REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 218 OF 2014

REPUBLIC .....APPLICANT

VERSUS

MANAGING TRUSTEE OF THE NATIONAL SOCIAL SECURITY FUND.....1ST RESPONDENT

THE NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES.....2ND RESPONDENT

EX-PARTE

TASSIA PLOT OWNERS ASSOCIATION

JUDGEMENT

The Applicant, Tassia Plot Owners Association is an association registered with the Ministry of Gender, Children and Social Development. The Managing Trustee of the National Social Security Fund is the 1st Respondent whereas the National Social Security Fund Board of Trustees is the 2nd Respondent.

The facts giving rise to this matter are not disputed. Between 1994 and 1995 the National Social Security Fund (NSSF) bought land from Tassia Coffee Estate Ltd and Nokin Investment Ltd with the objective of developing the land into residential and/or commercial properties as part of its investment portfolio. However, in 2001, before the land could be developed, it was invaded by squatters and land grabbers who claimed the land had been sold to them by land buying companies. When NSSF tried to evict the occupants of the land, they proceeded to the High Court and filed a claim of ownership on grounds of adverse possession. The case, **NAIROBI HIGH COURT CIVIL CASE NO. 529 OF 2002, RACHEL NJOKI WANAINA v NATIONAL SOCIAL SECURITY FUND** was filed by the Plaintiff, on her own behalf and in her capacity as a representative of all members of Embakasi Fedha Self Help Group. At the conclusion of the trial, the Plaintiff's claim of ownership was dismissed.

NSSF subsequently obtained orders to evict the occupants of its land and demolish structures that had been developed on the land. It was then that the representatives of the illegal occupiers approached NSSF and proposed to purchase the properties they were occupying. Realizing that it would be a big challenge to evict the squatters, NSSF considered this proposal and in 2005 a decision was reached in which NSSF was to sell the plots to the occupants. A 33 x 66 ft plot was to be sold for Kshs315,000/= and a 50 x 100 ft plot was to be sold for Kshs.800,000/=. The mode of payment was outright cash or payment by installments within a period of not more than six months. At the conclusion of the exercise 5,500 plots were sold. Of these, 4,708 plots were sold on cash terms and 792 plots were sold through NSSF Tenant

Purchase Scheme Agreements. The plots were named Tassia II and Tassia III Settlement Scheme.

In the notice of motion application dated 16th June, 2014 the Applicant approached the Court for the following orders:

> **"1. AN ORDER OF PROHIBITION, do issue prohibiting each and all the Respondents from imposing on the Ex-parte Applicant and its members the payment of an additional cost to the Respondents of Kshs.920,000/= towards the development of infrastructure as a precondition for the issuance of individual title deeds to the members of the Ex-parte Applicant.**

2. **AN ORDER OF PROHIBITION, do issue barring or prohibiting each and all the Respondents from changing and increasing the purchase price of plots measuring 33x66 and 50x100 unilaterally and arbitrarily.**
3. **AN ORDER OF PROHIBITION, do issue barring or prohibiting each and all Respondents from unilaterally and arbitrarily repossessing the Ex-parte Applicant's members plots and selling them off to unknown persons who are not members of the Ex-parte Applicant.**
4. **AN ORDER OF PROHIBITION, do issue barring or prohibiting each and all the Respondents from offering public utility plots for sale to the public.**
5. **AN ORDER OF MANDAMUS do issue to compel each and all the Respondents to issue title deeds to the Ex-parte Applicant and its members who have fully paid the purchase price of their respective plots.**
6. **AN ORDER OF MANDAMUS do issue to compel each and all the Respondents to surrender public utility plots to the Nairobi City County free of cost as stipulated in the approved Plan under the Physical Planning Act dated 23rd January 2009.**
7. **The costs of this Application be provided for."**

The basis of the application is that the respondents unilaterally and arbitrarily increased the agreed purchase price of the plots measuring 33x66 ft and 50x100 ft from Kshs.315.000/= and Kshs.800,000/= respectively to Kshs.550.000/= and Kshs.1.200,000/= respectively. Further, that the respondents unilaterally and arbitrarily approved the development of infrastructure at Kshs.5.04 billion and also unilaterally and arbitrarily procured M/s China Jiangxi International (K) Ltd as the contractor to undertake development of the infrastructure and services in the Tassia II and III Settlement Scheme. Consequently, the respondents imposed on the members of the Applicant an additional cost of Kshs.920,000/= towards the development of infrastructure as a precondition for the issuance of individual title deeds to the members of the Applicant.

