



Republic v National Land Commission & 5 others; CEC Land Housing and Physical Planning Uasin Gishu County & 3 others (Interested Parties); Ravindra Ratilal Taylor (Suing as the Trustee of Uasin Gishu Arts Society of Eldoret) & 5 others (Exparte) (Suing as the Trustees of Uasin Gishu Arts Society of Eldoret) (Judicial Review 09 of 2017 & 04 of 2016 (Consolidated)) [2022] KEELC 3 (KLR) (16 February 2022) (Judgment)

Republic v National Land Commission & 2 others Ex parte Ravindra Ratilal Taylor (Suing as the Trustee Uasin Gishu Arts Society of Eldoret) & 3 others; C.E.C Land Housing and Physical Planning Uasin Gishu County & another (Interested Parties) [2022] eKLR

Neutral citation: [2022] KEELC 3 (KLR)

REPUBLIC OF KENYA

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET
JUDICIAL REVIEW 09 OF 2017 & 04 OF 2016 (CONSOLIDATED)**

SM KIBUNJA, J

FEBRUARY 16, 2022

IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT, 2011

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF THE LAND ACT, 2012

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT, NO 17 OF 2012

AND

**IN THE MATTER OF O.53 CIVIL PROCEDURE RULES, 2010,
CIVIL PROCEDURE ACT, CHAPTER 12 LAWS OF KENYA**

AND

**IN THE MATTER SECTION 8 & 9 OF THE LAW
REFORM ACT CHAPTER 26 OF THE LAWS OF KENYA**

BETWEEN

REPUBLIC APPLICANT

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT



**THE COUNTY LANDS REGISTRAR UASIN GISHU COUNTY 2ND
RESPONDENT**

THE COUNTY GOVERNMENT OF UASIN GISHU 3RD RESPONDENT

AND

**CEC LAND HOUSING AND PHYSICAL PLANNING UASIN GISHU
COUNTY INTERESTED PARTY**

**UASIN GISHU COUNTY LAND MANAGEMENT BOARD INTERESTED
PARTY**

AND

**RAVINDRA RATILAL TAYLOR (SUING AS THE TRUSTEE OF UASIN GISHU
ARTS SOCIETY OF ELDORET) EXPARTE**

**DAYA SINGH LAHB KALSI (SUING AS THE TRUSTEE OF UASIN GISHU
ARTS SOCIETY OF ELDORET) EXPARTE**

**NARINDER SINGH LOCHAB (SUING AS THE TRUSTEE OF UASIN GISHU
ARTS SOCIETY OF ELDORET) EXPARTE**

SUING AS THE TRUSTEES OF UASIN GISHU ARTS SOCIETY OF ELDORET

**AS CONSOLIDATED WITH
JUDICIAL REVIEW 04 OF 2016**

BETWEEN

REPUBLIC APPLICANT

AND

**THE C.E.C LAND HOUSING AND PHYSICAL PLANNING UASIN GISHU
COUNTY 1ST RESPONDENT**

**THE COUNTY LANDS REGISTRAR UASIN GISHU COUNTY 2ND
RESPONDENT**

THE COUNTY GOVERNMENT OF UASIN GISHU 3RD RESPONDENT

AND

**C.E.C LAND HOUSING AND PHYSICAL PLANNING UASIN GISHU
COUNTY INTERESTED PARTY**

**THE UASIN GISHU COUNTY LAND MANAGEMENT
BOARD INTERESTED PARTY**

AND

**RAVINDRA RATILAL TAYLOR (SUING AS THE TRUSTEE OF UASIN GISHU
ARTS SOCIETY OF ELDORET) EXPARTE**



DAYA SINGH KALSI [SUING AS TRUSTEE OF UASIN GISHU ARTS SOCIETY OF ELDORET] EXPARTE

NARINDER SINGH LOCHAB [SUING AS TRUSTEE OF UASIN GISHU ARTS SOCIETY OF ELDORET] EXPARTE

UASIN GISHU ARTS SOCIETY OF ELDORET EXPARTE

A former holder of a Government leasehold title who was compliant with the terms of the lease had a legitimate expectation for lease renewal.

The court held that there was a right to the extension or renewal of a lease where the land in question had been developed. It noted that the lease whose term had lapsed had been granted for the creation of a cultural centre and had a building in it which had aged. The court thus observed that there was no reason to decline a renewal unless the lessee had breached the terms of the grant of the lease or was not interested in such renewal. The court also determined that there was a legitimate expectation that a lease would be renewed upon the lapse of its term where there was compliance with the terms of the grant of the lease. The court quashed the decision to decline renewal and granted orders for the application for renewal of the lease to be considered afresh.

Reported by Kakai Toili

Land Law – leases – renewal of leases – where a lease over land was granted for the creation of a cultural centre and the structure built for that purpose had since aged – whether there existed a right of renewal of a lease where the property was underdeveloped or held for speculative purposes – whether there was a legitimate expectation for the renewal of a leasehold title where a former holder of a Government leasehold title had complied with the terms of the lease.

