



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND MISC. CIVIL APP. NO. 3 OF 2013 (JR)

IN THE MATTER OF AN APPLICATION BY DR. J. A KUMENDA & DR. FLORENCE W. GATUNE FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI & PROHIBITION

AND

IN THE MATTER OF PUBLIC HEALTH ACT

AND

IN THE MATTER OF ENVIRONMENT AND CO-ORDINATION ACT

AND

THE CONSTITUTION OF KENYA, 2010

BETWEEN

REPUBLIC APPLICANT

VERSUS

THE CLERK MUNICIPAL COUNCIL OF KISII 1ST RESPONDENT

THE MUNICIPAL COUNCIL OF KISII 2ND RESPONDENT

THE COUNTY COMMISSIONER (KISII COUNTY) 3RD RESPONDENT

THE COUNTY DIRECTOR OF ENVIRONMENT (KISII COUNTY) 4TH RESPONDENT

DISTRICT PUBLIC HEALTH OFFICER, KISII 5TH RESPONDENT

DISTRICT COMMISSIONER, KISII CENTRAL DISTRICT 6TH RESPONDENT

THE HON. ATTORNEY GENERAL 7TH RESPONDENT

AND

DR. J. A. S. KUMENDA 1ST EX PARTE APPLICANT

AND

KISII COUNTY GOVERNMENT

COUNTY SECRETARY AND HEAD OF PUBLIC SERVICE

THE COUNTY DIRECTOR OF ENVIRONMENT ... INTERSTED PARTIES/CONTEMNORS

JUDGMENT

1. Introduction:

The ex parte applicant by a Notice of Motion dated 11th March 2013 seeks the following orders:

1. **The honourable court be pleased to grant an order of judicial review in the nature of writ and/or order of certiorari, removing into the High Court and quashing the decision of the respondents herein conveyed vide the letter dated the 19th day of February 2013 purporting to stop the ex parte applicants from continuing with developing their land and authorizing the 1st and 2nd respondents to utilize parcel number Kisii Municipality/Block III/301 as a garbage dumping site.**
2. **The honourable court be pleased to grant an order of judicial review in the nature of writ and/or orders of prohibition against the respondents, prohibiting the same from interfering, encroaching and/or intermeddling with the ex parte applicants developments on parcel number Kisii Municipality/Block III/301 other than any other lawful cause and/or enforcing the unilateral decision conveyed vide the letter dated the 19th February 2013.**
3. **The honourable court be pleased to grant an order of judicial review in the nature of prohibition, prohibiting the respondents from contaminating and/or polluting the environment by converting the parcel number Kisii Municipality/Block III/301 into a garbage dumping site, in contravention with the mandatory provisions of Article 70 of the Constitution, 2010 which act shall violate the ex parte applicants constitutional rights to clean environment and property.**
4. **Costs of this application do abide the substantive application for judicial review.**

2. The application is supported on the grounds set out on the body of the application, the statutory statement dated 26th February 2013 and the verifying affidavit sworn by Dr. A. J Kumenda, the 1st applicant on 26th February 2013 together with annexures thereto.
3. The 1st interested party, Kisii County Government opposed the application through a replying affidavit sworn by one Johnstone O. Ndege, the County Secretary of the 1st interested party on 20th March 2015.
4. **The ex parte applicants case:**

The ex parte applicants' case is that they are the registered owners of the private property known as **Kisii Municipality/Block III/301** situate within Kisii Municipality (hereinafter referred to as the "**suit property**"). The ex parte applicants hold a duly registered lease and certificate of lease to the property and have annexed a copy of the official search, lease and certificate of lease as AJK 1 (a), (b) and (c) to illustrate the fact. The applicants state that they lawfully acquired the suit property from Getembe Maternity and Nursing Home with the consent and approval of the 1st and 2nd respondents and that there had never been a dispute as to the ownership of the property since they acquired the same.

5. The ex parte applicants aver that they sought and obtained approval for development plans on the

suit property and commenced development thereon when vide the 2nd respondents letter dated 23rd January 2013 (AJK 6(a)) the 2nd respondent's requested the applicants to resubmit their ownership documents of the suit property and further required the applicants to suspend any further development on the subject property until further notice. The applicants vide a letter dated 5th February 2013 marked (AJK 6 (b)) responded to the 2nd respondent's letter of 23rd January 2013 and furnished the documents the 1st and 2nd respondents had sought.

