REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC. MISCELLANEOUS APPLICATION NO. 35 OF 2019

IN THE MATTER OF: THE CONSTITUTION OF KENYA,

THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 AND

THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES,2010

AND

IN THE MATTER OF: REVIEW OF PLOT NEW NO. B 228 OLE KASASI B

BETWEEN

REPUBLIC.....APPLICANT

VS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

COUNTY GOVERNMENT OF KAJIADO....2ND RESPONDENT

AND

KAMAU MBUGUA.....INTERESTED PARTY

IVAN MADEGWA.....EX PARTE APPLICANT

JUDGEMENT

Through a Chamber Summons Application dated 24th April, 2019 the Ex parte Applicant was granted leave to commence judicial review proceedings against the Respondents. The substantive Notice of Motion Application dated 6th June, 2019 was filed on the same date. Therein the ex parte Applicant sought for the following orders;

(a) That an order of Certiorari do issue for purposes of quashing the decision of the Respondents dated 6th November, 2018 purporting to cancel the Ex parte Applicant's allocation of Plot No. B 228 Ole Kasasi B.

(b) That an order of Prohibition do issue restraining the Respondents whether by themselves, their agents or persons acting on their behalf from implementing any decision or resolution from a review relating to the Ex parte Applicant's parcels of land known as Plot No. B228 Ole Kasasi B.

(c) That the costs of the application be provided for.

The 1st Respondent filed Grounds of Opposition dated 7th June, 2019 seeking for orders that the instant Application be dismissed as its decision was in line with statutory and administrative functions and the issues raised herein relating to ownership of the suit land can only be determined through an ordinary civil suit.

The 2nd Respondent filed a replying affidavit sworn by Jonathan Oseur, the Land Registrar Kajiado County where he deposes that as per their records, the *ex parte* Applicant was allocated Plot No. 511/Residential Ole Kasasi T in 2003 following a successful transfer. He explains that following a validation process in 2016, the *ex parte* Applicant's property 511/Residential – Ole Kasasi T was validated as Plot No. B. 227. He contends that the suit property Ole Kasasi/1043 Residential supposedly validated as Plot No. B 228 Ole Kasasi by the *ex parte* Applicant is currently under dispute between the *ex parte* Applicant and Interested Party wherein both parties were claiming ownership culminating in the said dispute referred to the 1st Respondent including the Dispute Resolution Committee. Further, the 2nd Respondent is yet to receive further directives on the conclusive outcome from the 1st Respondent in that regard. He reiterates that in view of the accusations and counter accusations made by both parties, there is need to resolve the ownership dispute by way of viva voce evidence and as such the instant application is an abuse of the court process.

The Interested Party opposed the application and filed a Replying Affidavit where he deposes that he is the bona fide and absolute registered proprietor of the property known as B228 (formerly 460/Business) hereinafter referred to as the 'suit land', situated at Olekasasi Trading Centre. He claims the *ex parte* Applicant illegally, wrongfully and unlawfully encroached on the suit land which is adjacent to his Plot No. 511 and fenced it, claiming ownership. He contends that he was allocated the suit land in 1998 and following a validation exercise in November 2016 by the 2nd Respondent, he was issued with a fresh Letter of Allotment on 13th November, 2018. He claims that the *ex parte* Applicant's Letter of Allotment for the suit land was cancelled as it was found that the said land belonged to him. He avers that despite several interventions by the 2nd Respondent, the *ex parte* Applicant has willfully refused to vacate the suit land and remove all encroachments including developments thereon. He insists he has been diligently remitting land rates and statutory dues for plot number B228 (Formerly 460/Business) to the County Council of Ol Kejuado and now County Government of Kajiado. He confirms having filed Ngong ELC No. 23 of 2019 due to the *ex parte* Applicant's continuous encroachment on the suit land and fencing the only access he has to the said plot. He states that the payment receipts by the *ex parte* Applicant are for a different plot being Ole Kasasi/1043 Residential and not plot B228 (formerly 460/Business). He reiterates that he started pursuing this matter with the County Council of Ol Kejuado and now the County Government of Kajiado in 2007 and the *ex parte* Applicant was advised to vacate the disputed plot and restrict his developments to the *ex parte* Applicant's plot measuring 50 x 100. Further, that being the absolute registered owner of the suit land and with a title, it vests in him all the title interest and right to land. He sought for the instant application to be dismissed or struck out.

