



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

JUDICIAL REVIEW NO. 6 OF 2019

IN THE MATTER OF; AN APPLICATION OF JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

**IN THE MATTER OF; CONSTITUTIONAL RIGHTS PURSUANT TO ARTICLES 21, 22, 23(1),
23(3)(f),25(c) ,27,40,47(1)& (2),48,50(1) & 68 (c) (v) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF; SECTIONS 3, 4(3), 7(1)&11(1)(a) OF THE
FAIR ADMINISTRATIVE ACTION ACT, NO.4 OF 2015**

AND

IN THE MATTER OF; SECTION 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF; THE NATIONAL LAND COMMISSION ACT,NO. 5 OF 2012

BETWEEN

REPUBLIC.....APPLICANT

VERUS

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

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

AND

FARMERS CHOICE LIMITED.....EX PARTE APPLICANT

JUDGMENT

By Notice of Motion Application dated 11th April 2019, the Ex parte Applicant brought this Judicial Review proceedings seeking for orders that;

1. THAT the Honourable Court be pleased and do hereby grant the Judicial Review order of Certiorari to remove into this Honourable Court and quash the decision of the 1st Respondent dated 7th February 2019, published in Kenya Gazette No. 27;Vol CXXI dated 1st March 2019 purpoting to revoke the ex parte Applicant's title to the parcel of land known as L.R 7593 measuring

248.5 acres or thereabouts situated in Uplands, Lari Constituency, Kiambu County(the property) in favour of the 2nd Respondent.

2. THAT this Honourable Court be pleased to grant a permanent injunction restraining the Respondents whether by themselves, their agents, officers or whomsoever from interfering with the Ex parte Applicant's property described as L.R7593 measuring 248.5 acres situated in Uplands Lari Constituency, Kiambu county.

3. THAT this Honourable Court be pleased to declare that the Ex parte Applicant is the sole registered owner of the property described as L.R7593 measuring 248.5 acres situated in Uplands, Lari Constituency, Kiambu County.

4. THAT this Honourable Court do issue any such other and further relief as it may deem just and fair in the circumstances of this case.

The Judicial Review is premised on the following grounds ; That the Ex parte Applicant is the registered owner of the suit property; That the 1st Respondent made an ultra vires decision in respect of the suit property by arrogating to itself mandate to revoke the title deeds contrary to **section 80 of the Land Registration Act**, and in breach of the provisions of the **National Land Commission Act**; Further that the 1st Respondent in making its decision acted arbitrarily contrary to **Articles 47, 48 and 50** of the **Constitution** and in breach of sections **131 and 151** of the **Land Act**, **Section 15(5)(b)** of the **National Land Commission Act** and **Section 4 of the Fair Administrative Actions Act**, as it denied the Ex parte Applicant the right to prior and adequate notice of the hearings scheduled for **27th September 2018**, an opportunity to be heard and make representations and information, materials and evidence that was relied on in making the decision. Further that the 1st Respondent's decision of **7th February 2019**, is in violation of the Ex parte Applicant's rights to property that is safe guarded by **Article 40 of the Constitution**, and therefore it is in the interest of justice that the Ex parte Applicant's rights be protected.

In his Supporting Affidavit dated **11th April 2019**, **James F.W Taylor**, the Managing Director of the Ex parte Applicant reiterated the contents of his Verifying Affidavit dated **1st April 2019**, in which he had averred that the Ex parte Applicant is the registered owner of the suit property. He further averred that sometime in **September 2018**, after the hearing had been conducted, he learnt through his Manager, **Dr. Sharon Tsigadi**, that the property belonging to the Ex parte Applicant had been listed in the Daily Nation Newspaper of **26th September 2018**, and that it was intended that the Ex parte Applicant appear at the hearing scheduled for the **27th September 2018**. That he was also informed by the said manager that she had contacted the Minister of Agriculture who had assured her that there was nothing to worry about.