Judicial Review – grounds for the grant of judicial review remedies – legitimate expectation and procedural impropriety – claim that an applicant who had complied with the terms of the grant of a lease for leasehold property had a legitimate expectation for the lease to be renewed when its term lapsed – where it was alleged that an application for the renewal of a lease was not processed in a fair, expedient or efficient manner – whether the court would grant the judicial review remedies of certiorari, mandamus and prohibition with respect to a decision to decline the renewal of the lease for the property.

Brief facts

The *ex parte* applicants claimed that the 4th *ex-parte* applicant was allocated the suit property through a grant on May 5, 1959, for a term of 49 years, which term lapsed on May 4, 2008. It was claimed that before the lease lapsed, they had applied for renewal and their application was on July 20, 2010 recommended by the District Planning Officer, Uasin Gishu County, to the Municipal Council of Eldoret, the 1st respondent's predecessor. It was further claimed that despite writing to the 4th respondent on the matter, they had not received any response. Instead, the 1st respondent had advertised to the public to apply for lease over the suit property. The *ex-parte* applicants wrote to the 1st and 2nd respondent protesting the intended acquisition of the suit property but the 1st and 2nd respondents forcefully took over the property without a court order, locking their tools of trade within.

The *ex parte* applicants thus sought for among other reliefs orders of: *certiorari* quashing the decision of the 3rd respondent; prohibition of the 3rd and 4th respondents from doing any act or thing that would give effect to the decision of the 3rd respondent and prohibition of the the 3rd and 4th respondents from deliberating the renewal of the lease to the suit property.

Issues

- i. Whether there existed a right of renewal of a lease where a property was undeveloped or held for speculative purposes.



- ii. Whether there was a legitimate expectation for the renewal of a leasehold title where a former holder of a Government leasehold title had complied with the terms of the lease.

Held

1. The original term of the suit property in favour of the *ex-parte* applicants was for a term of 49 years and 8 months from February 1, 1959. That meant the term was to expire on or about October 1, 2008. Before the repeal of the Government Land Act, Chapter 280 of the Laws of Kenya, through section 109 of the Land Registration Act No. 3 of 2012, it was the legislation applicable to the regulation of dispositions of land. However, that Act only provided a right to a grant over the property if it was agricultural land under section 27(1)(c). The renewal or extension of leases was provided for specifically under the repealed Registered Land Act, Chapter 300 of the Laws of Kenya. Section 60 of the repealed Registered Land Act allowed the lessor and lessee to extend a lease but it was not expressed in mandatory terms.
2. The question about whether a right to an extension of a lease existed, especially concerning the extension of leases on town plots had not resulted in uniform positions before the courts. Where property was underdeveloped, where an application for renewal of lease was over an un-developed leasehold property only, or perhaps held for speculative purposes, there existed no right of renewal. However, concerning developed properties, if the lessee of such property had utilized the land in accordance with the terms of the lease, there would be no reason for the Commissioner of Lands to refuse to renew such lease.
3. A former holder of a Government leasehold title, who had complied with the terms of the lease, held a legitimate expectation that such lease would be renewed to him by the Commissioner of Lands. Despite there not being any explicit provision in the repealed Government Land Act, concerning the renewal of leases of developed town plots, such plots needed to be renewed to the previous leaseholder, unless the leaseholder had breached a fundamental term of the lease, or was no longer interested in its renewal. In exercising his duty to renew such a lease, the Commissioner of Lands would be exercising an administrative function.
4. Any person acting in the exercise of administrative power had an obligation to act fairly and justly. That was what everyone expected of such a person. Administrative power was not to be exercised capriciously, without regard to what was fair, just and proportionate. The Commissioner of Lands could not in the fair exercise of his administrative power, renew the lease to another person, for such action would break the legitimate expectation of the incumbent leaseholder. What would be fair, just and equitable in such circumstances would be to renew the lease in favour of the incumbent holder of the lease.
5. A legitimate expectation of renewal of a leased property existed where the terms of the grant had been complied with, especially where the lessee had developed the suit property. To find otherwise would herald a situation where people were uprooted from properties following the expiry of their lease term, resulting in their developments on the properties reverting as fixtures on the land to the original lessors, which essentially amounted to a deprivation of the property in a manner the law did not contemplate. That would inevitably enrich lessors and incentivize refusal to renew leased property, where the lessor knew that as soon as the original term expired, they would be enriched by the developed property, and perhaps business being conducted.
6. The grant of the property was made to serve a cultural Centre and it was indeed probable that one was constructed in the 1960s, which explained the aged building seen on the suit property. The presence of the bar had also been explained satisfactorily. It was reasonable to expect that refreshments would be needed in a theatre which was the status *quo* in many theatres and movie cinemas globally. Further, the respondents had not rebutted the *ex parte* applicant deposition that no alcoholic drinks were served at the refreshment area labelled “the bar”. The refreshment area was not operated separately from the business of the theatre.



