REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

MISC. CIVIL CASE NO.1531 OF 2005 (O.S.)

BETWEEN

ABDUL WAHEED SHEIKIH AND ABDUL HAMEED SHEIKH AS

TRUSTEES OF THE SHEIKH FAZAL ILACHI NOORDIN CHARITABLE

TRUST…….....APPLICANTS/PLAINTIFFS

AND

COMMISSIONER OF LANDS……..1ST DEFENDANT/RESPONDENT

THE MINISTER FOR LANDS &

HOUSING…….…...…..2ND DEFENDANT/RESPONDENT

THE MINISTER FOR FINANC.....…3RD DEFENDANT/RESPONDENT

THE REGISTRAR OF TITLES……..4TH DEFENDANT/RESPONDENT

J U D G M E N T

1. The Originating Summons dated is premised on the provisions of **Section 70(c), 75(1), 84(1)** and **(2)** of the **Repealed Constitution** of Kenya, **Rules 9** and **11** of the **Constitution** of Kenya *(Protection of Fundamental Rights and Freedoms of the Individual)* **Practice** and **Procedure Rules, 2001** and **Order XXXVI** of the **Civil Procedure Rules** and the specific Prayers sought are as follows;

(1) A declaration that the Plaintiff's fundamental rights as protected and guaranteed by Sections 70(c) and 75(1) of the Constitution of the Republic of Kenya have been or are likely to be contravened in relation to the leasehold interest in the property known as L.R. No.209/193, Pangani, Nairobi.

(2) A declaration that there is no lawful basis upon which the Defendants and each of them should or could deprive the Plaintiffs of the right to the ownership and/or proprietorship over the leasehold interest in the property known as L.R. No.209/193, Pangani, Nairobi.

(3) A declaration that the Defendants and each of them are not entitled to deprive the Plaintiffs of the rights over the leasehold interest in the property known as L.R. No.209/193, Pangani, Nairobi otherwise than by compliance with the Law, due process of Law and upon prompt and full payment of such compensation as the Plaintiffs would be entitled to under the provisions of the applicable Law.

(4) That this Court do grant the Plaintiffs/Applicants a Conservatory Order by way of an order restraining the Defendants by themselves, their officers, servants, agents or otherwise howsoever from attempting to obtain possession, disposing or in any manner whatsoever interfering with the Plaintiffs proprietorship possession, custody and control of the property known as L.R. No.209/193, Pangani, Nairobi pending the hearing and determination of the Originating summons filed herein.

(5) That this Court do grant the Plaintiffs/Applicants a Conservatory Order by way of an order restraining the 2nd Defendant from proceeding any further with the proposed tender for the development of a Civil Servants Housing Scheme and/or site and service scheme on the property

known as L.R. No.209/193, Pangani, Nairobi pending the hearing and determination of the Originating Summons filed herein.

(6) That this Court do grant the Plaintiffs/Applicants a Conservatory Order by way of an order restraining the 2nd Defendant from proceeding any further with the proposed tender for the development of a Civil Servants Housing Scheme and/or site and service scheme on the property known as L.R. No.209/193, Pangani, Nairobi; as envisaged and outlined in the Tender document annexed as exhibit "AWS 7" to the Affidavit of Abdul Waheed Sheikh in support of this Application and for 2nd Defendant for himself, his servants, agents or architectural appointees whether under and by virtue of the said tender document or otherwise howsoever to forthwith cease with any other activity of whatsoever nature and kind in so far as it relates to the suit property L.R. 209/193 Pangani, Nairobi until further Orders of this Court.

(7) That this court do grant the Plaintiffs/Applicants a conservatory Order by way of an order restraining the 2nd Defendant from proceeding any further with the proposed tender for the development of a Civil Servants Housing Scheme and/or site and Service Scheme on the property known as L.R. No.209/193, Pangani, Nairobi; and to freeze all other actions by or on his behalf by himself his officers servants agents appointees whether under of by virtue of any award or direction by virtue of the exercise put into motion by the 2nd Defendant by issuing the tender document being "the Request for Proposals for the provision of consultancy services for design documentation and separation of construction of proposed housing project" in so far as it relates in any way whatsoever or howsoever to the suit property L.R. No.209/193 Pangani and for same to cease forthwith and until such time as this Court directs and/or orders otherwise.

