



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC JR CASE NO. 2 OF 2020**

**EUNICE KHALWALI MIIMA.....APPLICANT**

**VERSUS**

**COUNTY GOVERNMENT OF KAKAMEGA.....RESPONDENT**

**JUDGEMENT**

The application is brought under Sections 8 and 9 of The Law Reform Act and Order 53 of The Civil Procedure Rules seeking the following orders:-

1. That an order of certiorari do issue to remove to this honourable court, for quashing, the respondent's published notice of repossession of undeveloped plots in Kakamega Municipality and purported repossession of the Ex-parte applicant's parcel of land known as Kakamega Municipality Block 1/734.
2. That an order of prohibition do issue prohibiting the respondent from continuing with the intended repossession of all undeveloped plots within Kakamega Municipality.
3. That an order of prohibition do issue prohibiting the respondent by itself, servants, agents or whomsoever from alienating the ex-parte applicant's parcel of land comprised in title number Kakamega Municipality Block 1/734 or in any manner interfering with the ex-parte applicant's quiet possession of the said land.
4. That an order of prohibition do issue prohibiting the respondent by itself, servants, agents or whomsoever from continuing with the intended repossession process and/or in any manner revoking and/or issuing any title and/or license in respect to the ex-parte applicant's land comprised in title number Kakamega Municipality Block 1/734 or registering any encumbrance thereon.
5. That a declaration order to issue that the respondent's purported repossession of undeveloped land within Kakamega Municipality including the ex-parte applicant's parcel of land comprised in title number Kakamega Municipality Block 1/734 is unconstitutional, null and void.
6. That the costs of the suit be provided.

It is based on the grounds that the rights of the ex-parte applicant, under both Article 47 of the constitution and the Fair Administration Actions Act, to an administrative action which is efficient, expeditious, lawful, reasonable and procedurally fair has been contravened by the respondent by acting in excess of jurisdiction, it has purported to repossess all undeveloped land within Kakamega Municipality, including the ex-parte applicant's land without following due procedure. Under Article 40 of the Constitution of Kenya the ex-parte applicant has a right to acquire and own property and Article 40 (2) of the Constitution observes that no one should arbitrarily be deprived of property or in any way restricted from enjoying their own property. The National Land Commission, is a constitutional commission constituted under Article 67 (2) of the Constitution as read together with the National Land Commission Act, Cat No. 5 of 2012 with the mandate to compulsory acquire land on behalf of the Government and the County Government among other things. The respondent has not followed the laid down procedure set out under part VII of the Land Act No. 6 of 2012 for compulsory acquisition of land. The purported intended repossession of undeveloped plots is illegal, unprocedural and done in breach of the rules of natural justice as held by the Court of Appeal in Republic vs. Commissioner of Co-operatives ex-parte Kirinyaga Tea Growers Co-operative Savings and Credit Society Ltd, 1999 1 EACA 245, statutory powers can only be exercised validly if they are exercised reasonably for no statute ever allows anyone on whom it confers a power, to exercise such power arbitrarily, capriciously or in bad faith; the respondent has exercised its powers arbitrarily, capriciously and in bad faith. The decision of the respondent to reposes the ex-parte applicant's land without affording her a hearing is unreasonable according to Wednesbury principles and violates Article 47 (2) of the Constitution. As held by the Court of Appeal in Kenya National Examination Council vs. Republic, Court of Appeal at Nairobi Civil Appeal No. 266 of 1996, the orders of certiorari and prohibition issue where a statutory body is acting in excess of jurisdiction or in contravention of the laws of the land in that, the respondent has purported to usurp the

powers of National Land Commission to compulsorily acquire land without giving reasons for the same or providing just compensation. Under Article 165 of the Constitution, this honourable court has jurisdiction to review the decision of the respondent and quash it.

The applicant submitted that the ex-parte applicant is the registered proprietor of parcel known as title No. Kakamega Municipality Block 1/734 measuring approximately 0.241 Ha being a leasehold interest, for a term of Ninety-Nine (99) years from 1<sup>st</sup> November, 1991 from the County Council of Kakamega. The ex-parte applicant has to date paid all the outgoings namely land rent to the respondent for all the years since the purchase of the suit land. The ex-parte applicant has caused to be erected a perimeter wall and a dwelling house on the suit property. On or about 5<sup>th</sup> April, 2019, the ex-parte applicant submitted to the respondent building plans approvals for a proposed funeral home. Despite paying all the requisite fees, the building approvals were declined on grounds that the proposed construction does not conform to the zoning requirement and/or laws. The respondent under the guise of repossession of undeveloped land is trying to compulsorily acquire the ex-parte applicant's property without following due procedure. Only the National Land Commission has powers to compulsorily acquire land and can do so on behalf of the government or a County Government. The respondent has not engaged the ex-parte applicant in any discussion relating to the intended acquisition and as such intends to do so arbitrarily without even offering compensation. Under Article 40 (3) of the constitution as read together with section 111 of the Land Act, if land is compulsorily acquired, just and prompt compensation should be paid to the person whose interest is determined. The respondent's action and decision is arbitrary as there are no reasons or grounds at all to warrant the issuing of the Notice to the ex-parte applicant. The respondent's action not only violates the ex-parte applicant's constitutional rights but is also unreasonable and contrary to her legitimate expectation. This honourable court has supervisory jurisdiction over the respondent and power to make such orders or given any directions appropriate to ensure the fair administration of justice.