The Applicant contends that the contracts signed between its members and NSSF towards the purchase of the plots did not stipulate any payment of an additional cost to the respondents towards the development of infrastructure and as a precondition to issuance of individual title deeds. The Applicant contends that the respondents did not consult its members when arriving at the figure to contribute towards the infrastructure development nor did they consult the plot owners when awarding the tender to M/s China Jiangxi International (K) Ltd.

According to the statutory statement, the Applicant's case is that the respondents' decisions are discriminative, arbitrary, inconsistent and unfair as they will deny its members the opportunity to own/purchase plots and homes. Further that the decision to approve Kshs.5.053 billion towards infrastructure development and to procure M/s China Jiangxi International (K) Ltd as the contractor to undertake the development of the infrastructure and services in Tassia II and III was done unilaterally and unlawfully and amounts to oppression and abuse of power. The Applicant contends that the respondents are forcefully repossessing the plots and selling them off to persons who are not members of the Applicant. The Applicant asserts that the respondents' decisions are irrational, unreasonable and made in bad faith and/or for an improper motive or purpose. Further that the decisions are bad in law and *ultra vires* for failure to take into account relevant factors. The Applicant also faults the respondents for failing to consult it or its members. In support of these statements the Applicant cites the upward revision of the purchase prices and the imposition of Kshs.920,000/= towards the development of infrastructure. The

Applicant asserts that the respondents have failed to give any reasons for their decisions.

The Applicant argues that the decisions of respondents violated the legitimate expectation of its members that upon payment of full purchase price and all other sums due in the agreement, the respondents would transfer the properties to the Applicant's members or their nominees. The Applicant contends that there was no other precondition for the issuance of the individual title deed save the preconditions stipulated in the contract. The Applicant therefore contends that the imposition of new conditions outside the signed sale agreements is unfair and violates the principles of legitimate expectation. The Applicant submits that the imposition by the respondents on the Applicant and its members of the payment of an additional cost to the respondents of Kshs.920,000/= towards development of infrastructure as a precondition for the issuance of individual title deeds violates the legitimate expectation of the Applicant and its members to the extent that the additional cost is unconscionable, exorbitant and not part of the agreement.

The Applicant also faults the respondents' conduct and decisions for being inconsistent, unprocedural, *ultra vires* and illegal. The Applicant asserts that the respondents' decisions and conduct are unprocedural, inconsistent and *ultra vires* the sale agreements, representations and regulations already established to govern and regulate the purchase and sale of plots to the Applicant and its members.

The respondents opposed the application through a replying affidavit sworn by Gideon Wambua Kyengo, the General Manager in charge of NSSF's Finance & Investment Division. The respondents' case is that after it sold the approximately 5,500 plots in 2005 it proceeded to resurvey and re-plan the plots so as to get approval from the City Council of Nairobi for regularization of the haphazard developments. The City Council of Nairobi later gave conditional approval but directed that the final approval which would lead to sub-division and processing of individual titles could only be given once the settlement was linked to existing neighbourhoods of Baraka Estate, Nyayo Estate, Embaksi Village and Donholm. The City Council of Nairobi also directed that there should be a major through transport corridor (bus route) plus feeder roads to the bus route to service the scheme.

The City Council further directed that there should be other infrastructure developments for the scheme. In order to comply with these conditions NSSF appointed the relevant professionals to resurvey the scheme, carry out comprehensive design works, prepare cost estimates and obtain the necessary regulatory approvals of the designs. The consultant civil engineering firm came up with a cost estimate of Kshs.4.5 billion.

