REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE NO. 250 OF 2018

REPUBLIC.....APPLICANT

VERSUS

THE NATIONAL LAND COMMISSION .....RESPONDENT

AND

NAROK MUSLIM WELFARE ASSOCIATION .....INTERESTED PARTY

FATUMA MOHAMUD MOHAMED

(SUING ON BEHALF OF BILAL PRIMARY SCHOOL NAROK AND GMP,

MHA, KCN, WNI, WAI, ANM, MYM, MHA, SLD, SYM, AAY, FMA, SSA,

AA & SKE (MINORS)) .....EX PARTE APPLICANT

JUDGMENT

1. By Notice of Motion dated 19th December 2016, the ex parte applicant seeks the following orders:

> 1. That this honourable court be pleased to issue an order of certiorari to remove into the High Court and quash the decision of the respondent dated 12th October 2016 directing that Bilal Primary School Narok be evicted from Plot number 143 block 11 Narok.
>
> 2. That this honourable court be pleased to issue an order of prohibition stopping the respondent, or its agents or servants from evicting Bilal Primary School Narok from Plot number 143 block 11 Narok.
>
> 3. That the costs of this application be provided for.

2. The application was initially filed in the High Court at Narok but was later transferred to Environment and Land Court at Narok and finally to this court.

3. The application is supported by an affidavit sworn by Fatuma Mohamud Mohamed, the ex parte applicant who described herself as the manager of Bilal Primary School Narok. She deposed that the respondent directed through a letter dated 12th October 2016 that Bilal Primary School Narok be evicted from plot number 143 Block II Narok (hereinafter the suit property). She added that the school is not an illegal developer but a *bona fide* tenant pursuant to an agreement dated 9th December 2009 with Narok Muslim Welfare Society, the landlord. That the decision was made following a complaint by persons purporting to be office bearers of the landlord yet their purported election is the subject of proceedings in Narok High Court Judicial Review Application No. 3 of 2016. Further, that the decision was made without giving the school a notice or a fair hearing and in disregard of the rights of the students who are minors, to education. One Ahmed Bashir Hassan Gele also filed an affidavit supporting the application. He described himself as a member of the interested party. He referred to a leadership dispute within the interested party and stated that the school is not an illegal developer and that it was set up with the consent of members of the interested party.

4. The interested party reacted to the application through a supporting affidavit sworn by Mohamed Hassan Yunis, its chairman. He termed the impugned decision of the respondent a legitimate one, adding that the agreement granting the suit property to the ex parte applicant was signed by persons who were not officials of the interested party and that the ex parte applicant is doing business on a public utility.

5. The application was canvassed through written submissions. Although served, the respondent neither filed a response nor submissions. It equally did not attend court at the hearing of the application.

6. It is argued on behalf of the ex parte applicant that the respondent's impugned decision was arrived at in violation of the right to an administrative process that is fair, impartial and expeditious as enshrined in **Article 47** of the **constitution** as well as **section 4** of the **Fair Administrative Action Act**, the right to a fair hearing as provided under **Article 50** of the **constitution** and without notice as required under sections **152A** to **E** of the **Land Act**. The cases of **Moi Education Centre Co. Ltd v William Musembi & 16 others [2017] eKLR** and **Onyango Oloo vs. Attorney General [1986-1989] EA 456** are cited in support of those submissions. It is further argued that the focus in judicial review proceedings is process of decision making as opposed to the merits or demerits of the decision. Consequently, it is argued, the issues of leadership row in the interested party or validity of the ex parte applicant's tenancy are not for determination by this court.

7. It is argued on the part of the interested party that the ex parte applicant failed to disclose a material fact to the effect that there was fraud in the manner in which it acquired possession of the suit property and that the ex parte applicant is merely intent on using the court's process to sanctify an illegal acquisition. Thus, it is argued that the question that should be answered is whether judicial review orders should issue when there has been fraud prior to the subject decision. It is further argued that judicial review orders are discretionary and that certiorari should not issue herein since there was fraud. Citing **Section 9 (2)**, **(3)** and **(4) of the Fair Administrative Action Act, 2015**, it is argued that the ex parte applicant ought to have appealed to the respondent against the decision and exhausted the appeal process before approaching the court. The case of **Republic v National Environmental Management Authority [2011] eKLR** is cited in support of that submission.

8. I have considered the application, the statutory statement, the affidavits and the submissions. The issues that arise for determination are: firstly, whether the issues of leadership row in the interested party or validity of the ex parte applicant's tenancy are for determination in this matter and lastly, whether the reliefs sought are available.

9. It is apparent that there have been leadership disputes within the interested party. Those disputes led to the filing of Narok High Court Judicial Review Application No. 3 of 2016. Arising from those disputes, the interested party has taken the position that the agreement dated 9th December 2009 granting the suit property to the ex parte applicant was signed by persons who were not its officials and that therefore the impugned decision of the respondent is a legitimate. It must however be remembered that the scope of the court's jurisdiction in judicial review proceedings is limited to the process of decision making and not its merits. In **Republic v Chairman Amagoro Land Disputes Tribunal & another Ex-parte Paul Mafwabi Wanyama [2014] eKLR** the Court of Appeal stated thus:

> **Judicial review applications do not deal with the merits of the case but only with the process. For instance judicial review applications do not determine ownership of a disputed property but only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were given an opportunity to be 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. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute, the Court would not have jurisdiction in such proceedings to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.**

10. It follows therefore that this court cannot enquire into questions of whether or not the ex parte applicant has a valid property interest in respect of the suit property or even whether or not those who executed the agreement dated 9th December 2009 on behalf of the interested party had the legal capacity to do so. Those are matters that are for ventilation in ordinary civil suits. That resolves the first issue for determination.

