



Republic v National Land Commission & another; County Government of Kiambu (Interested Party); Kariuki (Exparte) (Judicial Review 7B of 2021) [2022] KEELC 3182 (KLR) (6 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3182 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
JUDICIAL REVIEW 7B OF 2021
JG KEMEL, J
JUNE 6, 2022
IN THE MATTER OF THE APPLICATION FOR LEAVE FOR THE
ORDERS OF CERTIORARI AND PROHIBITION
AND
IN THE MATTER OF THE GAZETTE NOTICE NO 1995 OF
1/3/2019
AND
IN THE MATTER OF LR NO 25484/20 & LR NO 25484/21

BETWEEN

REPUBLIC APPLICANT

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

REGISTRAR OF TITLES 2ND RESPONDENT

AND

COUNTY GOVERNMENT OF KIAMBU INTERESTED PARTY

AND

SAMUEL MWAURA FELIX KARIUKI EXPARTE

JUDGMENT

1. The Applicant was granted leave to file this substantive Motion on the 29/7/2019.



2. This paved way for the filing of the instant - Motion filed on the 19/8/2019 and dated 14/8/2019. In the main, the Applicant sought the following orders;
 - a. This Honorable Court be pleased to remove unto this Court and quash the decision of the 1st Respondent made on the 1st March 2019 through Gazette Notice 1995 dated 1st March 2019 and quash the said Gazette Notice as it concerns L.R No. 25484/20 and L.R No. 25484/21 recommending that the Certificates of Title to the abovementioned parcels of land be revoked/ cancelled by the 2nd Respondent.
 - b. This Honorable Court be pleased to issue an Order prohibiting the 2nd Respondent from revoking/cancelling the Certificates of Title to L.R No. 25484/20 and L.R No. 25484/21.
 - c. The leave granted herein on the 26th July 2019 do operate as stay of all proceedings, decisions, actions, acts implementation of the recommendations of the 1st Respondent on the matters complained of until further Orders of this Court.
 - d. Costs of this Application be borne by the 1st Respondent and/or Interested Party.
3. The Notice of Motion is not supported by any Supporting Affidavit. I have perused the statutory statements and the grounds in support of the chamber summons filed on the 26/7/2019. The reliefs sought are set out as above. The grounds anchoring the reliefs are; the Applicant was not invited to appear before the 1st Respondent for hearing; was not heard; was not given the opportunity to inspect any documents or any representation and submissions made before the 1st Respondent; the decision of the 1st Respondent is procedurally ultra vires *the Constitution* and against the rules of natural justice and in contravention of Section 14(3) of the *National Land Commission act*.
4. The Applicant filed a verifying affidavit on even date and deponed that he is the registered owner of parcels LR No. 25484/20 and 21 (suit lands) which were transferred to him on the 12/7/2018. He averred that he is in occupation of the said suit lands and has continued to pay rates to the Interested Party. He averred that in mid-June 2019 he received information that the titles of the said suit lands had been revoked vide Kenya Gazette Notice dated the 1/3/2019. That he was not notified of the notice by the 1st Respondent before taking the actions culminating into the cancellation of the titles. It is his case that the said cancellation was illegal unconstitutional and oppressive on account that ; it condemned him unheard; it deprives him of his property without compensation; decision is made in contravention of the *National Land Commission Act* and *the Constitution*. In support of his claim the Applicant has annexed the copies of the Kenya Gazette dated the 1/3/2019.
5. Despite service of the motion upon the Respondents and the Interested Party and notwithstanding directions having been taken on several dates before the Court, the motion is not opposed.
6. The firm of Mwaura Shairi & Co Advocates filed written submissions on behalf of the Applicant. He contended that no evidence has been tabled to support service of notice upon the Applicant. That even under Section 14 of the *National Land Commission Act* the 1st Respondent failed to accord him the opportunity to appear before it prior to making its decision to cancel his titles.
7. Relying on the case of *Super Nova Properties Ltd Vs The National Land Commission* (2019) eKLR, the Applicant submitted that the Respondent was obligated to afford him a hearing prior to arriving at its decision which decision, he avers was adverse to his right to property.
8. He urged the Court to find that the 1st Respondents actions were taken in contravention of the Articles 40, 47 and 50 of *the Constitution* as well as Section 14 of the Fair administrative Actions Act.



9. I have considered the application, the grounds upon which it is premised, the affidavit evidence and the brief written submissions made therein. The key issue is whether the Applicant is entitled to the judicial review remedies of certiorari and prohibition sought.

10. The province of judicial review is now settled. There is a plethora of cases decided by Courts in this country and I will adopt the definition given by Lord Diplock in the case of *Council for Civil Services Unions vs Minister for Civil Service* (1985) AC 374 at 401D when he stated as follows;

“Judicial review has I think developed to a stage today when.....one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’.....By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to itBy ‘irrationality’ I mean what can now be succinctly referred to as “Wednesbury unreasonableness’.....it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at itI have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”

11. The Court of Appeal in the case of *Municipal Council of Mombasa vs Republic and Another* 2002 eKLR 223 Civil Appeal No. 185 of 2001 stated:

“That is the effect of this Court’s decision in the Kenya National Examination Council case and as the Court has repeatedly said, judicial review is concerned with the decision -making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the Court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. 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 made 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 he 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 there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”

12. Equally in the case of *Republic vs Kenya Power and Lighting Company Limited & another* [2013] eKLR the Court observed that;

“...it is not enough for an Applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted.”

13. Article 50 of *the Constitution* provides that every person has the right to have any dispute that can be resolved by application of law decided in a fair and public hearing before a Court of law or if appropriate another independent and impartial tribunal or body.



14. Article 47 of *the Constitution* provides as follows:-

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.”

15. In the case of *Sceneries Limited v National Land Commission* (2017) eKLR, the Court held that;

“The right to a fair hearing under Article 50(1) of *the Constitution* encompasses several aspects. these includes, the individual being informed of the case against her/him, the individual being given an opportunity to present/her/his side of the story or challenge the case against her/him and the individual having the benefit of a public hearing before a Court or other independent and impartial body.”

16. Section 4 of the Fair Administrative Actions Act is more explicit in the following terms;

“1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

2. Every person has the right to be given written reasons for any administrative action that is taken against him.

3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

a. prior and adequate notice of the nature and reasons for the proposed administrative action;

b. an opportunity to be heard and to make representations in that regard;

c. notice of a right to a review or internal appeal against an administrative decision, where applicable;

d. a statement of reasons pursuant to Section 6;

e. notice of the right to legal representation, where applicable;

f. notice of the right to cross-examine or where applicable; or

g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.

4. The administrator shall accord the person against whom administrative action is taken an opportunity to-

a. attend proceedings, in person or in the company of an expert of his choice;



- b. be heard;
- c. cross-examine persons who give adverse evidence against him; and
- d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

5. Nothing in this Section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

6. Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 41 of *the Constitution*, the administrator may act in accordance with that different.”

17. I have with a lot of difficulty (on account that it is indecipherable) perused the Kenya Gazette Notice dated the 1/3/2019 and the said actions are stated to have been commenced pursuant to Article 67 (2) (e) of *the Constitution* read together with Section 6 and 15 of the *National Land Commission Act*.

18. Article 67(2) of *the Constitution* gives on the functions of the National Land Commission as to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress. In conducting its functions under this provision of *the Constitution* Section 15 of the *National Land Commission Act* provides as follows;

“When conducting investigations under subSection (1) into historical land injustices the Commission may—

- (a) request from any person including any government department such particulars, documents and information regarding any investigation, as may be necessary; or
- (b) by notice in writing, addressed and delivered by a staff of the Commission to any person, direct such person, in relation to any investigation, to appear before the Commission at such time and place as may be specified in the notice, and to produce such documents or objects in the possession, custody or under the control of such person and which are relevant to that investigation.”

19. Section 14(8) of the *National Land Commission Act* provides that in exercise of its functions under the Section the commission shall be guided by the principles set out in Article 47 of *the Constitution*.

20. Fair Administrative Action is described in Article 47 of *the Constitution* as follows:

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

21. The right to be heard is a fundamental principle of justice. The 1st Respondent had a cardinal duty to observe this principle as dictated by its Act. This is further buttressed in Halburys Law of England, 5th Edition 2010 Vol.61 at para 639, which states:-

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alterman partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with



the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a Court.”

22. It is the case of the Applicant that the 1st Respondent did not notify him of the hearings to afford him the opportunity to be heard, make representations before the decision to cancel his titles were heard.
23. It is unfortunate that the 1st Respondent kept away from responding to the motion and thus denied the Court the opportunity the benefit of an answer to the motion.
24. It is trite and it is part of our laws that where a party is not heard, a decision made in breach of the rules of natural justice are null and void ab initio. In the case of (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 colonialization of the globe during the hey-days we 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.”

25. It is not in dispute that the Applicant is the registered owner of the suit lands and the recommendation to cancel the titles is a decision that would affect the Applicant. Article 40 (6) of *the Constitution* provides that protection of rights to property does not extend to any property that has been unlawfully acquired. The point being underscored here is that even if there be a taint on a title, the same has to be examined and determined through the due process of the law. It is also my firm finding that the 2nd Respondent does not enjoy the power in law in the circumstances of this case to cancel titles as it is the preserve of the Court.
26. Based on the reasons given above I find that the application is merited. It is granted as follows;
 - a. This Court do and hereby quash the decision of the 1st Respondent made on the 1/3/209 through gazette notice no 1995 dated the 1/3/2019 as concerns the suit lands recommendations that the said titles be revoked /cancelled by the 2nd Respondent.
 - b. The Court do and hereby issue an order prohibiting the 2nd Respondent from revoking / cancelling the titles for LR No. 25484/20 and LR No 25484/2.
 - c. I make no orders as to costs.



27. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 6TH DAY OF JUNE 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of:

Mwaura for the Applicant

Ms. Owino holding brief for Ms. Masinde for 1st Respondent

2nd Respondent – Absent

Interested Party - Absent

Court Assistant - Phyllis