However, he was surprised to see the Kenya Gazette of **1st March 2019** containing Gazette Notice **No, 27 Vol CXXI**, in which the 1st Respondent made recommendations that the property which is erroneously described as **L.R No. 7593/1 and 7593/2**, revert back to the 2nd Respondent and further that a title be issued in the name of the 2nd Respondent as trustee and further stated that the property would not be available now or in the future. He further averred that when his lawyers obtained the 1st Respondents decision, they noted that the decision mentions the advertisement in the **Daily Nation of 26th September 2018**, for the hearings scheduled the next day. It was his contention that the Ex parte Applicant was not aware of the date until shortly after the hearings were concluded and that the **one day notice** was short for any arrangement to be made for adequate representations. He averred that his Advocates confirmed to him that the 1st Respondent is required to inform the Ex parte Applicant directly prior to any hearings and determinations and that it was unjust that the 1st Respondent could wholly adopt the complaint by the 2nd Respondent and not interrogate the veracity of the claims.

He further averred that he has been informed by the Ex parte Applicant's Advocate, that the **Fair Administrative Actions Act** requires administrative bodies such as the 1st Respondent to give prior notice and fair hearing before they make decisions. He contended that the 1st

Respondent disregarded legal provisions by making its recommendation without giving the Ex parte Applicant adequate reasonable notice of the hearings and also in failing to investigate the 2nd Respondent's complaints sufficiently. He further averred that if the 1st Respondent's decision is allowed to be operative, there is a likelihood that the 2nd Respondent will begin taking measures to have the titles returned to the **Lands Registry** for issuance of titles in the name of the 2nd Respondent. Therefore there is real and imminent risk that the Ex parte Applicant will be deprived of its property.

He contended that the land was initially granted on **6th June 1950** to the **Uplands Bacon Factory Limited**, that was to manage the factory. That the **Uplands Bacon Factory (Kenya) Limited**, had financial and management problems that resulted in the Company ceasing operations and a Winding up Petition was presented against the company upon which a liquidator was appointed. That as a result, the Kenyan Pig industry substantially collapsed. He averred that in **1992**, the Ex parte Applicant through its parent company leased the portion of the property and during the leasing period, it was agreed that the property would be purchased by **Lornho**, the parent Company and a transfer was prepared and the suit property eventually sold to the Ex parte Applicant from the **Lornho** group. He further averred that the Ex parte Applicant then fenced the property and developed it and that it

conducts its operations in the property and there is no justification for the finding that the land should be used as a public utility when it is well utilized by the private owner.

In its statutory statement, the Ex parte Applicant averred that the 1st Respondent acted **ultra vires** as it did not have jurisdiction to revoke titles on the basis of **section 80 of the Land Registration Act**, as it only has mandate to make recommendations and not to determine. Further that by failing to issue prior, proper and adequate notice, it did not acquire proper jurisdiction over the property. Further the 1st Respondent did not give the Ex parte Applicant prior and proper notice and that it violated its right to property as enshrined by **Article 40 of the Constitution**. That the 1st Respondent was unreasonable in its decision by not making any attempt to issue proper **notice** and therefore it was in breach of procedure and its acts were illegal and ultra vires the **National Land Commission Act** and **section 80 of the Land Registration Act**.

The suit is contested and **DR. Martin N.Mbugua**, the 2nd Respondent's County Secretary and the **Head of Public Service**, swore a Repeating Affidavit on the 27th June 2019, and averred that **Article 62(2) of the Constitution of Kenya, 2010**, provides that public land shall vest in and be held by a County Government in trust for the resident in the County and be administered on their behalf by the

National Land Commission. He further averred that he had been informed by his Advocate on record that the **National Land Commission Act** provides for the function and powers of the Commission which include but is not limited to managing of public land on behalf of the National and County governments. He further averred that he has been advised by his Advocates that the powers of the Commission include and is not limited to gathering by such means as it considers appropriate any relevant information including requisitions of reports, records, where it considers necessary and holding inquiries for the purposes of performing its functions under the Act and after investigating any claims shall recommend remedies that include but are not limited to order for revocation and reallocation of the land and order for revocation of any official declaration. That he has been advised by his Advocate that the 2nd Respondent was fulfilling its mandate granted by the Constitution of Kenya as custodians of public land. Further that the Applicant has not shown that the 2nd Respondent's actions have been tainted by an illegality, irrationality and procedural impropriety.

