



REPUBLIC OF KENYA

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**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC JUDICIAL REVIEW NO.58 OF 2018**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**THE NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR.....2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF SURVEYS.....3<sup>RD</sup> RESPONDENT**

**- AND-**

**NAIROBI CITY COUNTY.....1<sup>ST</sup> INTERESTED PARTY**

**SAVANNA JUAKALI ASSOCIATION .....2<sup>ND</sup> INTERESTED PARTY**

**DAVID WERE, CAROLINE AMOLO & LINET BANDA (On behalf of**

**Home owners of OYSTER Village Estate .....3<sup>RD</sup> INTERESTED PARTY**

**EX-PARTE: OYESTER VILLAGE LIMITED**

**JUDGEMENT**

**Background**

1. The subject matter of these Judicial Review Proceedings is LR No. Nairobi/Block 82/9102 (suit property). The suit property is an amalgamation of LR Nos. Nairobi/Block 82/1765 and 1767. The suit property is registered in the name of the Ex-parte Applicant. The Ex-Parte Applicant purchased the two properties from Shepherds Group of Companies Limited. The Ex-Parte Applicant then applied for amalgamation which was allowed.

2. The Ex-Parte Applicant constructed 68 maisonettes 28 apartments and 13 community shops on part of the suit property which it transferred to third parties. On 3<sup>rd</sup> December 2015, the directors of the Ex-Parte Applicant saw an advertisement by the 1<sup>st</sup> Respondent in the press calling members of the public to attend a review of the grants in Nairobi. The Ex-Parte Applicant sent its lawyers who submitted on behalf of the Ex-Parte Applicant.

3. In a determination dated 23<sup>rd</sup> March 2018, the 1<sup>st</sup> Respondent held that the amalgamation of LR Nos. Nairobi/Block 82/1765 and 1767 was done illegally into LR No. LR Nos. Nairobi/Block 82/9102. The 1<sup>st</sup> Respondent recommended that the amalgamation be canceled and directed the Director of the surveys to revert the suit property to its original state that is LR Nos. Nairobi/Block 82/1765 and 1767. The 1<sup>st</sup> Respondent also directed the Chief Land Registrar to issue title in respect of LR No. Nairobi/Block 82/1765 to the 2<sup>nd</sup> interested party. The 1<sup>st</sup> Respondent further directed the Ex-Parte Applicant to compensate members of the 2<sup>nd</sup> interested party at current market rate for loss of land in LR Nairobi/Block 82/1767 as well as structures that were illegally demolished.

4. It is the determination by the 1<sup>st</sup> Respondent which prompted the Ex-Parte Applicant to file a notice of motion dated 14<sup>th</sup> May 2018 in which it seeks the following orders:

1. That the Honourable Court be pleased to grant an order of Certiorari to remove into court and quash the decision by the National Land Commission to cancel the amalgamation of land titles numbers Nairobi/Block 82/1765 and Nairobi/Block 82/1767 into land title number Nairobi/Block 82/9102 and directing the Director of Surveys to revert to the Original Survey before amalgamation and which decision was contained in the determination dated 23/3/2018 by the National Land Commission.

2. That the Honourable Court be pleased to grant an order of Certiorari to remove into court and quash the decision by the National Land Commission directing the Chief Land Registrar to issue a title over land title number Nairobi/Block 82/1765 to the 2<sup>nd</sup> interested party members for use for commercial/business purposes and which decision was contained in the determination dated 23/3/2018 by the National Land Commission.

3. That the Honourable Court be pleased to grant an order of Certiorari to remove into court and quash the decision by the National Land Commission directing the Applicant to compensate members of the 2<sup>nd</sup> interested party for land title number Nairobi/Block 82/1767 at a current market rate which decision was contained in the determination dated 23/3/2018 by the National Land Commission.

4. That the Honourable Court be pleased to grant an order of prohibition directed to the Director of surveys prohibiting him from reverting to the original survey before amalgamation of the land title number Nairobi/Block 82/1765 and Nairobi/Block 82/1767 into land title number Nairobi/Block 82/9102 as directed by the National Land Commission in its determination dated 23/3/2018 or otherwise.

5. That the Honourable Court be pleased to grant an order of prohibition directed to the Chief Land Registrar prohibiting him from issuing a title over land parcel Nairobi/Block 82/1765 to the members of the 2<sup>nd</sup> interested party as directed by the National Land Commission in its determination dated 23/3/2018 or otherwise.

