Control Board for the area given in accordance with section 9 thereof. I have found that the transaction challenged before the Court was not a transaction for the sale of land for which consent of the Land Control Board was necessary and that the transaction for the sale of shares is not subject to the provisions of the Land Control Act following the repeal of section 6 (1) (c) of Act by the Statute Law (Miscellaneous Amendments) Act No. 22 of 1987. Consequently, the whole basis of the ex parte applicant's complaint in this application is removed and there cannot therefore be an arguable case to warrant the grant of leave to commence judicial review proceedings as prayed.

ORDERS

31. Accordingly, for the reasons set out above, the ex parte applicant's Chamber Summons herein for leave to file judicial proceedings and for such leave, if granted, to operate as a stay, is declined.

32. As the application was presented on the mistaken belief on the part of the parties on both sides of the matter, that the provision of law on which the application was based was existent, there shall be no order as to costs.

DATED SIGNED AND DELIVERED THIS 26TH DAY OF JUNE 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Kithi for the Applicant

No appearance for 1st, 2nd, 3rd, 4th, 5th and 6th Respondents

Ms. Muriithi for the 7th Respondent

Ms. Kasmani for the 1st and 2nd Interested Parties

No appearance for the 3rd Interested Party

Linda - Court Assistant.