The Application was canvassed by way of written submissions which the Court has carefully read and considered.

Despite being served with the suit papers the 1st Respondent did not enter appearance and the suit proceeded without its participation.

This Court has now carefully read and considered the Ex parte

Applicant's Judicial Review application, the annexures thereto, cited authorities and the relevant provisions of law and renders itself as follows;

Having taken into account the above, the Court finds the issues for determination are as follows:-

- a) *Whether the Ex Parte Applicant has met the grounds for granting of Judicial Review Order of Certiorari and Prohibition.*
- b) *If so, whether the application dated 11th April 2019 is merited.*
- c) *Who is entitled to costs of these proceedings?*

From the outset, it is important to set out the purpose of **Judicial Review**. 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 circumstances under which orders of **Judicial Review** can be issued were elaborated by **Justice Kasule in the Uganda case of Pastoli ...Vs...Kabale District Local Government Canal & Others (2008) 2EA 300 at pages 300-304.**.....

“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 the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality----.

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, is when there is 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 to act 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 legislature instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehidswi... Vs...Secretary of State for the Housing Department (1990) AC 876”.

So what does the **Judicial Review Orders** entail? This was elaborated in the case of **Kenya National Examination Council...Vs... Republic Ex parte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No.266 of 1996**, where the Court held that:-

“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.”

From the foregoing cases, the applicable law in cases of Judicial

Review have already been established and the Court will now consider the above applicable law and then juxtapose it with the available facts to determine whether the **Ex parte Applicant** is deserving of the orders sought.

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

As was stated in the case of **Kenya National Examination Council ...Vs...Republic (Ex parte Geoffrey Gahenji & Another (Supra)**, the Order of **Certiorari** can quash a decision already made as it will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or so such like reasons. So have the **Ex parte Applicant** established existence of the above conditions to warrant this Court quash the decision of **National Land Commission** issued in the **Kenya Gazette Notice No.27:Vol. CXX1 dated 1st March 2019** ?

It is the Ex parte Applicants contention that the 1st Respondent acted **ultra vires** to the provisions of the Constitution and those of the National Land Commission Act when it purported to revoke its title in accordance with **Section 80 of the Constitution**, thereby granting itself powers that it did not have. It is the Court’s considered view that the Ex parte Applicant having questioned whether the 1st Respondent acted ultra vires, it therefore has met the threshold for granting of Judicial review orders.

Secondly the Ex parte Applicant has averred that it was not afforded fair administrative action as it was not informed of the date of the hearing and that the notice that was put up was too short and therefore it did not have time to seek proper representations.

It is the Court’s considered view that the Ex parte Applicant has established the threshold for seeking the orders of Judicial review proceedings as it is questioning whether the 1st Respondent acted **ultra vires** and the process through which he 1st Respondent arrived at its decision by failing to accord it fair Administrative action.

b) If so, whether the application dated 11th April 2019 is merited.

It is the Ex parte Applicant’s submissions that the 1st Respondent made a determination as to the ownership and entitlement of the suit property instead of making a recommendation and therefore acted ultra vires to the Constitution and the National Land Commission Act. It further submitted that the 1st Respondent allocated itself the mandate to revoke the deeds contrary to section of the Land Registration Act on the other hand the 2nd Respondent submitted that section 14 of the National Land Commission Act mandates it to review all grant and dispositions of land relating to public and. Further it submitted that proper procedures were followed and that the 1st Respondent made a recommendation and not a decision.

Section 14 of the National Land Commissions Act provides ;

1. Subject to Article 68(c)(v) of the Constitution, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.

(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.”

From the above provisions of law, it is clear that the 1st Respondent is empowered to review grants and dispositions of land, to make a determination and direct the land Registrar to revoke a title where it

finds that the same was acquired in an unlawful manner.

The Court has perused the annexure and having gone through the gazette notice dated 1st March 2019, the Court notes that the Commission recommended that the suit property to revert back to the County government. It is therefore this Court’s considered view that the commission having made a recommendation did not act ultra vires.