6. That costs of this Application be provided for.

#### **Ex-Parte Applicant's contention.**

5. The Ex-parte Applicant contends that it purchased the suit property from Shepherds Group of Companies Limited vide a sale agreement dated 24<sup>th</sup> November 2009 at a consideration of KShs.130,000,000/=. The purchase was after a search at the lands office revealed that the two properties belonged to Shepherds Group of Companies Limited. The Ex-Parte Applicant applied and was granted approval to amalgamate the two properties. The Amalgamated title was issued to the Ex-Parte Applicant on 27<sup>th</sup> August 2015.

6. When the Ex-Parte Applicant appeared before the 1<sup>st</sup> Respondent, it turned out that the review of its titles was as a result of a petition by the 2<sup>nd</sup> interested party who had complained that the land which was held by Continental Developers Limited before it subdivided the same and transferred to various persons and entities belonged to the defunct Nairobi City Council.

7. The Ex-parte Applicant therefore contends that the 1<sup>st</sup> Respondent had no jurisdiction to deal with private property and that it had no powers to cancel the amalgamation which had been obtained legally and to order compensation to the members of the 2<sup>nd</sup> interested party.

#### **Response by 1<sup>st</sup> Respondent.**

8. The 1<sup>st</sup> Respondent opposed the Ex-Parte Applicant's application based on grounds of opposition dated and filed in court on 17<sup>th</sup> December 2018. The 1<sup>st</sup> Respondent contends that the Ex-parte Applicant's application offends the provisions of Order 53 Rule 2 of the Civil Procedure Rules and that the same is scandalous, frivolous, vexatious and is an abuse of the process of the court.

#### **Response by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.**

9. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents appear not to have filed any grounds of opposition or replying affidavit. I called for their documents if any were filed but none were availed. I therefore presume that none was filed. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents only filed submissions in which they state that the duty of the 2<sup>nd</sup> Respondent is to implement directives of the 1<sup>st</sup> Respondent in a case where the 1<sup>st</sup> Respondent finds that the title which is the subject of review was illegally obtained. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents contend that they are not involved in the process of review of grants which is a preserve of the 1<sup>st</sup> Respondent.

#### **Response by 1<sup>st</sup> Interested Party.**

10. The 1<sup>st</sup> interested party opposed the Ex-Parte Applicant's application based on a replying affidavit sworn by Geoffrey Cheruiyot on 15<sup>th</sup> June 2020. The 1<sup>st</sup> Interested Party contends that its predecessor the Nairobi city council had allocated the suit property to the 2<sup>nd</sup> interested party. The 1<sup>st</sup> Interested further contends that the sale of the suit property by Shepherds Group of Companies Limited to the Ex-Parte Applicant was fraudulent and that the Ex-Parte Applicant cannot claim that it is an innocent purchaser for value without notice.

11. The 1<sup>st</sup> Interested party further states that the suit property had been surrendered to Nairobi City council for public utilities and for settlement of squatters. The 1<sup>st</sup> Interested party contends that there have been various suits filed in court and that all of them have ended up in favour of the 2<sup>nd</sup> interested party. The 1<sup>st</sup> Interested party further states that it granted ownership documents to the 2<sup>nd</sup> interested party owing

to the decisions of the courts.

12. The 1<sup>st</sup> Interested party further contends that its predecessor had conducted investigations and found that the suit property had been surrendered for public utilities and had recommended to the Ministry of Lands to revoke the title. The 1<sup>st</sup> Interested party goes on to argue that the Ministry of Lands through the Public Complaint Resolution Committee found that the suit property among others had been surrendered to Nairobi City Council for public utilities and that the amalgamation which led to the suit property was illegal as there was no approval of the same.

#### **Response by the 2<sup>nd</sup> Interested Party.**

13. The 2<sup>nd</sup> Interested party opposed the Ex-Parte Applicant's application based on a replying affidavit sworn by Anne Khasoa on 16<sup>th</sup> October 2019. The 2<sup>nd</sup> Interested party contends that the suit property is as a result of an amalgamation of two properties which were illegally amalgamated. The 2<sup>nd</sup> Interested party states that the Ex-parte Applicant acquired a bad title from Shepherds Group of Companies Limited and that as such it cannot claim to have a better title.