The respondent submitted that this court has rendered itself severally on the laws and principles governing the grant of interim orders. In the case of *Giella vs. Cassman Brown & Co. Ltd* (1973) EA 358, it was held that parties seeking interim orders must satisfy the following principles; First, an applicant must show a prima facie case with probability of success; Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

That the applicant herein has failed to present before this honourable court overwhelming evidence that there is indeed a probable cause. The applicant has not presented relevant material facts that can persuade this court to grant the said orders. That the applicant was issued with a lease whose main purpose was for development and putting up structures to provide decent housing to the growing population of the residents of Kakamega County yet the plaintiff/applicant has not annexed even a single plan from the Ministry of Housing to show that she even intended to develop the land. Further, for the sake of justice the respondent provided a procedure to be followed by individuals had been affected by the directive and the plaintiff/applicant was to present his appeal before Kakamega Land Appeals Committee established vide Gazette Notice Number 59 (Vol. 4). The Kakamega Land Appeals Commission is an independent body of professionals and the plaintiff/applicant has not lodged any appeal, instead the applicant without exhausting the available remedies has rushed to this honourable court crying foul. Further this honourable court has no jurisdiction to hear and determine this matter. The respondent/defendant clearly provided the requisite procedure to the plaintiff which was and still is by way of lodging an appeal before the Kakamega Land Appeals Committee. Clearly the court cannot handle this matter yet the plaintiff/applicant has not exhausted the available avenues to air her dissatisfaction on the County directive to repossess the plot herein. That the application herein is pre-mature and ought to be dismissed in the first instance and the court order that the matter herein be referred to the Kakamega Land Appeals for hearing and final determination. That the applicant will not suffer any irreparable harm and/or damages because the said notice in the newspaper was only a notice of intention to repossess the undeveloped land and the repossession is yet to commence. The applicant had the chance to show cause why the said land parcel Kakamega Municipality Block 1/734 should not be repossessed by lodging an appeal before the Kakamega Land Appeals Committee and not moving to court. It is only after the plaintiff/applicant has shown cause why the plot should not be repossessed then that is when repossession will take place.

Secondly, the plaintiff/applicant has not shown that indeed she has done anything on the land or even showing an intention to develop the said plot. The parcel in question is leasehold purposefully for development. As per the special conditions for the lease given to the plaintiff/applicant herein in the supporting affidavit of one Mr. Patrick Likalo, one has to submit within 6 months of being given the land an approved plan for development from the Ministry of Housing, the applicant has not done the same, had she submitted then her plot would not have appeared on the list of parcels to be repossessed by the County Government.

It is instead the County Government of Kakamega incurring losses for not getting revenue for the said undeveloped plots. The people of Kakamega County are equally being deprived of their right to good housing by the applicant sitting on the land undeveloped. That the purpose of the lease granted to the applicant was for the sole purpose of development and providing affordable decent housing to the growing population of Kakamega County, granting the said orders to the applicant will be delaying the growth of the County and plans for its future development.

This court has carefully considered the application and the submissions therein. In *Republic v Kenya Revenue Authority & Another Ex-Parte Tradewise Agencies* (2013) eKLR, G.V. Odunga, J. in quoting from *Pastoli vs. Kabale District Local Government Council and Others* (2008) 2 EA 300 observed thus:

“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 are 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..... " "

In Republic vs Kenya Revenue Authority ex parte Yaya Towers Limited (2008) eKLR it was held that the remedy of judicial review is concerned with the reviewing not the merits of the decision of which the application for judicial review is made , but the decision making process itself.

The decision whether or not to grant judicial review orders is an exercise of discretion. As stated in Halsbury's Laws of England 4<sup>th</sup> Edition Vol. II page 805 paragraph 1508, the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles.

In Republic vs. Judicial Service Commission of Kenya Ex Parte Stephen S. Pareno (2004) 1 KLR 203, it was held that judicial review orders are discretionary and not guaranteed hence even if the case falls into one of the categories where judicial review will lie the court is not bound to grant it and what orders the court will make depends upon the circumstances of the case.

