



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**MISCELLANEOUS APPLICATION No. 408 OF 2017**

**(FORMERLY NAKURU HC MISC. APPLIC. No. 6 OF 2012 (JR))**

REPUBLIC.....APPLICANT

AND

THE CHAIRMAN, CIS-MARA LAND CONTROL BOARD...1<sup>ST</sup> RESPONDENT

THE CHAIRMAN, OLOLULUNGA

LAND CONTROL BOARD.....2<sup>ND</sup> RESPONDENT

THE DISTRICT SURVEYOR, NAROK DISTRICT.....3<sup>RD</sup> RESPONDENT

THE DISTRICT LAND REGISTRAR, NAROK DISTRICT....4<sup>TH</sup> RESPONDENT

JOHN KIPNGETICH KOECH.....5<sup>TH</sup> RESPONDENT

PAUL KIPROTICH KOECH.....6<sup>TH</sup> RESPONDENT

EZEKIEL KIPRONO BIEGON.....7<sup>TH</sup> RESPONDENT

WILLY LOIGERO.....8<sup>TH</sup> RESPONDENT

JOSEPH TUMPES OLOLOGEIRO.....9<sup>TH</sup> RESPONDENT

SIMAT OLOLOIGERO .....10<sup>TH</sup> RESPONDENT

EX PARTE:

REUBEN CHERUIYOT YEGON

EZEKIEL KIPKOECH RONO

**JUDGMENT**

1. This matter has had a chequered history. Proceedings commenced on 8<sup>th</sup> May 2007 in Nairobi when the ex parte applicants sought leave to apply for judicial review orders of certiorari and prohibition. The matter was serialized as **High Court Misc. Application Number 468 of 2007 (Nairobi)**. Leave was granted on 8<sup>th</sup> May 2007 and the ex parte applicants later filed the substantive application, Notice of Motion dated 22<sup>nd</sup> May 2007. The matter was later transferred to the High Court at Kericho on 18<sup>th</sup> December 2007 thus becoming **High Court Misc. Application Number 65 of 2008 (JR) (Kericho)**. Hardly settling in the tranquillity of the expansive rolling tea plantations, it was on the move again on 16<sup>th</sup> November 2011, this time on transfer to the neighbourhoods of the famed Menengai Crater and the flamboyance of flamingo lingo in Nakuru. On landing in Nakuru it became **High Court Misc. Application Number 6 of 2012 (JR) (Nakuru)**.

2. Although there doesn't appear to have been any formal transfer to the Environment and Land Court, the matter was routinely listed before judges of this court from as far back as 11<sup>th</sup> November 2013. On 10<sup>th</sup> November 2017, the ex parte applicants filed **Misc. Application**

**Number 408 of 2017**, an application seeking reconstruction of the court file on the basis that the original record had been missing since 4<sup>th</sup> November 2016. The application which was unopposed, was allowed on 13<sup>th</sup> February 2018 and the documents annexed to it together with further documents filed by the ex parte applicants on 1<sup>st</sup> November 2019 were deemed the new record. The matter has since then proceeded in this court under the new case number: **Misc. Application Number 408 of 2017**.

3. By consent of parties, it was ordered that Notice of Motion dated 22<sup>nd</sup> May 2007 be canvassed through written submissions and I retired to write judgment on 7<sup>th</sup> December 2018. However, upon perusing the record which had been placed before the court, I found it incomplete. I therefore ordered that an additional bundle containing all the documents that constitute the record be filed and that it be arranged sequentially and properly paginated. The matter was mentioned on 8<sup>th</sup> May 2019, 18<sup>th</sup> June 2019, 18<sup>th</sup> September 2019 and 28<sup>th</sup> November 2019 with a view to receiving the additional bundle of documents. Ultimately, it was confirmed that the ex parte applicants had filed the additional bundle on 1<sup>st</sup> November 2019. None of the respondents filed any bundle or raised any issue concerning the bundles filed by the ex parte applicants. I still find the record quite patchy. Nevertheless, litigation must come to an end, considering the age and history of matter and the several opportunities given to parties to reconstruct the record. I will therefore render judgment based on the record that is presently before me.

