



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT SIAYA

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NUMBER 1 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY

FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF THE LAND ACT NUMBER 6 OF 2012

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT

AND

IN THE MATTER OF THE REPOSSESSION OF PLOTS IN SIAYA TOWN

AND

IN THE MATTER OF THE NOTICE PUBLISHED IN THE DAILY NATION

BY COUNTY GOVERNMENT OF SIAYA DATED 19<sup>TH</sup> AUGUST 2021

BETWEEN

RUTH AKELO WERE.....APPLICANT

AND

COUNTY GOVERNMENT OF SIAYA..... RESPONDENT

ROSELLA NYANJA.....INTERESTED PARTY

RULING

**Ex-parte Applicant's case**

1. Pursuant to the provisions of **Order 53** of the **Civil Procedure Rules** and **Sections 8** and **9** of the Law Reform Act, the *ex-parte* applicant filed a chamber summons application dated 16/09/2021 against the respondent seeking the following verbatim reliefs:

a) Spent

b) That the applicants(sic) herein be granted leave to apply for an order of certiorari, to remove and bring to the high court for purposes of quashing the decision by the respondents(sic) dated 19/08/2021 repossessing the applicants(sic) plot no.LR 12045/121 and requiring the applicant to appear before the siaya county appeals panel between 6<sup>th</sup> September and 17<sup>th</sup> September 2021 to tender an appeal to the said notice of repossession.

c) That the applicants(sic) herein be granted leave to apply for an order of prohibition directed against the respondents(sic) prohibiting them through their servants and/or agents or directly from in any way interfering with or taking any action against the applicants(sic) property known as plot no.LR 12045/121 of the on any of the grounds and reasons set out in County Government of Siaya notice published in the daily nation dated 19/08/2021.

d) That the leave granted do operate as a stay of the intended appeal of Siaya County Appeals Panel on Land Administration & Management proceedings against the applicant(s) scheduled for 6<sup>th</sup> to 17<sup>th</sup> September 2021, or of any such action founded on the respondent(s) notice published in the daily nation dated 19<sup>th</sup> August 2021 or on any of the reasons therein.

2. The summons is supported by a statement of facts and an affidavit verifying the facts both dated 17/12/2020 and annexures thereto. The summons is grounded on the following main grounds; (i) in contravention with **Articles 23, 40, 47 (1) and (2) and 50 of the Constitution**, the *ex-parte* applicant has been deprived off her property known as LR Number 12045/121(**suit property**), (ii)the respondent did not disclose the specific provisions of the **Land Act** and **National Land Commission Act** that gave it jurisdiction to repossess undeveloped properties within Siaya town and, (iii)The respondent has purported to repossess the suit property without affording the *ex-parte* applicant an opportunity to be heard.

#### The respondent's case

3. The respondent through its Director of Lands and Survey swore a replying affidavit dated 28/09/2021 and a further replying affidavit dated 3/11/2021.He contended that the suit property is alienated public land which had been allocated on 1/08/1980 for development of a residential house subject to terms and conditions contained in the lease. The conditions in the lease were that the lessee would pay rates, rent, taxes and outgoings and that the property would be developed within 24 months from the time the grant was made. He averred that in the event of default to comply with these terms, the property would in accordance with **Section 12 (9) of the Land Act** automatically revert back to either the national or county government. He contended the respondent had set up an internal redress mechanism for an aggrieved owner of a repossessed property to be accorded a hearing. He averred the summons failed to meet the threshold set out in law for grant of orders for judicial review and urged the court to dismiss the motion with costs.

#### The interested party's case

4. The interested party filed a replying affidavit dated 4/10/2021. She contended she was not aware that she had been registered as a rate payer and in any case the issues between her and the applicant were conclusively dealt with in **Siaya ELC Number 93 of 2018**. In essence she contended the summons had not disclosed a cause of action against her and the suit was *res judicata*.

