



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

JUDICIAL REVIEW MISCELLANEOUS CIVIL APPLICATION NO. 5 OF 2016

IN THE MATTER OF AN APPLICATION BY JOSPHAT MURITHI

MBOROTHI AND DORCAS MUTHONI MAINA FOR LEAVE FOR

ORDERS OF CERTIORARI AND PROHIBITION

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010, LAW REFORM ACT, CAP 26,
THE CIVIL PROCEDURE ACT, CAP 21 OF THE LAWS OF KENYA, THE ENVIRONMENT
AND LAND COURT ACT, NO 19 OF 2011, THE LAND REGISTRATION ACT NO 3 OF 2012,
THE NATIONAL LAND COMMISSION ACT, NO 5 OF 2012 AND THE LAND ACT NO 6 OF
2012**

BETWEEN

THE REPUBLIC OF KENYA.....APPLICANT

VERSUS

1. NATIONAL LAND COMMISSION.....1ST RESPONDENT

2. THE COUNTY GOVERNMENT OF KAJIADO.....2ND RESPONDENT

AND

1. SUSAN NGINA KANIRA.....INTERESTED PARTY

EXPARTE APPLICANTS; JOSEPHAT MURITHI

MBOROTHI AND DORCAS MUTHONI MAINA

JUDGMENT

The Applicant's Case.

1. Through an Application dated 3rd May 2016 and allowed by on 5th May 2016, the applicant was granted leave to commence Judicial Review proceedings against the Respondents. On 16th May 2016, it was ordered that the grant for leave do operate as stay of the implementation of the order of the 1st Respondent of 21st April 2016 that the property known as plot number 273'A'/Residential-Bulbul trading centre belongs to Susan Ngina and as a further stay of the Respondent's action of transferring the property known as p-plot No 273'A'/Residential-Bulbul trading centre from the 1st Ex parte applicant to Susan Ngina. The main motion for Judicial Review is dated 20th May 2016. In it, the applicant has sought the following orders :-

1. **That** an order of Certiorari do issue to remove into the High Court and quash the entire decision of the 1st Respondent made through the letter from the County Land Management Board- Kajiado dated 21st day of April 2016 to revoke the 1st Ex-parte Applicant's ownership of the property known as plot Number 273'A' /Residential-Bulbul Trading Centre within Kajiado County.

2. **That** an order of Prohibition do issue to remove into the High Court to prohibit the Respondents, its servants, agents or in any manner whatsoever from revoking/cancelling and/ or in any manner interfering with the letter of allotment dated 9th November 2000 for plot number 273 'A'/Residential-Bulbul Trading Centre registered in the name of the 1st Ex parte Applicant or in any manner whatsoever from interfering with the 1st Ex-parte Applicant's title, possession and use of the land comprised in Plot No 273'A' /Residential-Bulbul Trading Centre.

3. **That** an order of prohibition do issue barring or prohibiting the Respondents, its servants, agents from transferring the allotment of the land comprised in plot No. 273'A' /Residential-Bulbul Trading Centre from the 1st Exparte applicant to any other third party in reliance upon the decision of the 1st Respondent made on the 21st day of April 2016.

4. **That** the court makes such other and further orders as are necessary and expedient in the circumstances of this case.

5. **That** costs of this Application be provided for.

2. The Application is based on grounds that the revocation of the allotment was done without availing the Applicants an opportunity to explain their acquisition of the allotment; 1st Respondent arrived at the decision without due regard to the principles of Natural Justice and in particular Articles 40, 47 and 67 of the Constitution and Sec 14 and 18 of the National Land Act; That the suit property is adjudicated private land as encapsulated under Article 64 of the Constitution and as such the 1st respondent through the secretary of the county land management board Kajiado acted ultra vires to the provisions of section 18 of the National Land Commission Act which charged it with the mandate to process applications for allocation of land , change and extension of user, subdivision of public land and renewal of leases.

