



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

MISC. JUDICIAL REVIEW CAUSE NO.10 OF 2019

IN THE MATTER OF ARTICLES 21(1), 23(3), (F), 25 (c),

27(1), 47(1), 49(1)(D), 50(2) & 159 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTIONS 3, 4, 5, 7 OF THE FAIR ADMINISTRATIVE ACT 2015

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT

AND

IN THE MATTER OF LACK OF FAIR HEARING PRIOR TO REVOCATION OF

TITLES TO RUIRU KIU BLOCK 3/2692, 927, 1391, 259, 1392, 2802, 2415, 2416, 2466 AND 3009

AND

IN THE MATTER OF AN EXERCISE OF A STATUTORY DUTY BY PUBLIC ENTITIES

BETWEEN

KAHAWA SUKARI LIMITED.....APPLICANT

VERSUS

LIVINGSTONE WAKIBIA WAIGANJO *in capacity as*

MEMBER OF COUNTY ASSEMBLY KAHAWA SUKARI WARD.....1ST RESPONDENT

COUNTY GOVERNMENT OF KIAMBU.....2ND RESPONDENT

NATIONAL LAND COMMISSION.....3RD RESPONDENT

JUDGMENT

By a Notice of Motion Application dated **4th June 2019**, the Applicant herein has sought for the following orders:

1. THAT the Honourable Court grants Judicial Review Orders of Prohibition barring the Respondents either jointly or severally acting through themselves, agents, servants, employees or persons assigned roles by them from in any way entering, encroaching onto, trespassing, and or in any other way interfering with the Applicant's possession and proprietary rights over its suit property known as Ruiru/ Kiu Block 3/2692, 927, 1391, 259, 1392, 2808, 2415, 2416, 2466 and 3009.

2. **THAT the Honourable Court grants Judicial Review Orders of Mandamus compelling the Respondents jointly and severally to avail reasons, documents, minutes or proceedings occasioning the revocation of the Applicant's above mentioned title to suit property known as Ruiru/Kiu Block 3/2692, 927, 1391, 259, 1392, 2808, 2415, 2416, 2466 and 3009.**

3. **THAT the Honourable Court grants Judicial Review Orders of Certiorari bringing to this Court proceedings, notices of objection, if any, minutes or correspondences or any document relied or utilized by the Respondents jointly and severally in revoking the Applicant's above mentioned title to suit property known as Ruiru/Kiu Block 3/2692, 927, 1391, 259, 1392, 2808, 2415, 2416, 2466 and 3009.**

4. **THAT the Honourable Court grants Judicial Review Orders of Certiorari quashing the 3rd Respondent's decision to revoke the Applicant's title to the suit property known as Ruiru/Kiu Block 3/2692, 927, 1391, 259, 1392, 2808, 2415, 2416, 2466 and 3009.**

5. **That Costs of this Application be provided for.**

The Application is premised on the grounds that the suit property belongs to the Applicant, from the General Welfare of **Kahawa Sukari Estate** granted for a period of **99 years**, which ends on/or about **2082**. That without any lawful and reasonable cause being advanced to the Applicant, the 3rd Respondent revoked the title to the suit property Vide Gazette Notice dated **9th November 2018**. That failure to give reasonable cause for revocation of its title to the suit property amounts to blatant injustice, unfairness and bias. That the 3rd Respondent though statutory mandated to revoke title to land ought to exhibit fairness and reasonableness to avert an imputation of bias.

It was contended that failure to give proper reasons or avail any objections lodged leading to revocation of the said titles amounts to blatant violation of its rights to Fair administrative action. That the Applicant failed to defend its constitutional right of ownership when the Respondents failed to give it a fair hearing amounting to an abuse of power and discretion. That the Respondents failure to abide by the mandatory statutory provisions prescribing process of cancelling a title occasioned a decision that was bad in law rising from a procedurally unfair process. That the Respondents are required to act fairly, transparently and disclosing all intervening circumstances or reasons for revocation of titles. That no reasonable and lawful cause has been made to the Applicant for revocation of the suit property whereas it has been the absolute owner and proprietor of the suit property for 36 years which grant has not expired.

That the 1st Respondent in his capacity as **Member of County Assembly of Kahawa Sukari Ward**, has incited members of public to claim **L.R Ruiru Kiu Block 3/2864**, as public property allegedly owned by the 2nd Respondent while the same is owned by the Applicant and is set apart as a Nursery School for the utilization of the community of **Kahawa Sukari residents**. Further that the 2nd Respondent has claimed **L.R 3/1391**, as public property allegedly owned by the 2nd Respondent while the same is owned by the Applicant and set apart as a market place for the utilization of the community of **Kahawa Sukari residents**. That the Application shall not prejudice any party.