11.The ex parte applicant seeks the judicial review orders of certiorari and prohibition. The scope and efficacy of such orders were discussed by the Court of Appeal in the case of **Kenya National Examination Council v Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** as follows:

> **… 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 of 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 … The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition.**
>
> **… Only an order of CERTIORARI can quash a decision already made and an order of certiorari 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 for such like reasons.**

12. The respondent's impugned decision is contained in a letter dated 12th October 2016, addressed to "Director Land Administration (NLC)". It reads as follows:

> **PLOT NO. 143 BLOCK II: NAROK MUSLIM WELFARE SOCIETY – NAROK COUNTY**
>
> We have received a request from the above society for the land allocated to them to be registered as a public utility. Documents to support their claim are attached.
>
> Please proceed to verify and issue ownership documents for the same, given that the integrated physical plan for Narok has recently been approved.

By a copy of this letter, the illegal developer on the plot is directed to vacate the land immediately, as per Section 152A and B of the Land Laws (Amendment) Act of 2016.

13. The ex parte applicant's complaint about the decision is that it was arrived at in violation of the school's right to an administrative process that is fair, impartial and expeditious, the right to a fair hearing and that no notice was issued to the school. As previously noted, the respondent did not file any response or submissions and did not also attend court at the hearing of this matter. Thus, the ex parte applicant's contentions as to lack of notice prior to the making of the impugned decision have not been challenged and I find that they are proven.

14. The respondent is a constitutional commission established under **Article 67** of the **Constitution** as read with the **National Land Commission Act**. It is a public body whose decisions are amenable to the judicial review jurisdiction of this court. In particular, the respondent is required to uphold natural justice in the course of discharging its public mandate. That would entail giving the ex parte applicant or the school notice of any complaint lodged against it and an opportunity to be heard. The Court of Appeal stated in **Registered Trustees Kenya Railways Staff Retirement Benefits Scheme v Chairman Rent Restriction Tribunal; Simon O Godia & 98 others (Interested Parties) [2019] eKLR** as follows:

> **9. As the Court stated in Onyango Oloo vs. Attorney General (above):**
>
> **"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard."**
>
> **10. In the same case, the Court, while holding that denial of the right to be heard renders any decision made null and void ab initio, pronounced that a decision reached in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right...**

15. One of the orders that the respondent gave in the impugned decision was that the school vacates the suit property immediately. Such an order and indeed the respondent's entire decision, could not be validly arrived at without giving the school an opportunity to be heard. That failure to give a hearing rendered the decision null and void *ab initio*. In the circumstances, I am persuaded that an order of certiorari is merited. Similarly, an eviction of the school from the suit property in enforcement of a decision arrived at after a departure from the rules of natural justice cannot be countenanced. An order of prohibition is thus also merited.

16. The interested party has argued that even if the court finds that the orders sought are merited, the court should nevertheless decline to issue the orders since judicial review orders are discretionary. Discretion must always be exercised judiciously. I have not been shown any valid reason why not to grant the orders especially when we are dealing with a decision which I have found to be null and void *ab initio*.

17. The interested party also argued that the ex parte applicant ought to have appealed to the respondent against the decision and exhausted the appeal process before approaching the court. The Court of Appeal stated in **Republic v National Environmental Management Authority** (supra) as follows:

> **The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it – see for example R V. BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD case.**

18. The interested party has not cited any statutory appeal procedure that the ex parte applicant could have used. In any case, even if an appeal procedure was available, the fact that the respondent's decision is null and void means that it amounts to nothing. As Lord Denning famously stated in **Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169**, a void act is a nullity in law and every proceeding founded on it is incurably defective. An appeal is hardly the right approach to deal with such a situation. The appropriate recourse is to immediately seek quashing of such a decision.

19. I find it necessary to emphasize, as I now do, that this court makes no determination on the validity or otherwise of any property interest in the suit property by the ex parte applicant or the school since that is not an issue before the court. This being a judicial review matter, the focus is purely on the decision making process leading to the respondent's impugned decision dated 12th October 2016.

20. In the result, I make the following orders:

> **a. An order of certiorari is hereby issued, removing into this court and quashing the decision of the respondent dated 12th October 2016 directing that Bilal Primary School Narok vacate Plot Number 143 block II Narok.**
>
> **b. An order of prohibition is hereby issued stopping the respondent, its agents or servants from evicting Bilal Primary School Narok from Plot Number 143 block II Narok pursuant to the respondent's decision dated 12th October 2016.**
>
> **c. Costs are awarded to the ex parte applicant and shall be borne by the respondent.**

Dated, signed and delivered at Nakuru this 24th day of September 2020.

D. O. OHUNGO

JUDGE