



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ENVIRONMENT AND LAND COURT

JUDICIAL REVIEW NO.31 OF 2013

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS IN THE FORM OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF LAND PARCEL NO. NAIVASHA MUNICIPALITY BLOCK 5/398

IN THE MATTER OF SECTION 14(1), (2) AND (3) OF THE NATIONAL LAND COMMISSION ACT 2012 AND IN THE MATTER OF PUBLIC NOTICE OF 10TH JULY 2013

BETWEEN

ELIZABETH NDITI NJOROGE.....APPLICANT

AND

THE NATIONAL LAND COMMISSION.....RESPONDENT

RULING

By a chamber summons dated 18th July, 2013, brought pursuant to the provisions of Order 53 Rule 1(1) (2) (3) and (4) of the Civil Procedure Rules, the *ex parte* applicant, Elizabeth Nditi Njoroge, among other prayers seeks leave to apply for certiorari to remove to this court for purpose of being quashed a public notice issued by the respondent on 10th July, 2013 and published in the Daily Nation of 10th July, 2013 at page 45 in so far as it relates to the Applicant's parcel of land No. NAIVASHA MUNICIPALITY BLOCK 5/398 (the suit property) and an order of prohibition stopping the respondent from undertaking any proceedings or dealing with the issues relating to the suit property or to deliberate on this matter and or make any findings thereon.

The application is supported by the affidavit of the applicant sworn on 18th July, 2013 and is premised on the following grounds:-

1. That there is jurisdiction friction and error of law as the respondent has undertaken to decide the legality or otherwise of the applicant's title to land which is the subject matter of petition No.31 of 2013 pending before this court;
2. That the respondent is by law an inferior body which cannot usurp powers of the High Court and purport to take up a matter from the High Court and undertake proceedings and make a

determination on it;

3. That there exists mala fides, malice, vindictiveness and outright discrimination by the respondent against the applicant;
4. That the respondent's notice to the applicant smacks of a very clear judicial interference with the applicant's matter pending in this court;
5. That the respondent has appointed itself as the complainant and the judge in its own cause which action is against the rule and principles of natural justice which demands that no man can be a judge in his own case;
6. That the respondent disregarded the mandatory requirement that a written prior notice be issued to a party before he or she can be subjected to judicial or quasi judicial proceedings;
7. That the respondent did not accord the applicant an opportunity to be heard on the issue raised in the public notice before publishing it;
8. That the respondent's failure to give the applicant pre-disclosure information is prejudicial to her; and
9. That there cannot be two parallel proceedings in two different bodies (one inferior to the other) over the same subject matter.

When this matter came up for hearing on 18th July, 2013 this court certified it as urgent but declined to grant leave and ordered the applicant to serve the application on the respondent before the application for leave could be heard.

Pursuant to the order of this court the applicant effected service on the respondent as can be deciphered from the affidavit of service sworn by Stanley Maina Waiganjo and filed in court on 22nd July, 2013.

Despite the respondent having been served with the application, it neither filed a reply thereto nor attended court when the matter was called for hearing on 23rd July, 2013. Consequently this court directed that the application be heard *ex parte*.

Before me counsel for the applicant, Mr. Karanja Mbugua, submitted that leave to commence judicial review proceedings should be granted as a matter of right, that although under section 14 and 15 of the National Land Commission Act (hereinafter called "the Act") the National Land Commission (hereinafter called "the Commission") has power to review grant and disposition of public land to establish their propriety or legality; before embarking on this, a notice should be given; that the applicant was never notified of the Commission's intention to review her grant either by way of a letter or Gazette notice but through the media. He also submitted that in the impugned notice the commission has already declared that the applicant's title is illegal and that such a declaration raises jurisdiction issues as the same is the subject of a petition that is pending before this court.