(8) An order directing the 4th Defendant to register the Plaintiff's, the proprietors of the leasehold interest in the property known as L.R. No.209/193, Pangani, Nairobi for the term of 99 years form 16th July, 2002 in terms of the letter of Allotment dated 23rd March 2003.

(9) The Court be pleased to issue such Orders, Directions and Writs as may be necessary to safeguard and prevent the violation of the Plaintiffs Fundamental Rights and Freedoms under the Constitution of the Republic of Kenya.

(10) The Court be pleased to award General and Exemplary Damages to the Plaintiffs for violation of their Fundamental Rights and Freedoms under the constitution of the Republic of Kenya.

(11) The Court does make such other or further orders and/or directions as I may deem just and expedient in the circumstances."

2. The grounds in support are that;

"(a) The 1st Defendant has approved the issuance to the Plaintiff of a new Grant for the term of ninety-nine (99) years.

(b) The Plaintiffs have paid all the fees and other costs attendant to the issuance of and have satisfied the other conditions for the issuance of the said fresh Grant.

(c) The Plaintiffs have a legitimate expectation that the 1st Defendant would issue them with a fresh Grant for the renewed period within a reasonable period.

(d) The Defendants have embarked on a scheme to deprive the Plaintiffs of the right to the ownership and/or proprietorship over the leasehold interest in the property known as L.R. No.209/193, Pangani, Nairobi arbitrarily ad otherwise than by compliance with due process of Law.

(e) The 1st Defendant at the instance of the 2nd Defendant has purported to allocate the suit property known as L.R. No.209/193, Pangani, Nairobi to the 3rd Defendant.

(f) The 2nd Defendant has embarked on a project for the development of a Civil Servants housing Scheme on the property known as L.R. No.209/193, Pangani, Nairobi and intends to sub-divide the same into 80 plots or portions and sell the same by way of a site and service scheme and/or all plots without necessarily awaiting construction of any houses or building thereon."

3. In furtherance of the above issues, the 1st Plaintiff in his Affidavit sworn on 21st October 2005 has deponed that L.R. No.209/193 Pangani, Nairobi, was first registered in 1942 and the second proprietor of the leasehold comprised in it were the Trustees of the Sheikh Ilahi Noordin Charitable Trust. The initial proprietor was Sheikh Fazal Illahi son of Sheikh Noordin who assigned it to the Trust by a Deed of Assignment dated 31st July 1943. The interest created over the land was a leasehold one and Abdul Waheed Sheikh became a trustee of the trust in 1976 pursuant to an order made in H.C.C.C. No.699/1969 (O.S.) and which order was registered against the title to the property on 7th April 1976. The said trustee in December 1999 through his Law firm, A. W. Sheikh & Co. Advocates, began the process of extension of the 99 years' lease by the Commissioner of Lands. After correspondence was exchanged on the subject, by letter dated 14th November 1995, the Commissioner of Lands notified the trustee that the lease had been extended by a further 44 years to give an unexpired total of 50 years subject to the following conditions;

(i) Surrender of the existing grant in exchange for a new grant which incorporates the extended term.

(ii) Payment of an enhanced rent upon valuation by the Government valuers.

(iii) Payment of legal fees for the transaction.

(iv) Acceptance of attached special conditions in writing.

4. The Nairobi City Commission had previously, by a letter dated 18th June 1992 informed the trustee that at ***"its Town and Planning Committee [meeting] held on 12th June 1992 recommended for approval the … extension of the lease at no conditions."***

5. In response to the extension, the trustee wrote to the Commissioner of Lands on 14th November 1995 and accepted the extension but requested for a 93 year lease making in total an unexpired 99 years' term. He justified his request by letters dated 3rd June 1996, 28th November 1996, 4th May and 15th May 1998 and by letter dated 19th October 1998, the Commissioner of Lands approved the extension of Lease for a further term of 99 years with effect from 1st November 1998 and the extension included titles Nos. L.R.No.209/193 Pangani, L.R.No.209/73/1, L.R.No.209/73/6, L.R.No.209/74/3, and L.R.No.209/74/6.

