REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

JUDICIAL REVIEW APPLICATION NO.3 OF 2019

REPUBLIC.....APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

AND

JAMES MWANGI WAGURA)

LUCY WARUGURA WAGURA).....EX- PARTE APPLICANTS

JUDGMENT

By a **Notice of Motion** dated **19th March 2019,** the Ex parte Applicants herein filed these Judicial Review proceedings against the Respondents seeking for orders that:-

> **1. That this Honourabe Court be pleased to issue an order of certiorari for purpose of being quashed Gazette Notice No.1550 Corrigendum to the Kenya Gazette Notice No.11714 of 9th November 2018 Table 3 published on 15th February 2019, in respect of LR.Ruiru Kiu Block 3/1372.**
>
> **2. That the costs of this Application be provided for.**

The Application is premised on the grounds that the 1st Respondent vide **Gazette Notice No.1550,** directed the Ex parte Applicants to surrender **6 acres** of the suit property registered in the name of the Exparte Applicants by way of a **Corrigendum** to the **Kenya Gazette Notice No.11714** of **9th November 2018, Table 3** published on **15th February 2019.** That subsequent to a full hearing on a review of the title for the suit property, it had been determined in **Gazette Notice 11714** of **9th November 2018,** that the title and current ownership were valid and the determination having been directed to the 2nd Respondent to regularize the current position. It was their contention therefore that the review of the decision was in violation of applicable provisions of the law and in breach of the rules of natural justice. That the said decision to review the 1st Respondent's initial decision was based on immaterial and irrelevant facts as they were not invited to scrutinize and or examine any new material that formed the basis of the review. Further that the Ex parte Applicants have not been notified of the findings of the Commission resulting to the impugned **Gazette Notice** and the 1st Respondent has failed to render a decision in writing and as such they stand to suffer damage and loss from the use and enjoyment of the property.

In his **Verifying Affidavit**, the 1st Ex parte Applicant **James Mwangi Wagura** averred that together with the 2nd Ex parte Applicant, they are the duly registered owners of the suit property and have been in possession of the suit property since acquisition. Further that they bought the suit property in the year **2005** from **Kahawa Sukari Limited** at a consideration of **Fourteen Million Kenya shillings (Kshs.14,000,000/=**) after which they were issued with an **Allotment Certificate No.71592,** by the Vendor and a Certificate of Lease was later issued to them in the year **2007,** and they have thus endeavoured to comply with all the terms and conditions of the leases as they have been paying their rent and rates upon demand.

He averred that on the **20th of October 2016,** and **18th January 2017,** the 1st Respondent notified the public that the Commission was intent to review **grants** and **dispositions** of public land in **Kiambu,** which review included the suit land in their names and other parcels of land acquired from **Kahawa Sukari Limited,** being part of an original parcel of land known as **10901/20 Ruiru/Kiambu**. That the notification was based on a complaint filed by the **Member of County Assembly,** for **Kahawa Sukari,** alleging that the parcels had been

acquired irregularly.

He further averred that they filed their **responses** to the said complaint and demonstrated that they acquired the property regularly and it did not form part of public land. That the matter was then fixed for hearing of the complaint on **30th January 2017,** and subsequent to the hearing the 1st Respondent informed them of their determination to uphold their title and they were supplied with the official determination.

He averred that vide **Gazette Notice No. 11714,** published on the **9th** of **November 2016**, the 1st Respondent confirmed the decision to uphold their ownership. However on the **15th** of **February 2019** without any notification **Vide Gazette Notice 1550,** the 1st Respondent directed them to surrender **6 acres** of the suit land by way of a **corrigendum**. It was his contention that they have never been served with any action or claim against their possession or ownership and they did not participate in any hearings that resulted in the determination to issue a corrigendum that reviewed the 1st Respondent decision.

After close of pleadings the Court directed the Ex parte Applicants to file written submissions which the Court has now carefully read and considered together with the cited authorities and the relevant provisions of law. The Court has also considered the pleadings, evidence adduced and the exhibits thereto and renders itself as follows;

Though the Respondents were duly served, the 1st Respondent only **entered appearance** but failed to file a Reply to the Application and therefore failed to defend the suit. On the other hand the 2nd Respondent failed to enter appearance and also defend the suit. The fact that the suit has not been defended means that the Ex parte Applicants' evidence remained unchallenged and uncontroverted.