7. The processing of the application for renewal of the lease was not undertaken in line with article 47 of the Constitution of Kenya, 2010, on fair administrative action. A cursory reading of the Fair Administrative Act, and taking the facts of the dispute side by side demonstrated unfair administrative action throughout the manner in which the *ex-parte* applicant's application for renewal was processed. The *ex parte* applicant's renewal application was not processed in an expedient way nor subjected to an efficient process. Therefore, at a *prima facie* level, the administrative process taken in the renewal application if any, was not done in terms of the law.
8. The infractions of the Fair Administrative Action Act were not the only ones noted. The manner in which the pre-eminent right of renewal of the lease in favour of the *ex parte* applicant over the suit property left lingering questions that tainted the decision that was eventually taken to grant the suit property to the County Government of Uasin Gishu as expressed under table 7, entry No.18 of Gazette Notice No. 6862 of July 17, 2017 published in the Special Issue of the Kenya Gazette Volume CXIX No. 97.

Application allowed.

Orders

- i. *Prayer 1 of the notice of motion dated the November 1, 2017 was granted as prayed and Table 7, Entry No. 18 of Gazette Notice No. 6862 of July 17, 2017, published in the Special Issue of the Kenya Gazette, Volume CXIX – No. 97 was quashed.*
- ii. *The National Land Commission and the County Government of Uasin Gishu to process afresh the ex parte applicant's application for renewal of lease for the suit property in accordance with the law.*
- iii. *The ex parte applicant's costs to be paid by the National Land Commission and the County Government of Uasin Gishu.*

Citations

Cases

Kenya

Kenya Industrial Estates Limited v Anne Chepsiror & 5 others Environment & Land Case 71 of 2013; [2015] KEELC 669 (KLR) - (Explained)

Statutes

Kenya

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 53- (Interpreted)
2. Constitution of Kenya articles 47, 62- (Interpreted)
3. Fair Administrative Action Act (cap 7L) section 4- (Interpreted)
4. Government Lands Act (Repealed) (cap 280) section 27- (Interpreted)
5. Land Act (cap 280) section 13- (Interpreted)
6. Land Registration Act (cap 300) section 109 - (Interpreted)
7. Law Reform Act (cap 26) sections 8, 9- (Interpreted)
8. Physical and Land Use Planning Act (cap 303) sections 31, 33(1)- (Interpreted)
9. Registered Land Act (Repealed) (cap 300) section 60- (Interpreted)

Advocates

Mr. Otieno for the *ex parte* applicant

Ms Karuga h/b for *Chesoo* for 3rd respondent and the 1st interested party

Mr. Kuria for the 2nd respondent



JUDGMENT

1. That as the parties, subject matter and the issues in the two judicial matters herein are the same despite describing the 2nd and 3rd respondents in Judicial Review No 4 of 2016 as the 1st and 2nd interested parties in Judicial Review No 9 of 2017, for the purposes of this judgement, the court will refer to the parties in the order they appear in the Judicial Review No 4 of 2016. In Judicial Review No 4 of 2016, the *ex-parte* applicants approached the court by way of notice of motion dated November 10, 2016, pursuant to leave granted on October 24, 2016. The application has invoked order 53 rule 3 of the [Civil Procedure Rules, 2010](#), sections 8 and 9 of the [Law Reform Act](#), chapter 26 of the Laws of Kenya and seeks for the following orders:
 - a. An order of *certiorari* do issue to bring before this court and quash the decision of the 3rd respondent made on April 27, 2016 and which is extracted in the 3rd respondent's letter dated May 2, 2016.
 - b. An order of prohibition do issue to prohibit the 3rd and 4th respondents from doing any act or thing that will give effect to the decision of the 3rd respondent made on April 27, 2016 and which is extracted in the 3rd respondent's letter dated May 2, 2016.
 - c. An order of prohibition do issue to prohibit the 3rd and 4th respondents from deliberating the renewal of the lease to Eldoret Municipality Block 13/ 22 (Formerly LR No 6619/35).
 - d. An order of prohibition do issue to prohibit the County Lands Registrar, Uasin Gishu County from opening any register, issuing a green card, and/or issuing any new title and/or certificate of lease to the 1st respondent or any other party or parties or anyone claiming through them to Eldoret Municipality Block 13/ 22 (Formerly LR No 6619/35), within Uasin Gishu County based on the decision of the 3rd respondent made on April 27, 2016 and which is extracted in the 3rd respondent's letter dated May 2, 2016.
 - e. An order of *mandamus* do issue to compel the 3rd and 4th respondents to follow the law to the letter when considering the renewal of the lease of land parcel Eldoret Municipality Block 13/22 and to conduct a fresh and transparent exercise on the issue of renewal.
 - f. An order of *mandamus* do issue to compel the 1st and 2nd respondents to obey the lawful court order, issued by Honorable Mr Justice Anthony Ombwayo on August 18, 2016, requiring the 1st and 2nd respondents to immediately vacate Eldoret Municipality Block 13/ 22 (Formerly LR No 6619/35) and to allow the *ex-parte* applicants to resume possession pending the inter-partes hearing.
 - g. Costs of this application be awarded to the *ex-parte* applicants.
 - h. Any and other relief that this honorable court shall deem just and expedient to grant.