3. The application is further based on the grounds that the unprocedural revocation of the 1st applicants letter of allotment is in breach of article 40 and 47(1) of the constitution as it constitutes an arbitrary acquisition of property without compensation and further that no hearing was afforded to the applicant in reference to cancellation of the letter of allotment dated 9th November 2000; that the 1st respondents decision is procedurally unfair, unlawful, unconstitutional and ultra vires the provisions of section 14 of the National land Commission Act No. 5 of 2012.

4. The application is also based on the grounds that the 1st respondent did not justify its decision neither present any evidence to the applicant leading to the cancellation of the applicants title vide its decision of 1st April 2016; that the respondents action violated the applicants legitimate expectation to absolute ownership of the plot in so far as the respondents decision disentitles the applicant the opportunity to own property as envisaged in the constitution.

5. The ex parte applicant Josephat Muriithi Mborothi contends in his affidavit that he is the lawful allottee of Plot number 273 A/Residential-Bulbul Trading Centre vide a letter of allotment dated 9th November 2000 (attached and marked JMM-1). He further contends that he leased it out to one Dorcas Muthoni Maina vide a lease agreement dated 23rd February 2016(JMM-2).

6. It is his further contention that adjacent to his plot lies plot number 273 'B' owned by the interested party herein Susan Ngina Kanira and that there has been several disputes between the interested party and the applicant which culminated into a series of adjudication meetings with the authorities as shown by a copy of letter dated 30th May 2013 (Annexure JMM-3).

7. The ex parte applicant claims further that the 1st respondent in the guise of alternative dispute resolution through the county land management board Kajiado summoned the him vide a letter dated 12th February 2016 but was not informed of the purpose of the said meeting. He contends further that he attended but was shocked to learn that the meeting sought to determine ownership of the suit premises which case had not been communicated to him by the 1st respondent earlier neither was he in a position to adequately present his case nor adequate time afforded to examine and interrogate any documents presented by the interested party.

8. The ex parte applicant continues to state that he was surprised to receive a letter from the chief of Bulbul location containing the decision of the 1st respondent dated 21st April 2016 observing that the suit premises plot number 273/R/Embulbul/Ngong be retained by Susan Ngina and that the same was unprocedurally subdivided and allocated to the 1st Applicant.

9. The ex parte applicants also contend that the 1st respondent is forcefully and illegally reposing his property without following due process and therefore seeks that the judicial review orders be granted.

1st Respondents Case

10. The 1st respondent is opposed to the ex parte applicants' application and filed its grounds of opposition dated 30th May 2016 and indicated that it will be opposing the applicants application on the grounds that the Applicant does not have a proprietary interest in the suit property to warrant issuance of the orders sought as the applicant is not the registered owner of the suit land and neither does he hold a certificate of Title, further that the applicant did not demonstrate any proprietary rights that they hold over the property capable of protection by this court under section 26 of The Land Registration Act and Article 40 of the Constitution.

11. The 1st Respondent also argues that that a letter of allotment only constitutes an offer and it does not confer any proprietary interests over land until all conditions in the letter of allotment have been met and certificate of title issued; further that no evidence of any approved subdivision over plot number 273 to create the two resultant plots namely "A" and "B" has been tendered by the Applicants and none exists in their records.

12. The 1st respondent also states that the applicant has concealed material facts from this court by failing to disclose that he was actually allocated plot no. 49 on 19th August 1999 and not the suit premises and further that due process was accorded to all parties on 18th February 2016 and 19th February 2016 when they appeared before the Kajiado County Land Management Board for hearing.

13. The 1st respondent also contends that judicial review orders does not lie as the matter pertains to issue of ownership of property which cannot be adjudicated by way of judicial review but are matters for civil courts and therefore prays that the application be dismissed with costs and that the grant of leave to operate as stay be discharged.

2nd Respondents case

14. The 2nd Respondent is opposed to the ex parte applicants' application vide its replying affidavit dated 29th December 2016 and sworn by Dr. Kennedy Ole Kerei the 2nd Respondent's County Secretary.