6. According to the Trustee, by letters dated 26th October 1998 and 20th November 1998, he surrendered all the documents of title in respect of the above properties with a view to obtaining fresh grants in accordance with the extensions granted. He later paid for the surrender and issuance of fresh grants and after much pressure from the trustee, on 21st march 2003, letters were issued allotting all the above – mentioned properties to the Trust and on 16th April 2003, the trust accepted the offer of renewal of all the leases.

7. It is also the case for the Trust that upon payment of land rent, the 1st Defendant issued grants for the following properties;

(i) L.R. No.209/73/1

(ii) L.R. No.209/74/4

8. That in April 2003, the Trustee aforesaid was contacted by an officer from the Criminal Investigation Department who informed him that L.R. No.209/193 Pangani had been allocated to one Joseph Bungei who had been issued with a fraudulent grant in respect of the property. Further, that the matter was under investigation and subsequently the alleged fraudster was prosecuted. The effect of that prosecution, according to the Trustee, was that the deed plan for the property and the extension of lease could not be undertaken in respect of the said property. In the meantime, however, the Commissioner of Lands continued demanding payment of land rent at the original rate, which rent, the Trust continued to pay.

9. As the Trustee continued to follow up the matter, he received intimations that squatters had invaded the land and the Permanent Secretary, Ministry of Lands was considering the matter. It turned out that although there was no encroachment on the land, there were plans to allocate funds towards the cost of development and construction of *"civil servants tenant purchase"* houses on the suit property.

10. It is the argument by the Trust that the allocation of land for the proposed development was illegal and wrongful. Further, that the acquisition of the land did not meet the requirements for compulsory acquisition under **Section 75(1)** of the **Repealed Constitution.** I have elsewhere above set out the orders that the Plaintiffs seek in furtherance of their case and I need not repeat them.

11. I have read the record in the matter and I note that the Respondents have never filed any response to the Originating Summons. In fact on 13th February 2012, a certain Affidavit titled *"Supporting Affidavit"* sworn on 14th February 2012, was expunged from the record having been filed without leave and in any event, it was filed more than six (6) years after service of the Summons.

12. For the record, on 19th January 2012, I granted leave for the Respondents to file their response within 14 days but as can be seen above, they all failed to do so.

13. It is becoming common that Government Ministries and Departments represented in litigation by the Attorney General do not take cases before Court with any semblance of seriousness. Invariably therefore, complainants end up having their orders, where they are deserving of such orders, without the Court having the benefit of hearing the Government's side. The consequences are sometimes not only of a painful nature to the Government but to the innocent tax-payer and citizen who ends up paying the price of an indolent, lethargic and completely unconcerned Government Ministry and/or Department.

14. It has been the hope of this Court that with the reorganization of Government, and the separation of the offices of the Attorney General and the Director of Public Prosecutions not to mention the invocation of **Article 10** of the **Constitution**, a modicum of order would be seen in defence of Government where litigation is filed against it. Sadly, that hope has continued to be a mirage! I have deliberately digressed.

15. Turning back to the issues at hand, and having read the written Submissions by the advocate for the Petitioner, it is obvious to me that since the facts as outlined above have not been controverted, I can only find them as true. I also say so because the Petitioners have given the court all the documents indicative of the process since the lease to the suit property lapsed. I wish to note the contents of a letter dated 10th September 2003 from the Criminal Investigation Department (CID) Headquarters addressed to the Commissioner of Lands. In that letter, it was stated that ***"investigations were conducted and [it] was found that the [suit] property is owned by Sheikh Fazal Ilahi Noordin Charitable Trust and the property was targeted by a fraudster (s) when the Trust applied for extension of Lease."***

16. I have also seen an internal document of the Ministry of Lands where one, Oundo, writes a note to the Officer-in-charge, Records, and states as follows;

"Please open a temporary file urgently to enable processing new grant."

