REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

JR MISC. APPLICATION NO.17 OF 2018

IN THE MATTER OF: AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE LAND ACT, 2012, THE NATIONAL LAND COMMISSION ACT, 2012: ORDER 53 CIVIL PROCEDURE RULES AND ALL OTHER ENABLING PROVISION AND PROCEDURES OF THE LAW

AND

IN THE MATTER OF: LAND REFERENCE NO. MOMBASA/BLOCK XLVII/113 SITUATE MOMBASA COUNTY

AND

IN THE MATTER OF: THE DECISION OF THE NATIONAL LAND COMMISSION CONTAINED IN THE STANDARD NEWSPAPER DATED 23RD JANUARY 2018

SUPER NOVA PROPERTIES LIMITED.....APPLICANT

VERSUS

THE NATIONAL LAND COMMISSION.....RESPONDENTS

(CONSOLIDATED WITH ELC JR. NO.18, 19 AND 20 OF 2018)

RULING

1. By a Notice of Motion dated 5th April, 2018 the Ex-parte Applicant seeks for orders that:

> **i. An order of certiorari to remove into the Environment and Land Court and quash the decision of the Respondent contained in the standard Newspaper of 23rd January 2018 to the effect that the Applicant's Property known as MOMBASA/BLOCK XLVII/113 was illegally alienated from the Kenya Ports Authority and to quash the Respondent's order/directive requiring the Applicant to vacate the said Property within 90 days.**
>
> **ii. An order of prohibition to prohibit the Respondent or any other person on its behalf from revoking the Applicant's title over Property known as MOMBASA/BLOCK XLVII/113 situate in Mombasa County and from evicting the Applicant or the Applicant's sub-tenant, agent or assign from the Property known as Mombasa/block xlviii/113.**
>
> **iii. The costs of these proceedings be provided for.**

2. The application is supported by the statutory statement dated 4th April 2018 and the verifying affidavit of Ashok Labshanker Doshi sworn on 4th April 2018 filed together with the chamber summons application for leave on 4th April 2018.

3. The Ex-parte Applicant's case is that it is the registered owner of the leasehold interest in the Property known as **MOMBASA/BLOCK XLVII/113** situate in Mombasa County having been granted a lease by the Government of Kenya for 99 years with effect from 1st May, 1998. That the Ex-parte Applicant acquired the leasehold interest from the original allottee, one Jackson Suter who had been issued with a letter of Allotment dated 2nd October 1998. That the Ex-parte Applicant and the said Jackson Suter executed a Transfer of Lease dated 16th December 1998 for a consideration of Kshs.1,500,000/=.

4. The Ex-parte Applicant avers that it duly paid the transfer fee of Kshs.60,260/= and was subsequently issued with a certificate of lease dated 15th December 2005. That it has been in constructive and actual possession of the Suit Property and has used, charged and subleased the same to various entities without any objection or complaint from any person including the Kenya Ports Authority.

5. The Ex-parte Applicant further avers that despite the legal ownership, possession and peaceful occupation of the Suit Property by the Ex-parte Applicant and or its subtenants/agent, the Respondent herein, through a notice advertised and published in the Standard Newspaper of 23rd January 2018 purported to revoke the Applicant's title over the Suit Property on the basis that the same was alienated from the Kenya Ports Authority and directed/ordered the Ex-parte Applicant to vacate the Suit Property within 90 days.

6. It is the Ex-parte Applicant's contention that the Respondent's decision to revoke the Ex-parte Applicant's title and to evict the Ex-parte Applicant from the Suit Property is illegal, made without jurisdiction and against the rules of natural justice.

7. The Respondent opposed the application and filed grounds of opposition dated 4th July 2018 which raises the following grounds:

> **i. That the application is scandalous frivolous and vexatious and abuse of the court process.**
>
> **ii. That judicial review is concerned with the decision making process and not the merits of the decision itself. The application is hence incompetent as it challenges the merits of the decision made by the Respondent and not the process that led to the making of the impugned decision.**
>
> **iii. That from the evidence on record, the Applicant was given a fair and reasonable opportunity to be heard.**
>
> **iv. That the Applicant (sic) has jurisdiction in law under the provisions of the Land Act and the National Land Commission Act to make the decision in question.**

8. The Application was consolidated with JR Nos 18,19 and 20 all of 2018. Both parties filed written submission. In their submissions filed on 12th October 2018, Mr. Oluga, the counsel for the Ex-parte submitted that the investigations purportedly conducted by the Respondent to reach the finding that the Ex-parte Applicant was illegally occupying the Suit Property and the Ex-Parte Applicant ownership and possession of the Suit Property was interfering with safe navigation of Kenya Waters did not involve the Ex-parte Applicant who is the registered owner of the lease hold interest thereof. That is it not clear where and when the Respondent conducted the alleged investigations and who was involved. That the Respondent has not produced the report of the alleged investigations or revealed the basis upon which it formed the opinion that the Suit Property was illegally occupied by the Ex-parte Applicant in a manner that was interfering with navigation.