The ex parte Applicant filed a supplementary affidavit where he reiterated his claim and insisted the actions of the 2nd Respondent are meant to steal a march against him and confer an unfair advantage to the Interested Party.

The Application was canvassed by way of written submissions.

Submissions

Ex parte Applicant's submission

The ex *parte* Applicant in his submissions contended that the dispute over the suit land emerged after validation exercise had been undertaken on 25th October, 2016 when the Interested Party laid claim on it leading to the establishment of an *Ad hoc* Committee whose decision is the subject of this Application. Further, the Committee ignored obvious facts that the *ex parte* Applicant's Letter of Allotment indicated that the suit land is residential while the Interested Party's Letter of Allotment indicated it is commercial. He argued that the said Committee should have granted him a fair hearing before revoking the Letter of Allotment as it failed to consider the fact that he had openly and without secrecy lived on the suit land with his family since 2003. He insisted the Committee exceeded its mandate by depriving him, his constitutional right to own property since it was not legally established, neither did it have Rules of Procedure nor were parties notified of the next step in case one was aggrieved with its decision. He reiterated that the Committee established by the 2nd Respondent to hear the dispute comprised of almost all its employees while the 1st Respondent who was expected to be a neutral arbiter was not substantially seized with the matter, neither did it produce documents of how it afforded the *ex parte* Applicant a fair hearing. He explained that this application is not an abuse of the Court process and the 2nd Respondent did not produce proceedings from the *Ad hoc* Committee to determine its procedural fairness in arriving at its decision. Further, that in its replying affidavit it acknowledges the existence of a dispute over the suit land between the *ex parte* Applicant and the Interested Party which is yet to be resolved, as it was referred to the 1st Respondent. It further argued that it was unfair for the 2nd Respondent to issue a Letter of Allotment to the Interested Party for the suit land despite existence of a dispute on it. He averred that his Application is not *sub judice* as it deals with procedural fairness and that the court has jurisdiction to grant the orders sought. He further submitted that he filed his defence in Ngong ELC No. 23 of 2019 which was instituted by the Interested Party seeking to determine ownership of the suit land and relied on Section 14 of the National Land Commission Act to support his arguments that the 1st Respondent's decision dated 6th November, 2018 was ultra vires as it ought to have been made on 1st May, 2017 since the Act came into force on 2nd May, 2017. Further, that the decision was ultra *vires* as it was made by a public body and hence cannot stand the test of judicial scrutiny and as such the Application deals with procedural impropriety of the Respondent in arriving at its decision

To buttress his averments, he relied on various decisions including: **Republic v Commissioner of Domestic Taxes Ex Parte Sony Holdings Limited (2019) eKLR; Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 Others (1997) eKLR; Republic v Commissioner of Domestic Taxes Ex Parte Sony Holdings Limited (2019) eKLR; Rukaya Ali Mohamed v David Gikonyo Nambacha & Another, Kisumu HCCA No.9 of 2004; and Republic vs National Land Commission & 2 Others ex Parte Biren Amritlal Shah (2019) eKLR**.

The 1st Respondent did not file any submissions.

The 2nd Respondent in its submissions contended that the instant application is sub *judice* and an abuse of the court process as there is already an existing suit filed at Ngong being ELC No. 23 of 2019 before a court of competent jurisdiction to determine the matters raised herein by the *ex parte* Applicant, who on his own motion opted not to respond but instead filed the instant Application thus violating Section 6 of the Civil Procedure Act. It insisted the Application is an abuse of the court process and must be struck out with costs or be stayed as this court is restricted to administrative issues.

To buttress its averments, it relied on the following decisions: **Nguruman Limited v Jan Bonde Nielsen & Another (2017) eKLR; Church Road Development Company Ltd v Barclays Bank of Kenya Ltd & 2 Others (2007) eKLR; Benja Properties Limited v Savings & Loans K. Ltd (2005) eKLR; Muturi Investments Ltd v NBK (2006) eKLR** and **Abigail Baram v Mwangi Theuri ELC 393 of 2013.**