The Comprehensive Infrastructure Development Project Design was approved by the Nairobi County Government in July, 2013 after which the consultant submitted to NSSF a revised cost estimate for the project of Kshs.5.053 billion inclusive of civil engineering works for the approximately 5,500 individual plots, and which cost translated into a sum of Kshs.920,000/= to be paid by every plot owner towards the development of infrastructure. It is the respondents' case that this requirement was communicated to the individual plot purchasers.

The respondents contend that the majority of the 4,708 cash purchasers had failed to pay as per the agreement and thus the need to marginally adjust the prices upwards and even to repossess the plots and sell them to willing third parties. The respondents therefore submit that their actions and decisions were rational, reasonable and lawful.

The respondents accused the Applicant of non-disclosure of material facts and urged the Court to deny it orders on this ground. They contend that there was no discrimination in the imposition of the sum of Kshs.920,000/= as the amount was imposed on all the plot purchasers. The respondents assert that the plots were sold as un-serviced plots and as early as October, 2005 the Applicant's members had been notified of this fact.

The respondents contend that the application before this Court is a backdoor appeal against the award of the tender for the infrastructure development to China Jiangxi International (K) Ltd. The respondents have therefore urged this Court not to entertain this application as it amounts to deciding a procurement matter outside the well-established statutory process and dispute resolution mechanism found in the

Public Procurement and Disposal Act, 2005. Further that in the award of the tenders, NSSF was not obliged to consult the Applicant's members. The respondents averred that NSSF has not sold any plots meant for public utilities to any person. It asserts that there are individuals who have encroached on these plots and they will be evicted in accordance with the law.

The respondents contend that it is the planning authority i.e. the County Government of Nairobi which has made the development of the necessary infrastructure and services a mandatory precondition for the final approval and which final approval would then pave way for the subdivision and issuance of titles of ownership.

The respondents contend that an order of prohibition is no longer available to the Applicant as NSSF has already assessed and approved the sum of Kshs.920,000/= as the costs of the infrastructure development to be borne by the purchasers, and a considerable number of purchasers have indeed made the payments. Further that NSSF has already made the marginal price adjustments to the purchase prices of the cash buyers in default and also enforced the same.

As for the prayers for orders of mandamus, the respondents contend that the same should not be issued as the Applicant has not demonstrated any statutory duty which NSSF has failed to discharge. Further that NSSF should not be compelled to issue any title deeds to the Applicant, its members and any other purchaser who are not ready and/or willing to meet the costs necessary and/or incidental to the issuance of their individual titles. Further that the surrender of Public utility plots to the Nairobi City Council can only be dealt with by NSSF and the City Council itself.

The respondents therefore pray for the dismissal of the application. They also pray for the costs of the proceedings.

The overriding issue for the determination of the Court is whether judicial review orders are available in the circumstances of this case. It is important, at the outset, to establish the purpose of judicial review. In the case of **MUNICIPAL COUNCIL OF MOMBASA v REPUBLIC & UMOJA CONSULTANTS LIMITED, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR** the Court of Appeal stated that in judicial review:

> **"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 made 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 he 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 there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review."**

The circumstances under which orders of judicial review can issue were elaborated by Justice Kasule in Ugandan case of **PASTOLI v KABALE DISTRICT LOCAL GOVERNMENT COUNCIL & OTHERS [2008] 2 EA 300** at pages 303 to 304 thus:

> **"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: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).**
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> **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 provisions 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: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".

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 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 legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876)."

The reach of the judicial review orders was laid down by the Court of Appeal in **KENYA NATIONAL EXAMINATION COUNCIL V REPUBLIC, EXPARTE GEOFFREY GATHENJI & 9 OTHERS, Nairobi Civil Appeal No. 266 of 1996** when it stated:

"That now brings 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 <u>ORDER OF PROHIBITION</u> 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 – See HALSBURY'S LAW OF ENGLAND, 4th Edition, Vol. 1 at pg.37 paragraph 128…….

