



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC JUDICIAL REVIEW 7 OF 2019

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI, PROHIBITION AND DECLARATORY

AND

IN THE MATTER OF: CONSTITUTION OF KENYA ARTICLES 23, 24, 40,47,50,60,61,62,63 & 64

AND

IN THE MATTER OF: THE NATIONAL AND COMMISION ACT 2012 NO.5 OF 2012

AND

IN THE AMTTER OF: THE ENVIRONMENT AND LAND COURT, ACT NO 19 OF 2011(REV.2015)

AND

IN THE MATTER OF: GAZETTE NOTICE VO.CXX-NO.138 (9TH NOVEMBER 2018)

AND

IN THE MATTER OF: GAZETTE NOTICE VO.CXXI-NO-21(15TH FEBRUARY 2019)

BETWEEN

PETER MAINA CHEGE T/A SMART CHOICE ELECTRONIC COMPANY....APPLICANT

VERSUS

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

THE CHIEF LAND REGISTRAR.....2ND RESPONDENT

KIAMBU COUNTY GOVERNMENT.....INTERESTED PARTY

JUDGMENT

The matter for determination is the Notice of Motion Application dated **11th April 2019**, by the Exparte Applicant as against the Respondents seeking for orders that;

- a) An order of Certiorari to remove into the High Court and quash all the proceedings , and determination contained in the Kenya Gazette special issue Vol. CXXI-No 21 of 15th February 2019 at page 573 and 574 in relation to Municipality Block 10/687, 695 , 696,697,698,699,700,701,702,703,704 and 705 (the suit properties)*

b) *An order of prohibition directed to the Respondents prohibiting them, their agents, servants and or anyone under their direction from revoking, resurveying, excising or vesting the suit properties to the interested party or in any other manner whatsoever alienating the aforesaid suit properties.*

c) *A Declaration that the gazette Notice Vol CXX-No 138 of 9th November 2018 at page 3988 constitutes a lawful recommendation over the suit properties and should be upheld.*

d) *An order that the determination and gazette notice contained in the gazette Notice special issue Vol. CXX-No21 of 15th February 2019 at page 573 and 574 in relation to the suit properties is unconstitutional null and void.*

e) *A Declaration that the 1st Respondent has no jurisdiction to revoke the applicants titles to the suit properties'*

f) *Damages and costs.*

The Judicial Review is premised on the grounds that on **9th November 2018**, vide gazette Notice **Vol. CXX-No.138** at page **3988** the 1st Respondent recommended that the suit properties be regularized to the owners (the Applicant) but to the Applicant's surprise, vide gazette Notice of **15th February 2019** at page **573 and 574**, the Ex parte Applicant's properties were revoked by the 1st Respondent without ever been given an opportunity to be heard and further without jurisdiction by the 1st Respondent. Further that the Revocation of the suit properties was arbitrary deprivation of property contrary to **Article 40** of the **Constitution of Kenya** and a breach to **Fair Administrative Action**, therefore illegal as the gazette notice is in contravention of the principle of finality of decision as the 1st Respondent could not seat on its own appeal having pronounced itself on the legality of the suit properties on the gazette Notice of **9th November**. Further that the unlawful administrative action by the Respondents will deprive the Applicant's right to the property arbitrarily as the same will vest absolutely to the interested party in breach of the legitimate expectation and will breach constitutional values by illegally compulsorily acquiring private property without compensation jurisdiction and without a hearing.

In his Verifying Affidavit sworn on **10th April 2019**, the Applicant averred that the Municipal Council of Thika(Defunct) caused the subdivision of **L.R 4918/8 Thika Municipality**, by a letter dated **9th May 2007**, the Municipal Council requested the Commissioner of Lands to issue allotments and subsequent leases to the plots in the intended subdivision. He averred that various letters of allotment were issued to individuals and conditions thereto made. That upon fulfilment of the said conditions in the allotment letters, the allottees and /or their nominees were issued with certificates of leases and being one of the nominees, the Applicant became a beneficiary of the suit properties to which he has been paying land rent and rates to the County Government of Kiambu.

He further averred that on **3rd March, 2017**, the 1st Respondent invited anyone with interest to respond to a claim raised by **Thiwasco** to which he made his representations and appeared. That vide Kenya **Gazette Vol. CXX-No138 of 9th November 2018**, the 1st Respondent delivered its recommendation to the effect that the title documents be regularized to the owners and upon this recommendation, he regularized the titles and vide a letter dated **14th November 2018**, he registered the gazette Notice effectively regularizing the titles. However, vide a gazette notice **Vol. CXXI No. 21 of 15th February 2019**, the 1st Respondent reversed the earlier determination without giving him an opportunity to be heard and revoked all the titles he had and vested them to the interested party.

