



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. JR APPLICATION NO. 10 OF 2014**

**IN THE MATTER OF: AN APPLICATION BY GROVE DEVELOPMENT LIMITED FOR  
LEAVE TO APPLY FOR JUDICIAL REVIEW AND ORDERS OF CERTIORARI,  
PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF: THE LAND ACT, ACT NUMBER 6 OF 2012**

**AND**

**IN THE MATTER OF: THE NATIONAL LAND COMMISSION, ACT NUMBER 5 OF 2012**

**AND**

**IN THE MATTER OF: ARTICLES 2, 3, 19, 20, 21, 22, 40 AND 67 OF THE CONSTITUTION OF  
KENYA, 2010**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

- 1. THE NATIONAL LAND COMMISSION**
- 2. DR. MOHAMED A. SWAZURI**
- 3. DIRECTOR OF PHYSICAL PLANNING.....RESPONDENTS**

**AND**

**GROVE DEVELOPMENT LTD.....EX PARTE APPLICANT**

**RULING**

**Introduction:**

1. Grove Development Limited, the ex parte Applicant is the registered proprietor of the parcel of land known as Kwale/Diani/Block/20 comprising by measurement of approximately twenty (20) acres (the suit

property) for a period of 99 years from First January, 1914 and for which it applied for, and was granted an extension upon the expiry of the said term.

2. The ex parte Applicant claims that following the obtention of all requisite approvals, the Chairman of the first Respondent, the National Land Commission, has declined to execute the lease for the extended period. Instead, the ex parte Applicant claims that the Second Respondent, has made an illegal and unconstitutional decision to deprive the Applicant of its property, and is in the process of distributing the said property to his proxies, and/or cronies.

### **THE NOTICE OF MOTION**

3. Pursuant to leave of the court granted on 26<sup>th</sup> March, 2014 the ex parte Applicant has come to this court by way of a Notice of Motion dated Second April, 2014 seeking –

**(a) An Order of Certiorari to quash the Notice of Completion of Part Development Plan made by the First, Second and Third Respondents and published in local daily Newspapers on 8<sup>th</sup> March, 2014, purporting to invite members of the public to make any representations and objections to the suit property;**

**(b) An Order of prohibition to prohibit the First and Second Respondents, their officers, agents, servants or any other authority appointed for that purpose from dealing, processing titles, allotting, issuing, sub-dividing and/or any dealing whatsoever that is detrimental to the Applicant's right to all that piece of land known Plot Number Kwale/Diani/Block/20;**

**(c) An Order of mandamus to compel the First and Second Respondents to renew the Applicant's lease to all that piece of land known as Plot Number Kwale/Diani/Block/20, and release the same to the Applicant.**

### **FACTS AND GROUNDS OF THE EX PARTE'S CLAIM**

4. The facts and grounds upon which the ex parte Applicant's claim is founded and set out in the joint Affidavit of **KAMLESH PANDYA** and **NITIN PANDYA**, directors of the ex parte Applicant, sworn on 24<sup>th</sup> March, 2014.

5. In summary, the ex parte Applicant states that prior to the expiry of the ninety-nine (99) years on 29<sup>th</sup> October 2009, it made an application seeking an extension of the lease, change of user and sub-division of the suit property, and paid the requisite fees (Exhibit GDL-02). The Application after receiving the necessary approvals, was recommended for extension per letter from the Ministry of Lands dated 19<sup>th</sup> November, 2009 expressing that it has no objection to the application for extension of lease (Exhibit GDL – 04). The County Council of Kwale on 14<sup>th</sup> April, 2011 wrote to the ex parte Applicant notifying it that its application (for extension of lease) had been approved (Exhibit GDL – 5).

6. Likewise on 6<sup>th</sup> December, 2011, the Department of Lands in Mombasa wrote to the Commissioner of Lands, the predecessor of the National Land Commission, recommending that the ex parte Applicant's application be approved (Exhibit GDN - 06). On 21<sup>st</sup> June, 2012 the Commissioner of Lands informed the ex parte Applicant that its application for sub-division, change of user and extension of lease had been approved (Exhibit GDL - 07).