Counsel further submitted that there is a lot of mala fides in the respondent's action as the applicant's property is the only one singled out in Nakuru County; that owing to the respondent's failure to give the applicant notice she is yet to know who the complainant is and that judicial review proceedings cannot be merged with the petition as the reliefs sought in judicial review proceedings cannot be sought in the petition. To buttress his argument he cited Njuguna v. Minister for Agriculture (2000)1 E.A 184 (CAK) where the Court of Appeal held:-

“The test as to whether leave should be granted to an applicant for judicial review is whether, without examining the matter in any depth, there is an arguable case that the reliefs might be granted on the hearing of the substantive application. As the High Court had gone beyond its limited jurisdiction at the stage of application for leave to institute judicial review proceedings and

considered the merits of the case, its order would be reversed and as the applicant had demonstrated that the applicant had an arguable case, leave would be granted.”

Counsel also cited Musyoka v. Chief of General Staff (2000) 1 E.A 157 (CAK), among other authorities. In the latter, the Court of Appeal overturned the High Court's decision to deny the applicant leave to commence judicial review and held that the seriousness of the complaints made therein showed that they deserved to be investigated by that court.

I have read and considered the application together with the submissions by counsel for applicant.

The issues for determination are:-

- i. Whether the public notice complained of amounts to a decision capable of being quashed by an order of certiorari?
- ii. Whether the proceeding contemplated under the impugned notice are similar to the proceedings pending before this court? And
- iii. Whether the applicant has made a case for granting of the orders sought?

The remedy of 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 has been subjected. See Republic V. Secretary of state for education and Science ex parte Avon County Council (1991) 1 ALL ER 282 at 285. The point was more succinctly made in the English case of Chief Constable of North Wales Police V. Evan (1982) 1 W.L.R. 1155 in which Lord Hailsham of St. Marylebone, said-

“The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court.”

Thus, a decision of an inferior court or public authority may be quashed (by an order of *certiorari*) where the court or authority acted without jurisdiction, or exceeded its jurisdiction, or failed to comply with the rules of natural justice in a case where those rules are applicable, or where there is an error of law on the face of the record or the decision is unreasonable in the Wednesbury sense.

Order 53 Rule 2 of the Civil Procedure Rules provides:-

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless”

From the foregoing provisions of the law, it is clear that what is to be subjected to judicial review is a decision. The impugned decision can be in the form of a judgment, order, decree, conviction or other proceeding. See Order 53 Rule 2 of the Civil Procedure Rules *supra*.

As leave can only be issued in circumstances contemplated under Order 53(2) aforementioned, the question which arises is whether the public notice which is subject of the proceedings herein amounts to a decision capable of being quashed by an order of certiorari?

In the notice which is the subject of these proceedings the respondent has specified a number of properties that it considers were obtained or granted in an illegal and/or irregular manner. Among the properties listed in the notice is LR. No. Naivasha Municipality/Block 5/398 located in Naivasha within Nakuru County (the suit property herein).

In the notice, the respondent invites any person with an interest in the named parcels of land to appear before it within fourteen (14) days of publication of the notice to make representations to it before

it makes any determination. The relevant portions of the notice read as follows:-

“Following the examination of various records in our possession and site visits, the Commission is of the view that grants and dispositions relating to parcels of land listed hereunder were obtained and granted in illegal and/or irregular manner.....”

Pursuant to section 14(3) of the National Land Commission Act, 2012, the Commission would like to invite any person with any interest in these parcels of land to appear before the Commission within fourteen (14) days from the date of this notice to make representations to the Commission before it makes any determination.” (Emphasis mine).

It is the applicant's contention that this notice is inappropriate as she ought to have been notified of the impending proceeding through a letter or a Gazette notice and that in the notice the respondent has already made a declaration to the effect that her parcel of land was illegally acquired without according her an opportunity to be heard on the allegations leveled against her.

On the appropriateness or otherwise of the notice issued by the respondent it is important to note that section 14(3) of the National Land Commission Act, 2012 under which the notice is issued, no directions is given on the form or manner of notice to be issued. The section provides:-

“In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.”

Be that as it may, I note that the notice was not targeted at the applicant only but to any person with an interest in the suit property, the applicant included.

Although a letter or Gazette notice addressed to the applicant, as holder of the impugned title would be a better way of communicating the impending proceeding to the applicant, I am unable to comprehend what prejudice, if any, the applicant has suffered by the procedure used by the respondent to notify her of the impending proceedings.

