



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC JUDICIAL REVIEW MISC NO. E001 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE TO FILE A MOTION ON

JUDICIAL REVIEW FOR ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA 2010,

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

IN THE MATTER OF THE LAND CONTROL ACT CAP 302

IN THE MATTER OF THE CIVIL PROCEDURE ACT AND RULES

IN THE MATTER OF THE LAW REFORM ACT CAP 26 SECTIONS 8 AND 9

AND

IN THE MATTER OF LAND REFERENCE NO. KERICHO/KIPTERE/5860, 5861, 5862 & 5863

AND

IN THE MATTER OF THE LAND CONTROL BOARD OF BELGUT

BETWEEN

DAVID KIPRUGUT CHERUIYOT.....APPLICANT

-VERSUS-

THE LAND CONTROL BOARD OF BELGUT.....RESPONDENT

RULING

1. By a Chamber summons dated the 24th May, 2021, brought pursuant to the provisions of Order 53 Rule 1(1) & 2 of the Civil Procedure Rules, Section 8 & 9 of the Law Reform Act and all other enabling provisions of the law, the Applicant herein sought leave to file a substantive Notice of Motion on Juridical Review for orders of Certiorari to remove unto this court the decision by the Respondent to refuse to grant a consent to the Applicant, so as to have the same quashed.

2. The Applicant also sought for leave to apply for an order of Mandamus to be effected to the Respondent to compel it to consider its decision within a specified period of time on the Applicant's application for consent, and to give reasons thereof should the decision be adverse and costs of the application.

3. The said application is supported by the grounds on the face of it and on the verifying affidavit by the Applicant dated the 24th May 2021.
4. Pursuant to the filing of the said motion, the court via its orders of 26th May 2021 directed that the application be served upon the Respondent who was granted leave to respond to the within seven(7) days and thereafter parties to file and serve their respective written submissions.
5. Service was effected upon the Respondent on the 31st May 2021, as per the affidavit of service herein filed on 15th of June 2021, who neither filed a response nor written submissions to the application. The Applicant complied and filed their written submissions on 14th June 2021 to which I shall summarize as herein under.

The Applicant's submissions

6. The Applicant's submission was that he was the registered proprietor of land parcels No. Kericho/Kiptere/5860, 5861, 5862 & 5863 to which he had sought to transfer as per the requirement of the law. That on several occasions he has appeared before the Respondent and sought consent from the Respondent who has verbally declined to grant the consent.
7. That the Respondent's refusal to give the reasons in writing for their refusal to grant the said consent was irregular, un-procedural and contrary to the provisions of Article 47 of the Constitution and Section 5 of the Fair Administration Actions Act.
8. The Applicant relied on the provisions of Section 6(1) of the Land Control Act which places a requirement that before any transaction affecting agricultural land is undertaken, the consent of the Land Control Board must be sought and obtained to effect any dealings of the land.
9. The Applicant further relied on Section 8 and 9 of the Land Control Act, which deals with the procedure for the application of a consent, to submit that the grant or refusal to grant a consent must be given in writing.
10. That although the decision to grant or not to grant consent was an exercise of discretion, yet the said discretion should not be abused since public offices are held in trust for the people of Kenya and therefore public officers should carry out their duties for the benefit of the people of Kenya. That to deny him his lawful rights which was donated by Article 40 of the Constitution, without proper discretion was wrongful exercise of discretion.
11. The Applicant further submitted that section 5(1) of the Fair Administrative Actions Act required public authorities to give reasons for their decisions in line with Article 47 of the Constitution and that these provisions were similar with those of Section 16 of the Land Control Board. The Applicant relied on the decided case in **Agricultural Finance Corporation vs Land Control Board Loitokitok & 3 Others (2014) eKLR** to buttress his submissions.
12. The Applicant further conceded that the court could not by way of an order of Mandamus compel the Respondent to issue the consent, but rather it could compel the Respondent to consider his application and make a decision one way or the other. That the Respondent was obliged under Article 47 of the Constitution to furnish him with the written reasons after considering his application more so where the decision given was likely to adversely affect the Applicant. The Applicant sought for the court to grant his application.