The note was in reference to L.R. No.209/193 and was dated 31st March 2004.

17. Prior to that, the Commissioner of Lands by a letter dated 10th March 1995 had agreed to an extension of the lease and there is no evidence whatsoever that the Trust had failed to meet any of the conditions imposed for the extension. In fact, in acceptance of that fact, the Commissioner of Lands continued to demand and receive land rent in respect of the disputed property.

18. What then triggered the change of mind by the Respondents? I do not know as I have no evidence that there was a genuine reason why, after leading the Trust to believe that an extension of lease had been granted; on discovery that a Fraudster had purportedly obtained title to the property; without notice to the Trust, and without any lawful explanation whatsoever, the Respondents would renege on a promise made on conditions that were fully met by the Trust.

19. The Plaintiffs have indicated however, that the plot was to be used for purposes of a civil Servant's housing purchase scheme. That is a noble venture and knowing the dire need for decent housing for the typical Kenyan civil servant, one would otherwise have seen the need for the scheme. However, whatever the nobility of that scheme, things ought to have been done lawfully. Granted, the land belongs to the Government but even then any acquisition of land or cancellation of lease to land or refusal to extend a lease must be done within processes known to law. Impunity is when the law is thrown aside to achieve an intended end, whether ultimately a good end or not.

20. I should now turn to the doctrine of legitimate expectation. In J.P. Bansal vs. state of Rajastan & Anor, Appeal (Civil) 5982 of 2001, the Supreme Court of India stated as follows;

"The basic principles in this branch relating to 'legitimate expectation' were enunciated by Lord Diplock in Council of Civil Service Unions and ors. Vs. Minister for the Civil Service (1985 AC 374 (408-409) (commonly known as CCSU case). It was observed in that case that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. The procedural part of it relates to a representation that a hearing or other appropriate procedure will be afforded before the decision is made. The substantive part of the principle is that if a representation is made that a benefit of a substantive nature will be granted or if the person is already in receipt of the benefit that it will be continued and not be substantially varied,

then the same could be enforced. In the above case, Lord Fraser accepted that the civil servants had a legitimate expectation that they would be consulted before their trade union membership was withdrawn because prior consultation in the past was the standard practice whenever conditions of service were significantly altered. Lord Diplock went a little further, when he said that they had a legitimate expectation that they would continue to enjoy the benefits of trade union membership, the interest in regard to which was protectable. An expectation could be based on an express promise or representation or by established past action or settled conduct. The representation must be clear and unambiguous. It could be a representation to the individual or generally to class of persons"

21. The learned judges (Shirvaraj, Patil, and Arijit, JJ) went on to state as follows;

"In Navjyoti Co-op. Group Housing Society vs. Union of India (1992) (4) SCC 477, the principle of procedural fairness was applied. In that case the seniority as per the existence list of co-operative housing societies for allotment of land was altered by subsequent decision. The previous policy was that the seniority amongst housing societies in regard to allotment of land was to be based on that date of registration of the society with the Registrar. But on 20th January 1990, the policy was changed by reckoning seniority as based upon the date of approval of the final list by the Registrar. This altered the existing seniority of the societies for allotment of land. This Court held that the societies were entitled to a 'legitimate expectation' that the past consistent practice in the matter of allotment will be followed even if there was no right in private law for such allotment. The authority was not entitled to defeat the legitimate expectation of the societies as per the previous seniority list without some overriding reason of public interest was shown. According to the principle of 'legitimate expectation', if the authority proposed to defeat a person's legitimate expectation, it should afford him an opportunity to make a representation in the matter. Reference was made to Halsbury's Laws of England (p.151, Vol.1(1) (4th Ed. Re-issue) and to the CCSU case. It was held that the doctrine imposed, in essence, a duty on public authority to act fairly by taking into consideration all relevant factors, relating to such legitimate expectation. Within the contours of fair dealing, the reasonable opportunity to make representation against change of policy came in."