4. Notice of Motion dated 22<sup>nd</sup> May 2007 seeks the following orders:

*(a) A writ of certiorari to remove into the High Court and quash the 1<sup>st</sup> respondent's decision dated 16<sup>th</sup> May 2000 being consent to subdivide L.R. No. Cis-Mara/Ilmotiok/195 into eight (8) portions, the 3<sup>rd</sup> respondent's mutation of L.R. No. Cis-Mara/Ilmotiok/195 into eight (8) portions (L.R. Nos. Cis-Mara/Ilmotiok/4419 to 4426) on 27<sup>th</sup> July 2006, the 2<sup>nd</sup> respondent's decision dated 14<sup>th</sup> September 2006 being consent to transfer L.R. Nos. Cis-Mara/Ilmotiok/4419 to 4426 (formerly L.R. No. Cis-Mara/Ilmotiok/195) and the 4<sup>th</sup> respondent's registration of the mutation on the 27<sup>th</sup> November 2006 subdividing land parcel number L.R. No. Cis-Mara/Ilmotiok/195 into eight (8) portions (i.e. L.R. Nos. Cis-Mara/Ilmotiok/4419 to 4426) and subsequent transfers of L.R. Nos. Cis-Mara/Ilmotiok/4420, 4424, 4425 and 4426 to the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> respondents.*

*(b) A writ of prohibition prohibiting the District Land Registrar, Narok District or any other officer subordinate to him from acting on the 2<sup>nd</sup> respondent's consent dated 14<sup>th</sup> September 2006 to transfer land parcels Cis-Mara/Ilmotiok/4419 to 4426 to any person or persons, and to prohibit the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> respondents from selling, transferring, subdividing, charging, alienating and/or doing any dealings and/or transactions touching on L.R. Nos. Cis-Mara/Ilmotiok/4419 to 4426 (formerly L.R. No. Cis-Mara/Ilmotiok/195).*

*(c) An order providing for costs of this application.*

5. The application is supported by an affidavit sworn by Reuben Cheruiyot Yegon as well as statement of facts. Mr Yegon deposed that he, the 5<sup>th</sup> respondent and the 2<sup>nd</sup> ex parte applicant were registered as proprietors of the parcel of land known as L.R. No. Cis-Mara/Ilmotiok/195 measuring 114.0 hectares and that all of them resided on the said property. He added that the 5<sup>th</sup> respondent who had been holding the title fraudulently subdivided the property into L.R. Nos. Cis-Mara/Ilmotiok/4419 to 4426. That the 5<sup>th</sup> respondent, without the consent, approval or knowledge of all the registered proprietors made an application to the 1<sup>st</sup> respondent on 14<sup>th</sup> April 2000 seeking to subdivide L.R. No. Cis-Mara/Ilmotiok/195 into eight (8) portions purportedly signed by chairman, secretary and treasurer and the 1<sup>st</sup> respondent granted consent at its fifth meeting held on 16<sup>th</sup> May 2000. That neither he nor the 2<sup>nd</sup> ex parte applicant signed the application or attended the said fifth meeting of the 1<sup>st</sup> respondent. He further deposed that the proprietors of L.R. No. Cis-Mara/Ilmotiok/195 were individuals and not a body corporate as to require signature of the application by chairman, secretary and treasurer. That the Cis-Mara Land Control Board acted in excess of its powers by considering and allowing the application without ascertaining the nature of the title and without requiring the attendance of all registered proprietors.

6. Mr Yegon further stated that on 24<sup>th</sup> July 2006 the 3<sup>rd</sup> respondent put in place a process that culminated in subdivision of L.R. No. Cis-Mara/Ilmotiok/195 into eight (8) portions namely L.R. Nos. Cis-Mara/Ilmotiok/4419 to 4426 and the 4<sup>th</sup> respondent subsequently registered a mutation on 27<sup>th</sup> November 2006. That identity card number 2411269 which was entered against his name is not his. He added that sometime in mid-2004, prior to the subdivision and registration of the mutation, the ex parte applicants had instituted a suit against the 5<sup>th</sup> respondent being HCCC No. 97 of 2004 (Kericho) claiming 2/3 share of L.R. No. Cis-Mara/Ilmotiok/195 and that the suit was still pending as at the date of swearing the affidavit. Despite the pendency of the suit, the 5<sup>th</sup> respondent made an undated application for consent to transfer L.R. Nos. Cis-Mara/Ilmotiok/4419 to 4426 which consent was purportedly granted at a meeting held on 14<sup>th</sup> September 2006 without the ex parte applicants signing the application or attending the meeting. Further, that Ololulunga Land Control Board acted in excess of its powers by deliberating on an application emanating from a land control division outside its jurisdiction since the registration section Cis-Mara/Ilmotiok falls under the jurisdiction of Mulot Land Control Board. He therefore termed the actions of Ololulunga Land Control Board of 14<sup>th</sup> September 2006 as fraudulent, illegal, null and void. He added that as a consequence of the aforesaid actions, L.R. Nos. Cis-Mara/Ilmotiok/4420, 4424, 4425 and 4426 have been transferred to the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> respondents respectively and that although the ex parte applicants are resident on what was formerly L.R. No. Cis-Mara/Ilmotiok/195, their right to property has been infringed and they therefore risk suffering damages.