#### The ex-parte applicant's submissions

5. The *ex-parte* applicant filed written submissions dated 2/11/2021.She contended that though she is a *bonafide* purchaser for value, she was dispossessed off the suit property from 2014 to January 2021 by the interested party. Further, during this period of dispossession, the interested party tore down a property that was then existing in the suit property. She contended that the notices issued by the respondent were in contravention with **Articles 40, 47 50(1) and 165(1) of the Constitution**, **Section 23(1) of the ELC Act**, **Sections 14(1) and (3) and 15 of the National Land Commission Act** and that the respondent acted in excess of its jurisdiction. On this, she placed reliance on among others, the authorities of **Macfay v United African Ltd (1961) 3 ALL ER 1169 at 1142** and **Satima Enterprises Limited vs Registrar of Titles & 2 Others (2012) eKLR**. The *ex-parte* applicant contended the respondent's actions were illegal and unreasonable and on this, she placed reliance on the decision of **Robert Mutiso Lelli & Cabin Crew Investments Limited vs National Land Commission & 3 others (2017) eKLR**.

#### The Respondent's submissions

6. The Respondent filed written submissions dated 18/11/2021. It contended that the summons had failed to meet the threshold of judicial review and on this, it placed reliance on the case of **Pastoli v Kabale District Local Government Council and others [2008] EA 300** whereby the court held that for one to succeed in an application for judicial review, one must demonstrate that the decision was illegal, irrational and bogged with procedural impropriety. It submitted that the procedure it undertook was legal, rational, procedural and that the *ex-parte* applicant had not exercised the doctrine of exhaustion of remedies.

7. The respondent submitted that the *ex-parte* applicant failed to fulfil the special conditions of the lease and thus the land reverted back to the county government. It stated that the *ex-parte* applicant had not tendered any evidence that she intended to build on the suit property thus the suit property warranted to be repossessed in accordance with **Section 12 (9) of the Land Act**. The Respondent outlined the processes it undertook.

#### Interested party's submissions

8. The interested party filed written submissions dated 19/11/2021. She contended that by virtue of the decision of **Siaya ELC 93 of 2018, Ruth Akelo Were (suing as the administrator of the estate of Dr. Joab Benaiah Ochieng) vs Joash Omondi Were & Roselle Otieno Nyaya**, the suit was *res judicata*. On this, she placed reliance on the case of **Pangaea Holdings LLC & Another v Hacienda Development Ltd & 2 others (2020) eKLR** among others. She contended that despite the applicant obtaining judgement against her in **Siaya ELC 93 of 2018**, the *ex-parte* applicant had failed to extract a decree. She urged the court to dismiss the summons with costs to her.

## **Analysis and determination**

9. Having considered the *ex-parte* applicant's summons, the statutory statement and verifying affidavit, the respondent's and interested party's replying affidavits, the respondent's further replying affidavit, annexures and parties' written submissions, these are the issues for determination; (i) whether the *ex parte* applicant has established grounds for the court to grant leave to apply for judicial review, and (ii) if the answer to issue (i) is in the affirmative, whether the leave shall operate as a stay of the implementation of the decisions of the respondent.

I will proceed to analyze the legal and jurisprudential framework on the issues in a sequential manner.

10. The first issue is whether the *ex-parte* applicant has established grounds for the court to grant leave to apply for judicial review. The applicant contended that the respondent is in breach of **Sections 5 and 14** of the **National Land Commission Act**. **Sections 14** reads thus: -

***(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.***

11. This provision of law deals with review of public land by the National Land Commission in order to establish the propriety or legality of dispositions in such parcels of land within a period of five years from the date of commencement of the Act. The date of commencement of the Act was 2/05/2012. The National Land Commission's mandate to review grants and dispositions in respect of public land therefore ended on or about 1/05/ 2017. This court has been unable to establish the nexus between this provision of law and **Section 5** of the **National Land Commission Act** to the issues in dispute because the issue in the present suit is on repossession of land by a county government for failure to develop a parcel of land within requisite timelines and not a review of the acquisition process.