22. I am in total agreement with the enunciation of the principle above and with regard to the present case, I have said enough to show that the Respondents have acted completely outside the doctrine of legitimate expectation. The process of extension of the lease started close to twenty years ago and a simple act of either extending or not extending the lease has led to numerous correspondences and interventions with consequences that are undesirable in any lawful process. The Respondents are quite free to change a certain policy but ***"although free to alter its policy, the authority is by no means free to ignore the existence of a legitimate expectation"*** – De Smith, Woolf a Towell (1995), Judicial Review of Administrative Action, 5th Edition, page 563.

23. I have no doubt in my mind that the Plaintiffs' legitimate expectation for extension of lease was not met and I have said why.

24. Having held as above and since the Originating Summons has not been challenged, I have little choice but to grant the necessary orders and the final therefore Orders shall be;

(1) A declaration that the Plaintiff's fundamental rights as protected and guaranteed by Sections 70(c) and 75(1) of the Constitution of the Republic of Kenya have been or are likely to be contravened in relation to the leasehold interest in the property known as L.R. No.209/193, Pangani, Nairobi.

(2) A declaration that there is no lawful basis upon which the Defendants and each of them should or could deprive the Plaintiffs of the right to the ownership and/or proprietorship over the leasehold interest in the property known as L.R. No.209/193, Pangani, Nairobi.

(3) A declaration that the Defendants and each of them are not entitled to deprive the Plaintiffs of the rights over the leasehold interest in the property known as L.R. No.209/193, Pangani, Nairobi otherwise than by compliance with the Law, due process of Law and upon prompt and full payment of such compensation as the Plaintiffs would be entitled to under the provisions of the applicable Law. The compensation shall be agreed with the Respondents failure to which this Court may assess the same.

(4) That this Court do grant the Plaintiffs/Applicants a Conservatory Order by way of an order restraining the Defendants by themselves, their officers, servants, agents or otherwise howsoever from attempting to obtain possession, disposing or in any manner whatsoever interfering with the Plaintiffs proprietorship possession, custody and control of the property known as L.R. No.209/193, Pangani, Nairobi.

(5) That this Court do grant the Plaintiffs/Applicants a Conservatory Order by way of an order restraining the 2nd Defendant from proceeding any further with the proposed tender for the development of a Civil Servants Housing Scheme and/or site and service scheme on the property known as L.R. No.209/193, Pangani, Nairobi.

(6) That this Court do grant the Plaintiffs/Applicants a Conservatory Order by way of an order restraining the 2nd Defendant from proceeding any further with the proposed tender for the development of a Civil Servants Housing Scheme and/or site and service scheme on the property known as L.R. No.209/193, Pangani, Nairobi; and to restrain the 2nd Defendant for himself, his servants, agents or architectural appointees whether under and by virtue of the said tender document or otherwise howsoever to forthwith cease with any other activity of whatsoever nature and kind in so far as it relates to the suit property L.R. 209/193 Pangani, Nairobi.

(7) That this court do grant the Plaintiffs/Applicants a conservatory Order by way of an order restraining the 2nd Defendant from proceeding any further with the proposed tender for the development of a Civil Servants Housing Scheme and/or site and Service Scheme on the property known as L.R. No.209/193, Pangani, Nairobi; and to freeze all other actions by or on his behalf by himself his officers servants agents appointees whether under of by virtue of any award or direction by virtue of the exercise put into motion by the 2nd Defendant by issuing the tender document being "the Request for Proposals for the provision of consultancy services for design documentation and

separation of construction of proposed housing project" in so far as it relates in any way whatsoever or howsoever to the suit property L.R. No.209/193 Pangani.

(8) An order directing the 4th Defendant to register the Plaintiff's, the proprietors of the leasehold interest in the property known as L.R. No.209/193, Pangani, Nairobi for the term of 99 years from 16th July, 2002 in terms of the letter of Allotment dated 23rd March 2003.

25. I shall make no order as to costs since the proceedings are unopposed.

26. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF MAY, 2012

ISAAC LENAOLA

JUDGE

In the presence of:

LENAOLA – JUDGE

Irene – court clerk

Mr. Abidha for Plaintiffs

No Appearance for Respondents

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE