



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**JUDICIAL REVIEW APPLICATION NO. 1 OF 2018**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR.....2<sup>ND</sup> RESPONDENT**

**EX PARTE; ANNE PEARL GACHUI (suing as executrix of the Estate of the Late James Gachui)**

**JUDGMENT**

Vide a Notice of Motion dated **16<sup>th</sup> March 2018**, the **Ex parte Applicant**, herein sought for the following orders as against the Respondents;

- 1. An order of Certiorari to remove into the High Court for purposes of it being quashed the decision and order of the National Land Commission, contained in Gazette Notice No. 6864 dated 17<sup>th</sup> July 2017, directing the Land Registrar to revoke the title to the property L.R No. Thika Municipality Block 7/104**
- 2. An order of Prohibition to prohibit the Chief Land Registrar, from revoking the title to the property L.R No. Thika Municipality Block 7/104.**
- 3. An order that the Respondents do pay the costs of this proceedings.**

The Application is premised on the grounds that the Late **James Gachui**, purchased the suit property on **1<sup>st</sup> June 1995**, without notice of any defect in the title which he held until his death and the same then vested in the Ex parte Applicant as the **executrix** of his Estate. That by a Public Notice in the **Daily Nation Newspaper** dated **18<sup>th</sup> January 2017**, the 1<sup>st</sup> Respondent called for a public hearing for the review of grants and disposition of public land in Kiambu County. That subsequently, the Applicant through her lawyers wrote to the 1<sup>st</sup> Respondent for particulars of the review of the grant but there was no response. Further that between the **1<sup>st</sup> and 3<sup>rd</sup> February 2017**, the Applicant through her lawyer attended the hearing and again no particulars to justify a revocation were given.

However, on **17<sup>th</sup> July 2017**, the 1<sup>st</sup> Respondent caused to be published in the Kenya Gazette **Notice No. 6864**, directing the **Land Registrar** to revoke the Applicant's title. Further that the 1<sup>st</sup> Respondent acted in excess of its jurisdiction under section **14(7) of the National Land Commission Act**, which prohibits it from revoking the title of a **bonafide** owner for value **without notice** of defect in the title. That the 1<sup>st</sup> Respondent acted unlawfully by violating the Applicants right to fair administrative action as required by section **14(8)** of the **National Land Commission Act**.

In her supporting Affidavit sworn on **11<sup>th</sup> January 2018**, the Exparte Applicant, **Anne Pearl Karimi Gachui** reiterated the grounds in support of the application and further averred that she has not been issued with any notice of revocation.

The Application is opposed and the 1<sup>st</sup> Respondent through its acting **Director of Legal Affairs and Enforcement, Brian Okol**, who swore a Replying Affidavit and averred that it received a complaint from the **Ethics and Anti-Corruption Commission**, vide a letter dated **6<sup>th</sup> May 2016**, listing properties in Kiambu County that were illegally acquired and registered to private individuals. That it was requested to review the said dispositions, and that the suit property was amongst the listed properties. He contended that the 1<sup>st</sup> Respondent then issued a **notice** to review the legality of the suit property and hearing before the **Review Committee**, was subsequently conducted from the **1<sup>st</sup> to 3<sup>rd</sup> February 2017**. He further averred that the 1<sup>st</sup> Respondent then received submissions in respect to the suit property from the Ministry of Lands, Housing and Urban Development. That following review proceedings and a ground visit, the Commission noted that the suit property

had been hived off from a government house and was therefore not available for alienation without due process.

He further averred that the 1<sup>st</sup> Respondent having noted that due process of alienation of government land as was then envisaged under repealed **Government Lands Act, Cap 280 Laws of Kenya (now repealed)** were never followed, thus rendering the suit property to be irregular, illegal and unlawful. Thus following a successful conduct of the review process, the 1<sup>st</sup> Respondent produced well-reasoned determination as prescribed by law. He further averred that the 1<sup>st</sup> Respondent subsequently published its decision vide a **Gazette Notice** and recommended to the Chief Land Registrar to revoke the title of the suit property. It was his contention that the Ex parte Applicant has not produced any evidence that the Late **James Gachui**, purchased the suit property. Further, that at the preliminary hearings before the Review Committee all parties were requested to submit documents to support their claim over their respective parcels of land and the Applicant ignored to do the same and the allegations that the 1<sup>st</sup> Respondent acted in excess of its jurisdiction is dishonest and incompatible with the facts.

The Application was canvassed by way of written submission and the 1<sup>st</sup> Respondent filed its written submissions on **1<sup>st</sup> July 2019**, and submitted that the 1<sup>st</sup> Respondent had not occasioned any breach of the Applicant's rights under **Article 47** of the Constitution as it ensured that the review proceedings were procedurally and fairly done by following the procedures laid down in the **National Land Commission Act**. It relied on various provisions of law and urged the Court to dismiss the Application in the interest of Justice.

The 2<sup>nd</sup> Respondent through its Litigation **Counsel, Anne Mwhaki Ndundu** submitted that the Applicant's right to a fair administrative action and fair hearing as enshrined under **Article 47** of the Constitution and **Section 4** of the Fair Administrative Act and **Section 14** of the **National Land Commission Act** were not infringed. It was further submitted that the 1<sup>st</sup> Respondent did not act **ultra vires** in directing the 2<sup>nd</sup> Respondent to revoke the suit property having been unlawfully acquired. That section **14(3), (4) & (5)** of the **National Land Commission Act** gives it the power to direct the Land Registrar to revoke title unlawfully acquired. It was therefore submitted that as the 1<sup>st</sup> respondent has proven that the Applicant was subjected to due process of the Notice of Motion ought to be dismissed with costs.

The **Ex parte Applicant** through the Law Firm of **Kaplan & Straton Advocates**, submitted that under relevant provisions of law, a proprietor's title to land cannot be revoked without the proprietor being accorded an opportunity of being heard. It was further submitted that the 1<sup>st</sup> Respondent was bound to issue a proper and adequate **notice** to the interested parties containing sufficient details, reasons and particulars of the alleged complaint to enable the Ex parte Applicant substantively make their representations. Further that the Ex parte Applicant called into question the process of arriving at the 1<sup>st</sup> Respondents determination. The Ex parte Applicant also relied on various provisions of law and decided cases and urged the Court to allow the orders of judicial Review as sought.

The Court has now carefully read and considered the written submissions by the parties. The Court has also carefully considered the Ex parte Applicant's Judicial Review application, the annexures thereto, and the **Notice of Preliminary Objection**, the **Replying Affidavit** by the 2<sup>nd</sup> Respondent, the written submissions, cited authorities and the relevant provisions of law and renders itself as follows:-

Having taken into account the above, the Court finds the issues for determination are as follows:-

- a) **Whether the Ex Parte Applicant has met the grounds for granting of Judicial Review Order of Certiorari and Prohibition.**
- b) **If so, whether the application dated 16<sup>th</sup> March 2018 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.**-----

**“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-Mehidwi...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, 4<sup>th</sup> 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 the Court will now consider the above applicable law and then juxtapose it with the available facts to determine whether the *Exparte Applicant* is deserving of the orders sought.

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

As was stated in the case of *Kenya National Examination Council ...Vs...Republic (Exparte Geoffrey Gathenji & Another (Supra)*, the Order of *Certiorari* can quash a decision already made as it will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or so such like reasons. So have the *Exparte Applicant* established existence of the above conditions to warrant this Court quash the decision of **National Land Commission** issued in the **Kenya Gazette 6864 dated 17<sup>th</sup> July 2017** ?

The *Exparte Applicant* has alleged that the **National Land Commission** arrived at a decision that was in excess of its jurisdiction under section **14(7)** of the National Land Commission Act, by revoking her title without **notice** of defect. Further that the Ex parte Applicant was not accorded a fair administrative action as she had sought for the documents that pertained to the revocation of the land but she was not given the said documents. She contended that the **National Land Commission** did not accord her a fair hearing as it did not follow the Rules of **Natural Justice** when making its decision.

While the Respondents are of the view that the Ex parte Applicant is contesting their jurisdiction, the Court finds that the issue being contested by the Ex parte Applicant is that she was not satisfied with the process through which the 1<sup>st</sup> Respondent arrived at its determination. **Section 7** of the **National Land Commission Act** provides;

“No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.”

Further **Section 8** of the **National Land Commission Act** provides

“In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the Constitution.”

The Ex parte Applicant herein is questioning the process through which the 1<sup>st</sup> Respondent arrived at its decision, but is not questioning the merit of the decision, but the process that brought about the decision. Therefore, she has established the threshold for grant of the orders sought.

**b.) If so, whether the application dated 16<sup>th</sup> March 2018 is merited.**

In her Application, the Ex parte Applicant has averred that she was not accorded a fair administrative action as it was not only sufficient for the 1<sup>st</sup> Respondent to invite the interested party to attend the hearings by way of a public notice, but the 1<sup>st</sup> Respondent was bound to issue a proper and adequate notice to the interest party prior to the hearing together with the reasons and particulars of the alleged complaint.

The Court has seen the letter dated 26<sup>th</sup> January 2017, by the Ex parte Applicant seeking for details of the complaints and the particulars of the same. The 1<sup>st</sup> Respondent has not refuted the claims that it did not provide the Ex parte Applicant with sufficient information and particulars of the case as against her and therefore this Court has no option but to believe the Ex parte Applicant. Though the Respondents have averred that the Ex parte Applicant was given an opportunity to be heard and that her Advocates were even present during the hearing, this Court agrees with the Ex parte Applicant that without the proper and sufficient information, there is no way that she would have been able to effectively defend herself and present her position.

Having not been aware of the allegations that were levelled against her and to what extent they went to, the Court finds and holds that the Exparte Applicant would not have been able to defend herself and present her case sufficiently having been blind sided. **See the case of Mwangi Stephen Muriithi ...Vs... National Land Commission & 3 others [2018] eKLR** where the Court held that;

“ My finding is that the right to be heard transcends mere notice and extends to the person being given sufficient information to enable them prepare and/ or present their case. Such a person is entitled to be furnished, in good time, with information, including reports and documents in the body’s possession that may be prejudicial to his/her case and which would guide that body relied in arriving at its decision. Section 14(3) of the Act is clear that such a person, apart from entitlement to notice, has the right to *inspect any relevant document*.

Having perused the documents placed before this Court, I am convinced that the Petitioner was neither furnished with the details of the complaint before the 1<sup>st</sup> Respondent nor granted access to the critical documents before the 1<sup>st</sup> Respondent. I find that in the circumstances of this case, it would be unfair then to expect or conclude that in the absence of such critical information, the Petitioner was granted a fair hearing as envisaged under Article 50 of the Constitution. In this respect I agree with the finding of Mativo, J in the case of *Sceneries Limited v National Land Commission [2017] eKLR*.

**In the absence of adequate notice, and access to the complaint as outlined herein, I am inclined to find that the Petitioner was not granted a fair hearing.”**

Further as per the Notice, it is not in doubt that while the Notice was sent out on the **18<sup>th</sup> of January 2017**, the interested parties were required to have put in their submissions on the **23<sup>rd</sup> January 2017**. In all fairness, the Court finds and holds that was not sufficient time or notice enough to get a counsel and instruct the said counsel and for the counsel to be prepared enough to defend his client. Therefore the Court holds that the lack of sufficient notice and information deprived the Applicant of fair administrative action which the Applicant was entitled to. See the case of **Republic...Vs...National Land Commission; Pacifica Mwangi & another (Interested Parties); Ex Parte Anil Ratil Tailor [2019] eKLR** where the Court held that;

“Section 14 (2) of the National Land Commission Act envisions the creation of a set of rules intended to guide the Commission in reviewing of grants or dispositions of public land subject to Articles 40, 47 and 60 of the Constitution. In the absence of those rules, the procedure under Section 4 of the Fair Administrative Action Act which was enacted to give force to Article 47 suffices to assess whether the respondent adhered to the rules of natural justice. The provision provides that in all cases where a person’s rights or fundamental freedoms are likely to be affected by an administrative decision, the administrator must give the person to be affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action. (See *Sceneries Limited -vs- National Land Commission [2017] eKLR*).

With the above in mind, the Court finds and holds that the **Ex parte Applicant** was not afforded a fair administrative action and her Application is therefore merited and the same is allowed entirely.

**b. Who is entitled to costs of these proceedings.**

**Section 27 of the Civil Procedure Act**, gives the Court discretion to grant costs. However costs always follow the events and the successful party should then be the person to be awarded costs unless there are special circumstances which should warrant the Court from deviating. The Ex parte Applicant in this instant being the successful party is therefore awarded costs of the suit and the same is to be borne by the 1<sup>st</sup> Respondent.

Having now carefully analysed the available evidence, the Court finds that the Ex parte Applicant has successfully established that this is a case that deserves Judicial Review Orders of **Certiorari** and **Prohibition** as prayed in the instant Application. The upshot of the foregoing is that the Ex parte Applicant’s Judicial Review Application dated **16<sup>th</sup> March 2018** is found merited and the same is allowed entirely in terms of prayers **No.1 and 2** with costs being borne by the 1<sup>st</sup> Respondent herein.

It is so ordered.

**Dated, Signed and Delivered at Thika this 8<sup>th</sup> day of April 2020.**

**L. GACHERU**

**JUDGE**

**Lucy- Court Assistant**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by the Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Judgment** has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**By Consent of:**

**Kaplan & Straton Advocates for the Ex parte Applicant**

**Charles Wambugu for the 1<sup>st</sup> Respondent**

**Anne Mwihaki for th 2<sup>nd</sup> Respondent**

**L. GACHERU**

**JUDGE**