7. However on 7<sup>th</sup> August, 2013 the First Respondent's Head, Land Administration, wrote an **internal memo** to the Second Respondent forwarding a list of Leases/Grants ready for execution, and the ex parte Applicant's suit property was among those listed (Exhibit GDL – 08). A draft lease had been prepared (Exhibit GDL – 09) and was ready for execution by the Second Respondent. For reasons unknown to the ex parte Applicant, the Second Respondent refused to execute the draft lease and instead, the Applicant claims, made illegal and unconstitutional decision to deprive the ex parte Applicant of its property. In

addition, a Notice was published in the local Newspapers on 8<sup>th</sup> March, 2014, and inviting interested parties to make representations or objections in connection with a Part Development Plan (PDP) for the suit property, and hence the suit herein.

### **THE RESPONSE TO THE APPLICATION**

8. The application is however opposed by the Third Respondent, through the Replying Affidavit of one Timothy W. Mwangi, a Deputy Director of Physical Planning in the Ministry of Lands, Housing and Urban Development, sworn on 29<sup>th</sup> September, 2014. He avers in paragraph 5 of the Affidavit that by a letter dated 23<sup>rd</sup> August, 2013 written by the Second Respondent to the Director of Physical Planning requesting him to prepare a physical development plan for the suit property, whose lease term had expired on 1<sup>st</sup> June, 2013 (Exhibit TWM – 1). The Director of Physical Planning in turn requested the County Director of Physical Planning to draft the appropriate plans (Exhibit TWM – 2).

9. The County Physical Planner prepared a Part Development Plan No.413KWL.01.2013 (Exhibit TWM - 3) and a notice was published in the local daily with national circulation inviting members of the public to make comments or objections to the plan (Exhibit TWM – 4).

10. The Third Respondent also avers that it did not receive any objections to the Part Development Plan, signifying that the public (including the ex parte Applicant) accepted the planning proposal, that the plan was prepared over the suit property which was considered to be public unalienated land since the ex parte Applicant's lease had by then expired. This deponent also faulted the ex parte Applicant's Application for extension of lease, sub-division and change of user for failure to comply with the provisions of section 32(1) of the Physical Planning Act (Cap 286 Laws of Kenya) which requires that every application must be forwarded to the Director of Physical Planning for comments, which was not done by the Applicant.

11. This deponent therefore rubbished the purported approvals as they were not informed by comments of the Director of Physical Planning and such approvals were under Section 32(c) and 33(1) of the Physical Planning Act, null and void **ab initio**. In addition this deponent faulted the ex parte Applicant's approvals contained in form PPA2 (Exhibit GDL – 05) alleged to have been issued by the County Council of Kwale as it did not conform to the statutory form provided in the Fifth Schedule of the Physical Planning Act, and was therefore defective.

### **THE SUBMISSIONS**

12. The First and Second Respondents did not make appearance, the Third Respondent chose to rely solely on its Replying Affidavit aforesaid, while the ex parte Applicant filed written submissions.

13. The ex parte Applicant's case is that the Respondents' actions are tainted with illegality, irrationality and procedural impropriety **ultra vires** and contrary to the provisions of section 13(1) of the Land Act which affords the ex parte Applicant pre-emptive rights of renewal. Further, that the renewal was duly approved save for the Second Respondent's execution which was refused without communication or reason that the Respondents did not inform the ex parte Applicant that the suit property was required for public purposes and therefore its application could not be approved.

14. The ex parte Applicants also submits that it had a legitimate expectation that it would receive a duly executed lease since its application for extension of the lease for the suit land had been communicated as approved.

