



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**JUDICIAL REVIEW NO. 175 OF 2014**

**IN THE MATTER OF: ORDER 53 RULE 1, CIVIL PROCEDURE RULES, SECTIONS 3, 3A AND 63 (e) OF THE CIVIL PROCEDURE ACT, CAP 21 LAWS OF KENYA, ARTICLES 40(1), 2(b), 232(1) OF THE CONSTITUTION, , SECTIONS 24, 25 AND 26 OF THE LAND REGISTRATION ACT, NO. 3 OF 2012 LAWS OF KENYA, SECTION 33(2) OF AGRICULTURAL FINANCE CORPORATION ACT, SECTION 9(1) OF THE LAND CONTROL ACT AND ALL OTHER ENABLING PROVISIONS OF LAW.**

**IN THE MATTER OF: AN APPLICATION BY AGRICULTURAL FINANCE CORPORATION FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI AND MANDAMUS.**

**BETWEEN**

**AGRICULTURAL FINANCE CORPORATION.....EX-PARTE APPLICANT**

**AND**

**1. THE LAND CONTROL BOARD OF LOITOKITOK.....1<sup>ST</sup> RESPONDENT**

**2. THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**AND**

**1. KAPITI DAIRIES LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**2. SIMON MWAURA.....2<sup>ND</sup> INTERESTED PARTY**

***EX PARTE* : AGRICULTURAL FINANCE CORPORATION**

**JUDGEMENT**

1. By a Notice of Motion dated 29<sup>th</sup> April, 2014, the *ex parte* applicant herein, **Agricultural Finance Corporation**, seeks the following orders:

1. **THAT, this application be certified urgent and service be dispensed with in the first instance.**
2. **THAT, the Applicant be granted leave to apply for:**

a. An order of certiorari to remove to this Honourable Court the decision by the Land Control Board, Loitokitok to refuse to grant consent to the Applicant and have the same quashed

b. AN ORDER OF MANDAMUS directed to the Respondents compelling them to grant consent to the Applicant to transfer all that parcel of land known as Loitokitok/Olkaria/550.

c. IN THE ALTERNATIVE, that this Honourable Court be pleased to grant an Order to direct the Deputy Registrar of the High Court to execute the transfer documents in favour of the 1<sup>st</sup> Interested party with respect to all that parcel of land known as Loitokitok/Olkaria/550.

3. THAT the costs of the application be in favour of the Applicant.

### Applicant's Case

2. The application was supported by a verifying affidavit sworn by **Geoffrey Mwirebua**, the applicant's debt recovery manager on 29<sup>th</sup> April, 2014.

3. According to the deponent sometimes on or about the years 1985-1987, the applicant advanced to the 2<sup>nd</sup> interested party several loans for agricultural development on the security of land parcel nos. Loitokitok/Olkaria/326 and the applicant lodged and registered a notification of charge thereon in its favour. Subsequently the 2<sup>nd</sup> interested party subdivided the said parcel into Loitokitok/Olkaria 550 and 551 and offered the former as security for the advances.

4. As a result of the 2<sup>nd</sup> interested party's default, the applicant in the exercise of its statutory power of sale disposed of the said parcel no. 550 by way of public auction on 20<sup>th</sup> December 1999 where it bid for and acquired the same and the same was thereafter transferred to the applicant on 23<sup>rd</sup> May, 2000. Subsequently the applicant offered the said parcel for sale to Kapiti Dairies Limited and lodged an application for consent to transfer the same with the 1<sup>st</sup> Respondent but the 1<sup>st</sup> Respondent verbally refused to grant the consent without giving any reasons therefor.

5. It was contended that the said decision defeats logic and is baseless in light of the fact that the applicant is the sole proprietor of the said parcel.

6. In the submissions filed on behalf of the applicant it was contended that the 1<sup>st</sup> Respondent's decision was so unreasonable as to defeat logic and that the 1<sup>st</sup> Respondent's decision amounted to abuse of power as it was arrived at without giving any reasons and was arrived at by taking into account irrelevant matters and failing to take into account relevant ones. In support of its submissions the applicant relied on **Seventh Day Adventist Church (East Africa) Limited vs. The Permanent Secretary, Ministry of Nairobi Metropolitan Development & Others HCMA No. 112 of 2011** and **Associated Provincial Picture Houses Limited vs. Wednesbury Corporation [1948] 1 KB 223**.

7. It was further submitted based on Kakamega Judicial Review No. 25 of 2011 – **John Mbotto Chitayi vs. The Chairman, Land Control Board – Kabras and Others** that a third party not privy to sale of land agreement cannot stop the issuance of the consent of a Land Control Board.

8. According to the applicant, though it was entitled to reasons, the Respondent acted in bad faith, abused its administrative authority and failed to take into account relevant considerations and reliance was placed on **Republic vs. The Commissioner of Lands ex parte Lake Flowers Limited Nairobi HCMA No. 1235 of 1998**.