Further that he has been advised by his Advocates, information which he believed to be true that the decision to revoke the titles unilaterally was illegal and without jurisdiction that the decision was arrived at without affording him an opportunity to be heard. Further that the decision was arrived at after the final finding by the 1st Respondent had been made and were therefore bound by the principle of *functus officio*, that the decision was in breach of his legitimate expectation founded in law and the decision contained in gazette notice of **9th November 2018**. He contended that though he had requested the 1st Respondent to rescind its decision, it has been in vain.

The suit is contested and the Interested Party filed a Replying Affidavit sworn on **27th June 2019** by **Dr. Martin N. Mbugua**, its County Secretary Head of Public Service. He averred that he had been informed by his Advocate that **section 5 of the National Land Commission Act** provides for the functions of the Commission which include but is not limited to managing of public land on behalf of the National Government. He also averred that the suit properties were acquired by the defunct Municipal Council of Thika and were originally reserved for Thika Water and Sewerage Company, but that the properties were acquired for construction of staff houses and development of affordable housing. He further averred that he is informed by his Advocate that after investigating any claims, the Commission shall recommend remedies that include but not limited to order for revocation and reallocation of land and an order for revocation of any official declaration in respect any public land and reallocation if the claim is found to be merited. That the complaint raised by the Interested Party was due to fulfilling of its mandate granted by the Constitution and its only following the directives and decision by the National Land Commission and the Applicants have not shown that the Interested Party's action have been tainted by any illegality, irrationality and procedural impropriety.

The Judicial Review was canvassed by way of written submissions and the Applicant through the **Law Firm of Muturi S.K & Company Advocates** filed his submissions dated **24th October 2019** and submitted that Judicial Review concerns itself more with the manner in which the decision is made and not the merit or otherwise of the ultimate decision. It was submitted that the Ex parte Applicant was not heard in relation to the reversal of the decision contained in gazette Notice of **15th February 2019**.

It was further submitted that the decision offends **section 14 of the National Land Commission Act** as no notice was sent out of such review and no opportunity was granted to the exparte Applicant before the rescission of the decision and therefore the decision to revoke the title contained in the impugned gazette Notice was illegal and without jurisdiction. The Applicant relied on the case of **Robert Mutiso Lelli & Cabin Crew Investments Ltd...Vs... NLC & 3 Others (2017) eKLR** where the Court held that;

“95 there is no legal provision for the commission to revoke titles whereupon inquiry it establishes that such titles were unlawfully or irregularly acquired.

The power to revoke title is vested in the registrar and not the commission.

98 in view that the commission was announcing determination to revoke the title and not recommendation to the Registrar for recommendation of the subject titles, it is clear that the commission acted illegally and usurped the powers of the Registrar in revoking the titles to the respective land reference numbers complained of.”

The Applicant further submitted that the decision was **ultra vires** to the **National Land Commission Act** and therefore illegal; for lack of hearing and that the 1st Respondent had no power to reopen the matter once there was a determination and all the proceedings had been concluded and a gazette notice published.

The interested party through **Natalia S. Sanaet, its Legal Counsel** filed its written submissions on **16th December 2019**, and submitted that **Section 14 of the National Land Commission Act** mandates the Commission to review all grants and dispositions of public land either on its own motion or upon receipt of a complaint with a view to establish their legality or propriety and therefore the 1st Respondent made a recommendation as prescribed by the Constitution of Kenya and reiterated by the **National Land Commission Act**, It was its further submission that the Commission made a recommendation and not a decision. Further that the proper procedures were followed by the Commission before coming into a decision and the Applicant reiterating that the land is private land does not put it beyond the reach of the Commission. It relied on various provisions of law and urged the Court to dismiss the suit.

Despite being served with the suit papers, the 1st and 2nd Respondents did not respond to the Judicial Review proceedings.

The Court has now carefully read and considered the written submissions by the parties. The Court has also considered the Ex parte Applicant's Judicial Review application, the annexures thereto, the **Replying Affidavit** by the Interested Party, 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 11th April 2019 is merited.**
- c) **Who is entitled to costs of these proceedings?**

From the outset, it is important to set out the purpose of **Judicial Review**. In the case of **Municipal Council of Mombasa...Vs...Republic Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007(2002) eKLR**, the Court of Appeal held that:-

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who make the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review”.

Further circumstances under which orders of **Judicial Review** can be issued were elaborated by **Justice Kasule in the Uganda case of Pastoli ...Vs..Kabale District Local Government Canal & Others (2008) 2EA 300 at pages 300-304**.-----

“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, 4th Edition vol.1 at Pg.37 paragraph 128.”