Is it true that the respondent has already made a declaration on the legality or otherwise of the titles issued in respect of the parcels of land listed in the notice?

My answer to this question is negative. This is because what the respondent has done is to express its opinion on the titles. With all due respect an expression of opinion cannot amount to making of a decision. A plain reading of the notice leads to the conclusion that a decision on the impugned titles would be made after receipt and consideration of representations from any persons with interest in the listed properties. The relevant clauses therein being:- **“the Commission is of the view that grants and dispositions relating to parcels of land listed hereunder were obtained and granted in illegal and/or irregular manner”** and that

“the Commission would like to invite any person with any interest in these parcels of land to appear before the Commission within fourteen (14) days from the date of this notice to make representations to the Commission before it makes any determination.

Having determined that the notice herein is not a decision capable of being quashed by an order of certiorari, I now turn to the other issues for determination, albeit for academic purposes.

Turning to the second issue for determination namely, whether the proceedings contemplated under the impugned notice are similar to the proceedings pending before this court? I hasten to point out that whereas the issues to be considered in the Commission might have a bearing on the proceedings before this court, by way of evidence (if concluded before the petition pending before this court) I am unable to agree with the applicant's contention that there is jurisdiction friction and error in law in the proceeding to

be conducted by the respondent. I say this firstly, because under Article 67(2) (e) of the Constitution as read with section 14(1) and (3) of the National Land Commission Act, 2012, the respondent has power to initiate investigations, on its own initiative or on complaint, into present or historical land injustices, and recommend appropriate redress. Secondly, because the issues for determination in the proceedings to be commenced by the Commission and those pending before this court are distinct. Whereas the issue to be determined in the proceedings to be commenced before the Commission is legality or otherwise of the applicant's title to the suit property, the prayers sought in the petition pending before this court are:-

- (a) A declaration that the government through the ministry of finance, its officials, servants and contractors has contravened the petitioner's right to property under Article 40(1) and (3) of the Constitution;
- b) A declaration that the government through the ministry of Finance has committed trespass to land;
- c) A permanent injunction to restrain the Government by itself, its agents, officials, servants and contractors from interfering with the petitioner's quiet enjoyment of the suit property;
- d) A declaration that the forcible entry, seizure, possession and threatened alienation of the petitioner's premises on the suit property by the Government amount to a violation of their rights to protection of property under Article 40 of the Constitution;
- e) That a declaration be issued to declare that the forcible entry, seizure, possession and threatened alienation of the petitioner's premises on the suit property violates the petitioner's right to human dignity and protection of the law enshrined in Article 27 of the Constitution;
- f) That an order of prohibition be issued to prohibit the respondent's severally and jointly from entry into, seizure, confiscation, occupation, alienation and from taking possession of the suit property unless and until the government has compulsorily acquired it and complied with Article 40 of the Constitution;
- g) That an order of compensation be made for loss occasioned by the Government's denial of access to the petitioner to the suit property between 1st June, 2011 until cessation of the same;
- h) That an award of damages and exemplary damages be made in favour of the petitioner for deprivation of her rights and freedoms under Articles 27, 28, 47, and 50;

I) Costs of the petition.

Clearly none of the prayers above touch on the issue to be determined at the Commission.

The only way the proceedings to be commenced at the Commission can affect the proceeding pending before this court is by way of evidence. That is to say if a determination is made to the effect that the land was illegally acquired and then that finding is tendered in evidence before this court, that determination would clearly have a bearing or effect on the proceeding pending before this court. But this is not the kind of bearing or effect that can be said to be prejudicial to the applicant as the court can take evidence from whatever source if the source meets the threshold of adduction of evidence.

The upshot of the foregoing is that the application for leave has no merit and is dismissed.

Dated, signed and delivered in open court in Nakuru this 26th Day of July 2013.

L N WAITHAKA

JUDGE

Present

Mr Karanja Mbugua for the Applicant/Petitioner

N/A for the Respondent

Stephen Mwangi : Court Clerk.

L N WAITHAKA

JUDGE