The Interested Party in his submissions contends that he was allocated the suit land on 29th October, 1998 while the *ex parte* Applicant whose land is adjacent to the suit land encroached on it. He argued that the *ex parte* Applicant was accorded a fair hearing and fair administrative processes, as he admitted that he was summoned by the Respondents to discuss the dispute herein. Further, that the Committee hearing the dispute considered oral submission of parties, witnesses and supporting documentation by its letter dated 9th November, 2018. On whether the Respondent acted Ultra *Vires*, the Interested Party relied on Article 67(2) (e),67(3) and 68(c)(v) of the Constitution and Section 3(b) and 14 of the National Land Commission Act to argue that the 1st and 2nd Respondents acted within their constitutional mandate to resolve disputes on allocation of public land by following the due process. He further argued that the *ex parte* Applicant declined to file the aforementioned civil suit in Ngong but instead filed this application relating to determination of rights and not implementation of 1st and 2nd Respondents' decision. He insisted that in this application, the Court will not determine the ascertainment of the true ownership of the disputed suit land as this can only be done through a substantive suit. He reiterated that the instant application does not meet the threshold to grant Certiorari and Prohibition orders as the ex parte Applicant failed to produce any evidence tendered against him which needed to be quashed neither was any eviction notice or order issued against him as he still occupies the suit land. To support his arguments, he relied on the following decisions: **R v Aga Khan Education Services *ex parte* Ali Sele & 20 Others High Court Misc. Application No.12 of 2002; Russel vs Duke of Norfork (1949) 1 All ER at 11B; Livingstone Kunini Ntutu v Ministry of Lands & 4 Others (2014) eKLR Court of Appeal decision on Kenya National Examination Council vs Republic (1997) eKLR.**

Analysis and determination

Upon consideration of the Notice of Motion Application dated 6th June, 2019, including the respective parties' affidavits, statutory statement, annexures as well as the rivalling submissions, the following are issues for determination:

· Whether the *ex parte* Applicant is entitled to the Judicial Review orders sought?

· Who shall bear the costs of the application.

As to whether the *ex parte* Applicant is entitled to the Judicial Review orders sought and who should bear the costs of this Application. The *ex parte* Applicant sought for an order of Certiorari to quash the decision of the Respondents' dated 6th November, 2018 purporting to cancel his allocation of Plot No. B 228 Olekasasi B and an order of Prohibition to restrain the said Respondents' whether by themselves, their agents or persons acting on their behalf from implementing any decision or resolution from a review relating to Plot No. B228 Olekasasi B. He contended that the proceedings undertaken by the 1st and 2nd Respondents to determine the ownership of the suit land was biased, discriminatory and materially flawed amounting to an injustice against him. He confirmed participating in the proceedings but insists his evidence was not considered. The Respondents and the Interested Party contend that this is not the right forum to determine the ownership of the suit land claimed by the *ex parte* Applicant and the Interested Party. The Respondents insist they acted in accordance with the law. The Interested Party contends that he is the owner of the suit land as he holds Letters of Allotment to that effect. Further, that the *ex parte* Applicant has encroached thereon and put up structures which culminated into his filing the aforementioned suit at Ngong but the *ex parte* Applicant declined to defend it and instead opted to file this suit. However, the ex parte Applicant in his submissions confirms he is defending the Ngong suit which was filed prior to this judicial review application.

Based on the averments from the respective parties herein, the key question we need to ponder is whether the *ex parte* Applicant was accorded a due process by the Respondents to determine the dispute in respect to ownership of the suit land.

Lord Diplock in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** clearly articulated the standards set for judicial review when he stated thus:

> **"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 it...By '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 it...I 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.'**

In line with these set standards, I will proceed to decipher whether the *ex parte* Applicant was accorded a due process in the determination of the dispute herein. However, before, I proceed to do so, I wish to first provide a brief background of the dispute herein. From the correspondence annexed to the *ex parte* Applicant's and Interested Party's affidavits, I note the dispute over the suit land had been longstanding as it spanned over a decade. The *ex parte* Applicant holds a Letter of Allotment for plot B 227 (formerly plot 511 residential) while the Interested Party holds a Letter of Allotment for plot B 228, which plots are adjacent to each other. The ex parte Applicant claims when he purchased his land, it measured 100*100 but admits the County Council of Ol Kejuado informed all residents at Olekasasi T. Centre that Council through its WTP & Marketing Committee meeting held on 15th June, 2004, Min 26/2004, informed the residents that they would henceforth be required to own 50 x 100 plots and advised them to regularize their position. He insists he regularized his plot and he was issued with a second letter of allotment dated 22nd April, 2007 for plot 1043/Residential Ole Kasasi T. Centre. Further, that on 25th October, 2016, the 2nd Respondent conducted a validation exercise on the various plots at Ole Kasasi T. Centre and the Applicant's plots measuring 50*100 each were validated with Plot 511/ Residential Ole Kasasi T. Centre validated as Plot B 227 while Plot 1043/Residential Ole Kasasi T. Centre as Plot B 228. He claims on 27th October, 2016, after the validation exercise the Interested Party in the company of the