The next issue we must deal with is this: What is the scope and efficacy of an <u>ORDER OF MANDAMUS</u>? Once again we turn to HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

At paragraph 90 headed "the mandate" it is stated:

"The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the

detriment of a party who has a legal right to expect the duty to be performed……

Only an order of <u>CERTIORARI</u> 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."

Having established the applicable law, I will now proceed to apply the law to the facts of this case.

Upon review of the material placed before the Court, I find that the Applicant and its members are aggrieved by two decisions made by the respondents. The first decision is that of increasing the prices of plots. A 33x66 plot was increased from Kshs.315,000/= to Kshs.550,000/= and a 50x100 plot was increased from Kshs.800,000/= to Kshs.1,200,000/=.

The second decision challenged by the Applicant is the imposition of an additional cost of Kshs.920,000/= towards the development of infrastructure as a precondition for the issuance of individual title deeds. In this regard, the Applicant questions the approval of a figure of Kshs.5.035 billion for infrastructure development and the award of the tender to M/s China Jiangxi International (K) Ltd.

The Applicant argued that these decisions were illegal, unreasonable and contrary to the principles of natural justice. On the increment of the prices, the Applicant contends that the decision to vary the prices was unilateral as the same was arrived at without any consultations.

As for the decision to award the tender to M/s China Jiangxi International (K) Ltd, the Applicant contended that the decision was reached outside the law. The Applicant submitted that two key members of the 2nd Respondent namely Ms Jacqueline Mugo the Executive Director of the Federation of Kenya Employers (FKE) and Mr. Francis Atwoli the Secretary General of the Central Organization of Trade Unions (COTU) had publicly disowned the infrastructure project on the ground that it was unlawfully approved. Further, the Applicant asserts that the Parliamentary Public Investments Committee had indicated that the 2nd Respondent should not have allowed the award of the contract to put up infrastructure prior to the Applicant and its members being consulted.

The Applicant contends that the said Parliamentary Committee also indicated that allowing the award of the contract without assurances it would be funded was contrary to the Public Procurement & Disposal Act, 2005.

It is the Applicant's case therefore that the decision to award the infrastructure contract was made illegally and without consultations and the decision should be quashed.

The Applicant's counsel urged this Court not to look at this matter as a contractual dispute but one that calls for intervention through public law remedies. In doing so, counsel for the Applicant urged the Court to find that any action taken by a public body must be justified by positive law. In support of this proposition he referred the Court to the statement of Laws J in the case of **R v SOMERSET COUNTY COUNCIL, EX-PARTE FEWINGS & OTHERS [1995] 1 ALL ER 513** that:

"Public bodies and private persons are both subject to the rule of law; nothing could be more elementary. But the principles which govern their relationships with the law are wholly different. For private persons, the rule is that you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books. Such a notion would be anathema to our English legal traditions. But for public bodies the rule is opposite, and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake; at every turn, all of its dealings constitute the fulfillment of duties which it owes to others; indeed, it exists for no other purpose. I would say that a public body enjoys no rights properly so called; it may in various contexts be entitled to insist that this or that procedure be followed, whether by a person

affected by its decision or by a superior body having power over it; it may come to court as judicial review applicant to complain of the decision of some other public authority; it may maintain a private law action to enforce a contract or otherwise protect its property (though a local authority, at any rate, may not sue in defamation: see *Derbyshire CC v Times Newspapers Ltd* [1993] 1 All ER 1011, [1993] AC 534). But in every such instance, and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performance of the duties for whose fulfillment it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility: a responsibility which defines its purpose and justifies its existence. Under our law, this is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them."

This indeed is the law applicable to all public bodies. Their actions must be driven by good faith and done in accordance with the law.

Counsel for the respondents submitted that the decisions of the respondents were taken in compliance with the law. He referred the Court to **Section 27** of the **National Social Security Fund Act Cap 258** and submitted that its decisions were meant to protect the interests of the contributors to the Fund.