The application revolved around the *ex-parte* applicants' assertion that they have pre-eminent rights of renewal of the lease over the suit property. They asserted that the 4th *ex-parte* applicant was allocated Eldoret Municipality Block 13/ 22 (Formerly LR No 6619/35), through a grant on the May 5, 1959 for a term of 49 years, which term lapsed on May 4, 2008. That before the lease lapsed, they had applied for renewal and their application was on July 20, 2010 recommended by the District Planning Officer, Uasin Gishu County, to the Municipal Council of Eldoret, the 1st respondent's predecessor. That despite writing to the 4th respondent on the matter, they had not received any response, but instead,



the 1st respondent has gone ahead to advertise to the public to apply for lease over the suit property. That upon the said advert coming to their attention, the *ex-parte* applicants wrote to the 1st and 2nd respondent protesting the intended acquisition of the said property but on the August 6, 2016 the 1st and 2nd respondent forcefully took over the property without a court order, locking their tools of trade within. The foregoing averments were verified by the 1st *ex-parte* applicant who swore an affidavit on October 24, 2016 reiterating the above facts, and produced several documents including a copy of their certificate of grant of May 5, 1959, letters dated February 5, 2008, September 15, 2008 and September 16, 2009 applying for renewal of the lease, receipts in evidence of payments made for their application, advertisement of January 22, 2016, protest letters written over the renewal of the lease dated February 10, 2016 this court's interim orders of August 6, 2016 and an affidavit filed in proof of service of the orders. The 1st *ex-parte* applicant also annexed a letter from the Ministry of Lands dated February 15, 2011 to the effect that they apply for renewal of lease as it had lapsed; a letter of May 26, 2014 from the 4th respondent to various offices of the 1st respondent, including the County Secretary, Land Adjudication Officer, District Physical Planning Officer and Surveyor, seeking for their comments/recommendations on the *ex partes'* application for renewal of lease over the suit property; a letter dated October 30, 2015 from the 4th respondent to the 2nd respondent asking the 1st and 2nd respondent to publish in a local daily their intention to acquire the said land, a letter of April 20, 2016 from the 4th respondent to advocates of the *ex-parte* applicants asking them to visit their offices with original documentation in respect their application for the renewal of the lease; and a letter dated May 2, 2016 from the 3rd respondent asking the 1st and 2nd respondents to begin preparation of title over the suit property and to utilize it.

2. The 1st and 2nd respondents opposed the application through replying affidavit sworn by SKLel, the County Attorney, on the March 5, 2018 in which he among others deponed that the lease over the suit property had expired, and the property had reverted to public land under article 62 of the [Constitution](#). That the 4th *ex-parte* applicant had one year nine months after expiry of the lease prepared an application for approval of developments on the suit property on July 20, 2010. The deponent took issue with the *ex parte* applicants' application for renewal of lease of September 15, 2008 terming it was non-compliant with the mandatory terms of sections 31 and 33(1) of the [Physical Planning Act](#). That the 1st respondent, had through its predecessor, the Municipal Council of Eldoret, vide the letter of February 6, 2010 responded to the Director of Survey's letter of December 22, 2009 confirming that the suit property had reverted back to the Government of Kenya. That the allocation of the said land to some three named individuals on the October 9, 2009 was revoked/cancelled through the Commissioner of Lands' letter dated the January 10, 2011 on the grounds that it was public land. That the 1st respondent subsequently applied to the 4th respondent on the April 7, 2014 to have the property allocated to itself, and on July 2, 2014 applied to the Cabinet Secretary Ministry of Housing and Urban Development to have the lease over the suit property allocated to itself. That the application was approved and decision communicated through the letter of May 2, 2016 to the 3rd respondent. That the 1st respondent had acquired title over the property and that the pre-emptive rights to renew lease had been extinguished because of the need the 1st respondent had of the property. That there then existed no right of renewal of lease over town properties as opposed to agricultural lands under section 27 of the [Government Land Act](#) (Repealed). He urged the court to let the dispute be handled in ELC Suit No 122 of 2016, where the parties could cross-examine those producing various documents and alleging material facts. He further urged the court to find that the matters before it were complex land matters that should have been tried through an ordinary civil action and not judicial review proceedings. He also urged the court not to grant the orders sought based on various arguments advanced in the replying affidavit and urged the court to dismiss the application.