From the foregoing cases, the applicable law in cases of Judicial Review have already been established and 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 Ex Parte Applicant has met the grounds for granting of Judicial Review Order of Certiorari and Prohibition.

As was stated in the case of Kenya National Examination Council ...Vs...Republic (Exparte Geofrey Gahenji & 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 has 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 Vol . CXXI-No.21 dated 15th February 2019 at page 573 and 574 ?**

The **Exparte Applicant** has alleged that the **National Land Commission** arrived at a decision that was in excess of its jurisdiction by revoking its titles vide gazette Notice **Vol.CXXI No. 21** and purported to cancel its titles after it had already made a decision vide Gazette Notice **CXX-No. 138** and became **functus officio**. Further that the Ex parte Applicant was not accorded a fair administrative action, Further that the 1st Respondent did not act in accordance with the rules of **Natural Justice**, as it was not afforded a chance to be heard by the 1st Respondent before the second decision was arrived at.

The Interested Party has averred that the **National Land Commission** in arriving at its decision was guided by the National Land Commission Act and the Constitution and only did what it was mandated to do and therefore followed all procedures.

While the interested party, is of the view that the Ex parte Applicant is contesting the jurisdiction and legality of the 1st Respondent’s decision, the Court finds that the issue being contested by the Ex parte Applicant is whether the 1st Respondent usurped its powers and acted *ultra vires* and further that it was not satisfied with the process through which the 1st 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 1st Respondent arrived at its decision. Therefore, she has established the threshold for grant of the orders sought.

b.) If so, whether the application dated 11th April 2019 is merited.

In its Application, the **Ex parte Applicant** has averred that the 1st Respondent acted *ultra vires* and in excess of its jurisdiction when it made a decision after it had already ruled on a matter and further that it purported to revoke its title in contravention to National Land Commission Act. It is not in doubt that **Section 14 of the National Land Commission Act**, empowers the Commission to direct the Land Registrar to revoke any title that was acquired unlawfully. In this case to establish whether or not the Commission revoked the title as opposed to directing the revocation, this Court needed to see the said gazette Notice. However the said impugned gazette Notice or any decision in that matter has not been attached to the pleadings. Therefore, it is the Court’s considered view that it cannot hold that the 1st Respondent acted *ultra vires*.

Further the Ex Parte Applicant has contended that it was not accorded a fair administrative action as it was not afforded any hearing before the reversal of the decision made Vide Gazette Notice **Vol.CXXI-No. 21** was made. As already stated above, the Ex parte Applicant failed to attach the impugned gazette notice. However, the interested party has acknowledged that indeed there was reversal to the decision in the gazette **Notice Vol.CXX-No 138**.The Court has also seen the demand letter dated **22nd March 2019**, by the Exparte Applicant to the 1st Respondent touching on the issue. Therefore it is the Court’s considered view that the said gazette exists. Further the contentions by the Ex parte Applicant have not been rebutted and given that there is no evidence to the contrary, this Court has no option but to believe the said contention.

Having held that there is no evidence that the Ex parte Applicant was afforded an opportunity to be heard before a reversal was made, It is the Court’s considered view that the 1st Respondent did not accord the Applicant fair administrative action which the Applicant was entitled to. See the case of In the case of Republic...Vs...The Honourable The Chief Justice of Kenya & Others ...Vs...exparte Moijo Mataiya Ole

Keiuwa, Nairobi HCM CA No.1298 of 2004, the Court held that:-

“The rules of Natural justice are minimum standard of fair decision making imposed by the common law on persons, or bodies that are under a duty to act judicially”.

Having found that the *ex parte Applicant* was condemned unheard and that goes against the doctrine of Natural justice as was outlined in the Halsbury Laws of England Volume 1(1) page 218, which states as follows:-

“Natural justice comprises two basic rules; first that no man is to be a judge in his own cause (nemo iudex in causa sua), and second that no man is to be condemned unheard (audi alteram partem). These rules are concerned with the manner in which the decision is taken rather than with whether or not the decision is correct”.

Therefore, the *Court finds* that the *ex parte Applicant* has established the **threshold for granting of judicial review orders**.

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 1st Respondent.

Having now carefully analyzed 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 **11th April 2019**, is found merited and the same is allowed entirely in terms of prayers **a, b, c, d and f** with costs being borne by the 1st Respondent herein.

It is so ordered.

Dated, signed and Delivered at Thika this 15th Day of June 2020.

L. GACHERU

JUDGE

Jackline - 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 **15th 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 :

None for the Ex parte Applicant

None for the 1st Respondent

None for the 2nd Respondent

None for the Interested Party

L. GACHERU

JUDGE