



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**ELC JUDICIAL REVIEW No. 7 OF 2019**

**(FORMERLY HC MISC. APPLIC. NO. 119 OF 2019 (NAIROBI))**

**REPUBLIC.....APPLICANT**

**VERSUS**

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

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR.....3<sup>RD</sup> RESPONDENT**

**THE KENYA AGRICULTURAL AND**

**LIVESTOCK RESEARCH ORGANIZATION.....4<sup>TH</sup> RESPONDENT**

**AND**

**KARATI FARM.....1<sup>ST</sup> INTERESTED PARTY**

**TOP FARM.....2<sup>ND</sup> INTERESTED PARTY**

**ETHICS AND ANTI-CORRUPTION**

**COMMISSION.....3<sup>RD</sup> INTERESTED PARTY**

**AND**

**WAZAZI FARMERS COMPANY LIMITED.....EX PARTE APPLICANT**

**JUDGMENT**

1. The ex parte applicant was granted leave to commence these proceedings on 18<sup>th</sup> April 2019. It subsequently filed Notice of Motion dated 10<sup>th</sup> June 2019, seeking the following orders:

*1. An order of certiorari to remove into this honourable court for purposes of the same being quashed the decisions of the 1<sup>st</sup> respondent contained in Kenya Gazette Notice Number 1716 of 22<sup>nd</sup> of February, 2019 revoking the title in respect of L.R. No. 5211/2.*

*2. An order of mandamus to compel the 1<sup>st</sup> respondent to reinstate the applicant as the lawful owner of L.R No. 5211/2.*

*3. An order of prohibition prohibiting the 3<sup>rd</sup> respondent from acting upon and or executing the directions made and or given by the 1<sup>st</sup> respondent against the applicant in the decision contained in Kenya Gazette Notice Number 1716 of 22<sup>nd</sup> February, 2019.*