The second issue that has been contended by the Ex parte Applicant is that it was not afforded fair administrative action as it was never served with the Notice of the hearing and only heard of it when they read the Daily Nation newspaper. Further that the Notice contained in the Daily Nation newspaper did not give it enough time to even seek representations and put its

house order. This Court has seen the Commission's determination annexed as JFWT-4. The Court notes that the hearing was conducted on the 27th and 28th September 2018. Further the Court notes that the commission indicated that it sent out the Notice on 26th September 2018 in the Daily Nation newspaper and that the hearing proceeded on the 27th of September 2018 as scheduled.

Section 7 of the National Land Commission Act provides;

“No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.”

Further Section 8 of the National Land Commission Act provides

“In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the Constitution.”

Article 47 of the Constitution provides;

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

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”.

Further in the case of Republic...Vs...The Honourable The Chief Justice of Kenya & Others ...Vs...exparte Mojjo Mataiya Ole Keiuwa, Nairobi HCM CA No.1298 of 2004, the Court held that:-

“The rules of Natural justice are minimum standard of fair decision making imposed by the common law on persons, or bodies that are under a duty to act judicially”.

Going by the above provisions of law and cited authorities, it is therefore not in doubt that the 1st Respondent was required to give the Ex parte Applicant notice in person and that the Notice ought to have been sufficient.

It is not in doubt that the Ex parte Applicant was invited vide the Daily Nation Newspaper to present its case. It is also not in doubt that the said invitation was made on the 26th of September 2018 and that the hearing was set to be on the 27th of September 2018, and it was conducted on the said date. This Court concurs with the Ex parte Applicant that this was not sufficient time to seek representation nor was it sufficient time for it to put its house in order. Consequently, the Court holds that the lack of sufficient and proper notice deprived the Applicant of fair administrative action which the Applicant was entitled to. See the case of Republic...Vs...National Land Commission; Pacifica Mwango & another (Interested Parties); Ex Parte Anil Ratilal Tailor [2019] eKLR where the Court held that;

“Section 14 (2) of the National Land Commission Act envisions

the creation of a set of rules intended to guide the Commission in reviewing of grants or dispositions of public land subject to Articles 40, 47 and 60 of the Constitution. In the absence of those rules, the procedure under Section 4 of the Fair Administrative Action Act which was enacted to give force to Article 47 suffices to assess whether the respondent adhered to the rules of natural justice. The provision provides that in all cases where a person's rights or fundamental freedoms are likely to be affected by an administrative decision, the administrator must give the person to be affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action. (See Sceneries Limited -vs- National Land Commission [2017] eKLR).

With the above in mind, the Court finds and holds that the Ex parte Applicant was not accorded a fair administrative action and its Application in terms of seeking for an order of Certiorari and prohibition is merited.

The Ex parte Applicant has further sought for an order of declaration that it is the sole registered proprietor of the suit property.

However as already held above, Judicial Review proceedings the Court is concerned with the process through which a decision was arrived at and not the merits of the case. It is the Court's considered view that the prayers sought by the Ex parte Applicant for a declaration that it is the sole registered owner of the suit property is without merit

and it is therefore disallowed

b. Who is entitled to costs of these proceedings.

Section 27 of the Civil Procedure Act, gives the Court discretion to grant costs. However costs always follow the events and the successful party should then be the person to be awarded costs unless there are special circumstances which should warrant the Court from deviating. The Ex parte Applicant in this instant being the successful party is therefore awarded costs of the suit and the same is to be borne by the 1st Respondent.

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** and **Prohibition** as prayed in the instant Application.

The upshot of the foregoing is that the Ex parte Applicant's Judicial Review Application dated **11th April 2019**, is found partially merited and the same is allowed in terms of prayers **No.1 and 2** with costs being borne by the 1st Respondent herein.

It is so ordered.

Dated, signed and Delivered at Thika this 7th day of May 2020

L. GACHERU

JUDGE

7/5/2020

Jackline - 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 His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. 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.

By Consent of :

Mr. Mbeva for the Ex parte Applicant

No appearance for the 1st Respondent

M/S Sanaet for the 2nd Respondent

L. GACHERU

JUDGE

7/5/2020