14. It is the 2<sup>nd</sup> interested party's contention that Continental Developers Limited who sold the suit property to Shepherds Group of Companies Limited had illegally converted public land belonging to Nairobi City council. The 2<sup>nd</sup> Interested party further contends that the suit property was illegally created by Continental Developers Limited using survey plans for land in Mtwapa in Kilifi County. The 2<sup>nd</sup> Interested party further states that the suit property had been allocated to its members who were paying rates and had constructed on the same and that therefore the 1<sup>st</sup> Respondent was right in ordering the Ex-parte Applicant to compensate the members of the 2<sup>nd</sup> Interested party whose structures had been demolished illegally.

#### **Response by 3<sup>rd</sup> Interested Party.**

15. Though, the 3<sup>rd</sup> Interested party was enjoined in these proceedings, its representatives neither filed any document in support or opposition of the Ex-parte Applicant's application. The officials did not also file any submissions.

#### **Analysis.**

16. The parties were directed to file written submissions. The Ex-parte Applicant filed its submissions dated 14<sup>th</sup> May 2020. The 1<sup>st</sup> Respondent did not file any submissions. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed their submissions on 15<sup>th</sup> June 2020. The 1<sup>st</sup> interested party filed its submissions dated 15<sup>th</sup> June 2020. The 2<sup>nd</sup> Interested party filed submissions dated 17<sup>th</sup> June 2020. The 3<sup>rd</sup> Interested party did not file any submissions.

17. I have carefully considered the Ex-Parte applicant's Application as well as the opposition to the same by the 1<sup>st</sup> Respondent and the 1<sup>st</sup> and 2<sup>nd</sup> Interested parties. I have also considered the submissions filed by the parties herein. This is an application for judicial review which is based under Article 47 of the Constitution and the Fair Administrative Action Act. In the case of **Pastoli Vs Kabale District Local Government Council & Others (2008) 2 EA 300**, it was held as follows:

**“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”.**

18. It is on the basis of Article 47 of the Constitution, the provisions of the Fair Administrative Action Act and the principles set out in the **Pastoli Vs Kabale District Local Government council (Supra)** that I will identify the issues for determination. The first issue is whether the Judicial Review application is time barred. The second issue is whether the 1<sup>st</sup> Respondent's decision is in breach of the Ex-parte Applicant's right to fair administrative action. The third issue is whether the 1<sup>st</sup> Respondent's decisions is *ultra vires* its powers. The fourth issue is whether the Ex-parte Applicant should be granted the reliefs sought. The fifth and last issue is which order should be made on costs.

#### **Whether the judicial review application is time barred.**

19. The 1<sup>st</sup> Respondent in its grounds of opposition argues that the Ex-parte Applicant's application offends the provisions of Order 53 of the Civil Procedure Rules. The 1<sup>st</sup> Respondent had in mind the six months' period within which an application for Judicial Review ought to be brought. In answer to this contention, the Ex-parte Applicant stated that its application was brought under Article 47 of the Constitution and the provisions of the Fair Administrative Action Act.

20. Though the Ex-parte Applicant applied for leave to commence these judicial review proceedings, the main motion clearly indicates the provisions under which the said application was made. It was brought under the Fair Administrative Action Act which provides that such application be brought without unreasonable delay. In the instant case it is clear that the 1<sup>st</sup> Respondent did not send its decision to the Ex-parte Applicant. This is despite the same decision being sent to other affected parties. The Ex-parte Applicant had even to write letters to the 1<sup>st</sup> Respondent. As at the time the Ex-parte Applicant came to learn of the 1<sup>st</sup> Respondent's decision, it filed these proceedings. The

application having been pegged on the Fair Administrative Action Act, I find that the same was brought without unreasonable delay in the circumstances.

21. The Court of Appeal while dealing with the procedural aspects of Judicial Review applications in the case of Diamond Hasham Lalji & Another Vs Attorney General & 4 Others (2018) eKLR stated as follows:-

**[26] Further, we wish to point out that the proceedings in the High Court were commenced and concluded before the Fair Administrative Action Act, 2015 came into effect on 17<sup>th</sup> June 2015. We are gratified to note that Article 47 of the Constitution which gives a right to Fair Administrative Action as a fundamental right and the Fair Administrative Action Act which gives effect to Article 47 has drastically transformed the procedural law on judicial review and conferred added jurisdiction to the High Court. The procedure for judicial review stipulated in section 9 of the Fair Administrative Action Act does not expressly require leave as a pre-requisite for commencement of an application for judicial review and section 11 confers jurisdiction on the court to grant any relief which is just and equitable including declaration of rights, injunctions and the setting aside of the administrative action.”.** (emphasis added).