12. Purportedly in accordance with the provisions of **Land Act** and **National Land Commission Act**, the respondent issued a notice to allottees and lessees of undeveloped land within Siaya County without disclosing the applicable provisions of law that gave it such mandate and, in any case, it issued the notice after it had already repossessed the suit property. Are there provisions in the Land Act and National Land Commission Act that granted the respondent jurisdiction to act in the manner it did? The answer to this is in the affirmative. **Section 12 (8) and (9)** of the **Land Act** reads as follows;

***“Public land allocated under this section shall not be sold, disposed off, subleased, or subdivided unless it is developed for the purpose for which it was allocated...Where the land allocated under subsection (8) is not developed in accordance with the terms and conditions stipulated in the lease, that land shall automatically revert back to the national or county government, as the case may be and the Commission shall include in its annual report the status of implementation of this subsection. [Emphasis Added]***

13. The annual reports contemplated under **Section 12 (9)** of the **Land Act** are provided for within **Section 33** of the **National Land Commission Act**. **Section 12 (9)** of the **Land Act** which is couched in mandatory terms gives powers to either the national or county government to revert a property back to itself in the event a land proprietor defaults in developing a property in accordance with the terms of the lease.

14. **Section 12 (9)** of the **Land Act**, does not have a mechanism of giving an opportunity to a proprietor of land to raise an objection to such repossession. It is the considered view of this court that to cure this lacuna and in order to comply with the provisions of **Article 50** of the Constitution, the respondent established an internal mechanism whereby, any aggrieved party would be given an opportunity to appeal against its decision to repossess a property.

15. **Article 47** of the **Constitution** resonates with **Section 4** of the **Fair Administrative Actions Act** and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Looking at the circumstances of the instant case, the respondent in its newspaper notices provided the procedure for appealing against its decision and it gave timelines within which parties could appeal against its decision. It accorded all lessees and allottees of undeveloped land within its jurisdiction an opportunity to verify their information within stipulated timelines. Siaya County Appeals Panel on Land Administration and Management had been set up by the respondent as an internal redress mechanism which would handle any disputes related to repossessed parcels of land.

16. The notices gave a two thronged process; an affected party was to undertake an inspection and verification exercise at the chief lands office and to pursue the internal mechanism process within certain timelines and to follow certain procedures.

17. In accordance with the provisions of **Section 9 (2) and (3)** of the **Fair Administrative Actions** of the **Fair Administrative Actions Act**, an applicant is mandatorily required to exhaust alternative remedies before seeking leave of the court to institute judicial review. These provisions of law on exhaustion of remedies was upheld in the Court of Appeal decision in the case **Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR** where the court held thus;

***“...it is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked...”***

1. The issue of *res judicata* was raised by the interested party. The Court of Appeal in the case of **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR** set out the following principles in establishing *res judicata*: there must be;(i) a previous suit in which the matter was in issue, (ii) the parties were the same or litigating under the same title, (iii) a competent court heard the matter in issue, and, (iv) the issue has been raised once again in a fresh suit. This court has been able to look through the judgement of the court in **Siaya ELC 93 of 2018** and it is apparent the issues in dispute in that case and in the present suit are not the same. The latter was on permanent injunction, eviction and trespass while in the instant suit, the issue is on repossession of the suit property by the respondent and therefore, the court does not find the instant suit as *res judicata*.

18. It is the finding of this court that the decision undertaken by the respondent was not illegal, irrational or procedurally defective and *this suit bad in law for failure to adopt the doctrine of exhaustion of remedies* which was enacted to operationalise **Article 47** of the **Constitution** and in any case, I do not find any exceptional circumstances permitting me to deviate from this principle.

19. Ultimately, I make the following disposal orders;

**a) The *ex-parte* applicant's chamber summons dated 16/09/2021 is hereby dismissed.**

**b) Costs to the respondent and interested party.**

**Ruling delivered in open court.**

**DATES, SIGNED AND DELIVERED THIS 8TH DAY OF DECEMBER 2021**

**In the Presence of:**

Mr. Ochieng for the *ex-parte* applicant.

Mr. Agina for the respondent

N/A for the interested party

Court assistant: Sarah Ooro.

**HON. A. Y. KOROSS**

**JUDGE**

**8/12/2021**