9. It was further submitted that the decision to order the eviction of the Ex-parte Applicant from the Suit Property was made without inviting or giving the Applicant an opportunity to be heard which was against the provisions of Articles 47 (2) and 50 (1) of the Constitution of Kenya, Section 4 of the Fair Administrative Action Act, Section 14 (8) of the National Land Commission Act and the rules of natural justice. The Ex-parte Applicant's counsel relied on the case of **Republic –v – National Land Commission Ex-parte Krystalline Salt Limited (2015)eKLR** where the court held:

> "***Judicial review is available where a public body or tribunal has acted illegally, unreasonably or failed to comply with the rules of natural justice-see the already cited case of Pastoli –v- Kabale District Local Government Council and others (2008)2 EA 300 and also the case of Civil service Union –v- Minister for Civil Service (1985)A.C. 374."***

10. They also cited the case of **Republic –v- National Land Commission & Another (2016)eKLR** where the court stated that:

> "***None compliance with the Rules of Natural Justice as coded in the provisions of Article 47 (1) of the Constitution and Section 4 of the Fair Administrative Action Act No.4 of 2015 and Section 14 of the National Land Commission Act is a fertile ground for granting judicial review orders.***"

11. It was submitted that the Respondent did not file any replying affidavit and therefore no evidence on record that the Ex-parte Applicant was given an opportunity to be heard. It was further submitted that the directive that the Applicant submits its documents of ownership after the Respondent had made a decision that the Applicant's title is unlawful and after ordering the Applicant to vacate the Suit Property is against the rules of natural justice and the Applicant's constitutional right to a fair hearing. Further, that the newspaper advertisement/notice did not give reasons or the findings or results of the investigation allegedly conducted by the Respondent and such findings have never been supplied to or shared with the Applicant. That on 16th February, 2018, through its advocates on record, the Applicant submitted its documents of title to the Respondent but despite doing so, the Respondent did not withdraw, revoke, nullify, review or reconsider its decision that the Applicant's title was unlawful. It is the Applicant's submission that the decision to revoke the Applicant's title violates its constitutional right to fair administrative action.

12. It was further submitted that the Respondent failed to follow the procedure laid down in Section 14 of the National Land Commission Act before arriving at the impugned decisions. That the Respondent did not give the Ex-parte Applicant notice that it was either investigating or reviewing the Ex-parte Applicant's title and occupation of the Suit Property. Further, that the newspaper

advertisement/notice did not give reasons or the findings or results of the investigation allegedly conducted by the Respondent and such findings have never been supplied to or shared with the Applicant and have not been filed in this court.

13. The Ex-parte Applicant further submitted that the Respondent did not abide by Sections 131 and 151 of the Land Act which makes provisions on service of notice upon the Applicant. That the Respondent did not publish its decision to evict the Applicant from the Suit Property in the Kenya Gazette or through radio announcement as required by Section 152C of the Land Act (as amended by the Land Laws (Amendment) Act, 2016) and that therefore the decision was riddled with procedural lapses. That under Sections 152A and 153 B of the Land Act (as amended by the Land Laws (Amendment) Act, 2016), it is only unlawful occupant of private, community or public land that is liable to eviction. That the Ex-parte Applicant was not an illegal occupant of the Suit Property as it had a valid title issued by the Government of Kenya and its title as well as occupation and use of the Suit Property is not illegal as no such finding has been made by a court of law or any other competent lawful authority, and therefore the Respondent's finding and decision has no basis since the Applicant was not afforded an opportunity to be heard.

14. It was also the Ex-parte Applicant's submission that the Respondent does not have jurisdiction, either in the Constitution or statute to make a finding that the Applicant is occupying the Suit Property illegally. The Applicant contends that it is the legal proprietor of the Suit Property and has been in possession thereof without any objection or complaint from any person or even the Kenya Ports Authority. Thus the Respondent's decision to revoke the Ex-parte Applicant's title is illegal and against the right to own Property as guaranteed by Article 40 of the Constitution. That Sections 152A, 152B and 153C of the Land Act (as amended by the Land Laws (Amendment) Act, 2016), do not give the Respondent power to revoke the Applicant's title or declare the same illegal or unlawful, and the Respondent's decision to evict the Applicant from the Suit Property violates the Applicant's Constitutional right to own Property. It is the Applicant's submission that this case does not challenge the merits of the Respondent's decision but rather the process of making the impugned decision and how the decision was arrived at, which does not go into the merits of the decision. It was further submitted that even if the Ex-parte Applicant had challenged the merits of the decision, the scope of judicial review has since been expanded to include the merits of the concerned decision. They relied on the case of SUPER NOVA PROPERTIES & ANOTHER –V- THE DISTRICT LAND REGISTRAR MOMBASA & 2 OTHERS, COURT OF APPEAL AT MOMBASA CIVIL APPEAL NO.98 of 2016 (unreported) where the Court of Appeal stated that:

> "***27. On our part, we find no fault that the judge expanded the grounds for judicial review above the conservative grounds to include the principles of proportionality, public trust, accountability by public officers, justice and equity…..As aforementioned, even before the Constitution of Kenya, 2010, the list of the traditional grounds was considered inconclusive in the case of Republic –v- Kenya Revenue Authority Ex-parte Yaya Towere Ltd (2008)eKLR where the court observed that the grounds of judicial review were not limited to; abuse of discretion, irrationality, excess of jurisdiction, improper motives, failure to exercise discretion, abuse of the rules of natural justice and error of law….***
>
> ***28. The cases where courts have interpreted judicial review remedies outside the four corners of the common law principles are now growing as such interpretations are now anchored in several Articles of the Constitution….suffice to state that within the context of expansion of principles to bring to bear in a judicial review matters, we agree each case must be reviewed bearing in mind the constitution, the law and its own peculiar facts. There is no longer one size for all….*** "

15. The Respondent's learned counsel, Mr. Wahome Murakaru filed submissions dated 15th October, 2018 and submitted that notice was given to the Ex-parte Applicant to vacate the Suit Property within 90 days since the occupation of the Ex-parte Applicant therein was deemed to be illegal and interfering with the safe navigation of Kenya Waters by vessels, thereby threatening Marine safety and operations. It was counsel's submission that the Respondent had jurisdiction to issue eviction notices pursuant to Section 151A, 152B and 153C of the Land Act in relation to unlawful occupation of public land. It was further submitted that the Ex-parte Applicant has not established any illegality, irrationality or, procedural impropriety in the procedure followed by the Respondent. Counsel relied on the case of **Peninah Nadako Kilishwa –v- Independent Electoral Boundaries Commission (IEBC) & 2 others (2015) eKLR** where the Supreme Court of Kenya stated:

> "***The well-recognized principle in such cases, is that the court's target in judicial review is always no more than the process which conveyed the ultimate decisions arrived at. It is not the merits of the decision, but the compliance of the decision making process with certain established criteria of fairness. Hence an Applicant making a case for judicial Review has to show that the decision in question was illegal, irrational or procedurally defective.*** "

16. Counsel for the Respondent also relied on the case of **Municipal Council of Mombasa – v- Republic & Umoja Consultants Ltd Civil Appeal No.185 of 2001** where it was held:

> "***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.***"

17. Counsel equally cited the Ugandan case of **Pastoli –v- Kabali District Local Government Council & Others (2008) 2EA 300-30**1 where the court stated thus:

> "***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 or procedural impropriety….***"

18. Finally, counsel for the Respondent cited the case of **Kenya National Examination Council –v- Republic Ex-parte Geoffrey Gathenji Njoroge & 9 Others (1997)eKLR** where the power, efficacy and scope of each of the remedies of judicial review was extensively covered

by the Court of Appeal.

19. I have considered the application and the rival submissions made. In my view, the main issue for determination by the court is whether the judicial review remedies of certiorari and prohibition should be granted as sought by the Ex-parte/Applicant.