*4. Costs of this application be provided for.*

2. The Notice of Motion is supported by statement of facts dated 17<sup>th</sup> April 2019 and verifying affidavit sworn by Linda Mugure, a director of the ex parte applicant. She deposed that the ex parte applicant became the registered proprietor of the parcel of land known as L.R No. 5211/2 on 3<sup>rd</sup> March 2000. That prior to owning the land, the ex parte applicant successfully applied to the Settlement Fund Trustees for allocation of land and paid KShs 1,040,300 to the said body on 27<sup>th</sup> January 2000 for outright purchase of the land. She added that the ex parte applicant took possession and remains in possession. That it later subdivided and disposed part of the land to five other parties.
3. Ms Mugure went on to state that they were later surprised when they saw Kenya Gazette Notice Number of 1716 of 22<sup>nd</sup> February 2019 issued by the 1<sup>st</sup> respondent revoking the title in respect of L.R No. 5211 which is the mother title of 5211/2. She further stated that the ex parte applicant was never invited to the proceedings leading to the decision by the 1<sup>st</sup> respondent and neither received a copy of the determination nor proceedings. She contended that the 1<sup>st</sup> respondent's decision was in disregard of the principles of natural justice, was ultra vires, unreasonable, contrary to good faith and amounted to abuse of power. Further, she deposed that they were condemned unheard.
4. Despite being served, the 1<sup>st</sup> respondent, 1<sup>st</sup> interested party and 2<sup>nd</sup> interested party neither responded to the application nor participated in the proceedings.
5. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents responded to the application through grounds of opposition. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents contended that the ex parte applicant did not annex the decision it's seeking to quash and that the gazette notice is not the decision but mere communication of the decision. The 4<sup>th</sup> respondent took a similar stand and added that no cause of action has been revealed against it, that the application is incompetent for challenging merits of the decision as opposed to the process and that the ex parte applicant was given a fair hearing.
6. The 3<sup>rd</sup> interested party (EACC) responded through a document titled "Grounds of Opposition" but whose body reveals an affidavit sworn by Agosta Mecca. He described himself as a forensic investigator employed by the 3<sup>rd</sup> interested party. He deposed that sometime in 2018, EACC received a report alleging that the 4<sup>th</sup> respondent's (KALRO) land in Naivasha had been grabbed. That investigations established that the said parcels of land Naivasha Municipality L.R No. 5210, 5211 and 5212 were set aside for government use as a livestock experimental farm in 1904. He annexed letters and deed plans. He added that EACC also established that the whole of Naivasha L.R No. 5211 save for L.R No. 5211/1 which is under the actual ownership of KALRO was initially allocated to Kimonda Limited and Kingpin Limited in 1997. That Naivasha L.R. No. 5211/2 was transferred to the ex-parte applicant by the Settlement Fund Trustees on 3<sup>rd</sup> March 2000 upon payment of KShs 1,040,300 for 346 acres at the rate of KShs 3,000 per acre.
7. Mr Mecca went on to state that the Ministry of Agriculture wrote to the Ministry of Lands on 6<sup>th</sup> November 2009 inquiring about encroachment on public land including L.R. No. 5211 by private individuals and that on 22<sup>nd</sup> January 2015, KALRO wrote to the 1<sup>st</sup> respondent seeking its assistance in reviewing the titles issued to private persons. That the 1<sup>st</sup> respondent carried out the review and on 22<sup>nd</sup> February 2019 it revoked the titles of LR No. 5211/2 based on the outcome of its investigations and instructed the Land Registry to revert it back to KALRO. That EACC then processed title in respect of LR No. 5211/2 in the name of the 4<sup>th</sup> respondent. He annexed a copy of a certificate of title dated 23<sup>rd</sup> August 2019.
8. Mr Mecca concluded by stating that the ex-parte applicant is not entitled to the suit property and that the only recourse that the ex-parte applicant has is to seek refund of the consideration of KShs 1,040,300 together with the rents and rates which it paid to the government.
9. The Notice of Motion was canvassed through written submissions. It was argued on behalf of the ex parte applicant that it was condemned unheard by the 1<sup>st</sup> respondent and that the decision to cancel the title L.R No. 5211 by extension affected all subsequent titles including the ex parte applicant's L.R No. 5211/2. Reliance was placed on **Articles 47 and 50 (1) of the Constitution** and on the cases of **Diana Kethi Kilonzo & Another v IEBC & 2 Others Petition No. 359 of 2013** and **Kenya Revenue Authority v Menginya Salim Murgani Civil Appeal No. 108 of 2009** to reinforce the argument that failure to accord them a hearing and to be supplied with information to enable reasonable response was a breach of principles of natural justice.
10. It further argued that the 1<sup>st</sup> respondent's action was unreasonable and irrational hence the determination cannot stand. The ex parte applicant further cited **Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300** and **Republic v Land Registrar TaitaTaveta District & another [2015] eKLR** and urged the court to grant the orders sought.
11. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent submitted that pursuant to **Order 53 rule 7(1) of the Civil Procedure Rules**, an ex parte applicant must annex a copy of the decision sought to be quashed for scrutiny and that failure to annex it is fatal. Further, that the gazette notice is merely a notice to announce that a decision was made. They argued that although the gazette notice confirms that a decision was made, it cannot help the court to determine if the rules of natural justice were followed. They also contended that the ex parte applicant has not offered any explanation as to the failure to annex the decision.
12. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent went on to argue that in this case, the prayers of certiorari and prohibition are intertwined thus the 3<sup>rd</sup> respondent should not be ordered not to act on a decision that has been faulted. They concluded by urging the court to dismiss the application with costs.
13. The 3<sup>rd</sup> interested party submitted that the suit land was not available for alienation as it was already vested in KARI and that the Commissioner of Land had no authority to alienate public land. As to whether the revocation of title was properly ordered, the 3<sup>rd</sup> interested party argued while relying on **Eld. HC Judicial Review case no. 10 of 2008 Republic v Commissioner of Lands and another ex parte Lima Ltd** and **Mbsa. Hc Misc Civil Appeal No. 70 of 2010 Republic v Senior Registrar of Titles, Mombasa and 2 others ex parte Conmen Ltd** that the suit land was undoubtedly public land and that title to the same in private hands was rightly revoked.
14. Additionally, the 3<sup>rd</sup> interested party argued that judicial review orders are discretionary and that the court may exercise discretion not to