### **DETERMINATION**

15. Before considering the ex parte Applicant's counsel's argument, I will consider the arguments raised in opposition by the Third Respondent against the orders sought by the Applicant. The first objection was that the approvals by the Commissioner of Lands for sub-division, extension and change of user were null and void as such approvals were granted contrary to the requirements of section 13(1) of

the Land Act, sections 32(1) and 32(c) of the Physical Planning Act, (Cap, 286, Laws of Kenya). Section 31 of the Physical Planning Act provides that -

**“any person requiring a development permission to make an application in the form prescribed in the Fourth Schedule for the Clerk to the Local Authority responsible for the area in which the land concerned is situate,**

16. And section 32(1) and 32(1) provides –

**“(1) A local authority to which a development application is made under section 31 shall not later than thirty days after the receipt of the application, refer it to the Director for his comments.**

**2. The local authority may when considering a development application submitted under sub-section (1) consult with any, or all of the following persons –**

- a. **the Director of Survey**
- b. **the Commissioner of Lands**
- c. **the Chief Engineer (Roads) Ministry of Public Works and Housing, and**
- d. **other eleven officers listed under that sub-section.”**

17. The determination herein would be incomplete without reference to section 42 of the Physical Planning Act which says –

**“42. Subject to the provisions of the Government Lands Act, the Trust Land Act and any other written law relating to administration of land, no sub-division, consolidation, lease or renewal of lease of an unalienated Government land or trust land or of a private land shall be effected without due regard to the requirements of the relevant development plan.”**

18. Considering both sections 31 and 42 of the Physical Planning Act, it is clear that they are all subject to the relevant provisions of the Government Lands Act, section 34(1) which provides that there shall be implied in every lease that the lessee shall not divide the land and assign or sub-let any portion thereof except with the previous written consent of the Commissioner and in such manner and subject to such conditions as he (the Commissioner) may prescribe subject to the provisions of Part V (of the Act). Section 34(2) requires that every application for consent shall be made to the Commissioner setting out the particulars therein prescribed, including –

**“(a) the applicant’s proposals for apportionment of any development conditions, in the original lease and for the development and maintenance of development of each portion of land be assigned or sublet; and**

**(b) be accompanied by suitable plans in quadruplicate on durable material showing the proposed sub-division;**

And sub-section (3) requires every applicant to furnish the Commissioner with any or further information the Commissioner may require.

19. Finally section 149(2) of the Government Lands Act empowers the Minister to make rules generally for the better carrying out of the provisions of the Act, and without prejudice to the generality of the foregoing power, those rules may make provisions –

**“(a) – (e)**

**(f) for prescribing or regulating any matter or thing in relation to any sale, lease, licence or agreement under the Crown Lands Ordinance, 1902, or anything done or to be**

**done under that Ordinance which might lawfully have been prescribed under the Ordinance.”**

20. Pursuant to the said provision, the Minister made the Government Lands (Approval) Rules (Legal Notice Number 170 of 1976, as amended by Legal Notice Number 308 of 1994, and Legal Notice Number 11 of 2010), and prescribed fees for approval given by the Commissioner of Lands in respect of sub-divisions of lands, building plans, **extensions** of terms of leases; allocation of plots, **changes of user, extensions of user**, and such matters requiring approval.

21. A composite reading of the above provisions clearly show that the application for land for any purpose, agricultural, or commercial or residential purposes must be made to the Commissioner of Lands. Likewise any application for extension of lease, changes or user, sub-division of land, or extension of user must be made to the Commissioner of Lands. That was the architecture and regime of the allotment of, and use of land, law, prior to the advent of the Constitution of Kenya 2010, and the enactment of the Land Act, 2012 (No. 6 of 2012).