6. The applicants further state that the 1st and 2nd respondents had established a temporary dumping site for garbage near the vicinity of the suit property and owing to the health hazard the dump site posed, the applicants had raised complaints respecting the location of the dump site but that rather than solve the problem the 1st and 2nd respondents hatched a scheme to extend the dump site to include the suit property owned by the applicants notwithstanding the property is privately owned and is not designated as a dump site for garbage.
7. The applicants further state that on 20th February 2013 the 1st respondent conveyed to them the decision made vide the letter dated 19th February 2013 whereby the respondents purported to have convened a meeting on the 14th February 2013 at which meeting it was resolved to stop the applicants from continuing with the ongoing developments on the suit property and to have the suit property used as a dumping site until an alternative dumping site was found. The full content of the letter addressed to Kisii Medical Diagnostic and Imaging clinic of the applicants was in the following terms:-

RE: KISII DUMPING SITE PLOT III/301

Reference is made to National Environment Management meeting held on 14th February 2013 in the County Commissioner's office chaired by the County Commissioner and attended by the County Director of Environment and District Public Health Officer Kisii among others.

It was resolved that you stop any further development on the said plot with immediate effect and remove the equipment from site with immediate effect and the council continues using the site as dumping site while the issue of an alternative dumping site is addressed.

We are also pursuing the issue of confirmation of ownership of the suit land.

Signed

William K. Chepkwony

Town clerk

8. The applicants impugn the decision carried vide the said letter and contends that the decision was unilateral, arbitrary, callous and oppressive and that the respondents conduct was reckless and amounted to abuse of office. The applicants aver the respondents' action was ultra vires as the respondents undoubtedly violated the applicants' rights to be heard before such a decision that affects and infringes on their rights and interest is made. The applicants aver that the respondents' action and conduct is in violation of the applicants' constitutional rights as enshrined in articles 25, 40, 42, 47, 50, 64 and 70 of the Constitution, 2010. The applicants contend that their rights to property were infringed and it is their contention that their privately owned property cannot be appropriated without due process of the law. The applicants aver the acts of the respondents amount to depriving the applicants of their property without affording the applicants a chance of being heard and in complete disregard of the rule of law. The applicants argue that this is a proper case for the court to intervene by way of judicial review and grant the applicants the relief sought in the Notice of Motion.
9. **The respondents/interested party's case:**

The interested party, County Government of Kisii, is essentially the successor of the defunct Kisii Municipal Council. This point was aptly settled by my brother Hon. Justice Okong'o in a ruling he delivered in this same matter on 14th June 2013. In the ruling the judge observed thus:-

“County Governments under the new constitution took over the powers and functions of the local authorities as they were recognized and defined under the old constitution and the Local Government Act. Pursuant to the provisions of the said section 33 of the sixth schedule to the Constitution of Kenya 2010, County Government are therefore the natural and presumptive legal successors of the defunct local authorities.”

10. Thus although the County Government of Kisii was ordered to be served with the pleadings being an interested party and as someone who stood to be affected by the decision in the case, in my view they were properly the 2nd respondent and their name could as well have been substituted in place of **“Municipal Council of Kisii”** who had ceased to exist by operation of the law following the birth of devolved units. Essentially therefore, Kisii County Government, stands in the shoes of the defunct Municipal Council of Kisii and in this judgment I will draw no distinction between the two as the latter is but the successor of the former.
11. The Kisii County Government in response to the ex parte applicants application have stated that the ex parte applicants acquired the suit property irregularly and aver that the records of the defunct Municipal Council of Kisii do not show any minute allocating the suit property to Getembe Maternity and Nursing Home, the original allottee from whom the ex parte applicants purchased the suit property. The County Government contend no consent to transfer the suit property to the ex parte applicants was obtained in terms of the special condition of the lease and consequently the transaction was void ab-initio. The interested party/respondent avers the suit property was being used as a dump site by the time the County Government came into office and asserts that the suit property as per the approved development plan for Kisii Town **Plan Ref No. N37/71/01 of 1971** lies within an area designated as riparian and recreation area (plan annexed and marked as **“JON-01”**). The interested party/respondent further avers the suit property is one of the properties under inquiry/investigation by the National Land Commission on account of being suspected to have been irregularly and/or illegally acquired.
12. The interested party/respondent asserts that the suit property was irregularly allocated and points to the absence of a letter of allotment and/or any evidence of an approved Part Development Plan (**PDP**). The respondent avers that the suit property lies within the 30 metres riparian reserve of River Nyakomisaro and states that there has never been any replanning of the area so that the location of the suit property was changed from riparian reserve to commercial user. At any rate the respondent asserts that the applicants never complied with special conditions 2 and 4 of the lease and cannot for that reason claim to be bonafide owners. The respondent denies there were any approved building plans for the development that the applicants had commenced on the suit property and reiterated that the property having been irregularly and unprocedurally acquired the applicants were not entitled to effect any developments thereon.
13. **Submissions by the parties;**

The ex parte applicants submissions and response submissions to the interested parties/respondents submissions were filed on 29th July 2015 and 11th February 2016 respectively. The interested parties/respondents submissions were filed on 10th February 2016. Counsels for the parties, **Mr. O. M Otieno** for the ex parte applicants and **Mr. K. C Onsembe** for the interested parties/respondents highlighted their respective clients submissions orally before me on 9th March 2016.

14. The gist of the ex parte applicant's submissions was that the respondents in issuing the decision conveyed vide the letter dated 13th February 2013 acted unilaterally and did not afford the ex parte applicants an opportunity to be heard before the decision was made and it is their submission that the omission rendered the decision unlawful and ultra vires and therefore amenable to the exercise by the court of its jurisdiction to quash the same by way of judicial review. The ex parte applicant asserts they were the registered owners of the suit property and were therefore entitled to the

protection of the law and their property could not be appropriated without due process being followed. They argued the respondents in making the decision to put a stoppage over the development of the suit property by the applicants were acting as quasi judicial authority and by failing to follow due process their decision was unlawful and *ultra vires*. The applicants submit the respondents' decision was unfair and was contrary to the principles of natural justice which requires all parties to be afforded an opportunity of being heard before any decision that is likely to affect them is made. The applicants' argument is that they were condemned without being heard and therefore the decision ought not to be allowed to stand. The applicants contend that the respondents breached the constitutional provision that guarantees the applicants the right to fair administrative action and hence the respondents' decision was null and void and the same ought to be quashed.

15. Mr. Onsembe advocate on behalf of the respondents/interested party submitted that the impugned decision conveyed by the letter of 13th February 2013 did not constitute a unilateral decision as would invite the court's intervention. The interested party submitted that the subject letter was in fact addressed to Kisii Medical Diagnostic and Imaging Clinic and not to the ex parte applicants suggesting that the ex parte applicants were not the affected parties. The interested party further submitted that the ex parte applicants by the application are seeking validation of the ownership of the suit property which cannot be done in a judicial review application owing to the fact that judicial review cannot permit the taking of oral evidence which would be necessary to prove ownership.

16. The interested party/respondent further submitted that the allocation of the suit property was irregular as the land is situated within an area reserved as riparian reserve intended for recreation. The interested party to illustrate its position pointed out that the ex parte applicants did not have a Part Development Plan (PDP) that was relied upon to alienate the suit property and neither did they demonstrate that there had been a change of user of the suit land from residential as shown in the lease to commercial user. The interested party further averred that the ex parte applicants did not have approvals for the development they were undertaking on the suit land and further that the ex parte applicants had not complied with special conditions 2 and 4 of the lease and therefore cannot claim to be bonafide owners of the suit property. The interested party additionally stated that the suit property constitutes one of the properties that it has submitted to the National Land Commission for investigations with a view to having the title revoked for having been irregularly acquired. The interested party finally submitted it had queried the ownership of the suit property by the ex parte applicants and had in that regard requested the applicants to submit their ownership documents for review and therefore as the review process had not been completed the applicants cannot claim the decision of 19th February 2013 was unilateral as they had been consulted.