provide a remedy if to make an order would serve no practical purpose or would aid in the perpetuation of illegalities. It cited *inter alia* **Regina v Monopolies and Mergers Commission and Another ex parte Argyle Group, Plc** [1986] 2ALL ER 257, **East African Cables Limited v The Public Procurement Complaints Review & Appeals Board and Kenya Power and Lighting Company Limited** Civil Application No. 109 of 2007 (unreported) and **Suchan Investment Limited v Ministry of National Heritage and Culture & 3 others** [2016] eKLR.

15. Finally, citing public interest and public trust, it submitted that certain resources have great importance to the public as a whole and it would be wholly unjustified to make them a subject of private ownership and that the government has a duty to protect the resources for the enjoyment of the general public rather than permit their use for private ownership or commercial purpose to the exclusion of the public. It placed reliance on **Articles 10 (2) (d) and 73 (1)** of the **Constitution** and urged the court to dismiss the Notice of Motion with costs.

16. The ex parte applicant responded through supplementary submissions. It argued that the 1<sup>st</sup> respondent failed to follow the procedure laid down under **Section 14** of the **National Land Commission Act** by not giving it notice that it was investigating or reviewing its title and occupation of the suit property. Regarding the 3<sup>rd</sup> interested party's allegation of illegal acquisition, it argued that no evidence has been presented to back such claims. That the decision to revoke its title was contrary to provisions of **Articles 47 (2) and 50** of the **Constitution of Kenya**, **Section 4** of the **Fair Administrative Action Act**, **Section 14 (8)** of the **National Land Commission Act**, **Sections 131 and 151** of the **Land Act** and the rules of natural justice. It cited *inter alia* the cases of **Republic v National Land Commission Ex parte Krystalline Salt Limited** [2015] eKLR., **Municipal Council of Mombasa v Republic & Umoja Consultants Ltd** Civil Appeal No. 185 of 2001 and **Sceneries Limited v National Land Commission** [2017] eKLR.

17. The ex parte applicant concluded by submitting that in the impugned notice, the respondent purported to render "a determination" as opposed to a "recommendation". It urged that the prayers in its application be granted as sought. A reading of the supplementary submissions also reveals several attempts to adduce evidence through submissions. Needless to state, that is unacceptable.

18. I have carefully considered the application, the affidavits, grounds of opposition and submissions. From the onset, I must reiterate that while exercising its judicial review jurisdiction, the court is concerned purely with the decision-making process and not the merits of the decision. The mandate of a judicial review court was stated by the Court of Appeal in **Municipal Council of Mombasa v Republic & another** [2002] eKLR as follows:

*... judicial review is concerned with the decision -making process, not with the merits of the decision itself. ... 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.*

19. With the above background in mind, I have distilled two issues for determination; whether the ex parte applicant has met the threshold for granting of judicial review orders of certiorari, mandamus and prohibition, and if so, whether the orders sought should issue.

20. The 1<sup>st</sup> respondent is a constitutional commission established under **Article 67** of the **Constitution** which also defines its functions. Further, under **Article 68 (c) (v)**, parliament was mandated to enact legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality. Accordingly, parliament enacted the **National Land Commission Act, 2012** which came into operation on 2<sup>nd</sup> May 2012. **Section 14 (1)** of the Act provides:

*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.*

21. The ex parte applicant herein seeks an order of certiorari to remove into this court for purposes of being quashed, a decision that it contends the 1<sup>st</sup> respondent made and published through Gazette Notice Number 1716 in the Kenya Gazette of 22<sup>nd</sup> February 2019, which decision it claims revoked the title in respect of L.R. No. 5211/2. The proceedings herein were stated on the face of Chamber Summons dated 17<sup>th</sup> April 2019 to have been commenced *inter alia* under **Order 53 Rules 1, 2, 3 and 4** of the **Civil Procedure Rules**.

