



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 173 OF 2012**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI, PROHIBITION  
AND MANDAMUS**

**AND**

**IN THE MATTER OF THE REGISTRATION OF TITLES ACT CHAPTER 281 LAWS OF  
KENYA**

**THE LAW REFORM ACT CHAPTER 26 LAWS OF KENYA AND ORDER 53 CIVIL  
PROCEDURE RULES CHAPTER 21 LAWS OF KENYA**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**THE COMMISSIONER OF LANDS.....RESPONDENT**

**CHESSE PROPERTIES LTD**

**SHELFCO LTD ..... EXPARTE APPLICANTS**

**INTERNATIONAL PROPERTIES LTD.....INTERESTED PARTY**

**IN THE MATTER OF LAND PARCELS NUMBERS 209/1781 AND 2099/1782 NAIROBI  
RENAMED LR NO. 209/20054 AND LR 209/20055 RESPECTIVELY**

**JUDGEMENT**

1. On 18<sup>th</sup> July, 2012, the ex parte applicants herein, **Chess Properties Ltd and Shelfco Ltd**, filed an amended Notice of Motion dated 16<sup>th</sup> July, 2012 seeking the following orders:
  1. **THAT an order of certiorari do issue to move to the High Court and quash the decision order/action of the Commissioner of Lands that resulted in the cancellation/revocation of the Applicant's titles and failure to extend/ and determination of the leaseholds and titles for land parcels LR 209/1781 and LR 209/1782/2, closing the land registry files in respect thereof, renumbering the same as LR 209/20054 and 209/20055 and granting new leases for**

- the same to **International Properties Limited** and all Consequential Order emanating from the Commissioner of Land's said action/decision/order.
2. **THAT an order of Mandamus do issue compelling the Commissioner of Lands to revoke/cancel the leases to International Properties Ltd in LR 209/20054 and 209/20055 and tore- open the file registers for LR 209/1781 and LR 209/1782/2 and issue extension of leases in favour of the Applicants.**
  3. **THAT an order of prohibition do issue directed at the International Properties Limited and/or their servants/agents/representatives prohibiting and restraining them from entering remaining is, selling, letting, charging, using, transferring, demolishing or in any way interfering with the Applicants use and quiet possession and property rights of the properties LR 209/1781 and LR 209/1782/2 which titles have been renumbered LR 209/20054 and LR 209/20055 by the Commissioner of Lands.**
  4. **THAT costs of this application be provided for.**

### Applicant's Case

2. The application was supported by a verifying affidavit sworn **Rachel Mumbi Mungai** and **Elizabeth Njoki Kariuki**, the applicants' directors on 26<sup>th</sup> April, 2012.
3. According to the deponents, the Applicants separately respectively purchased the properties known as LR 209/1782/2 Limuru Road in 1999 and 2001 respectively which properties were adjacent to one another and were both leaseholds for the residue of a period of Seventy Four (74) years with effect from first day of June nineteen thirty one. The conveyances in favour of the Applicants were duly registered in the Land Registry and the Applicants took possession of the properties and have been in possession thereof to date.
4. It was deposed that the properties consisted of two commercial buildings which the Applicants leased out to tenants and from which they have been deriving income. In view of the expiry of the leaseholds, the Applicants vide letter dated 23<sup>rd</sup> December, 2006 applied to the Commissioner of Lands for extension of the leases and also paid for the land rent for the said properties. However, while they were still waiting for official communication from the Commissioner of Lands regarding the extension of leases for the properties, certain persons went to the properties in June 2011 claiming to have been allocated both properties by the Commissioner of Lands, and threatened forceful removal and eviction of the Applicants' tenants from the properties and demolition of the commercial buildings thereon to make way for new developments. On carrying out searches over the properties at the Lands Registry, the Land Registry files over the two properties could not be traced. However, a postal search on one of the properties showed the property to still be in the name of the Applicant. However, further investigation at the Land Registry revealed that the Registry files for LR 209/1782/2 Limuru Road had been closed without notice to the Applicants and new files opened and new leaseholds for the properties issued to **International Properties Ltd** (hereinafter referred to as the interested party) and renamed LR 209/20054 and LR 209/20055 respectively in 2011. Further inquiries at the Lands Office disclosed that that the interested party had applied to the Commissioner of Lands for allocation of the two properties to itself on grounds that the Applicants as owners of the said properties could not be traced for a long time and that the properties were vacant and the buildings therein in a dilapidated condition deserving demolition, which allegations were untrue.
5. The deponents however denied that the properties have ever been vacant and averred that Applicants have permanent and extensive developments therein which are in good condition and let out to tenants who are carrying out thriving business therein. In their view, relying on that false information, and irregularly the Commissioner of Lands closed the Land Registry files for LR 209/1781 and 209/1782/2 which were in the Applicants favour and opened new files for new leaseholds for the said properties in favour of the interested party as LR 209/20054 and LR 209/20055 which action was illegal, unfair, unjust and contrary to all known procedures and propriety as it was done without notice to the Applicants who have been in continuous, active possession of the properties, and was in complete disregard for the Applicant's application for extension of the leases in December 2006.
6. The deponent's position was therefore that the Commissioner of Lands should cancel the new titles LR 209/20054 and LR 209/20055 and the leaseholds issued thereon to the interested party

- and re-open the Land Registry files for LR 209/1781 and LR 209/1782/2 and grant extension of the leases thereof in favour of the Applicants, and that the Applicants had a first priority over the properties.
7. The further deposed that representatives of the new allottees of the properties the interested party have now severally come into the properties with threats of forceful removal of the Applicants and their tenants from the premises and to demolish the existing building to make room for new developments therein. Apart from that, the interested party or Banks representing them have also sent valuers to the properties who informed the deponents that they were doing valuation thereof with a view to supporting applications for Loan facilities on the security of the Titles, which action led the Applicants to formally claim to the said Banks. Despite complaining to the Minister of Lands and the Commissioner of Lands no action has been taken hence the orders sought herein as the interested party has never been in possession use, enjoyment or occupation of the said properties and therefore will not suffer any loss or prejudice if the orders sought are granted while the Applicants would suffer great loss and prejudice if the orders sought are not granted.
  8. It was submitted by **Mrs Maira**, learned counsel for the applicant that there was no notice that that the application for extension of the lease was not going to be granted and similarly there was no communication about the closing of the land registers. Since the applicants were in actual physical possession of the land, the issue was how the Respondent could register the interested parties as the proprietors of the two parcels of land. It was submitted that the Respondent relied on the wrong reasons that the properties were dilapidated and abandoned as the applicants were in possession. According to learned counsel, these proceedings are not about the ownership of the suit parcels but are about the procedure adopted in cancelling the applicants' ownership since the applicants were never afforded an opportunity of being heard in breach of the rules of natural justice and the Constitution. In support of her submissions learned counsel relied on **Beatrice Wairimu Kiiru vs Director of Surveys, Commissioner of Lands and District Land Registrar, Naivasha JR o. 91 of 2010, Commissioner of Lands vs. Kunste Hotel Ltd Civil Appeal No. 234 of 1995** and **Fahim Twaha & Another vs. District Land Registrar Lamu Malindi HC Misc. 17 of 2008.**
  9. It was the Applicant's position that the respondent was in direct violation of the rules of natural justice and consequently acted improperly, irregularly and outside his jurisdiction. Further the respondent also violated the provisions of Article 40 of the Constitution by depriving the applicants of their property instead of protecting and preserving their rights thereto.

#### **Interested Party's Case**

10. On behalf of the interested party a replying affidavit was filed sworn by **Rose Muthoni Kariuki**, its director, on 22<sup>nd</sup> October, 2012.
11. According to the deponent, the Interested Party is the registered owner of the suit parcels being LR No. 209/20054 and LR No. 209/20055 and its interest is protected constitutionally and by indefeasibility of title.
12. According to her, on or about 13<sup>th</sup> March 2011, Commissioner of Lands issued Letters of Allotment in respect of LR No. 209/1782 and LR No. 209/1782 respectively to the Interested Party who in answer thereto accepted the respective allotments vide its letter of 21<sup>st</sup> March 2011 and complied with the terms and conditions of the Letters of Allotment and more particularly made the requisite payments for the allotment of the two suit properties. Accordingly, the Interested Party went through the motions and met the conditions for the registration of the titles for the two suit properties allotted to it and on the 17<sup>th</sup> of May 2011, the Director of Survey issued Original Deed Plans for the two parcels (Reference No. 209/20054 and 209/20055). Subsequently, the Interested Party applied for registration of new grants for the two suit properties and was issued with titles under ***Registration of Titles Act*** (Cap 281, now repealed) for the two parcels which parcels are now L.R NO. 209/20054; I.R 129978/1 and L.R. No. 209/20055; I.R 129977/1 on the 26<sup>th</sup> of May 2011. It was deposed that subsequent to issuance of title, the Registrar of Titles confirmed vide official searches that the suit titles indeed belong to the Interested Party.
13. According to the deponent, while the court only granted leave for an application for an order of certiorari, the substantive Notice of Motion herein seeks several other prerogative orders which leave was not granted.