22. The Commissioner does not work in isolation. He works with other officers charged with the duty of physical planning the use and allocation of land. It is in that regard the Director of Physical Planning got in touch with the County Director of Physical Planning and asked him to prepare Part Development Plans for the suit land. Neither the Director of Physical Planning nor the County Director of Physical Planning have authority to decide on the grant of leases or extension of leases, or change of user. Their respective role is limited to consultation by the local authority under sections 32(2) and 42 of the Physical Planning Act. That is the only reason why the ex parte Applicant paid a sum of Kshs. 37,000/= to the County Treasurer's Office on 16<sup>th</sup> November, 2009, when the initial application was made though the Notification of Approval marked GDL – 5 and dated 14<sup>th</sup> April, 2011 refers to an application submitted on 10<sup>th</sup> February, 2011.

23. The averment on behalf of the Third Respondent that the approval granted by the Commissioner of Lands are null and void **ab initio** have no basis in law.

24. In any event, and irrespective of whether the application was lodged on 16<sup>th</sup> November, 2009, or 10<sup>th</sup> February, 2010, the Notification of approval marked GDL –dated 14<sup>th</sup> April, 2011, and the letter dated 21<sup>st</sup> June, 2012 giving assurance to the ex parte Applicant, and not having been in any way repudiated or discredited, created a legitimate expectation that approval had been lawfully granted as applied, for the extension or renewal of the terms of lease, change of user, sub-division as proposed by the ex parte Applicant.

25. Consequently, the decision of the Respondents beginning sometime on 23<sup>rd</sup> August, 2013 through the Government of Kwale County to alienate the suit property as public land without any **communication** or reference to the ex parte Applicant is a breach of the rules of natural justice and amounts to procedural impropriety, one of the grounds which renders the decision amenable to judicial review. It is unfortunate that the County of Kwale is not a party to the suit as it would have shed more light on this matter, but it would have made little difference to **the ratio** in the decision of this application. It is strange that the County Government forwarded on one hand an approval for renewal of lease to the First Respondent for execution, and on the other hand, the same authority recommended that the suit property be alienated as public land.

26. On 13<sup>th</sup> November, 2014 this court ordered that the application herein be served upon the Government of the County of Kwale, to which service was effected on 25<sup>th</sup> November, 2014 per the Affidavit of Service sworn on the same day by one Eric Muinde Musyoka, a court process server. Their failure to make any representation despite proper service in the circumstances creates an inference that they have no useful response to the Applicant's complaint. It is equally unfortunate that the Second Respondent found it unworthy of his high office and time to either enter an appearance or participate in these proceedings, again, despite service effected by a process server, one Vincent O. Maiga, on 15<sup>th</sup> April, 2014 as indicated in his Affidavit of Service sworn at Nairobi on 20<sup>th</sup> May, 2014. He too would

have raised objection if any valid reason existed.

27. This case is distinguishable from the case of **REPUBLIC V COMMISSIONER OF LANDS & 3 OTHERS ex parte SHELF CO LIMITED, Milimani Judicial Review Misc. Application N. 173 OF 2012** where Odunga J. found that judicial review was not the proper forum to determine the issue of whether or not an application for renewal of lease was made before the suit land was allocated to a party, not being the previous lessor. In this case the ex parte Applicant has presented documents evidencing an application for approval. The Third Respondent's accusation that the Notification of Approval (GDL – 5) did not meet the standard form provided in the Act is both short of transparency, and adequacy to answer the ex parte Applicant's complaint in light of the subsequent positive correspondence from the Ministry of Lands and the Commissioner of Lands (GDL – 6 and GDL – 7), even to having the lease prepared and awaiting execution by the Second Respondent.

28. Lenaola J, in the case of **ABDUL WAHEED SHEIKH & ABDUL HAMEED SHEIKH as Charitable Trustees of the Sheikh Fazal Ilachi Noordin Trust vs. The Commissioner of Lands & 3 Others (Nairobi HCCC No. 1531 of 2005 (O.S), [2012] eKLR** also found that where the Commissioner of Lands had approved an extension of lease, a legitimate expectation had been created and the Commissioner could not allocate the land to or for another purpose as any subsequent cancellation, acquisition or refusal to extend the lease must be done within the law, however noble the Commissioner's intentions or reasons were.