15. It is the 2nd Respondents case that the ex parte applicants' application is fatally defective as it falls short of the threshold of judicial review application. Further the 2nd respondent contends that the 2nd respondent has not revoked the ex parte applicants ownership over the property known as plot 273 A as shown by (annexture marked RBTC-1 a copy of the true copy of current letter of allotment) and further that as per the records available at the 2nd respondents Registry the 1st ex-parte applicant is the registered owner of the said plot.

16. The 2nd respondent further contends that on 22nd December 1999 plot 273 was jointly allocated to the 1st ex parte applicant Josphat Muriithi Mborothi and the interested party herein Susan Ngina Kanira as shown by annexture RBTC-2 Copy of original allotment letter dated 27th December, 1999). It is his further assertion that on 9th November 2000, the said plot was sub divided into two equal portions which were registered as plot no. 273 "A" in the name of the 1st ex parte applicant and Plot 273 "B" in the name of the interested party and thereafter the original allotment letter dated 22nd December 1999 cancelled and new ones issued.

17. The 2nd respondent further contends that the allotment letter exhibited by the ex parte applicants constitutes only an offer and it does not confer any proprietary interests over land until all the conditions in the letter of allotment and any other applicable law have been met and a certificate of title issued over the property. The 2nd respondent also avers that the ex parte applicant does not own a certificate of title as envisaged under section 26 of the Land registration Act which is the only proof that the holder of such title is the absolute owner of land.

18. It is further the 2nd respondents case that as per condition 2 of the allotment letter the 2nd respondent reserves the right to repossess (without compensation) any plot that remains undeveloped for two years after allocation and therefore the 2nd respondent did not take drastic measures.

19. The respondent also states that it is evident and clear from the suit papers filed in court that a judicial review does not lie as the matter pertains to an issue of ownership of property which cannot be adjudicated by way of judicial review but is a matter of civil courts and thus this application ought to be dismissed with costs.

SUBMISSIONS

Applicant's submissions

20. The Applicant's submissions were premised on three grounds; a) What is the classification of the suit property? B) what are the function of the 1st Respondent and in exercising its mandate what laid down procedure should they follow; C) what redress do the applicant's have?

21. On classification of the suit property, counsel submitted that the question at heart is whether the suit property is private, public or community land, counsel submitted as follows;

Article 62 defines Public land and states that it will be administered as follows;

a) Public land is unalienated government land as defined by an Act of Parliament in force t the effective date

b) Land lawfully held, used or occupied by any state organ, except any such land that is occupied by state organ as a lessee under a private lease,

c) Land transferred to the state by way of sale, reversion or surrender

d) Land in respect of which no individual or community ownership can be established by any legal process.

22. Further reference was made to Article 62 which states that public land shall vest in and be held by a county government in trust for the people resident in the county and shall be administered on their behalf by the National Land Commission.

23. On definition of Private land, Counsel cited **Article 64 of the Constitution which defines private land as;**

a. Registered land held by any person under any freehold tenure

b. Land held by any person under leasehold tenure

c. Any other land declared private land under an Act of parliament

24. Whilst Art 63 inter alia defines community land as land lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Art 62(2). It further proceeds to state that ...Any unregistered community land shall be held in trust by the County Government on behalf of the communities for which it is held and community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.

25. Counsel submitted that the alienation and subsequent issuance of the letter of allotment over the suit property took place before the enactment of the current constitution (2010) and before the new land law regime. The law therefore that governed the land regime at that time were the LTA (cap 282) , GLA (CAP 280), RTA(CAP 281) ITPA and the RLA(CAP 300).

26. Counsel submitted that the suit property was initially prior to its allotment and subsequent registration trust land and that under the previous regime trust land are neither owned by government nor by the county councils within whose area the land falls. Counsel submitted that as long as trust land was adjudicated, it belonged to the local tribes, groups, families and individuals of the area but once adjudicated and registered, section 114,115 and 116 of the repealed constitution provided that Trust land transformed into private land.