14. According to the deponent, the Ex-parte Applicant **Shelfco Company Limited** have not exhibited any proof of ownership of the parcel 209/1782/2 as what is exhibited is only a Sale Agreement hence the suit property did not belong to the Applicant. As for L.R 209/1781, the Ex-parte Applicant, **Chess Properties** have annexed an Indenture purportedly for a leasehold for 74 years as against a freehold and expired in June 2005. According to her, it is extremely curious that the Ex-parte Applicants would purchase the two titles for several millions with only about 5 years before the lease lapse and without applying for an endorsement of extension of the lease as is the norm. She added that only **Shelfco Company Limited** who purportedly owned LR. 209/1781 is alleged to have applied for extension of the lease in December 2006, over 1½ years after expiry. However, the Ex-parte Applicants have not exhibited proof of delivery of such application for extension notwithstanding the fact that the said **Shelfco Company Limited** have not annexed any proof of ownership of any title. She added that **Chess Properties Limited** have never made or annexed any application for renewal of their purported lease for LR 209/1782/2 which expired in June 2005 and that the Ex-parte Applicants have failed to prove not just title to the two suit properties but any application or attempt to renew their purported titles which ought to have been either through endorsement of the extension on the title document or an application leading to a new letter of allotment, payment and the process leading to a new grant. To her, extension of a lease is not automatic and the Commissioner of Lands can in Law grant a title to a third party for several reasons including non-compliance of the conditions to the lease/title.
15. She further averred that it is extremely suspect that the Ex-parte Applicants has since expiry of the two titles in June 2005 waited for about 1½ years after expiry of the purported lease for LR No. 209/1781 to apply for an extension; never applied for any extension of lease for LR No. 209/1782/2; never corresponded with the Respondent over the matter; and only came to court after the titles issued to the Interested Party and after over 7 years of expiry of their purported lease.
16. Apart from the foregoing, the Ex-parte Applicants have not exhibited any payments of Land Rent or Rates since they purportedly acquired the titles in 1999 and 2001 in the two suit titles and asserted that prior to the allotment of the suit titles to the Interested Party, the suit properties were dilapidated and abandoned.
17. According to **Mr Sagana**, learned counsel for the interested party, the interested party's titles are indefeasible under Article 40 of the Constitution save for fraud. In this case however, no fraud has been pleaded against the interested parties. With respect to **Shelfco**, it was submitted no proof of ownership has been shown save for the application for extension of the lease 1½ years after expiry. According to him no evidence of payment of rates were exhibited and there are no correspondences to the Commissioner. This, matter, it was contended is 7 years after the expiry of the lease and with respect to the title in the name of **Chesco Properties Ltd** no application for extension has been exhibited. Similarly, the search has been disputed by the maker and the same applies to the exhibited indenture since the search indicates the property to be a freehold and not leaseholds. It was submitted that indentures are usually freeholds. Without either an extension of the lease or new allotment letters, it was submitted that the Commissioner acted procedurally as the properties were dilapidated. To him, judicial review can only be granted after a lease has been granted.
18. It was also submitted that the leave was only granted with respect to an order for certiorari. However there is no evidence that the Respondent acted ultra vires or that a wrong procedure was followed or that there was an abuse of power, bad faith or unreasonableness. Since there was no extension of the lease until the expiry of the lease there was no breach of the rules of natural justice since there is no automatic extension. In the interested party's view what is sought by the applicant is the cancelation of the interested party's title. In support of the submissions the interested party relied on **Dr N K arap Ng'ok vs. Justice Moiwo ole Keiwua & 5 Others Civil Appeal No. 60 of 1997.**

#### **Respondent's Submissions**

19. On the part of the Respondent, it was submitted that from the competing interests asserted by the applicants and interested party, the issue before court is an issue of ownership and occupation of land which can only be determined by viva voce evidence and not judicial review. It was also submitted that there is an alternative remedy available which is more suitable. To the Respondent

- the applicants are guilty of delay in applying for extension hence they should be deemed to have acquiesced in the situation by showing lack of interest in another lease.
20. According to the Respondent, there are glaring errors in the documentation relied upon by the applicants.
21. Since the grant of the orders sought herein is unlikely to settle the issue of ownership, it was submitted that the application ought not to be granted. In support of the submissions the Respondent relied on Sanghani Investment Limited vs. officer in Charge Nairobi Remand and Allocation Prison Misc. Application No. 99 of 2006 and R vs. Attorney General & Another ex parte Samuel Kazungu Kambi [2012] eKLR.