29. Likewise, Majanja, J. in **SERAH MWERU MUHU V COMMISSIONER OF LANDS & 2 OTHERS (High Court at Milimani Petition No. 413 of 2012 [2014] eKLR** made a similar finding where the lease expired pending negotiations between the proprietor of the land the Government.

30. Lastly, unlike the Government Lands Act, the Land Act 2012, expressly grants to the lessee of whose lease which has expired or about to expire, the **pre emptive rights** to the allocation of the expired leasehold interest. This law was only enacted and came into force on 2nd May, 2012, well after the matter had been filed. It did not apply, but it retains the old principles, that an expired lease maybe renewed on terms.

31. In this case, the ex parte Applicant having applied and having been notified of approval of extension of lease, change of user, and sub-division of the suit property, it was not open for the Respondents or any one of them to renege on the approval without reference to the Applicant. Such act was both procedurally improper, and irrational in the **Wednesbury** principle as it defied logic, and is indefensible.

32. The ex parte Applicant sought two fundamental remedies of judicial review, an order of **certiorari**, and an order of **prohibition**. An order of certiorari is also called a quashing order. It issues to quash a decision of lower court, tribunal or a person invested with authority for acting **ultra vires** his powers, without or in excess of jurisdiction. In this regard, the Second Respondent acted both without jurisdiction and in breach of the rules of natural justice that is to say his refusal to execute the lease which had been processed in accordance with the requirements of the Government Lands Act, the Physical Planning Act before the Land Act came into force was procedurally improper.

33. For these reasons an order of certiorari will issue to bring into this court, and quash the Notices of completion of Part Development Plan made by the First, Second and Third Respondents and published in the local daily papers of 8<sup>th</sup> March, 2014 to invite members of the public to make representations and objections to the suit property.

34. The judicial review order of prohibition or prohibitory order will issue on the same grounds as an order of certiorari, except that unlike an order of certiorari which deals with the past, an order of prohibition looks to the future. It forbids illegal or unlawful behaviour or acts by the Respondents in the future. An order of prohibition shall therefore issue prohibiting the Respondents from purporting to alienate the suit property of the ex parte Applicant at all, or without the concurrence of the ex parte Applicant first sought, and granted in writing.

35. An order of mandamus is a command from this court to the inferior court, or tribunal or person or body acting in quasi-judicial manner, to do what is required of it according to law. It is said that the court will usually not issue an order of mandamus directing the inferior body, tribunal, person or body of persons to exercise their discretion in a particular or certain manner. There must however be an exception to this general and time honoured principle of judicial review which is based on the other principle that at no time would the court usurp the discretion of the inferior court, tribunal, person or body of persons. The exception in my respectful view, is this, that where a or person or tribunal body whether alone, or in conjunction with other lawfully constituted bodies, such in this case as the Commissioner of Lands, the Kwale Local authority as it then was, have made a decision, that decision can only be reversed in the same manner in which it was made. It cannot be reversed by a decision of part of that constituent body, like the Second Respondent or third Respondent without reference to the affected party, the ex parte Applicant. It is no defence to say that the ex parte Applicant did not object to the illegal acts by the Respondents. The ex parte Applicant sought relief from the court.

36. In that regard therefore there shall issue an order of mandamus commanding the Second Respondent to sign the necessary documents of title, constituting the renewal, extension of lease, the sub-division, the change of user of the suit property.

37. The Notice of Motion dated 2<sup>nd</sup> April, 2014 therefore succeeds in all respects. The ex parte Applicant shall also have the costs of the application.

38. There shall be orders accordingly.

**Dated, Signed and Delivered in Mombasa this 30<sup>th</sup> day of July, 2015.**

**M. J. ANYARA EMUKULE**

**JUDGE**

In the presence of:

No Appearance for Applicant

Miss Lutta for 1<sup>st</sup> and 3<sup>rd</sup> Respondents

No Appearance for 2<sup>nd</sup> Respondent

Mr. Kaunda Court Assistant