27. As to functions of the 1st respondent, counsel directed this court to Article 67 of the constitution on establishment of the 1st Respondent and its functions. Counsel proceeded to state that the Constitution and the National Land Commission Act restricts the 1st Respondent's mandate to reviewing of grants or dispositions of public lands, which include land that was known as government land under the repealed constitution and the Government Lands Act. Government land or public land includes settlement schemes.

28. Counsel submitted that whereas sec 14 of the National Land Commission Act No. 5 of 2012 confers the 1st Respondent power to review all grants or dispositions of public land to establish their propriety or legality, the same unequivocally relates to public land alone and not private land. Therefore the 1st respondent acted ultra vires as it was erroneous for him to purport to exert the same authority over private land.

29. Counsel also submitted that even if the suit property was public land as envisaged under sec 14 of the NLA, there are clear rules to be followed in reviewing of grants under s 14(2) and (3) of the National Land Commission Act. These include a notice of the review to every interest holder, an opportunity to appear before the 1st respondent and to inspect any relevant documents. Additionally the principles envisioned under Articles 40 and 47 of the Constitution must be adhered to. Counsel took the position

that the Notice marked JMM-4 inviting the members to attend a ‘meeting’ on 18th February 2016 did not disclose that the presupposed meeting is for review of the grant or title at all but the invitation was for a mediation. Since the applicants were under the notion that this was a mediation, procedural fairness was not even accorded as they were not given an opportunity to be amply represented and to face its accuser by examining any contrary documents.

30. Lastly, counsel submitted that there is no evidence of how the determination was arrived at and reasons and considerations that underlie it hence the decision was arbitrary and unreasonable.

31. On the point of the remedies available, counsel submitted several authorities in proposition of judicial review remedies and stated that the *ex parte* applicants have met the threshold warranting the orders of certiorari and prohibition as sought in the Notice of Motion dated 20th May 2016.

1st Respondents submissions

32. The 1st Respondent filed submissions dated 25th January 2017 by advocate S Mbutia. Counsel submitted that the orders sought cannot issue as the applicants are twisting the court to make a determination on the issue of ownership of land which is a preserve of the Environment and Land Court. Counsel relied on the case of ***Sanghani Investment Limited Vs Officer in charge Nairobi Remand and allocation Prison(2007) 1 EA 354*** where the court held as follows;

“....A declaration does not fall under the purview of judicial review for the simple reason that the court would require viva voce evidence to be adduced for the determination of the case on the merits declaring who that owner of the land is. ... Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether the remedy is the most efficacious in the circumstances obtaining... so that in this case even though this application were properly before this court and the application had merit , the court may not have granted an order of certiorari because it would not be the most efficacious remedy in the circumstances.

33. Counsel further submitted that the court would be forced to examine evidence on how the land was allocated, passed to the parties, registered in favour of either parties herein, authenticity of the documents which issues are proper for determination in a trial court and not a judicial review court.

34. The second issue counsel submitted was that the applicants have a more efficacious remedy in the form of a civil suit and that despite the ruling of this court, the issue of ownership will still stand undecided.

35. Counsel also submitted that the *Ex-parte* applicants have no proprietary interests over the suit land capable of protection by this court as they are not the registered owners of the suit property (Art 40 of Constitution and sec 26 of the Land Registration Act.) Counsel reiterated that a letter of allotment simply amounts to an offer and is not a substitute for the certificate of lease or certificate of title. Counsel relied on ***Evans Kafusi Mcharo Vs Permanent Secretary, ministry of roads, public works and housing &anor(2013)Eklr.***

36. On jurisdiction of the 1st Respondent to entertain and determine the dispute, counsel cited the following provisions of the law;

Art 67(e) and (f) which mandates the 1st Responded to: (e) Initiate investigation, on its own initiative or on a complaint into present or historical land injustices and recommend appropriate redress and (f) to encourage the application of traditional dispute resolution mechanisms in land injustices.

