



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELC JUDICIAL REVIEW CASE NO. 67 OF 2018**

**REPUBLIC.....APPLICANT**

**VERSUS**

**KENYA AIRPORTS AUTHORITY.....RESPONDENT**

**EX PARTE: GANSHYAM DESHABAI PATEL**

**SARLABEN GANSHYAMBHAI PATEL**

**JUDGEMENT**

1. Through the application dated 7/6/2019, the *Ex Parte* Applicants (“the Applicants”) sought an order of certiorari to remove to this court and quash the Respondent’s decision contained in the letter dated 5/4/2018 signed by its Corporation Secretary, Katherine Kisila and an order of mandamus to compel the Respondent to issue consents to the Applicants in accordance with the lease dated 19/2/2009.
2. The application was made on the grounds that by an agreement dated 19/2/2009 registered as IR 120457/1, the Respondent leased to the Applicants a portion of land reference number (L.R. No.) 21919 measuring 409,028 square feet and that the lease required the Applicants to seek and obtain consent from the Respondent to construct any buildings on the demised premises which consent the Respondent was not to unreasonably withhold. The Applicants claimed that they submitted an application for consent but the Respondent had unreasonably and unlawfully refused to grant the consent based on ulterior irrelevant grounds. The Applicants contended that being a public statutory body, the Respondent had acted contrary to their legitimate expectations.
3. The application was supported by the affidavit of Gyanshambhai Desaibhai Patel in which he deponed that together with his wife Sarlaben Gyanshambhai Patel, they entered into an agreement with the Respondent dated 19/2/2009 for the lease of a portion of 409,028 square feet of L.R No. 21919 situated at the Jomo Kenyatta International Airport (JKIA) Nairobi. The agreement was drawn by the Respondent’s advocate, M/s Nyiha Mukoma and Company Advocates, a copy of which he produced. The lease was for a period of 87 years with effect from June 2008. Under clause 2 (a) of the agreement, the lessees were required to seek consent before carrying out any construction on the land which consent was not to be unreasonably denied. He averred that since the completion of the lease, the lessees had not been granted possession of the premises despite their requests. He added that they continued to pay land rent and rates to the Respondent. He maintained that the Respondent had ignored their application for approval to build a perimeter wall around the demised premises despite that being a major provision in the lease and without which the Applicants cannot effectively enjoy quiet possession of the demised premises.
4. He contended that the actions of the Respondent prompted the Applicants to file **ELC Case No. 728 of 2012** in which the court delivered a judgement on 12/10/2017. He produced a copy of the judgement in which the court directed the Applicants to submit building drawing plans to the Respondent for approval and its consideration and the Respondent was to consider and give its decision within 45 days of the application.
5. The Applicants claimed that through the firm of MMC Africa they prepared and submitted their application for consent to the Respondent together with all the relevant drawings and plans for the construction of a perimeter wall. He annexed a copy of the letter which was received by the Respondent on 15/11/2017. Having not received any response to the application within the period prescribed by the court, the Applicants instructed Coulson Harney LLP Advocates to pursue the matter of the approval and this firm of advocates wrote a letter to the Respondent on 21/12/2017.
6. He deponed that the Respondent acknowledged receipt of the application for consent to construct a perimeter wall through its Corporation Secretary’s letter dated 9/1/2018 but did not address the application for consent but instead raised other peripheral issues whereby it demanded a review of the lease while quoting the Public Private Partnership Act of 2013 and its Concession Policy Guidelines.
7. The Applicants’ advocates M/s Coulson Harney LLP Advocates wrote to the Respondent on 31/1/2018 reminding it that the court order had compelled it to respond to the application within 45 days. The Respondent wrote to the Applicants on 5/4/2018 stating that since they were not willing to consider revision of the lease, the Respondent had declined to give consent to build the perimeter wall. Mr. Patel urged that the Respondent’s demand to review a validly executed and registered lease was not only unfair but was also arbitrary, unlawful and amounted to blackmail and a derogation from the grant.