22. Since the promulgation of the 2010 Constitution and subsequent enactment of the Fair Administrative Action Act based on Article 47 of the Constitution, the procedural law with respect to Judicial Review Applications has since changed. An Applicant need only to bring the application without unreasonable delay. I therefore find that the Ex-Parte Applicant’s application is not time barred.

**Whether the 1<sup>st</sup> Respondent’s decision is in breach of the Ex-Parte Applicant’s right to fair administrative action.**

23. The Fair Administrative Action Act provides that any person who is likely to be affected by an administrative act has to be given adequate notice including what he is expected to face. In the instant case, the Ex-Parte Applicant’s officials saw an advert in the press which called for affected parties to attend a hearing. The Ex-parte Applicant was not served with the complaint which its officials expected to find during the hearing. When the Ex-parte Applicant sent its lawyers to the hearing of the review, the lawyers were shown for the first time a petition by the 2<sup>nd</sup> Interested Party which formed the basis of the review.

24. The Ex-Parte Applicant required adequate notice and the complaint which its officials were expected to face. In Onyango Vs Attorney General (1986-1989) EA 456, the Court of Appeal held that the Principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly. In Ridge Vs Baldwin (1963) 2 ALL ER 66 at Page 102, Lord Morris Y Gest held that :-

**“It is well established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself and in order he may do so that he is made aware of the charges or allegations or suggestions which he has to meet”.**

25. Failure to give the Ex-parte Applicant allegations which it was to face beforehand was a breach of its rights under the Fair Administrative Action Act. The 2<sup>nd</sup> interested party was aware that the Ex-parte Applicant had built houses on part of the suit property which it had sold to third parties. The implication of this required that all the affected parties or at least the Ex-parte Applicant would have been informed in advance of the allegations it was to face for adequate preparations.

26. The 1<sup>st</sup> Respondent proceeded to the suit property and gathered additional evidence without affording opportunity to the Ex-Parte Applicant’s officials to be present. The 1<sup>st</sup> Respondent’s decision was withheld from the Ex-parte Applicant even when the Ex-Parte Applicant’s lawyers asked for the decision. Even after the initial decision of the 1<sup>st</sup> Respondent had been advertised in the Gazette Notice, the same was later revised through another Gazette Notice without any involvement of the Ex-parte Applicant despite the huge implication on the Ex-Parte Applicant and its investments.

27. In its revised verdict, the 1<sup>st</sup> Respondent declined to interfere with one case similar to Ex-parte Applicant’s case citing reasons that the matter was before court yet it went ahead to do exactly the opposite in the Ex-parte Applicant’s case where the court had even given conservatory orders stopping the implementation of its recommendations. This was a clear case of bias and discrimination.

**Whether the 1<sup>st</sup> Respondent’s decision was ultra vires its powers.**

28. The 1<sup>st</sup> Respondent carried out review of the grants in issue pursuant to its powers under section 14 of the National Land Commission Act. Section 14 (4),(5) (6) and (7) of the National Lands Commission Act provides as follows:-

**(4) After hearing the parties in accordance with subsection (3), the Commission shall make a determination.**

**(5) Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.**

**(6) Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.**

**(7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.**

29. From the Petition by the 2<sup>nd</sup> Interested party which formed the basis of the inquiry and the way the 1<sup>st</sup> Respondent went on with the

inquiry, the investigations were based on unlawful acquisition of title. In this case the commissions should have invoked its power under section 14 (5) of the National Land Commission Act and directed the Registrar to revoke the title. The 1<sup>st</sup> Respondent instead in its revised determination ordered the registrar to grant one title to Nairobi City County and the other to the Ex-parte Applicant. By doing this, the 1<sup>st</sup> Respondent exceeded its powers. It had no power to act beyond what the law provided. It had no business to order the Registrar to give titles or to order the Director of surveys to cancel the amalgamated title which had been lawfully obtained.