3. The 4th respondent also opposed the application through the replying affidavit sworn by Matano Ngatia, its Uasin Gishu County Coordinator, on the October 18, 2017 in which he among others acknowledged the grant over the suit land was previously held by the *ex-parte* applicants, but added that its term had expired and the property reverted back to being public land under the management of the 4th respondent. He stated that in considering the 1st respondent's application for allocation, they visited the suit property and found that the property was not being used in accordance with the terms of the grant as a public cultural center, but was instead being used as a private restaurant. He stated that only an old building on the side was being used as an auditorium, and therefore that it was within the law to have the property reverted for public purpose. That the 1st respondent's application for allocation of the property was processed in accordance with the law and title granted to them.
4. The 5th respondent filed grounds of opposition dated January 8, 2018 in opposition to the application raising five (5) grounds that as the land was public land, the 3rd and 4th respondent had the mandate to review grants and dispositions over it; that there was no obligation to renew the lease as the terms of the grant underlying it had not been complied with, to wit, the land had not been used for Arts as intended; that in any event, the grant of lease had already been deliberated and concluded and prohibition prayers had been overtaken; that the 5th respondent only implemented the decision of the 3rd and 4th respondents and could not be faulted for doing so, and that an order of mandamus could not be issued to compel exercise of a discretionary power.
5. The 1st *ex-parte* applicant swore a supplementary affidavit on May 25, 2018 responding to the 4th respondent's replying affidavit. He deponed that the lease was under the Government Lands Act, that provided a right of renewal of the lease and that the suit property was being used in accordance with the grant. That the reference to as 'the bar' that the 4th respondent was calling a private restaurant, was indeed a refreshment place. That the name 'bar' was a universal feature of theatres globally and that no alcoholic drinks were served there. He stated that the building housing the theatre was constructed in 1960's and was therefore not new, but renovations had been ongoing, and new theatre seats and other modern theatre facilities were being sourced from China. That contrary to the 4th respondent's assertion that section 13 of the *Land Act* precluded renewal of leases, that what it required were guidelines to be published, which was done in 2017, through gazette notice number 75 of June 9, 2017 in volume CXIX of the Kenya Gazette. That the *ex parte* applicants' application for renewal of lease, had been made directly to the Commissioner of Lands, whose functions had been taken over by the 4th respondent and both the Commissioner's letter of February 15, 2011 and the 4th respondent's invitation of April 20, 2016 had the same reference number 32202/142, indicating a file existed over the application already with continuity over the two offices, and the 4th respondent switching to a new file reference 301766 was therefore irregular.
6. The 1st *ex-parte* applicant also swore a supplementary affidavit on May 25, 2018 in response to the replying affidavit by the 1st and 2nd respondents, in which he among others faulted the 1st respondent's attempt to determine the applications for renewal of lease as it was unlikely to be impartial as a party interested with the same property.
7. That this though the chamber summons application was granted on the October 24, 2016 including prayer (7) for leave to operate as stay of the decision of the 3rd respondent of April 27, 2016 as extracted in the letter of 2nd May, 2016 and despite the existence of the interim orders of August 19, 2016 issued in Eldoret ELC No. 220 of 2016, placing possession of the suit land back onto the *ex parte* applicants herein, the 4th respondent gazetted the allocation of the suit property to the 1st respondent in the gazette notice number 6862, Volume CXIX No 97 of 17th July 2017, under entry No 18 following the review of grant that had expired of the lease for the 4th *ex parte* applicant. That development led to the filing of



a subsequent Judicial Review application being JR number 9 of 2017 by the same *ex parte* applicants. The orders sought in the chamber summons dated the October 18, 2017, were granted on the October 19, 2017 and the notice of motion dated the November 1, 2017 filed seeking for the following prayers/orders;

- a. That an order of *certiorari* do issue to bring before this court and quash table 7, entry 18 under gazette notice No 6862 of July 17, 2017 published in the Special Issue of the Kenya gazette Volume CXIX No 97.
 - b. That an order of prohibition do issue to prohibit the National Land Commission and County Land Registrar, Uasin Gishu, hereinafter referred to as the 4th and 5th respondents respectively, from doing any act or thing that would give effect to Table 7, entry No 18 under Gazette Notice No 6862 of July 17, 2017 published in the Special Issue of the Kenya Gazette Volume CXIX No. 97.
 - c. That an order of prohibition do issue to prohibit the 5th respondent from opening any register, new green card, new title, and/or issuing certificate for lease to County Government of Uasin Gishu, hereinafter referred to as the 3rd respondent, or any other third party or parties or anyone claiming through them in respect to the suit property, based on Table 7, entry No 18 of gazette notice No 6862 of July 17, 2017, published in the Special Issue of the Kenya gazette Volume CXIX No 97.
 - d. That an order of *mandamus* do issue to compel the 1st 4th respondents and the 3rd Interested Party (note that the application has only 1st and 2nd interested parties), to follow the law to the letter while considering the lease to Eldoret Municipality Block 13/22 (Formerly L R 6619/35) and to conduct a fresh and transparent exercise on the issue of renewal.
 - e. That the grants of leave herein do operate as a stay of operation to Table 7, entry No 18 of gazette notice No 6862 of July 17, 2017, published in the Special Issue of the Kenya gazette Volume CXIX No 97.
 - f. That costs of the application be awarded to the *ex parte* applicants.
 - g. That any other or further relief that this honourable court shall deem just and expedient to grant.
8. The application No 9 of 2017 is essentially an extension of the application No 4 of 2016 and the averments made in the verifying affidavit of the 1st *ex-parte* applicant mirror those in the earlier application. That as earlier indicated the parties, especially the respondents and interested parties, in the 2017 application will be referred to under the reference they appear in the 2016 application.
9. The 5th respondent opposed the application through the four (4) grounds of opposition dated January 8, 2018 affidavit sworn on January 8, 2018 which mirrors those filed in respect of Judicial Review No 4 of 2016. The 4th respondent opposed the notice of motion through the replying affidavit of Matano Ngati, Uasin Gishu County Coordinator, sworn on the 1st December, 2017 that reiterates his depositions in his earlier affidavit of October 18, 2017 in respect of Judicial Review No 4 of 2016. The 3rd respondent and 1st interested party filed the replying affidavit sworn by SKLel on March 5, 2018 in opposition to the application.