8. The application was opposed by the Respondent through the affidavit of its Corporation Secretary, Katherine Kisila which was filed in court 7/2/2020. She deponed that the Respondent was a contracting authority according to Section 2 of the Public Private Partnership Act, No. 15 of 2013. She conceded that the Respondent entered into a lease with the Applicants for 87 years from 1/6/2008. She averred that the terms of the lease were that the Applicants who were the registered proprietors of L.R. No. 9042/633 on L.R. No. 212741 were to transfer their rights and interests in this land to the Respondent in exchange for and as consideration for the Respondent agreeing to grant the Applicants a lease over a portion of L.R. No. 21919 measuring 409, 028 square feet on a *Build Operate and Transfer* basis in line with the Public Private Partnership Act.

9. She deponed that upon execution of the lease, the Applicants were given possession of the leased property as agreed subject to the terms of the lease and with the promise that a certified copy of title over L.R. No. 9042/633 would be provided to the Respondent. Through their lawyers M/s Archer and Wilcock Advocates, the Applicants submitted a request for approval to construct a boundary wall in 2011. She produced a copy of a letter dated 21/4/2011 in which the Respondent informed the Applicants that its relevant departments were looking into the issue and would respond substantively.

10. She averred that the Applicants filed **ELC No. 728 of 2012** seeking among other orders, a mandatory injunction for the Respondent to give approval or permission for the construction of a perimeter wall on the demised premises. Sometime in 2015 while the suit was pending, the Applicants through their advocates sought consent to assign the lease to Bonbon Investments Limited. The Respondent responded vide its letter dated 22/7/2015 which was erroneously dated 2014 and cited public interest concerns in addition to the concern that the lease period of 87 years raised the issue of the Respondent's reversionary interest.

11. The Respondent suggested a way forward with the first option it gave to the Applicants being to have the lease term reviewed to 30 years and in the event that the Applicants' business plans were incompatible with the leased area, a suitable area would be identified by the Respondent for re-allocation. The Applicants were also required to complete the pending transfer of L.R. No. 9042/633 to the Respondent. The 2<sup>nd</sup> second option that was suggested was for the cancellation of the lease following which the Applicants would revert to L.R. No. 9042/633 and carry on with their business plans in accordance with the Airport Master Plan.

12. She stated that the Applicants rejected the options through their letter dated 8/1/2016 while stating that the 30-year lease period would deprive them of their proprietary rights and that they were not interested in the re-allocation. The Applicants were not agreeable to the cancellation of their lease nor to reverting to L.R. No. 9042/633.

13. She averred that **ELC No. 728 of 2012** was heard and it was determined by Lady Justice Gacheru vide her judgment delivered on 12/10/2017. The Respondent contended that the court found that the Applicants did not make the request for approval properly hence the failure to grant approval by the Respondent was not a breach of the contract. Further, the court found that the Applicants were not entitled to an injunction or an award of damages and directed them to submit a complete application for consent to the Respondent which was to give its decision whether it was approving it or not. She admitted that following the court's judgement the Applicants submitted an application for the approval of the construction of a perimeter wall on the Suit Property together with the relevant drawings and plans. The Respondent through its letter of 9/1/2018 responded citing its concerns over the lease period of 87 years and the concern over its reversionary interest as well the public interest over the lease and property. The Respondent renewed its proposal to the Applicants for re-allocation or review of the lease in line with the Public Private Partnership Act and its Concessions Policy Guidelines.

14. The Applicants responded on 31/1/2018 declining the Respondent's proposal while offering a counter proposal for the Respondent to purchase L.R. No. 9042/633 from the Applicants at market value. The Respondent rejected that proposal. The Respondent wrote to the Applicants on 5/4/2018 informing them that since the Applicants were not willing to consider the revised terms and conditions of the lease, the Respondents were unable to consent to the application for the construction of the boundary wall in line with Section 12 (3) (f) of the Kenya Airports Authority Act.