9. It was submitted that the 1<sup>st</sup> Respondent ought to exercise its administrative authority in reasonable

manner so as not to defeat the applicant's legitimate expectation of obtaining consent and relied on **Council of Civil Service Unions vs. Minister for the Civil Service**.

10. It was submitted that that the applicant is constitutionally entitled to enjoy any rights as provided by Article 40(1)(b) of the Constitution which right can be in the form of buying, selling, transferring and/or any other form without interference.

### **Respondent's Case**

11. In response to the application the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed the following grounds of opposition:

- 1. That the orders prayed for are not available to the Applicant.**
- 2. The Applicant has failed to pursue the available remedies in law for he has the right to appeal to the provisional lands board as provided under the Land Control Act and is only abusing the court process.**
- 3. That the order of mandamus directed against the 1<sup>st</sup> Respondent cannot issue as court cannot question the decision of the Land Control Board subject to the right of appeal, which the Applicant herein has not opted not to explore as its decision shall be final and conclusive.**
- 4. That the order of certiorari directed against the 1<sup>st</sup> Respondent cannot issue as the Applicant is making mere allegations and has not demonstrated to the court how the 1<sup>st</sup> Respondent acted *ultra vires* Section 9 of Land Control Act.**
- 5. That judicial review proceedings purely deal with the procedure and process of decision making and not the merits and/or substance of the case.**
- 6. The application is misconceived, bad in law and an abuse of the court process and should therefore be dismissed with costs.**

### **Determinations**

12. Having considered the application, the affidavit in support of the Motion and the grounds of opposition thereto as well as the submissions filed, this is the view I form of the matter.

13. Section 16 of the *Land Control Act* provides as follows:

***(1) Every decision of a board shall be given in writing in the prescribed manner and shall be signed by or on behalf of the chairman or other person presiding, and where consent is refused or an appeal is dismissed the reasons for the refusal or dismissal shall be stated in the decision.***

***(2) A copy of the decision shall in every case be delivered or sent by post to the applicant and, in the case of an appeal, to the board whose decision is appealed against.***

14. The clearly imposes a statutory duty on the Board to give its decisions in writing stating the reasons thereof. In this case, it is contended, a contention which though made on oath is not controverted on oath that the decision declining to grant the consent was verbal and that no reasons were given. That being the position, it is clear that the refusal to give the consent was clearly unprocedural. Apart from that Article 47 of the Constitution similarly obliged the 1<sup>st</sup> Respondent to give its decision in writing with reasons for making the same.

15. The decision of the 1<sup>st</sup> Respondent being no decision at all, the Respondents' contention that the applicant ought to have appealed against the same has no basis as there was nothing capable of being appealed against.

16. The parameters of judicial review were set out by the Court of Appeal in Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996 as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.....Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.....The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way.....These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done.....Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

17. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300. In that case the Court cited with approval Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479 and held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral

**standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”**

18. Whereas it is true that the decision whether or not to grant a consent is an exercise of discretion, public authorities are not entitled to abuse the discretion given to them since public offices are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights donated to him or her by the Constitution, in this case Article 40 thereof, without proper reasons would in my view amount to wrong exercise of discretion. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.

19. Therefore there are circumstances under which the Court would be entitled to intervene even in the exercise of discretion and this Court is empowered to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See **Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323.**

20. In my view the 1<sup>st</sup> Respondent is under an obligation to consider an application for consent for transfer and give its decision in writing and the failure to do so amounts to abuse of discretion.

21. However, as was held in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra) where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way. Therefore, this Court cannot by way of an order of mandamus compel the Respondent to issue the consent. The Court can only compel the Respondents to consider the application and make a decision one way or the other. However the Respondents are obliged under Article 47(2) to furnish the applicant with written reasons after considering the application where the decision is likely to adversely affect the applicant. Where no reasons are given and the decision arrived at adversely affects the applicant the Court would as well be entitled to conclude that there were no good reasons for exercising the discretion in the manner it was exercised.

22. As there is no competent decision made by the 1<sup>st</sup> Respondent, there is no valid decision capable of being quashed.

### **Order**

23. Accordingly the order which commends itself to me and which I hereby grant is an order of mandamus compelling the 1<sup>st</sup> Respondent to consider the applicant's application for consent and give the applicant reasons if its decision is adverse to the interest of the applicant within 30 days from the date of service of this order. In default of such reasons, then the Respondent will be deemed not to have any reasons in which event an order of mandamus shall issue compelling the Respondent to issue the said consent.

24. There however will be no order as to costs as the applicant in the substantive motion framed the prayers in the form of leave rather than for substantive reliefs.

**Dated at Nairobi this 16<sup>th</sup> day of December 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Rashid for the Applicant**

**Cc Richard**