S 14 of the National Land Commission Act which mandates the commission on its own motion, upon a complaint by the national or county government, a community or an

individual, review all grants or dispositions of public land to establish their propriety or legality.

Sec 14(5) of the NLC Act which provides that where the commission finds that the title was acquired in an unlawful manner, the commission shall direct the Registrar to revoke the title.

Sec 14(6) which states that where the commission finds that the title was acquired irregularly, the commission shall take appropriate steps to correct the irregularity and may also make consequential orders.

37. Counsel submitted the cases of **R Vs Registrar Mombasa and 2 others Ex Parte Bhanga Limited[2012] eKLR** and **R Vs National Land Commission and 2 others Ex parte Airways Holdings Limited [2015]eKLR** whereby in both cases, the court have given section 14 of the National Land Act the stamp of approval.

2nd Respondent's Submissions

38. Counsel or the 2nd Respondent submitted that the records maintained by the 2nd Respondent and the and the annexures produced how that plot NO 273 'A' Residential-Bulbul Trading Centre is owned by Josephat Murrithi Mborothe and that there I no proof of a decision by the 2nd Respondent revoking the letter of allotment or taking steps to revoke the letters of allotment.

39. To this end, counsel maintained that the Application is based on perceived rather than actual decision and or action. Counsel Relied on the Court of Appeal Authority in **R Vs Professor Mwangi S Kaimenyi Ex Parte Kippra, Civil Appeal No. 160 of 2008** where the Court of Appeal held that the Court cannot act on non-existent decision. Counsel proceeded to state that without an identified decision that can be challenged by way of judicial Review proceedings, the court will be acting in vain if it grants orders sought by the Applicants.

40. Counsel also submitted that judicial review is a remedy of last resort and where another remedy is available, Judicial Review route should be avoided. Counsel proceeded to submit that the underlying issue is ownership of land and that this should be canvassed by the appropriate court.

41. As to locus standi, counsel submitted that the Applicants lack proprietorship from this matter as a letter of allotment cannot ascertain proprietary interest. Counsel relied on **John Mukora Wachichi & Others Vs the Minister for lands & Others High Court Petition No. 82 of 2910** where it was observed that the right to property protected under the law and the constitution is afforded to registered owners o land; the letter of allotment is not proof of title as it is only a step in the process of allocation of land.

42. Counsel also submitted the authority in **Wreck Motors Enterprises Vs the Commissioner of lands and 3 others Nairobi Civil Appeal No. 71 of 1997(unreported)** where the Court o Appeal held that Title to land property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to provisions held.

DETERMINATION

43. I have gone through the respective parties pleadings and rival submissions herein and wish to proceed as follows. Many issues have arisen in this matter for determination by the court. First there is the issue whether land Plot Number 273"A" the suit property is public or private land? and consequently whether the Respondents had jurisdiction to entertain this matter or whether they acted in excess of their jurisdiction. The second issue is whether the Applicant has a proprietary interest over the suit property and lastly is the issue of ownership.

44. As correctly submitted by the Respondents' respective counsels the issue revolving this case appertains to ownership of the suit property and this is an issue which cannot be canvassed in this court.

However, the parties herein have already submitted themselves to the jurisdiction of Respondents and a decision has already been made. The question therefore that this court must address itself is whether the Applicants were accorded due process once they submitted themselves to the jurisdiction of the Respondents herein and whether the decision arrived at by the Respondents was tainted by procedural impropriety.

45. The purview of judicial review was clearly set by **Lord Diplock** in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** when he stated that:-

“Judicial review has 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 had applied his mind to the question to be decided could have arrived at itI 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.”

48. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** it was held that:

“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.”