Determination.

13. I have considered the Applicant's unopposed application. Order 53 Rule 1 of the Civil Procedure Rules, is the applicable law on leave to commence Judicial Review proceedings. The said proviso provides as follows:

(1)No application for an order of Mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

(2)An application for such leave as aforesaid shall be made ex-parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the Applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

14. As seen from the above, no application for Judicial Review orders should be made unless leave of the court was sought and granted.

15. In the case of the **Republic v County Council of Kwale & another ex parte Kondo & 57 others (1998) 1 KLR (E&L)** the court held as follows:

*“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the Applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the Applicant the test being whether there is a case fit for further investigation at a full **inter partes** hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially”.*

16. In the present application, the substantive issue that requires to be determined is whether an arguable case has been shown for leave to be granted to the Applicant to commence judicial review proceedings. The Applicant is seeking orders of Certiorari and Mandamus against the Respondent herein to compel them to either grant him consent to transfer his parcels of land No. Kericho/Kiptere/5860, 5861, 5862 & 5863 or in the alternative to give him reasons in writing for their refusal to grant the said consent.

17. It was held in **R vs Panel on Take-Overs and Mergers, ex parte Datafin PIC & Another**.1987 ALL E.R 564, that in order to ascertain whether a particular action, decision or failure to act is amenable to judicial review, the Courts will generally consider whether the relevant matter arose out of the exercise of a public function. The question whether a function that is exercised has a public element will depend on a number of factors, including the source of the power being exercised, and if legislation is that source of power, this is a strong indicator that the relevant matter is amendable to judicial review.

18. Section 6(1) of the Land Control Act provide that all transactions affecting agricultural land is void for all purposes unless the Land Control Board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

19. Section 16 of the Land Control Act provides as follows:

(1) Every decision of a board shall be given in writing in the prescribed manner and shall be signed by or on behalf of the chairman or other person presiding, and where consent is refused or an appeal is dismissed the reasons for the refusal or dismissal shall be stated in the decision.

(2) A copy of the decision shall in every case be delivered or sent by post to the Applicant and, in the case of an appeal, to the board whose decision is appealed against.

20. From the above provision of the law, the same clearly imposes a statutory duty on the Board to give its decisions in writing stating the reasons thereof. The Applicant has deponed that the decision declining to grant the consent was verbal and that no reasons were given. That being the case, it is clear that the refusal to give the consent by the Respondent was clearly un-procedural and contrary to the provisions of Section 16 of the *Land Control Act* and Article 47 of the Constitution, as the same ought to have been given in written and the reasons thereof.

21. Whereas it is true that the decision whether or not to grant a consent is an exercise of discretion, yet there are circumstances under which the Court would be entitled to intervene and interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See **Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze [2008] 2 EA 323**.

22. I therefore find that the Respondent in the present circumstance, as a decision-maker, failed to exercise discretion in the performance of his duty and although this Court cannot by way of an order of Mandamus compel the Respondent to issue the consent, I direct as follows.

i. The order of Mandamus is hereby granted compelling the Respondent to consider the Applicant's application for consent and give the Applicant reasons if its decision is adverse to the interest of the Applicant within 30 days from the date of service of this order.

ii. In default of such reasons, the Respondent shall be deemed not to have any reasons in which event an order of Mandamus shall issue compelling the Respondent to issue the said consent.

iii. The Applicant has also sought for orders of certiorari to remove unto this court the decision by the Respondent to refuse to grant a consent to the Applicant, as there is no competent decision made by the Respondent, there is no valid decision capable of being quashed.

iv. There however will be no order as to costs as the Applicant in the substantive motion framed the prayers in the form of leave rather than for substantive reliefs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 21ST DAY OF OCTOBER 2021

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE