



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

JUDICIAL REVIEW APPLICATION NO. 14 OF 2012

BOMET TECHNICAL INSTITUTE LIMITED T/A

LOMU INVESTMENTS.....EX-PARTE APPLICANT

VERSUS

1. THE DIRECTOR OF SURVEYS.....1st RESPONDENT

2. THE COMMISSIONER OF LANDS.....2nd RESPONDENT

3. THE PERMANENT SECRETARY,

MINISTRY OF LANDS.....3rd RESPONDENT

JUDGMENT

Introduction

1. By a Notice of Motion dated 26th June, 2012, the ex-parte applicant moved this honourable Court seeking the following reliefs;

An order of certiorari to bring before this honourable court and to quash the decision of the Commissioner of Lands to re-allocate Surveyed Plot No. 270 Bomet Municipality previously known as Uns. Educational plot No.' A' Bomet and now known as BOMET TOWNSHIP/270 and thereby causing the beacons to be fixed in the Applicants' property with the intention of unlawfully encroaching thereon.

An order of prohibition to prohibit the 1st respondent by himself, his servants, agents and/or other officers, from resurveying, erecting or continuing to erect beacons on the suit property.

An order of prohibition to prohibit the 1st respondent by himself, his servants, agents and/or other officers, or his lead Ministries, from purporting to or from interfering with the lawful proprietorship of the suit land.

An order for costs.

2. The application is based on the grounds stated in the Statement dated 26th June 2012 and the Verifying Affidavit of Franklin Kipkoech Rono sworn on the 26th June 2012.

Applicant's case

3. In the said statement and affidavit, the Ex- parte applicant contends that it is the duly registered and lawful allottee of all that piece of land known as Surveyed plot No. 270 Bomet Municipality previously known as Uns. Educational plot No.' A' Bomet and now known as BOMET TOWNSHIP/270, and as such enjoys indefeasible title save for fraud, which is non-existent.

4. It is further contended that the 2nd Respondent has purported to issue allotment letters in respect of the said parcel of land to different entities, which has the effect of taking away the proprietary rights of the Ex-parte applicant over the said land.

5. The 2nd Respondent has, in disregard of the letter of allotment dated 17th January 1997(which is now a Certificate of lease as from 15th May, 2017) issued to the Ex-parte applicant, issued two allotment letters dated 2nd April, 2012 to the Permanent Secretary to the Treasury as Trustee for Bomet Technical Institute and for St. Michaels Primary School respectively. The applicant states that as a general consequence of

the foregoing, the Ex-parte applicant stands to suffer loss of its right to own property.

6. It is the Ex-parte Applicant's position that the Respondents' actions are in breach of the principles of natural justice, otherwise unreasonable and founded on irrelevant and/or improper considerations.

7. The Ex-parte Applicant has annexed copies of a letter of allotment dated 17th January 1997, a certificate of lease dated 15th May, 2017 and a copy of the certificate of official search dated 4th October, 2017 to the affidavit of Franklin K. Rono thus demonstrating that it is the duly registered and lawful allottee and owner of all that parcel of land known as Surveyed Plot No.270 Bomet Municipality previously known as Uns. Educational plot No.' A' Bomet and now known as BOMET TOWNSHIP/270.

8. Additionally, the Ex-parte Applicant has annexed copies of the allotment letters dated 2nd April, 2012 issued by the 2nd Respondent to different entities being the Permanent Secretary to the treasury as trustee for Bomet Technical Institute and for St. Michaels Primary School in respect of the suit land.

9. The Ex-parte Applicant has also exhibited clearance certificates from the Municipal Council of Bomet to show that that the Ex-parte applicant has been making all requisite payments to the Council since the time of allotment of the property in the year 1997.

10. A copy of the Registry Index Map has also been annexed to Mr. Franklin Rono's affidavit to show the the location of the suit property.

Respondent's case

11. The Respondents did not file any response to the ex-parte applicant's application.

Issue for determination

12. The main issue for determination is whether the ex-parte applicant is entitled to the orders sought.

Analysis and determination

13. The Ex-parte Applicant is seeking an order of certiorari to remove into the Court and to quash the decision of the Commissioner of Lands to re-allocate Surveyed Plot No. 270 Bomet Municipality previously known as Uns. Educational plot No.' A' Bomet and now known as BOMET TOWNSHIP/270 and thereby causing the beacons to be fixed in the Applicants' property with the intention of unlawfully encroaching thereon.