In his Supporting Affidavit, **Stephen Mbugua Benson Mutuma**, the Applicant's Chairman and Managing Director averred that the Applicant is a private developer registered on **18th November 1982**, under the Company's Act. Further that the Applicant is the developer of **Kahawa Sukari Scheme** on **L.R 10901/20**, and has caused the said property to be subdivided. That the Applicant was created so as to develop a low density middle class residential estate, with public utility facilities commensurate to High standards. That their proposed subdivision was approved on **14th June 1983**, and on **11th June 1993**, they requested the planning authority to be allowed to develop and retain the public utility plots set aside in the scheme in order to ensure high quality developments in the Estate. Further they requested for some variations of the approved conditions and the Planning Authority consulted and gave no objections to the variation of the approval conditions. That in his letter dated **27th July 1983**, the Commissioner of Lands varied **condition (g)** of his letter dated **14th June 1983**, and the Applicant was allowed to develop the plots. That the Commissioner of Lands endorsed his final approval to the amended subdivision vide his letter dated **22nd March 1995**, and the Director of Survey approved the survey plan and issued title numbers in order to facilitate the issuance of subdivision titles. That the Applicant surrendered the original title on **14th May 1995**, and was issued with subdivision titles for both residential and public utility development.

Further that the Applicant surrendered areas reserved for Secondary school (12 acres) Nursery school (6 acres) and Church sites (2 acres) in exchange for new grants of the respective plots for duration of **99 years** at an annual rent to be assessed. That the Applicant offered the Post Office plot to Kenya Postal Corporation for free, but the same was transferred to another party against their planning policy. Further, the Applicant offered a Police Post for free and a Police Station was constructed. That the Company sold some plots that it was allowed to develop to third parties with the clear understanding that the development conditions were to be maintained and one such plot was a Nursery School plot known as **L.R Ruiru/Kiu 3/2864** bought by **Mukamwamu Investment**, who were issued an allotment Certificate on **6th March 1990**, and the total consideration was **Kshs. 90,000/=**. That there were complaints from the Residents Association that part of the suit property should vest in the County Government of Kiambu, which claim had been wrongfully alleged by the then Member of **County Assembly - Kahawa Sukari Ward, Peter Geche Karanja**.

That the National Land Commission and the Land Registrar were asked to look into the matter, and **Livingstone Wakibia Karanja Waiganjo**, the Member of County Assembly - Kahawa Sukari Ward has commenced construction on one of the suit properties **L.R 3/2864**, in the guise of it being the property of the County Government of Kiambu. That the same is an ultra vires act of **fraud, illegality** and **blatant** dispossession of the Applicant of its property for the utilization of a Nursery School. This decision to revoke the titles to the suit properties was never communicated to the Applicant, and were never granted a fair hearing prior to such revocation nor awarded an audience to a seating whereby the 3rd Respondent and other interested parties could hear and acknowledge their constitutional rights of ownership over the suit property. That the Court granted the Applicant leave to commence Judicial Review proceedings out of time and he urged the Court to consider the Application and grant the Applicant an opportunity to present its case before the Court for a fair hearing.

On **14th October 2019**, the 3rd Respondent indicated that it had filed grounds of Opposition. The said Grounds of Opposition dated **4th October 2019** and filed in Court on **7th October 2019**, appear to oppose Chamber Summons dated **13th May 2019** on the grounds that;

1. That *Judicial Review* is concerned with the decision making process and not the merits of the decision. Therefore an Applicant who wishes to institute *Judicial Review* proceedings must show that the decision in question was illegal, irrational or procedurally defective.

2. That pursuant to Article (68)(v) of the Constitution and Section 14 of the National Land Commission Act, 2012 the 3rd Respondent has jurisdiction to review all grants and dispositions of public land either on its own motion or upon receipt of a complaint from either the National and County Governments, Communities, Organizations or individuals.

3. That the Kenya Gazette Notice of 9th November 2018, was a mere report by the Respondent intended only for consumption of the general public and as such not a decision capable of being quashed by an order of *Certiorari*.

4. That issues of legality of the Applicant's title over the suit properties cannot be sufficiently addressed through the institution of *Judicial Review Proceedings* as the same would require the production of evidence, calling of witnesses and in some instances site visits which ordinarily would be carried out in a normal civil suit.

5. That the Application is scandalous, frivolous and vexatious and an abuse of the Court process.

On 14th October 2019, the Court directed the parties to file written submissions. However, only the Applicant filed written submissions dated 2nd October 2020 with regards to a Chamber Summons in which the prayers listed did not commensurate with the ones sought for in the instant Notice of Motion Application for determination.

The Court has now carefully read and considered the *Judicial Review Application* and the Grounds of Opposition. The issues for determination are;

a) Whether the Ex Parte Applicant has met the grounds for granting of *Judicial Review Order of Certiorari, Mandamus and Prohibition.*

b) If so, whether the application dated 4th June 2019 is merited.

c) Who is entitled to costs of these proceedings?

Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the said decision. The Court is called upon to look at the decision if it is made within the confines of the law. In the case of *Municipal Council of Mombasa... Vs... Republic Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007(2002) eKLR*, the Court of Appeal held that:-

*“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who make the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of *Judicial Review.*”*

Further in the case of *Republic...Vs... Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji (2014) eKLR* the Court held that:-

*“Judicial review applications do not deal with the merits of the case but only with the process. In other words, *Judicial Review* only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings *Judicial Review* proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties, the court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore, judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant.....”*

In the case of *Kenya National Examination Council ... Vs ... Republic Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No.266 of 1996*, the Court elaborated on what *Judicial Review Orders* entails?

“That now bring us to the question we started with, namely the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the council in this case. What does an Order of Prohibition do and when will it issue? It 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 or 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 – See Halsbury's Law of England, 4th Edition vol.1 at Pg.37 paragraph 128.”

The above is the scope of the Judicial Review. Is the Applicant deserving the Judicial Review orders sought?

a. Whether the Applicant has met the grounds or threshold for granting of Judicial Review Order of Certiorari, Mandamus and Prohibition.

As was stated in the case of *Kenya National Examination Council ...Vs...Republic (Exparte Geofrey Gahenji & Another (Supra)*, the Order of Certiorari can quash a decision already made and the same can issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons. So has the *Exparte Applicant* established existence of the above conditions to warrant this Court quash the decision of the 3rd Respondent to revoke title to the suit property?.

The Applicant has contended that the 3rd Respondent purported to revoke titles to the suit properties without giving the registered proprietors a chance to be heard and therefore not affording them a fair administrative action. The Applicant has contended that it was not given a fair administrative action and that it was not given a chance to be heard before the titles to the suit properties were cancelled. If the above allegation is the issue herein, then this Court finds that the *exparte applicant* has met the threshold for grant of Judicial Review orders.

b) If so, whether the Application dated 4th June 2019 is merited.

It is the *Ex parte Applicant's* contention that being the registered owner of the property in issue herein, it was not given a chance to be heard before a decision was arrived at to revoke the title to the suit property. The 3rd Respondent though duly served did not participate in the instant proceedings. The 1st and 2nd Respondents filed grounds of opposition and alleged that the Notices to the Kenya Gazette dated 9th November 2018, were not a decision capable of being quashed. The Court has seen the said Gazette Notice and it is clear that the 3rd Respondent directed the Chief Land Registrar to revoke the said titles.

The Court has seen the letter dated 12th July 1993, referenced variation of approval of conditions in which the Applicants was allowed to develop various plots. The Court has also seen the Certificate of title evidence that the Applicant was the registered owner of L.R 10901/20, and that it surrendered the said title and was issued with subdivision titles. There is no evidence that the Applicant was given a chance to be heard before the said titles were revoked by the 3rd Respondent herein. The 3rd Respondent did not file any Submissions to defend its position.

Natural justice was outlined in the *Halsbury Laws of England Volume 1(1) page 218*, as follows:-

“Natural justice comprises two basic rules; first that no man is to be a judge in his own cause (nemo iudex in causa sua), and second that no man is to be condemned unheard (audi alteram partem). These rules are concerned with the manner in which the decision is taken rather than with whether or not the decision is correct”.

In the case of *Msagha vs. Chief Justice & 7 Others, Nairobi HCMCA no. 1062 of 2004 (Lessit, Wendo & Emukule, JJJ on 3/11/06) (HCK)*.

[2006] 2 KLR 553, the Court held that:

“The Court observes firstly that the rules of natural justice “audi alteram partem” hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialisation of the globe during the hey-days of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision...It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.

The *exparte Applicant* has alleged that it was not given a chance to be heard before the decision to revoke the titles was made. This allegation was not reported by the 3rd Respondent. The Court finds that the 3rd Respondent failed to accord the Applicant fair administrative action making its decision a nullity. Therefore, the Court finds the *Exparte Applicant* is entitled to Judicial Review Orders sought. For the above reasons, the Court finds the *Exparte applicant's* application herein is merited.

c) Who is entitled to costs of these proceedings?

Section 27 of the Civil Procedure Act gives the Court the discretion to award costs. However costs usually follow the events, and unless there are special circumstances and in this case the Court finds there is none. The Applicant being the successful party is entitled to the costs.

Having now carefully analysed the available evidence, the Court finds that the *Ex parte Applicant* has successfully established that this is a

case that deserves Judicial Review Orders of **Certiorari, Mandamus** and **Prohibition** as prayed in the instant Application.

The upshot of the foregoing is that the Ex parte Applicant's Judicial Review Application dated **4th June 2019**, is found **merited** and the same is allowed entirely with costs being borne by the 3rd Respondent herein.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 11TH DAY OF MARCH, 2021

L. GACHERU

JUDGE

11/3/2021

Lucy - Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by the Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

- i. Judgement delivered in the absence of the parties who have not been attending Court for a while now.*
- ii. Notice of delivery of Judgement to be issued by the ELC Registry.*

L. GACHERU

JUDGE

11/3/2021