However the Court will not just enter Judgment without interrogating the veracity of the evidence placed before it as the Applicants are still required to prove their claim on the required standard of balance of probabilities. See the case of **Shaneebal Limited… Vs…County Government of Machakos (2018)eKLR,** where the Court cited the case of **Karuru Munyororo…..Vs….Joseph Ndumia Murage & Another, Nyeri HCCC No.95 of 1988,** and held that:-

> **"The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaint and in the absence of the Defendant's and or their Counsel to cross examine her on evidence, the Plaintiff's evidence remained unchallenged and *uncontroverted. It was thus credible and it is the Kind of evidence that a court of law should be able to act upon''***

The fact that the evidence is not challenged does not then mean that the Court will not interrogate the ex parte Applicants evidence. The Court still has an obligation to interrogate the evidence and determine whether the same is merited to enable the Court come up with logical conclusion as exparte evidence is not automatic prove of a case. The Plaintiff has to discharge the burden of proof. See the case of **Kenya Power & Lighting Company Limited… Vs…Nathan Karanja Gachoka & another [2016] eKLR, where the Court** stated:-

> **"I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.''**

Further the case of **Gichinga Kibutha…Vs…Carooline Nduku (2018) eKLR,** the Court held that:-

> **"It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.''**

Having considered the available evidence, the Court finds the issues for determination are;

a) Whether the Applicants have met the grounds for granting of Judicial Review Order of Certiorari.

b) If so, whether the application dated 19th March 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, where it was held:-**

"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 entails? This was elaborated in the case of **Kenya National Examination Council…Vs… Republic Exparte 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 this Court will now consider the above applicable law and then juxtapose it with the available facts to determine whether the **Exparte Applicants are** deserving of the orders sought.

a. Whether the applicants have met the grounds or threshold for granting of Judicial Review Order of Certiorari

As was stated in the case of **Kenya National Examination Council…Vs…Republic (Exparty Geofrey Gahenji & Another (Supra),** the Order of **C*ertiorari*** can quash a decision already made as an Order of ***Certiorari*** will issue if the decision is made without or in excess of jurisdiction or where the rule of natural justice has not been complied with or such like reasons.

So have the **Exparte Applicants** established existence of the above condition to warrant this Court quash the decision of **National Land Commission** issued in the **Kenya Gazette No.11714 of 9th November 2018 Table 3?**

It is the Ex parte Applicants contention that before the 1st Respondent sought to review its determination, in which they had supplied to them, it did not afford them an opportunity to be heard and that they have never gotten any communication over the alleged proceedings that led to the decision by the 1st Respondent, reviewing its earlier decision. This Court has gone through the annextures presented before it, and it is satisfied that while before the 1st Respondent made a decision that led to the publication of the Kenya Gazette No.11714 of 9th November 2018, the 1st Respondent never afforded the Ex parte Applicants a chance to be heard as required by Section 14 of the National Land Commission Act. As already held and found, the Respondents did not defend the suit and so the allegations by the Ex parte Applicants remain uncontroverted and without any evidence to the contrary, then this Court takes their sequence of events as the truth.

Further this Court finds that there had been a hearing before in which the 1st Respondent made a determination and from the exhibits or documents presented before this Court, it is very clear that parties had been given an opportunity to be heard and the rules of natural justice had thus been followed. However, this Court fails to understand at what point the 1st Respondent decided to depart from the said determination. Without any explanations as to what made the 1st Respondent to depart from its earlier findings, and without following the rules of natural justice and the requirements of the Constitution, this Court finds and holds that the proper procedure that led to the Corrigendum of the Gazette Notice was not followed. Without following the rules of natural justice, this Court has no option but to find and hold that the decision of the 1st Respondent cannot stand and should be quashed. **See the case of Onyango –v- Attorney General (1986-1989) EA EA 456,** Nyarangi, JA asserted at **page 459 -460** that:-

"I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly…..A decision in breach of the rules of natural justice is not cured by holding that decision would otherwise have been right if the principle of natural justice is violated, it matters not that the same decision would have been arrived at. "

b) Is the application dated 19th March 2018 merited?

The Exparte Applicants herein are seeking an Order of Judicial Review of ***Certiorari*** to quash the decision of the 1st Respondent and an

Order of Prohibition.

The Court has found that the 1st Respondent did not act within the confines of the law and therefore breached the rights of the Ex parte Applicants as contemplated under **Article 47** of the **Constitution** since the 1st Respondent did not grant the ***Exparte Applicants*** an opportunity to be heard,. These are enough grounds to warrant the Court to issue an Order of ***Certiorari*** to quash the decision of the 1st Respondent. In the case of **Republic …Vs…Kenya Revenue Authority Exparte Yaya Towers Ltd (2008) eKLR**, the Court held that:-

> **"The remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected….."**

Having now carefully considered the facts of this case and the available provisions of law, the **Court finds that the Exparte Applicants are deserving of the orders sought.**

c) Who is to bear costs of these proceedings?

Ordinarily, costs do follow the event. **Section 27** of the **Civil Procedure Act** provides that **'costs are granted at the discretion of the Court.'** Therefore **the 1st Respondent should bear costs of these proceedings.**

The upshot of the foregoing is that the Court finds and holds that the ***Exparte Applicants*** are **deserving of the orders sought in the Notice of Motion** dated **19th March 2019,** and **proceed to allow the said Notice of Motion application entirely with costs to be borne by the 1st Respondent herein.**

It is so ordered.

Dated, Signed and Delivered at Thika this 30th day of January 2020.

L. GACHERU

JUDGE

30/01/2020

In the presence of

Mr. Mingo for Ex parte Applicants

No appearance for 1st Respondent

No appearance for 2nd Respondent

No appearance for Applicant

Lucy - Court Assistant.

L. GACHERU

JUDGE

30/01/2020