14. In the case of *Republic v Chairman Business Premises Rent Tribunal & 2 others Ex-Parte Abdulkadir Hubess [2017] eKLR*, the learned judge referred to the Court of Appeal case of ***National Examinations Council exparte Gathenji & Others, Civil Appeal No. 266 of 1996*** where the Court observed as follows:

“Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

15. In his submissions, learned counsel for the Applicant has submitted that what the Ex-Parte Applicant is challenging is the process that was adopted by the Respondents in purporting to revoke its allotment letter and consequently the title to the suit property. Validity or otherwise of the Ex-Parte Applicant's letter of allotment and certificate of lease is not for determination by the Court in these proceedings. Doing so would be tantamount to delving into the merits of the impugned decision rather than looking into the process through which the decision was made.

16. Learned counsel has submitted that the process that led to the purported issuance of allotment letters in respect of the said parcel of land to different entities being the Permanent Secretary to the Treasury as trustee for Bomet Technical Institute and for St. Michael's Primary School is clouded in impropriety and blatant disregard of the Ex-parte applicants' rights.

17. He has submitted that in essence the Commissioner of Lands purports to revoke the Ex-parte applicant's letter of allotment and consequently the Certificate of Lease that he holds in respect of the suit property, by issuing further allotment letters in respect of the property to 3rd parties. He submits that it is illegal and unreasonable to superimpose the fresh allotment letters on the Ex-parte Applicants land.

18. He has relied on the case of *the case of Republic v Chief Magistrate Milimani Commercial Court & 2 others ex-parte Violet Ndanu Mutinda & 5 others [2014] eKLR*: where the court stated as follows: -

“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.....”

19. Furthermore, in the case of ***Pastoli V Kabale District Local Government Council and Others (2008) E.A 2 EA 300***. In that case the Court cited with approval the case of ***Council of Civil Unions V Minister for Civil Service (1985) AC 2 and An Application by Bukoba Gymkhana Club (1963) EA 478 at 479*** and held as follows:

“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... Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of the law or its principles are instances of illegality. It is for example an illegality where the Chief Administrative officer of a District interdicts a Public Servant on the direction of the District Executive Committee when the powers to do so are vested in the District Service Commission.

Irrationality is when there is such unreasonableness in the decision taken or act done that, no reasonable authority addressing itself to the facts and the law 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 or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere to and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”

20. In the instant case the Applicant has complained that he was not given a fair opportunity to be heard. The applicant in this matter was simply confronted with the said allotment letters without a notice of intention to cancel the allotment letter held by it dated 17th January, 1997 in respect of the suit property.

21. There was no prior notice of the resolution to cancel the allotment letter, no opportunity for the applicants to be heard, no reasonable time frame within which the Ex-parte applicant was to make known its grievances in respect of the purported resolution. He was simply confronted with already processed allotment letters purporting to allocate the land parcel to third parties. His submission is that the Respondents merely superimposed the purported letters of allotment on the Ex-parte Applicant's property.

22. As was held in **Noor Maalim Hussein & 4 Others vs. Minister of State for Planning, National Development and Vision 2030 & 2 Others [2012] eKLR:**

“If statutory power is exercised in a manner contrary to the drafters or against public interest, the power can be said to have been exercised capriciously, irrationally or unreasonably. Thus irrationality and unreasonableness would play a major role and we shall as courts continue to assert our traditional duty and intervene in situations where authorities like Ministers and persons act in bad faith, abuse power, fail to take into account relevant considerations or act contrary to legitimate expectations.”

23. The **Constitution of Kenya, 2010** at Article 23(3) states that: - “in any proceedings brought under Article 22, a court may grant appropriate relief, including-

(f) an order of judicial review.”

24. Article 47(1) of the Constitution of Kenya, 2010 states that: -

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

25. I agree with counsel for the applicant that Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights.

26. It is my finding therefore that the decision was tainted with illegality.

27. Accordingly, I allow the application and make the following orders:

a) That an order of certiorari is hereby issued removing into this court for purposes of being quashed and quashing the decision of the Commissioner of Lands to re-allocate Surveyed Plot No. 270 Bomet Municipality previously known as Uns. Educational plot No. 'A' Bomet and now known as BOMET TOWNSHIP/270 the beacons to be fixed in the Applicants' property with the intention of unlawfully encroaching thereon.

b) An order of prohibition is hereby issued prohibiting the 1st Respondent by himself, his servants, agents and/or other officers, from resurveying, erecting or continuing to erect beacons on the suit property.

c) An order of prohibition is hereby issued prohibiting the 1st Respondent by himself, his servants, agents and/or other officers, or his lead ministries, from purporting to or from interfering with the lawful proprietorship of the suit land.

d) The costs of this application shall be borne by the Respondents.

Dated, signed and delivered at Kericho this 13th day of July 2018.

J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Kemboi for Mr. Kipkoech for the Ex parte Applicant
2. No appearance for the Respondent
3. Court Assistant - Rotich