15. Ms. Kisila averred that the 87 years' period for the lease contravened the Public Private Partnership Act and the Respondent's Concession Policy Guidelines which provides that concession terms on a Built Operate Transfer (BOT) should not exceed 30 years. She added that while exercising its mandate under Section 6 of its Act, the National Land Commission gave a determination to the Respondent in which it recommended the revocation of all long-term grants of 99 years affecting the Respondent's title, which would include L.R. No. 9042/633, and their replacement with short term leases.

16. She maintained that the Respondent was still ready and willing to review the Applicants' lease and reduce it to 30 years and should their business plans be incompatible with the leased area, the Respondent was prepared to re-allocate the Applicants a suitable area subject to the Applicants completing the transfer of L.R. No. 9042/633 to the Respondent. She added that this land property was still registered in the names of the Applicants and urged the court that it was in the interest of the public and in line with the prudent management of public assets for this application to be dismissed to allow the Respondent to comply with the statutory requirements.

17. Gyanshambhai Deshabai Patel swore a further affidavit which was filed in court on 25/2/2020 and annexed a copy of the correct lease. He expressed surprise that the Respondent had introduced new issues regarding the Public Private Partnership Act which he contended came into force five years after the lease had been registered and which in his view did not invalidate the lease. On the issue of L.R. No. 9042/633, he deponed that the Applicants' advocate submitted all the original documents to M/s Nyiha Mukoma Advocates who acted for the Respondent at that time. He also maintained that this was an extraneous issue and that the Applicants had fulfilled their obligations under the law.

18. Parties filed submissions which the court has considered. The Applicants submitted that what was at stake was land which a public body had leased out for productive use in terms of the lease. They added that the Respondent was under an obligation to act fairly in its dealing with the public including the Applicants. Further, that the Respondent was bound by the Fair Administrative Actions Act of 2015 to act fairly and consider relevant factors in its decision making. The Applicants contended that instead of considering the Applicants' plans and drawings submitted and in line with their legitimate expectation from the contract, the Respondent had instead brought in other ulterior and unrelated issues in an attempt to scuttle the application for consent which was provided for in the lease agreement.