Section 27 provides:

> **"27. (1) All moneys in the Fund which are not for the time being required to be applied for the purposes of the Fund shall be invested in such investments, being investments in which any trust fund (or part thereof) is permitted by the Trustee Act to be invested, as may be determined by the Board of Trustees with the approval of the Minister and the Minister for the time being responsible for matters relating to finance. "**

The 2nd Respondent indeed has a duty to secure the contributions of the members of NSSF. The core business of the 2nd Respondent would be to ensure that there is secure, profitable and effective financial management of the fund for the benefit of the workers. In discharging its mandate the 2nd Respondent must always have its objectives in its radar. Any actions that would derail its objectives would be unlawful.

The respondents have clearly stated what informed their decisions. The decision to marginally increase the prices of the plots was informed by the fact that some of the plot buyers had breached their agreements by failing to pay the purchase money within six months. NSSF was therefore losing value for money and that is why it increased the prices. The Applicant did not move to Court to challenge this increment. It appears that a political solution was sought as stated by James Mbugua Gichuru in his verifying affidavit of 5th June, 2014. At paragraphs 18-20 he deposes:

> **"18. THAT through a Notice dated 30th May 2013, all members of the Applicant were given 30 days to clear payments of the plots by making payment of Kshs 550,000/= and Kshs 1,200,000/= for the plots measuring 33x66 and 50x100 respectively**
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> ***Find attached and marked as Exhibit JMG-6 is a Notice dated 30th May 2013.***
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> **19. THAT the said Notice dated 30th May, 2013 made the members of the Applicant to carry out peaceful demonstration and upon the intervention of Cabinet Secretary Ministry of Lands, Housing and Urban Development Hon. Charity Ngilu, Nairobi Senator, Mike Mbuvi (Sonko), Nairobi Women Representative Hon. Rachael Shebesh and Embakasi Member of National Assembly Hon. John Omondi a resolution was made that the matter would be left to the Cabinet Secretary Ministry of Lands, Housing and Urban Development Honoruable Charity Ngilu to determine. The said persons had paid a visit to the Scheme Site.**

> **20. THAT subsequently, a formal agreement on extension was drafted on 28th June 2013 at a meeting being chaired and held in the office of Cabinet Secretary Ministry of Lands Housing and Urban Development Hon. Charity Ngilu which meeting was also attended by the Chief Executive Officer of the Respondents one Tome Odongo. However the Respondents failed to sign the Agreement**
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> ***Find annexed and marked Exhibit JMG-7 is the unsigned Agreement between the Respondents and the Applicant."***

Among the documents annexed to the affidavit is an unsigned draft agreement. This document though unsigned clearly shows that there was an agreement to vary the prices for the plots.

It appears from the documents placed before the Court that the Applicant and its members agreed to the revised prices. They cannot now turn around and accuse the respondents of arbitrarily increasing the prices of the plots. There is another reason which I will outline later in this judgement as to why the decision to revise the prices of the plots cannot be challenged through judicial review.

The second decision is the imposition of a cost of Kshs.920,000/= for infrastructure development and the award of a tender of Kshs.5.035 billion for the infrastructure project. The respondents' reply is that the purchasers of the plots were all along aware that the plots were sold as un-serviced and they knew that any cost incurred for servicing the plots would be met by them.

The respondents' submission has backing from the documents placed before the Court. The first document is the unsigned agreement titled **"AGREEMENT BETWEEN NATIONAL SOCIAL SECURITY FUND (NSSF) AND TASSIA RESIDENTS ON LAND RELATED MATTERS AT TASSIA ESTATE"** which was exhibited as "JMG 7" in the verifying affidavit of the Applicant. This document was drafted by the Applicant and its members. It was also brought to the attention of the Court by the Applicant.

Clause 8 of the document states:

> **"Approval for infrastructure is pending with the County Government of Nairobi. Once this approval is granted, Residents will be advised on the cost of developing infrastructure."**

This clearly confirms the respondents' assertion that the infrastructure cost was to be met by the purchasers of the plots. The Applicant's members were aware that the plan for infrastructure development was to be approved by the County Government of Nairobi. The cost would also be determined by the approved plan.