### Determinations

22. It is contended that the leave which was granted was only in respect of one order. Vide an application brought by way of Chamber Summons dated 30<sup>th</sup> April, 2012, the applicants sought leave to apply for orders of certiorari, mandamus and prohibition. On 2<sup>nd</sup> May, 2012, the Court granted leave to commence judicial review proceedings. There was no restriction as to which of the orders the applicant was granted leave to apply for. Although the order which was extracted only dealt with the issue of leave to apply for certiorari, it is my view that that did not vary the express order as granted by the Court. Accordingly I do not agree that the leave was only granted with respect to one order.
23. Judicial review proceedings, it was held in Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001:

**“...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.”**

24. Accordingly, the Court in Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR 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 4<sup>th</sup> Edition Vol (1)(1) Para 60*.
25. Accordingly, this Court will only concern itself with the process followed by the Respondent in the cancellation of the Applicants' leases and the registration of the suit properties in the names of the interested party. The Court therefore will not dwell on whether the documents held by the applicants were genuine or otherwise. Similarly this Court cannot based solely on the affidavit evidence make a decision as to whether the applicant was in possession of the suit premises or the status of the same as at the time of the registration of the suit properties in the name of the interested party in light of conflicting averments by the parties herein. This Court is however aware of a holding in Kampala District Land Board and Another vs. National Housing and Construction Corporation [2005] 2 EA 69 to the effect that:

**“While the land occupied by a *bonafide* occupant could be leased to somebody else, the first option would be given to the *bona fide* occupant. As this was not done, in the present case, the suit land was not available for leasing to the second appellant...If a person procures registration to defeat an existing unregistered interest on the part of another person of which he is proved to have knowledge, then such a person is guilty of fraud... A deliberate failure to follow prescribed**

**procedure or to deceive that the land is available for leasing or to deny the respondent a fair hearing, amounted to fraud.”**

26. However, it bears repetition that in this case the issue of occupation is not clear-cut. To the contrary it is seriously disputed. Hence that being a crucial factor, it can only be resolved in a full-fledged hearing where parties would be afforded an opportunity of being heard in which their evidence would be tested by cross examination.
27. The applicants' case is that before their titles were cancelled they were not afforded an opportunity of being heard. Article 47 of the Constitution provides:

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

***(2) 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.***

28. Therefore if at the time of the purported cancellation of the applicants' proprietorship they had interest in the suit land and were not heard, that would be a valid ground for granting the orders of judicial review. As was recognised in ***Commissioner of Lands vs. Kunste Hotel Ltd*** (supra), the exercise of the discretion being questioned must have affected the legal rights of the applicant. This was the position taken by **Lord Diplock** in ***Attorney General vs. Ryath [1980] AC 718 at 730*** where it was held that a decision affecting the legal rights of an individual which were arrived at by procedure which offend against the principles of natural justice is outside the jurisdiction of the decision making authority.
29. In this case, according to the indenture dated 6<sup>th</sup> July, 1999 made between **Bhagwanji & Co. Limited** and **Chess Properties Ltd** in respect of LR No. 209/1781 (Original 170/12) the period of demise of the said land was 74 years from 1<sup>st</sup> June 1931. Accordingly the said demise was due to come to an end at the end of May, 2005. The only letter on record seeking extension of the demise was a letter dated 23<sup>rd</sup> December 2006 which referred to an earlier application for extension, which earlier application is not itself exhibited. That letter though it referred to Plot Nos. 209/1781 and 209/1782/2 was signed by **S. Mungai** for **Shelfco Ltd** rather than for **Chess Properties Ltd**. By the time of the letter dated 23<sup>rd</sup> December, 2006, it is clear that the demise in respect of this particular land had lapsed.
30. With respect to Land parcel No. LR 209/1782/2, it is true that the only document exhibited is an agreement for sale thereof to **Shelfco Limited**. However from the said agreement it is likewise clear that the period of the leasehold in question was 74 years from 1<sup>st</sup> June 1931. Similarly the only document on record which alluded to extension was the same letter dated 23<sup>rd</sup> December, 2006.
31. Accordingly without clear evidence that an extension was sought and (possibly) obtained, there would be no legal interest therein by the applicant which can be the basis of the application for judicial review. Whereas the Court cannot state with certainty that there was no such application made in light of the allusion in the said letter to an application made by a **Mr Bhagwanji**, what is clear is that there is no sufficient information availed to the Court on the basis of which the Court can determine that that application was in fact made before the expiry of the lease assuming without deciding that such an application could be construed as an extension of the lease for the purposes of legal interest in terms of judicial review proceedings.
32. Having considered the application herein I am not satisfied that based on the material on record, this Court can state with certainty that the Applicants had legal interest in the suit parcels of land which would have enjoined the Respondent to accord them an opportunity of being heard before the impugned decisions were taken.
33. Apart from that there is a serious controversy in the authenticity of the documents filed in this matter. Such controversy in my view cannot be sorted out in an application for judicial review since the Court will need to call the authors of the disputed documents for examination and cross examination in order for the Court to make a determination as to their authenticity.
34. In the result the amended Notice of Motion dated 16<sup>th</sup> July, 2012 fails and is dismissed with costs.

**Dated at Nairobi this 6<sup>th</sup> day of June 2014**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Representative of the Applicants in person***

***Cc Kevin***