19. Further, the Applicants contended that the Respondent was unfairly trying to coerce them to alter or vary the terms of the lease as a condition to granting consent for the construction of the boundary wall and that it had failed to take into account relevant factors and by so doing had acted in bad faith with an ulterior motive which was calculated to prejudice the Applicants' rights under the lease. The Applicants contended that the Respondent had breached their legitimate expectations by introducing new extraneous conditions which were not provided under the lease agreement.
20. The Applicants submitted that the court had power to review the decision of the Respondent under Sections 7 and 11 of the Fair Administrative Actions Act; and to issue orders of certiorari and mandamus where it was shown that the Respondent acted ultra vires, unfairly, irrationally and contrary to the provisions of the law. The Applicants pointed out that judicial review was concerned with the decision making process and not the private rights or the merits of the decisions being challenged. Further, that the purpose of judicial review was to ensure that the individual was given fair treatment by the authority to which he had been subjected. They relied on **R v Secretary of States for Education and Science, Ex Parte Avon County Council [1991] 1 All ER 282**. They also relied on **Republic v Joint Administrative Review Board, Leeds Equipment and Systems Limited, Ex Parte Kenya Veterinary Vaccines Production Institute [2018] eKLR**.
21. The Respondent submitted that the principles and scope of judicial review applications were well settled and cited the decision in **Republic v Public Procurement Administrative Review Board & 3 Others, Ex Parte Olive Communication PVT Limited [2014] eKLR** and several other decisions on the jurisdiction of a court sitting on judicial review and the test for reasonableness and irrationality.
22. The Respondent urged that when the Applicants entered into a lease agreement with it, it was clear that it was based on a concession agreement and relied on the definition of concession under the Public Private Partnership Act. It also relied on the Second Schedule to that Act in urging that a "Build-Operate-and-Transfer" scheme was where the private party finances, constructs, operates and maintains an infrastructure facility, and was to transfer the facility to the contracting authority at the end of the term which should not to exceed 30 years.
23. It also submitted that under clause 2 (b) of the lease agreement it was not automatic for the Respondent to give consent upon an application being made by the Applicants and added that the Respondent was required to consider several factors before arriving at a decision which it did in this instance. It maintained that its decision was not unreasonable when one considers the alternative options it gave to the Applicants. It pointed out that under the Kenya Airports Authority Act it had a duty to manage public land and ensure the prudent management of the public assets. It urged that the Applicants could not claim to have had a legitimate expectation if it was contrary to the Constitution and other laws. The Respondent submitted that since the grant of judicial review orders was discretionary then the court ought to consider the fact that rights of individuals should not override public interest.
24. Further, it relied on Article 66 of the Constitution which mandates the State to regulate the use of any land or interest over land in the interest of defence, public safety, public order, public morality, public health or land use planning. The Respondent relied on **Republic v Public Procurement Administrative Review Boards and 3 others, Ex Parte Olive Telecommunication PVT Limited [2014] eKLR, Kenya Civil Aviation Authority and Another v Timothy Nduthi Mutungi [2017] eKLR, Republic v Public Procurement Administrative Review Board and 2 others, Ex Parte Rongo University [2018] eKLR**.
25. The issue for determination is whether the court should grant the orders of certiorari and mandamus which the Applicants sought. The Applicants seek these orders based on the grounds that they entered into a lease with the Respondent dated 19/2/2009 for a portion of L.R. No. 21919 measuring 409,028 square feet and that the agreement enjoined them to obtain the Respondent's consent before carrying out any construction on the demised premises. They sought the Respondent's approval to erect a boundary wall around the demised premises but the Respondent withheld its consent which decision they contended was unreasonable and based on ulterior irrelevant grounds. The Applicants further contended that the Respondent was in breach of the terms of the lease and that its actions were in breach of the Fair Administrative Actions Act.
26. The court notes that the Applicants sought orders similar to what they now seek in **ELC Case No. 782 of 2012**. In that suit they sought to be permitted and allowed quiet possession of the demised premises and a mandatory injunction to compel the Respondent to give them approval or permission to construct the perimeter wall. The court directed the Applicants to submit a complete application for approval to the Respondent for its approval. The Applicants submitted their plans to the Respondent who withheld its consent and gave the Applicants other options, either to have the lease term reduced from 87 years to 30 years or be re-allocated another suitable area by the Respondent if their business plans were incompatible with the leased area.
27. The Respondent also alluded to the fact that the lease to the Applicants for a portion of L.R. No. 21919 was subject to the Applicants' transferring their interest in L.R. No. 9042/633 to the Respondent which had not been concluded.
28. The Applicants contended that being a public body, the Respondent was bound by the Fair Administrative Actions Act to act fairly and consider relevant factors in its decision making. The Respondent contended that its decision to withhold its consent was based on the provisions of the Public Private Partnership Act relating to concessions and "Build-Operate-and-Transfer" schemes under that Act. It also submitted that its decision was based on public interest.
29. In the court's view, the Applicants are not challenging the process through which the Respondent arrived at its decision or contending that it acted in excess of its jurisdiction. The Applicants are challenging the merits of the Respondent's decision in denying them approval to construct the boundary wall under the lease. Looking at the lease itself, it gave the Respondent the discretion to withhold its approval on an application by the Applicants for consent to develop the demised premises although it was not open to it to withhold the consent unreasonably.
30. The Applicants have failed to show that the Respondent acted unreasonably or that it made its decision based on irrelevant, irrational and ulterior considerations.
31. The court declines to grant the orders sought in the application dated 12/7/2018. Each party will bear its own costs.

Delivered virtually at Nairobi this 15<sup>th</sup> day of February 2021.

**K. BOR**

**JUDGE**

**In the presence of: -**

Ms. Eva Kahiti for the Respondent

Mr. V. Owuor- Court Assistant

No appearance for the *Ex Parte* Applicants