Secondly, the sale agreements exhibited by the Applicant shows that Clause 6 clearly provided that:

> **"The Fund sells the property as unserviced portion of land."**

The Applicant and its members were therefore expected to meet the costs of infrastructure development. Had NSSF proceeded to use its funds for the infrastructure project, it would have acted outside its statutory mandate. The money for infrastructure development and services had to come from the purchasers of the plots.

Having settled the issue as to who was to pay the cost for infrastructure development, the next issue would then be the award of the contract for the project. The respondents have through the replying affidavit clearly explained how the figure of 5.035 billion was reached. There is no evidence placed before the Court to show that there was a better price. It is difficult to fault the respondents on the cost of infrastructure development and services.

The Applicant asserted that Dr. Evans Kidero, the Governor of the Nairobi County had in his letter dated

5th February, 2014 indicated that NSSF had the legal responsibility of providing infrastructure for Tassia II and Tassia III.

The letter addressed to Kazungu Cabinet Secretary, Ministry of Labour Social Security and Services states in part:

> **"From legal stand point, it is the NSSF as the legitimate owner of the land who has development rights upon the land and responsibility to obtain prerequisite statutory approvals prior to any development on the land. In its bid to legitimize occupation of those who had settled on the land and their development activities, NSSF had to seek regularization of the settlement through the defunct City Council of Nairobi's development approval process in compliance with the provisions of the Physical Planning Act Cap 286, EMCA, Public Health Act Cap. 242 relevant to planning determination of such schemes.**
>
> **The regularization plan of the scheme was submitted in March, 2007 by the NSSF knowing that the first phase of the application was for conditional planning approval. The defunct City Council of Nairobi granted conditional planning approval in July, 2007. It is noteworthy that re-survey and infrastructure implementation as per the regularization plan of the amalgamation and sub-division scheme were not only primary conditions for the sake of compliance but were also critical to addressing poor sanitary and environmental conditions of the settlement. The scheme's conditional approval and the agreement between the NSSF and investors transformed the settlement into a legitimate site and services scheme with NSSF responsible for infrastructure and services.**
>
> **It is important to note that the investors at the Tassia II and III cannot access their development rights and neither can they obtain land rights upon the pieces of land they have purchased until NSSF fulfils its obligation in accordance with the conditional planning approval granted to the scheme's regularization plan."**

The Governor goes ahead to state that it is only after the scheme is regularized that NSSF can transfer the ownership rights to investors and urges that NSSF should ensure full compliance with the conditional approval.

The essence of this letter is that the NSSF cannot fulfill its part of the agreement entered between it and the Applicant's members unless the plots are serviced. That is what the respondents are trying to do. I do not think the Governor was attempting to interpret the agreements entered between the Applicant's members and NSSF. As already demonstrated, the understanding from the beginning was that the cost of providing infrastructure belonged to the purchasers of the plots.

The Applicant questioned the decision to award the tender to M/s China Jiangxi International (K) Ltd. The respondents' answer is that any queries touching on the award of a tender by a public body should be addressed under the mechanism provided by the Public Procurement and Disposal Act, 2005. I agree that the procedure for questioning the award of a tender by a public entity is indeed provided by the said Act. In any case Ms. China Jiangxi International (K) Ltd has not been made a party to these proceedings and it would be unfair to make any adverse findings about the tender awarded to it without giving it a hearing.

I have clearly pointed out why the application before this Court should fail. There is, however, another important reason why this application should not succeed. These proceedings arise out of contractual obligations between the Applicant's members and NSSF. Those are matters that fall into the private law realm. Judicial review remedies are therefore not the most efficacious in such circumstances.

The remedies available in judicial review are discretionary in nature. One of the grounds for denying the orders is where alternative remedies are available. In this particular case, the Applicant's members ought to have sued for breach of contract.

The end result is that the application before this Court has no merit. It is dismissed with costs to the respondents.

Dated, signed and delivered at Nairobi this 4th day of September, 2014

W. KORIR,

JUDGE OF THE HIGH COURT