17. Analysis and determination:

The ex parte applicants' case is premised on the fact that they are the registered owners of the suit property and as such registered owners they assert they are entitled to enjoy the exclusive rights of ownership as conferred and vested under the provisions of sections 24, 25 and 26 of the Land Registration Act, 2012. The ownership rights of the applicants can only be challenged under section 26. 1 (a) and (b) of the Land Registration Act, 2012 if it is shown and proved that the title was obtained through fraud or misrepresentation to which the registered owner is shown to have been a party or if it is shown the title was irregularly and unprocedurally obtained. The applicants position is that the respondents decision vide the letter of 23rd February 2013 that required the applicants to stop any further development on the suit property and to remove their equipment therefrom to facilitate the respondent (Kisii Municipal Council) to continue to use the suit property as a dumping site was unilateral and a violation of the law as the respondents were in effect appropriating private property of the applicants without any adherence to the law. The applicants fault the process the respondents followed in reaching the decision that they did and which decision was prejudicial to the applicants. The applicants were not given an opportunity to be heard before the decision was taken and they contend the decision having been unilaterally made they were condemned without being heard.

18. Both the applicants and the interested party/respondent have devoted considerable space in their pleadings and submissions on the question of ownership of the suit property. The applicants maintain they are the registered owners of the suit property while the interested party/respondent

counter that the applicants could only have acquired ownership irregularly and/or illegally intimating that the applicants ownership is challengeable under the provisions of the law and it is for that reason the interested party affirms they have referred the title of the suit property held by the applicants to the National Land Commission for investigation with a view to having the same revoked. With respect the issue whether or not the applicants are the registered owners of the suit property is indeed a non issue. I say so because the copy of the certificate of official search annexed dated 5th February 2013 (AJK 1(a) and the copy of certificate of lease (AJK 1 (b) dated 2nd July 2012 respectively show the applicants are the registered owners. Section 26 (1) of the Land Registration Act, 2012 provides that a certificate of title is conclusive evidence of proprietorships. Section 26 (1) provides:-

“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:-

- a. **On the ground of fraud or misrepresentation to which the person is proved to be a party; or**
- b. **Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

19.The interested party has contended that the applicants’ title was irregularly obtained. This court in a judicial review as in the present matter only has jurisdiction to grant reliefs as provided under section 8 of the Law Reform Act, Cap 26 Laws of Kenya which are restricted to mandamus, certiorari and prohibition. Any other reliefs such as 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 determination of the case on merits before making such a declaration. Judicial review is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application. See the case of **Khobesh Agencies Limited and 32 Others –vs- Minister of Foreign Affairs and International Relations and 4 Others [2013] eKLR**. In this judicial review application to determine whether or not the applicants irregularly acquired the title they hold in respect of the suit property would entail receiving oral evidence in order to determine the issue. That is beyond the scope of a judicial review application and would fit in the realm of the ordinary civil litigation or constitutional petitions where declarations may be sought and viva voce evidence adduced in support or otherwise.

20.The other issue for determination in this matter is whether the decision communicated vide the letter of 19th February 2013 to the applicants constituted a decision that would be amenable to judicial review. As I have observed earlier in this judgment the applicants are the registered owners of the suit property and by virtue of Article 40 of the Constitution their property rights are protected. It follows therefore any act and/or decision by the respondents that was bound to affect the applicants property rights in regard to the suit property, the applicants ought to have been involved. The respondents in the instant case convened a meeting on 14th February 2013 at which the applicants were not invited and proceed to make a resolution to not only stop the applicants from further continuing with the development that they were undertaking on the property but also to permit the respondents (Kisii Municipal Council) to use the suit property as a temporary dumping site pending the identification of an alternative site. The meeting also resolved to pursue the issue of confirming the ownership of the suit property. The effect of this decision/resolution by the respondents was to take over the applicants’ property even as they awaited the confirmation of the ownership yet the applicants prima facie held ownership documents.