Judicial review is a discretionary remedy. They are prerogative remedies. It is in the orders to quash, prohibit or compel. In the Kenya legal system, the said prerogative remedies may be obtained under Order 53 of the Civil Procedure Rules (2010) and the Law Reform Act, Cap 26, Laws of Kenya (Part VI of the Act). It has been noted that judicial review proceedings as envisaged under Order 53 of the Civil Procedure Rules are a special procedure; which are invoked whenever orders of certiorari (quash), mandamus (mandamus) or prohibition are sought in either criminal or civil proceedings - See Welamondi vs The Chairman, Electoral Commission of Kenya (2002) 1 KLR,

"..... in exercising powers under Order 53, the court is exercising neither civil or criminal jurisdiction in sense of the word. It is exercising sui generis ....."

In the case of Republic vs Chairperson Business Premises Rent Tribunal & Another Ex-parte Keiyo Housing Cooperative Society Ltd & another (2014) eKLR it was held that;

*"Being discretionary remedies, judicial review orders will only issue based on various considerations by the court and peculiar circumstances of each case. In the book "Judicial Remedies in Public Law" by Clive Olive, it is noted that "there are varieties of considerations discernible in the case law which are relevant to the exercise of the judicial discretion to refuse a remedy. Some are related to the conduct of the claimant, such as delay or waiver; others are related to the circumstances of the particular case, such as the fact that a remedy would be of no practical effect. Other considerations relate to the particular nature of public law where the court may need to have regard to the wider public interest as well as the interest of the claimant in obtaining an effective remedy."*

In Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others, Civil Application No. 307 of 2003, Omolo JA stated as follows;

*"The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way."*

Be that as it may, this application is based on the grounds that the rights of the ex-parte applicant, under both Article 47 of the constitution and the Fair Administration Actions Act, to an administrative action which is efficient, expeditious, lawful, reasonable and procedurally fair has been contravened by the respondent by acting in excess of jurisdiction, it has purported to repossess all undeveloped land within Kakamega Municipality, including the ex-parte applicant's land without following due procedure. The respondent submitted that they provided a procedure to be followed by individuals that had been affected by the directive and the applicant was to present his appeal before Kakamega Land Appeals Committee established vide Gazette Notice Number 59 (Vol. 4). The Kakamega Land Appeals Commission is an independent body of professionals and the plaintiff/applicant has not lodged any appeal, instead the applicant without exhausting the available remedies has rushed to this honourable court crying foul. The preliminary issue to be determined in this case is *whether or not this suit is bad in law under the doctrine of exhaustion. In the case of Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others* (2015) eKLR the court stated that:-

*"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews.... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."*

In the *Matter of the Mui Coal Basin Local Community 2015 eKLR*, the court stated that;

*"The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fess to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases..."*

Section 9 (2) of the Fair Administrative Action Act which was enacted to bring into operation Article 47 of the Constitution, provides that the High Court or a Subordinate Court under subsection (1) shall not review an administrative action or decision under the Act unless the

mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Sub-section (3) which provides that the High Court or a Subordinate Court *shall*, if it is not satisfied that the remedies referred to in sub-section (2) have been exhausted, direct that an applicant *shall* first exhaust such remedy before instituting proceedings under sub-section (1). **In expounding on Section 9 (2) of the Fair Administrative Action Act in the case of Republic vs Kenya Revenue Authority, Commissioner Ex parte Keycorp Real advisory Limited (2019) eKLR the court held as follows;**

“The use of the word *shall* in the above provisions is worth noting. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions. There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory. The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

It is the duty of courts of justice to try to get at the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or a statute to be considered. The Supreme Court of India has pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

The word “*shall*” when used in a statutory provision imports a form of command or mandate. It is **not permissive**, it is **mandatory**. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation. The Longman Dictionary of the English Language states that “*shall*” is used to express a command or exhortation or what is legally mandatory. Ordinarily the words ‘*shall*’ and ‘*must*’ are mandatory and the word ‘*may*’ is directory.”

I find that the Kakamega Land Appeals Committee was established vide Gazette Notice Number 59 (Vol. 4). The applicant cannot call it an illegal body and then refuse to submit to its jurisdiction. *This suit is bad in law under the doctrine of exhaustion because Section 9 (2) of the Fair Administrative Action Act which was enacted to bring into operation Article 47 of the Constitution, provides that the High Court or a Subordinate Court under subsection (1) shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. I do not find any exceptional circumstances to permit me to deviate from this principle. Hence this application must fail and is dismissed with costs to the respondent.*

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 23<sup>RD</sup> FEBRUARY 2021.**

**N.A. MATHEKA**

**JUDGE**