10. That directions were taken on filing and exchanging written submissions on the substantive applications. The learned counsel for the *ex parte* applicants, 3rd respondent and 1st interested party, filed their submissions dated the October 12, 2018 and February 25, 2019 respectively, while the 5th respondent filed theirs dated December 4, 2018.
11. The issues for determination by the court are as follows;
- a. Whether there existed a pre-eminent right in favour of the *ex-parte* applicants of renewal of lease over the suit property under the operative law regulating the suit property at the expiry of the term of the original grant;
 - b. Whether the application for renewal was processed in accordance with the law;
 - c. Whether the *ex parte* applicants are entitled to the prayers or any of the prayers sought; and
 - d. Who pays the costs in each of the two judicial review applications.
12. The court has carefully considered the grounds set out in the two notices of motion, the statutory statements, verifying and supplementary affidavits, replying affidavits, grounds of opposition, submissions by the learned counsel, superior courts decisions cited and come to the following determinations;
- a. To examine whether a pre-eminent right of renewal of the lease existed, it is important to examine the operative statute at the time. The original term of the grant IR number 16118 in favour of the *ex-parte* applicants was for a term of 49 years and 8 months from February 1, 1959. This means the term was to expire on or about October 1, 2008. That before the repeal of the *Government Land Act*, chapter 280 of Laws of Kenya, through section 109 of the *Land Registration Act* No 3 of 2012, it was the legislation in charge of regulation of dispositions of land. However, this Act only provided a right to grant over the property if it was agricultural land under section 27(1)(c). The renewal or extension of leases was provided for specifically under the *Registered Land Act*, chapter 300 of Laws of Kenya, now repealed. Section 60 of the Act provided for extension and renewal of leases as follows;

“60. Subject to section 58, the agreements and conditions contained or implied in any registered lease may be varied, negative or added to, and the period of any registered lease may from time to time be extended, by an instrument executed by the lessor and the lessee for the time being and registered before the expiration of the then current term of the lease.”

This provision allowed the lessor and lessee to extend a lease but it was not expressed in mandatory terms.
 - b. The question of whether a right to extension of a lease existed, and especially concerning the extension of leases on town plots has not resulted in uniform positions before the courts, as was noted by Honourable Munyao Sila in *Kenya Industrial Estates Limited v Anne Chepsiror & 5 others* [2015] eKLR, whose decision I agree with. The court when discussing the question of whether the legal regime prior to the existing one, held as follows;

“45. Court decisions on whether a leaseholder had a right of renewal are also not unanimous. In the case of *Goan Institute Nakuru v Said Abdalla Azubedi* (2007) eKLR, the plaintiff held a lease which had expired. The Government then issued a



new lease which led to the registration of the defendant as proprietor. The plaintiff's suit for a declaration that it is owner of part of the lease was dismissed. In the case of *Nairobi City Council v Chbagal Lala Divani W/o Chbagan Lala & 2 Others* (2013) eKLR, the plaintiffs sought an order to compel the Commissioner of Lands to renew and extend their lease. It was held that there was no specific provision conferring upon the plaintiff the right to an extension of the leasehold title. There is also the fairly recent Ruling made in an interlocutory application in the case of *Suleiman Murunga v Nilestar Holdings Ltd & another*, Nairobi ELC No 1549 of 2013, (2014) eKLR. The applicant in that case previously held a leasehold title which expired. Upon expiry, the lease was renewed to the tenant in the premises comprised in the leasehold title. The previous leasehold owner sued for rent. In determining the interlocutory application, Mutungi J, was of the view that that once the leasehold title expired, the Government henceforth became entitled to allocate the property to any other person. The learned judge dismissed the interlocutory application for injunction as in his view, the plaintiff had not established a prima facie case. In the case of *Republic v Commissioner of Lands & 3 others ex parte Shelfco Ltd*, Milimani Judicial Review Misc Application No 173 of 2012 the matter therein touched on renewal of a lease that had expired. Odunga J was of the view that the matters therein were not proper for determination by way of Judicial Review and dismissed the application. However a separate holding was made in the case of Abdul Waheed Sheikh and Abdul Hameed Sheikh as Charitable Trustees of the *Sheikh Fazal Ilachi Noordin Trust v Commissioner of Lands & 3 Others*, Nairobi High Court, Misc Civil Case No 1531 of 2005 (OS) (2012) eKLR. In the matter, the applicants held a leasehold title that expired and they applied for renewal. The Commissioner of Lands however intended to renew the same to another person. The court held that the applicants were entitled to hold a legitimate expectation that the lease would be renewed to them. A similar holding was made in the case of *Serah Mweru Mubu v Commissioner of Lands & 2 Others* High Court at Milimani, Petition No 413 of 2012 [2014] eKLR. In the matter, the petitioner held a lease that was due to expire. Before its expiry, she entered into negotiations with the state to purchase the same. While negotiations were ongoing, the leasehold title expired. The State declined to renew the lease and acquired it for itself. Majanja J, held that the petitioner held a legitimate expectation that the lease would be renewed to her."

The court went ahead to attempt to harmonize the position taken by courts and distinguished between two situations, where property was undeveloped, and where it was developed and used by the leaseholder. In the former, the court was of the opinion that where an application for renewal of lease was over an un-developed leasehold property only, or perhaps held for speculative purposes, there existed no right of renewal. However, concerning developed properties, the court held as follows;

"If the lessee of such property has utilized the land in accordance with the terms of the lease, why would the Commissioner of Lands refuse to renew to him such lease? There would be no reason at all. In fact, it would be unjust not to renew the lease to such person because such person would have spent resources in developing the property. Imagine a lessee who has under a leasehold title developed, say, a 30 storey commercial building, or a 5 star hotel, in accordance with the terms of the lease. Any other person taking over such property, as a subsequent lessee, would be unjustly enriched by the industry of the first lessee. In the same vein, the first lessee



would be deprived of his investment for no reason at all. It follows, that the first lessee, is entitled to hold a legitimate expectation, that the Commissioner of Lands would renew the lease to him for a further term. I am fully in agreement with the decision of Lenaola J, in *Abdul Wabeed Sheikh & another v Commissioner of Lands* and Majanja J, in *Serab Mweru Muhu v Commissioner of Lands* which held that the previous lessee has a legitimate expectation that the expired lease would be renewed to him, so long as he has complied with the terms of the grant. I have looked again and again at the decision in *Nairobi City Council v Chhagal Lala & 2 others* and with the utmost of respect, I find great difficulty in following it. I have seen that in arriving at the finding, reliance was made upon the decision of Osiemo J, in the case of *Charles Mwangi Kagonia v Dharj D Popat & another*, Nairobi High Court, Civil Suit No 96 of 2005, [2006] eKLR. But the latter case involved a dispute of an expired lease between two private individuals and I think the facts therein can be distinguished where the property in issue is a leasehold title from the Government. The case of *Goan Institute Nakuru v Said Abdalla Azubedi* [2007] eKLR, did not succeed partly because the Commissioner of Lands was not a party to the case.

49. I have every conviction to hold, and I do hold, that a former holder of a Government leasehold title, who had complied with the terms of the lease, held a legitimate expectation that such lease would be renewed to him by the Commissioner of Lands. It is my considered view, that despite there not being any explicit provision in the GLA, concerning renewal of leases of developed town plots, such plots needed to be renewed to the previous leaseholder, unless the leaseholder had breached a fundamental term of the lease, or is no longer interested in its renewal.

50. In exercising his duty to renew such lease, the Commissioner of Lands would be exercising an administrative function. Any person acting in the exercise of administrative power has an obligation to act fairly and justly. That is what everyone expects of such person. Administrative power is not to be exercised capriciously, without regard to what is fair, just and proportionate. The Commissioner of Lands could not in the fair exercise of his administrative power, renew the lease to another person, for as I have laid out before, such action would break the legitimate expectation of the incumbent leaseholder. What would be fair, just and equitable in such circumstance would be to renew the lease in favour of the incumbent holder of the lease.”

The court is persuaded that a legitimate expectation of renewal of a leased property exists where the terms of the grant have been complied with, especially where the lessee has developed the suit property. To find otherwise would herald a situation where people are uprooted from properties following expiry of their lease term, resulting to their developments on the properties reverting as fixtures on the land to the original lessors, which essentially amounts to a deprivation of the property in a manner the law does not contemplate. This would inevitably enrich lessors and incentivize refusal to renew leased property, where the lessor knows that as soon as the original term expires, they would be enriched by the now developed property, and perhaps business being conducted thereon.

- c. The question to be determined is whether in these judicial review applications the *ex-parte* applicants had complied with the terms of the original grant, or put differently, whether they had a legitimate expectation or right to have their lease over the property renewed. The



National Land Commission through the affidavit of Matano Ngatia sworn on October 18, 2017 alleges that when a site visit was conducted on the suit property, they realized the property was not being used in accordance with the terms of the grant, to wit, to hold a cultural center. He deponed that there was an old building used as a theatre and a private restaurant which was also being operated on the suit property, but added that in their opinion, the property was not being used for a cultural center in accordance with the terms of the original grant. The 1st *ex-parte* applicant denied that claim through his supplementary affidavit in response to the National Land Commission affidavit of May 25, 2018. He further denied that a private restaurant existed on the suit property and deponed that what was referred to as “the bar” was a refreshments area. He stated that refreshment areas were common in theatres globally and that in fact, the one on the suit property did not serve alcoholic drinks. He denied further that the property was being used as a restaurant or bar of any sort. He further stated that the building being used a cultural theatre was constructed in the 1960’s and that it was obviously old. He further stated that new theatre seats and modern theatre equipment was being sourced from China for the theatre. That the explanation offered by the 1st *ex-parte* applicant on the use of the property sufficiently answers the allegations that the *ex parte* applicant had not development the suit property or put to use the same for the purposes in the grant. The grant of the property was made to serve a cultural center and it is indeed probable that one was constructed in the 1960’s, which explains the aged building seen on the suit property. The presence of the bar has also been explained satisfactorily. It is reasonable to expect that refreshments would be needed in a theatre which is the status quo in many theatres and movie cinemas globally. Further, the respondents have not rebutted the *ex parte* applicant deposition that no alcoholic drinks are served at the refreshment area labelled “the bar”. The court therefore finds that the refreshment area is not operated separate from the business of the theatre.

- d. That flowing from the above findings, the next issue for determination is whether the exercise of the administrative function of processing the *ex parte* applicants’ application for renewal of lease was in accordance with the law. Even without an in-depth analysis, it is easy to see that the processing of the application was not undertaken in line with article 47 of the [Constitution](#) on fair administrative action. A cursory reading of the Fair Administrative Act, and taking the facts of this dispute side by side demonstrate unfair administrative action throughout the manner in which the *ex-parte* applicants’ application for renewal was processed. For instance, section 4 of the [Fair Administrative Action Act](#) requires an administrative action to be expeditious, efficient, lawful, reasonable and procedurally fair. It is unarguable that the *ex-parte* applicant’s application for renewal of their lease was made prior to its expiry on the February 5, 2008 with further inquiries on the status of this application being made on other dates, among them being the September 15, 2008 and September 16, 2009. It is clear that the said application for renewal, and the subsequent enquiries appear not to have been elicited the expected response within reasonable time. That by the April 26, 2014 the National Land Commission was still inquiring on the way forward from the offices of the County Government of Uasin Gishu, which was itself a party interested with the property, and hence incapable of being impartial in the process. That then, in 2017 the suit property was granted to the Uasin Gishu County Government. Clearly the *ex parte* applicants renewal application was not processed in an expedient way nor subjected to an efficient process. That therefore, at a prima facie level, the administrative process taken in the said renewal application if any, was not done in terms of the law.
- e. These infractions of the [Fair Administrative Action Act](#) are not the only ones noted. That the manner in which the pre-eminent right of renewal of the lease in favour of the *ex parte* applicant



over the suit property leaves lingering questions that taints the decision that was eventually taken to grant the suit property to the County Government of Uasin Gishu as expressed under table 7, entry No18 of Gazette Notice No 6862 of July 17, 2017 published in the Special Issue of the Kenya Gazette Volume CXIX No 97. This court therefore finds that the *ex parte* applicants applications for judicial review for certiorari order has merits and therefore succeeds.

- f. The *ex parte* applicants have also prayed for an order of mandamus to compel the County Government of Uasin Gishu and the National Land Commission to conduct a transparent and fresh exercise of renewal. That even though the respondents have demonstrated willful non-compliance with the previous court's orders issued on the October 24, 2016 and notwithstanding the apparent desire of the Uasin Gishu County Government's desire to have the suit property for itself, they are obligated by the Constitution and statutes to process the applications for renewal of leases received in accordance with the law. That the respondents should in the process take note of the above court decision that the immediate previous holder of a leasehold had a right of renewal of a grant as the use of the property had been in line with the terms of the original grant. That though the court in a judicial review application do not substitute the impugned decision with its own, the respondents herein have little wiggle room out of renewing the grant of lease.
- g. That on the issue of costs, the *ex parte* applicants being successful in the main prayers are entitled to costs in each of the two applications.

13. That in view of the foregoing, the court finds for the *ex parte* applicants and orders as follows;

- a. That prayer 1 of the notice of motion dated the November 1, 2017 is hereby granted as prayed and Table 7, Entry No 18 of gazette notice No 6862 of July 17, 2017, published in the Special Issue of the Kenya gazette, Volume CXIX – No 97 called into this court and quashed.
- b. That National Land Commission and the County Government of Uasin Gishu do process afresh the *ex parte* applicants' application for renewal of lease for land parcel Eldoret Municipality Block 13/22 [formerly known as LR No 6619/35] in accordance with the law.
- c. That the *ex parte* applicants' costs be paid by the National Land Commission and the County Government of Uasin Gishu.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 16TH DAY OF FEBRUARY, 2022.

S.M. KIBUNJA, J.

ELC ELDORET

IN THE VIRTUAL PRESENCE OF;

Exparte Applicants: ...Absent

Respondents: ...Absent

interested parties: ...Absent

Counsel: ...Mr. Otieno for exparte Applicant,

Ms Karuga for Chesoo for 3rd Respondent and



1st Interested Party and Mr. Kuria for the 2nd Respondent.

COURT ASSISTANT: ONIALA

S.M.Kibunja, J.

ELC ELDORET