21.The decision by the respondents to the extent that the applicants were not involved in the process that culminated in its making, was unilateral and was an affront to the rules of natural justice as the applicants were not afforded an opportunity of being heard before the decision was made. In the case of **Republic –vs- Public Procurement Complaints Review and Appeals Board Ex parte Invesco Assurance Co. Ltd [2014] eKLR Odunga, J.** granted an order of certiorari where he found that the rules of natural justice had been contravened. He rendered himself thus:-

“I have considered the application, the supporting affidavit and submissions of the applicant. The applicant’s case is that it was never given an opportunity of being heard before the respondent made the impugned decision. In the absence of any evidence that the applicant was notified this court finds that the respondent in arriving at its decision contravened the rules of natural justice.”

22. In the instant case even though the respondent stated the applicants had not obtained approval for the development they were carrying on the suit property, there is no evidence that the respondent (Kisii Municipal Council) had complied with the provisions of section 38 of the Physical Planning Act, Cap 286 Laws of Kenya whereby the respondent would have served the applicants with an enforcement notice in case the developments they were undertaking had not been approved. The applicants nonetheless had not annexed any approved building/development plans to support their averment that the building plans had been approved. Payment of an approval fee does not connote approval of the plans since the fee is payable to enable the approval process to take place.
23. Article 47 of the Constitution entitles every person to the right of fair administrative action and provides thus:-

47 (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

The applicants were not given an opportunity to be heard before the impugned decision was made and on that account the process through which the decision was made was not procedurally fair and the decision in the circumstances cannot stand. **Musinga J.** in the case of **Kuria Greens Ltd –vs- Registrar of Titles & Another [2011] eKLR** expressed his view in regard to situations where title to land is said to have been fraudulently acquired. He succinctly set out what a party who is aggrieved ought to do and stated thus:-

“Even assuming there was fraud or misrepresentation in alienating the suit land to the original registered proprietor, the petitioner was not party to such fraud or misrepresentation. The petitioner lawfully purchased the suit land from Riangi Estates Ltd and obtained all the necessary consents and invested heavily on the suit land. The 1st respondent could not therefore purport to arbitrarily revoke its title without any notice and most importantly without following the due process of law. Due process must be adhered to by all the state and its citizens.

Whereas unlawful acquisition of public property by citizens must be lawfully resisted, the court will be failing in its constitutional duties if it failed to protect its citizens from unlawful acquisition of their property by the state through unlawful decisions taken by public officers. If the respondents were satisfied that the suit land had been unlawfully alienated and that it was in the interest of the public that the land reverts to the state or to the Kenya Agricultural Research Institute, appropriate notice ought to have been given to the petitioner and thereafter the respondents ought to have exercised any of the following options:-

- a. **Initiate the process of compulsory acquisition of the suit land and thus pay full and prompt compensation to the petitioner, or**
- b. **File a suit in the High Court challenging the petitioner’s title and await determination in one way or the other.**

Short of that, the respondent’s purported action of revoking the petitioner’s title is an affront to private proprietary rights which are guaranteed by our Constitution and such an action must be frowned upon by the law.”

24. I fully endorse Musinga J’s exposition of the law. The respondents actions in the instant matter virtually amounted to appropriating the applicants property without following due process and I am satisfied the respondents actions and decision are indeed amenable to judicial review. While I hold that an order of certiorari removing into this court the impugned decision of the respondents conveyed vide the letter dated 19th February 2013 and quashing the same is merited, I nonetheless

do not order that the applicants should continue with the developments that they state they were undertaking. The developments must be sanctioned by the interested party in accordance with the provisions of Section 30 of the Physical Planning Act, Cap 286 of the Laws of Kenya. It has not been demonstrated by the applicants that indeed their development plans had been approved as required under the Physical Planning Act as aforesaid.

25. Accordingly subject only to the qualification that the applicants development plans on the suit property must be approved under the provisions of the Physical Planning Act, Cap 286 Laws of Kenya which has its own mechanisms as relates to approvals of any development plans on the suit property, I grant the orders sought in the Notice of Motion dated 11th March 2013 in terms of prayers 1, 2 and 3. The costs of the application are awarded to the applicants and the same shall be borne by the interested party (Kisii County Government).

26. It is so ordered.

27.

Judgment dated, signed and delivered at Kisii this 3rd day of June, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the ex parte applicants

..... for the respondents

..... for the interested parties

..... for the Court Assistant

J. M MUTUNGI

JUDGE