30. The 1<sup>st</sup> Respondent did not make a finding that the title to the suit property was irregularly acquired. Had it made a finding based on Section 14(6) of the National Land Commission Act, then it had powers to correct the irregularity and make consequential orders. In the instant case, the record is clear that the 1<sup>st</sup> Respondent had found that the titles were unlawfully acquired. In that case, the only verdict would have been to recommend revocation as section 14(5) of the National Land Commission Act did not give the 1<sup>st</sup> Respondent Powers to make consequential orders as it purported to make. These orders included an order for compensation and cancellation of the amalgamation.

31. Besides this, the evidence which emerged during the review hearing showed that the Ex-parte Applicant was a bonafide purchaser without notice of any defect in the title if any. In any case, Continental Developers Limited which had sold the suit properties to the company which finally sold the same to the Ex-parte Applicant had stated that there were only two blocks of plots which had been reserved for public utilities and the two were not the suit properties. The 1<sup>st</sup> Respondent found that the land held by Continental Developers Limited was about 1200 acres and that the owner ought to have surrendered 20% of it for public utilities. The 20% was equivalent to 240 acres. It defeats logic why out of the alleged 240 acres, the 1<sup>st</sup> Respondent singled out the suit properties and a few others as having been reserved for public utilities. The Ex-Parte Applicant and others whose grants were reviewed did not cumulatively add to the 240 acres which ought to have been surrendered by Continental Developers Limited. By virtue of Section 14(7) of the National Land Commission Act, the Ex-parte Applicant's title ought not to have been revoked or in any other way affected without evidence that it was involved in any illegality in its acquisition if any.

32. The verdict of the 1<sup>st</sup> Respondent was clearly ultra-vires and is thus of no legal effect. See Boddington Vs British Transport Police (1999) 2 AC 143.

#### **Disposition**

33. From the analysis herein-above, it is clear that the decision by the 1<sup>st</sup> Respondent was, illegal, irrational and ultra vires its powers. I therefore grant the following final orders: -

**1. An order of certiorari is hereby granted removing into this court the decision of the National Land Commission contained in its determination dated 23<sup>rd</sup> March 2018 and as revised vide Gazette Notice No.1551 dated 13<sup>th</sup> February 2019 touching on LR Nos. Nairobi/Block 82/1765 and Nairobi/Block 82/1767 which had been amalgamated into Nairobi/Block 82/9102 directing the Director of Surveys to revert to the original survey before amalgamation which decision is hereby quashed.**

**2. An order of certiorari is hereby granted removing into this court, the decision of the National Land Commission contained in its determination dated 23<sup>rd</sup> March 2018 and as revised vide Gazette Notice No.1551 dated 13<sup>th</sup> February 2019 directing the Chief Land Registrar to issue title over LR No. Nairobi/Block 82/1765 to Savanna Jua Kali Association for commercial and business use which decision is hereby quashed.**

**3. An order of certiorari is hereby granted removing into this court the decision of The National Land Commission contained in its determination dated 23<sup>rd</sup> March 2018 as as revised vide gazette Notice No. 1551 dated 13<sup>th</sup> February 2019 directing the Ex-Parte Applicant to compensate the members of Savanna Jua kali Association for LR No. Nairobi/Block 82/1765 which is hereby quashed.**

**4. An order of prohibition is hereby granted directed at the Director of surveys prohibiting him from reverting the original survey before amalgamation of LR Nos. Nairobi/Block 82/1765 and LR Nos. Nairobi/Block 82/1767 into LR Nos. Nairobi/Block 82/9102 as directed by the National Lands Commission in its determination dated 23<sup>rd</sup> March 2018 and as revised vide gazette notice No. 1551 dated 13<sup>th</sup> February 2019.**

**5. An order of prohibition is hereby granted directed at the chief land Registrar prohibiting him from issuing title over LR Nos. Nairobi/Block 82/1765 to either members of Savanna Jua kali Association or Nairobi City County as directed by the National Land Commission in its determination dated 23<sup>rd</sup> March 2018 and as revised vide gazette Notice No.1551 dated 13<sup>th</sup> February 2019.**

**6. Each party to bear their own costs.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF APRIL 2021**

**E.O.OBAGA**

**JUDGE**

In the Virtual Presence of :-

Mr Amoko and M/s Waruhiu for Ex-Parte Applicant

Mr Omino for 2<sup>nd</sup> interested party

M/s Fatma for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Court Assistant: Okumu

**E.O.OBAGA**

**JUDGE**