22. Since the ex parte applicant seeks certiorari, **Order 53 Rule 7 (1)** of the **Civil Procedure Rules** comes into play. It provides:

*In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.*

23. A perusal of the affidavit in support of Chamber Summons dated 17<sup>th</sup> April 2019 through which leave to commence these proceedings was sought reveals that the actual decision that is sought to be quashed was not annexed. Equally, the decision was not filed with the Notice of Motion that is the subject of this judgment.

24. I have had occasion to read Gazette Notice Number 1716 as published at page 637 of the Kenya Gazette of 22<sup>nd</sup> February 2019. It communicates that the 1<sup>st</sup> respondent conducted proceedings and directed the 3<sup>rd</sup> respondent "to revoke the titles for L.R. No. 5211 and L.R. No. 5212 respectively held by Karati Farm and Top Farm and vest the property to Kenya Agricultural and Livestock Research Organization

*(KALRO) .... The full determination may be collected from the Legal Directorate Registry ..."*

25. It is thus abundantly clear that the Gazette Notice is not the decision and that the decision itself could be obtained from the 1<sup>st</sup> respondent's Legal Directorate Registry. Although attempts were made by the ex parte applicant in its submissions to explain that the decision was not availed to it, such explanations remain invalid to the extent that no evidence was tendered by way of affidavit to form a basis for the submissions. I agree with the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that the Gazette Notice cannot substitute the decision since it does not comprise the record of the 1<sup>st</sup> respondent that would provide material on the basis of which to determine whether the ex parte applicant was accorded a fair hearing.

26. **Order 53 Rule 7 (1)** of the **Civil Procedure Rules** is couched in mandatory terms. Thus, failure to avail a copy of the decision sought to be quashed coupled with failure to account for such an omission is fatal to an application for an order of certiorari, more so in the context of this matter where the complaint is that the ex parte applicant was never notified of the proceedings leading to the decision. To verify the ex parte applicant's allegations of denial of a fair hearing, the court would need to peruse the actual decision as well as the proceedings leading to the said decision. The obligation to put all those materials before the court is upon the ex parte applicant.

27. In this case, the ex parte applicant also seeks an order of mandamus to compel the 1<sup>st</sup> respondent to reinstate it as the owner of L.R No. 5211/2 and an order of prohibition to restrain the 3<sup>rd</sup> respondent from acting upon the 1<sup>st</sup> respondent's decision. By its nature, an order of mandamus commands performance of a public duty while an order of prohibition forbids a body from acting in excess of its jurisdiction or in contravention of the laws of the land. Without quashing the decision that the ex parte applicant has complained about, there would be no basis upon which to grant mandamus to compel the 1<sup>st</sup> respondent to reinstate the ex parte applicant as owner of L.R No. 5211/2 or prohibition to restrain the 3<sup>rd</sup> respondent from executing the decision, as is sought. As pleaded in this matter, the prayers of certiorari, mandamus and prohibition are joined at the hip. It follows therefore that the ex parte applicant has not met the threshold for granting of judicial review orders of certiorari, mandamus and prohibition.

28. In view of the foregoing, the ex parte applicant is not entitled to the reliefs sought. Notice of Motion dated 10<sup>th</sup> June 2019 is dismissed with costs to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents and to the 3<sup>rd</sup> interested party. I do not award any costs to the 1<sup>st</sup> respondent and to the rest of the interested parties.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2021.**

**D. O. OHUNGO**

**JUDGE**

Delivered through Microsoft Teams video link in the presence of:

No appearance for the Ex Parte Applicant

No appearance for the 1<sup>st</sup> and 4<sup>th</sup> Respondents

Ms Wanjeri holding brief for Ms Cheruiyot for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

No appearance for the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties

No appearance for the 3<sup>rd</sup> Interested Party

No appearance for the 4<sup>th</sup> Interested Party

Court Assistant: E. Juma