2nd Respondent's Physical Planner with the local Chief came to his house demanding for the Letter of Allotment for Plot B 228 and cancelled the same. The Interested Party on the hand explains that he was allocated the suit land in 1998 and following a validation exercise in November 2016 by the 2nd Respondent, he was issued with a fresh Letter of Allotment on **13th November, 2018.** I note the *ex parte* Applicant produced the Transfer of Plot dated 22nd September, 2003 from Julius Mayiani Leshao to himself for plot 511/ Residential Ole Kasasi T. Centre while the Interested Party furnished copies of receipts to prove he had been paying land rates for the disputed plot. From the correspondence it is evident the matter was then referred to the *Ad Hoc* Committee under the 1st Respondent to determine the dispute herein, which determination is the fulcrum of this application. As relates to administrative action, section 47 of the Constitution provides that: **'(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.'**

While Section 7 of the Fair Administrative Actions Act provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to— (a) a court in accordance with section 8; or (b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Subsection (2) provides that a court or tribunal under subsection (1) may review an administrative action or decision on any of the grounds listed in the said section.

In the case of **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001,** it was held that:

> **"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to 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…The court should not act as a Court of Appeal over the decider which 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…It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorized by the statute creating it and in the manner authorized by statute."**

Further in the case of **Republic vs. National Employment Authority & 3 others Exparte Middle East Consultancy Services Limited (2018) *eKLR,*** Justice Mativo discussed the discretionary remedy of judicial review and observed as follows, "**This application means that even if a court finds a public body has acted wrongly it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for judicial review where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration or where the judge considers that an alternative remedy could have been pursued."**

While, in the case of **Reid vs. Secretary of state for Scotland (1999) 2AC 512** it was held, **"Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence.**

See also the case of **Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 Others (1997) eKLR.**

From a careful perusal of the correspondence presented by the respective parties, I note vide a letter dated 4th December, 2018 written by the *ex parte* Applicant (***annexure 'IM 7'***) it is evident he participated in the hearing of the *Ad hoc* committee meeting in respect to the determination of the dispute of the suit land but expressly states at paragraph two (2) that he is dissatisfied with their verdict. At paragraph 9 of the said letter, he explains the proceedings therein and confirms he tendered evidence, called witnesses, produced documents including his Letter of Allotment but disagrees with the determination of the dispute and insists the same was malicious. Further, he now seeks to quash the implementation of the said decision. I note the Ol Kejuado County Council as well as the County Government of Kajiado had on several occasions exchanged correspondence with the ex parte Applicant confirming the disputed plot which forms the fulcrum of this application, belonged to the Interested Party and directed him to vacate the same but he declined to do so.

In relying on the above cited judicial authorities including the legal provisions quoted above, I find that the *ex parte* Applicant was indeed accorded a fair hearing as he even admits so. Even though he is dissatisfied with the outcome, I opine that the Respondents acted within the law to convene the hearing as well as determination of the said dispute. I beg to disagree with the *ex parte* Applicant that in making their findings, they failed to observe the Constitutional principles of reasonability and procedural fairness as he confirms that he called witnesses, produced documents including Letters of Allotment before the said Committee. He cannot turn around and say that the 1st Respondent was not mandated to hear the dispute when he presented himself before the National Land Commission and produced documents and witnesses. Insofar as he is aggrieved with the outcome of the dispute, I opine that since he has not demonstrated that there was failure by the Committee members to consider all the materials presented before it, before arriving at a finding, or there was an amount of 'unreasonableness' on their

part to obviate the rules of natural justice. It is my considered view that this is not the right forum for the ex parte Applicant, as he has an alternative remedy to pursue, since the Interested Party already has his Letter of Allotment and with the determination over ownership of the suit land still pending before Ngong vide ELC No. 35 of 2019. To my mind, it would be pertinent for him to defend the said suit, present all his documents in the said forum and seek for cancellation of the Interested Party's Letter of Allotment, and let the said Court which is competent make its determination.

In the circumstances, I find that the ex parte applicant's Notice of Motion Application dated 6th June, 2019 unmerited and will dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20TH DAY OF SEPTEMBER, 2021

CHRISTINE OCHIENG

JUDGE