47. In dealing with the same circumstances the Tanzanian Court of Appeal whose judicial review provisions are similar to ours had this to say in the case of **Lausa Alfian Salum & 116 Others v Minister for Lands Housing and Urban Development and National Housing Corporation [1992] TLR 293:**

“Broadly speaking, prerogative orders of certiorari and prohibition may be issued in certain cases either to quash a decision made in the course of performing a public duty or to prohibit the performance of a public duty, where the injured party has a right to have anything done, and has no other specific means of either having the decision quashed or the performance of the duty prohibited, when the obligation arises out of official status of the party or public body complained against,.....had an imperative legal duty of public nature which they had to perform in their official capacity. In any considered view, any of their actions or decisions is challengeable.

Firstly, if it is tainted with illegality, that is, the power exercised is *ultra vires* and contrary to the law. Secondly, if it is tainted with irrationality that is the action or decision is unreasonable in that it is so outrageous in its defiance of logic or of accepted moral standards that no sensible person rightly applied his mind to the matter to be acted upon or to be decided could have thus acted or decided. Thirdly, if the action or decision is tainted with procedural impropriety that is failure to observe basic rules.”

48. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was 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 and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

49. Judicial review is, therefore, concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected.

50. The general legal principles which run through the cited authorities substantially deal with lack of or excess of jurisdiction, violating natural justice rules, a legality of procedure or decision on reasonable decision that no reasonable tribunal or authority could ever come to it, or taking into account matters which it ought not to have taken into account in arriving at a decision. ***(See also the case of Associated Provincial Pictures Houses Ltd v Wednesbury Corp [1947] 2ALL ER 680).*** These are the principles of law intend to apply in deciding this notice of motion by the exparte applicant.

51. It is not in dispute that the exparte applicant Josephat Muriithi Mborothi is the lawful allottee of all that parcel of land referenced as plot Number 273 "A"/ Residential- Bulbul Trading Centre as evidenced by **Annexure JMM-1 Allotment Letter dated 9th November 2000.** The same is further buttressed by the replying affidavit of the 2nd respondent sworn by Dr. Kennedy Ole Kerei the county Secretary of the 2nd Defendant who depones at paragraph 27 of his affidavit thus;

"..That as per the records available at the 2nd Respondents registry, the 1st ex parte applicant herein Josphat Murithi Mborothi is the registered owner of Plot 273 "A" Residential Bulbul Trading Centre within Kajiado Count."

52. A dispute seems to have arisen on the interest and rights vested to the exparte applicant that accrue by virtue of the allotment of Plot No. 273A. The exparte applicant has been enjoying the said rights to land since the allocation in the year 2000. The interests of the exparte applicant are not permanent but subject to renewable as to the terms of allotment but subject to public interests.

53. Article 47(1) of the constitution provides that;

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

Article 47(2) provides that " 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."

54. Under section 4 (1) of the Fair Administrative Action Act 2015 provides as follows:

"Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair."

55. Section 4 (3) : Where the 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 reasons for the proposed administrative action.**
- b. **An opportunity to be heard and to make representation in that regard.**
- (g) **Information, materials, and evidence to be relied upon in making the decision or taking**

the administrative action.”

56. The procedures that were required by this Act to be observed by the 1st respondent in connection with the making of the decision against the exparte applicant were not observed.

57. This Act provides an automatic obligation to any tribunal or state officer, public authority to undertake its functions under the following guidelines, that would be issuance of notice to a party aggrieved with the decision, the question of due process to the affected party with an opportunity to be heard, having heard the parties set out the reasons for the decision, together with findings of fact and material issues to the dispute.

58. In the instant case applicant the 1st respondent has not demonstrated that proper notice was served upon the exparte applicant. The notice could have enabled the exparte applicant an opportunity to be heard including calling of witnesses or availing relevant materials in support of the dispute to the 1st respondent.

59. It is now very clear to me that the 1st respondent did have such obligations in fulfillment of the statutory obligations to determine the dispute between the exparte applicant and the interested party.

60. In the persuasive authority on procedural fairness in appropriate circumstances the court in the case of **Republic v Immigration Appeal Tribunal; Exparte Kahu [1983] QB 794-5** Lord Donaldson observed:

“Judged by that standard the board should have given outline reasons sufficient to show to what they were directing their mind and thereby showing not whether their decision was right or wrong, which is a matter solely for them, but whether their decision was lawful. Any other conclusion would reduce the board to the status of a free-wheeling palm tree.”

61. I accept without hesitation that this principle resonates with the complainant being lodged by the exparte applicant. He was entitled and had a legitimate expectation from the 1st respondent to know the reasons for the award of rights and interest to suit property to the interested party.

62. The failure on the part of the 1st respondent does attract an order of judicial review to set aside the decision which adversely affects the rights of the exparte applicant.

63. It is also not in dispute that the suit premises was as a result of a subdivision of Plot 273 Residential-Bulbul Trading Center jointly allocated to the exparte applicant and the interested party but later subdivided giving rise to the resultant subject suit property and plot Number 273 “B”/ Residential- Bulbul Trading owned by the interested party.

64. I have perused and examined the letter dated 12th February 2016 marked JMM-4 inviting the applicants to attend a meeting on the 18th February 2016 and I am satisfied that the said letter does not indicate neither does it disclose that the meeting is for the applicants to show cause why his title should not be reviewed by the 1st Respondent.

65. It is not in dispute that after the said meeting convened by the 1st respondent, the exparte applicant received a letter from the 1st respondent resolving that plot number 273/R/Embulbul/Ngong be retained by the interested party herein as the said property had been unprocedurally sub divided and allocated to the 1st Applicant.

66. I am satisfied that no evidence has been adduced by the respondent either in form of minutes or otherwise to prove that the exparte applicant was accorded a fair hearing as dictated by the rules of natural justice and pursuant to section 14 (3) of the NLC ACT which provides that;

“In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.

The NLA Act further provides under subsection 8 that;

“ 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.”

68. I am therefore satisfied that the ex parte applicant’s application has met the threshold required in granting of the judicial review orders and consequently I find the Notice of Motion Application dated 20th May 2016 merited and proceed to make the following orders;

1. An order of Certiorari do issue to remove into the High Court and quash the entire decision of the 1st Respondent made through the letter from the County Land Management Board- Kajiado dated 21st day of April 2016 to revoke the 1st Ex-parte Applicant’s ownership of the property known as plot Number 273’’A’’ /Residential-Bulbul Trading Centre within Kajiado County.
2. An order of Prohibition do issue to remove into the High Court to prohibit the Respondents, its servants, agents or in any manner whatsoever from revoking/cancelling and/ or in any manner interfering with the letter of allotment dated 9th November 2000 for plot number 273 ‘A’/Residential-Bulbul Trading Centre registered in the name of the 1st Ex parte Applicant or in any manner whatsoever from interfering with the 1st Ex-parte Applicant’s title, possession and use of the land comprised in Plot No 273’’A’’/Residential-Bulbul Trading Centre.
3. An order of prohibition do issue barring or prohibiting the Respondents, its servants, agents from transferring the allotment of the land comprised in plot No. 273’’A’’/Residential-Bulbul Trading Centre from the 1st Ex parte applicant to any other third party in reliance upon the decision of the 1st Respondent made on the 21st day of April 2016.

Orders

1. Notice of Motion dated 20th May 2016 is allowed.
2. Orders 1, 2 and 3 in the Application dated 20th May 2016 are issued.
3. The issue of ownership to land was not resolved by the impugned decision made by the 1st respondent. This court has no jurisdiction to determine any dispute as to title to land. The parties are therefore at liberty to apply to the relevant forum. In this case Environment and Land Court to look at the matter on the merits on Land Parcel No. 273A.
4. No orders as to cost.
5. It is so ordered.

Dated, signed and delivered in open court at Kajiado this 20th day of March 2017.

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R NYAKUNDI

JUDGE

Representation:

Mr. Oyoo holding brief for Githogori for the applicant

Mr. Sankale for the respondent present

Mateli for Court Assistant