20. The purview of judicial review was clearly set by Lord Diplock in the case **of Council for Civil Services Unions –vs- Minister for Civil Service (1985) AC 374 at 401D** when he stated that:

> "***Judicial review 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 has 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.*** "

21. Article 47 of the Constitution provides:

> **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.**

22. Article 50 (1) of the Constitution provides that 'every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court of law or, if appropriate, another independent and impartial tribunal or body' while Section 4 of the Fair Administrative Action Act provides as follows:

> **1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.**
>
> **2. Every person has the right to be given written reasons for any administrative action that is taken against him.**
>
> **3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**
>
> **a. Prior and adequate notice of the nature and reason for the proposed administrative action;**
>
> **b. An opportunity to be heard and to make representations in that regard;**
>
> **c. Notice of a right of review or internal appeal against an administrative decision, where applicable**
>
> **d. Statement of reasons pursuant to Section 6**
>
> **e.**
>
> **f. –**
>
> **g. Information, materials and evidence to be relied upon in making the decision or taking the administrative action."**

23. Section 14 (8) of the National Land Commission Act provides that in the exercise of its power under that Section, the commission shall be guided by the principles set out under Article 47 of the Constitution while Sections 131 and 151 of the Land Act make provision on service upon persons that may be affected by the commission's action. Further, Section 152 C of the Land Act requires the National Land Commission to cause a decision relating to an eviction from public land to be notified to all affected persons, in writing, by notice in the Gazette and in one newspaper with nationwide circulation and by radio announcement.

24. That the issuance of the notice published in the standard newspaper of 23rd January 2018 was an administrative action by the Respondent is not in dispute. The Respondent was therefore under a duty to ensure that its action was expeditious, efficient, lawful, reasonable and procedurally fair. Procedural fairness necessarily requires that persons who are likely to be affected by the decision be afforded an opportunity of being heard before the decision is taken. Further, in my view, the law as stated above contemplates valid notification.

25. In this case, the notice published in the standard newspaper on 23rd January 2018 required the Applicant to vacate the Suit Property within 90 days failure to which they should be evicted. The Act required the Respondent to publish its decision in the Kenya Gazette and make an announcement by a radio. There was no evidence that such publication and announcement were done as required by Section 152 C of the Land Act.

26. Furthermore and more importantly, Section 14 of the National Land Commission Act required the Respondent to give the Applicant an opportunity to appear before it before arriving at the decision to evict. In my view, the Respondent failed to follow the procedure laid down in Section 14 of the National Land Commission Act before arriving at the impugned decision that the Applicant was illegally occupying the Suit Property and that the Applicant's ownership and possession was interfering with safe navigation of Kenya Waters. The Respondent should have given the Applicant notice that it was either investigating or reviewing its title and occupation of the Suit Property and give the Applicant an opportunity to explain itself before the impugned decision was arrived at. Additionally, the newspaper advertisement did not even give reasons or the findings or results of the investigations allegedly conducted by the Respondent. The Applicant has stated that no such findings have been supplied to it. Of course none has been filed in this court as the Respondent did not file any replying affidavit.

27. The Respondent was obliged to afford the Applicant a hearing before it made its decision which decision was, undoubtedly bound to adversely affect the rights and interests of the Applicant over the Suit Property. In the case **of Onyango Oloo –v- Attorney General (1989) EA 456,** the Court of Appeal held that:

> "***The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly, and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard… There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principles of natural justice…. A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decisions would have been arrived at…..***"

28. Where a party has not been heard, a decision made in breach of the rules of natural justice are null and void *ab initio.*

29. There is no doubt that the Applicant is the registered proprietor of the Suit Property. The Land Act does not give the Respondent power to revoke the Applicant's title. The Respondent could only direct the Registrar to do so. The Respondent's decision to revoke the Applicant's title was made without jurisdiction or legal backing and therefore illegal.

30. It is therefore my view that the rules of natural justice were flouted and the decision made without jurisdiction, and all actions taken pursuant thereto were null and void.

31. Consequently, I find merit in the notice of motion dated 5th April 2018 and grant the following orders:

> **a. An order of certiorari removing into this court the decision of the Respondent contained in the standard newspaper of 23rd January 2018 to the effect that the Applicants' properties known as MOMBASA/BLOCK XLVII/113; MOMBASA/MAINLAND SOUTH/BLOCK 1/1817; MOMBASA/MAINLAND SOUTH/BLOCK 1/1789 and MOMBASA /MAINLAND SOUTH/BLOCK 1/1797 was illegally alienated and the Respondent's order/directive requiring the Applicant to vacate the said Property within 90 days is hereby quashed.**
>
> **b. An order of prohibition to prohibit the Respondent or any other person acting on its behalf from revoking the Applicants' title over the said properties without following the process of the law.**
>
> **c. The Applicants will have the costs of these proceedings.**
>
> **d. Orders to apply to JR Nos.18, 19 and 2018 all of 2018.**

Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 18th day of February 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Oluga for Applicant

Mwandenje holding brief for Wahome for Respondent

Yumna Court Assistant

C.K. YANO

JUDGE

18/2/19