7. I didn't find on record any reply by the 1<sup>st</sup> to 4<sup>th</sup> respondents.

8. The 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> respondents responded to the application through a replying affidavit sworn by John Kipngetch Koech, the 5<sup>th</sup> respondent, on 21<sup>st</sup> December 2009. He deposed that the first ex parte applicant and one Ezekiel Kiprono Biegon were registered as proprietors of L.R. No. Cis-Mara/Ilmotiok/195 on 13<sup>th</sup> April 2000 as trustees of Kipkoimet Set Kobor Self Help Group. He added that the name Ezekiel K. Rono appeared in the title because he as chairman entered it erroneously although his identity card number was correctly

captured as supported by minutes of the general meeting. That L.R. No. Cis-Mara/Ilmotiok/195 was initially owned by Raen Oloigero while Kipkoimet Set Kobor Self Help Group owned Narok/Cis-Mara/Nkobon/12 measuring 111 acres whose title was in the names of the deponent, the first ex parte applicant and Ezekiel Kiprono Biegon as trustees of Kipkoimet Set Kobor Self Help Group. Pursuant to an agreement dated 28<sup>th</sup> June 1995, Raen Oloigero transferred 111 acres of his L.R. No. Cis-Mara/Ilmotiok/195 to Kipkoimet Set Kobor Self Help Group in exchange for the latter's entire Narok/Cis-Mara/Nkobon/12. That consequently, the deponent, the first ex parte applicant and Ezekiel Kiprono Biegon held L.R. No. Cis-Mara/Ilmotiok/195 as trustees of Kipkoimet Set Kobor Self Help Group and not as their private property. He added that the land registrar did not indicate in the title of L.R. No. Cis-Mara/Ilmotiok/195 that proprietors held it as trustees and that the ex parte applicants want to use the omission to fraudulently dispossess other members of Kipkoimet Set Kobor Self Help Group. That police in Narok were looking for the second ex parte applicant on allegations of forgery in connection with this matter. That L.R. No. Cis-Mara/Ilmotiok/195 falls within the jurisdiction of Ololulunga Land Control Division and not Mulot Land Control Division and therefore Cis Mara Land Control Board acted within its jurisdiction and procedurally conducted deliberations prior to issuance of the consent. He therefore urged the court to dismiss the application.

9. The 7<sup>th</sup> respondent relied on a replying affidavit which he swore on 31<sup>st</sup> March 2015 and filed in court on 1<sup>st</sup> April 2015. He deposed therein that he "participated in the fraudulent signing of a consent to subdivide LR No Cis Mara/Ilmotiok/195 into 8 portions being Cis-Mara/Ilmotiok/4419 to 4426" on 14<sup>th</sup> September 2006 "in cahoots with" the 5<sup>th</sup> and 6<sup>th</sup> respondents. He added that he has never been a bona fide proprietor of L.R. No. Cis-Mara/Ilmotiok/195 and that he impersonated Ezekiel Kipkoich Rono during the signing of the consent to subdivide. He termed the transactions fraudulent.

10. The application was canvassed through written submissions.

11. It is argued on behalf of the ex parte applicants that in the decision to grant consent to subdivide the land the Land Control Board acted without jurisdiction and in excess of its powers while the decision to grant consent to transfer were illegal, null and void. That the consents given were legally unsound and were granted without due regard to the identification, presence and/or consent of all registered owners who were not called upon to attend the said land control board and/or respond to the application for consents to sub-divide and transfer. Further, that Ololulunga Land Control Board did not have jurisdiction to deliberate on an application for consent to transfer emanating from a land control division outside its area of jurisdiction. Relying on the replying affidavit filed by the 7<sup>th</sup> respondent, it is argued that the signatures, executions and attestation by the 7<sup>th</sup> respondent that resulted into the subdivision of all the parcel of land was fraudulent and forged hence rendering it illegal *ab initio*. Accordingly, it is argued while citing **Section 17** of the **Land Control Act**, the 1<sup>st</sup> respondent failed to consider that an applicant should adduce evidence to its satisfaction as to the identity and to the ownership of the land in respect of which an application relates and it therefore acted in excess of its jurisdiction when it granted consent to subdivide. Regarding the 2<sup>nd</sup> respondent, it is argued that it entertained an application for consent to transfer emanating from a land control division outside its area of jurisdictions and thereby acted in excess of its powers contrary to **Section 6** of the **Land Control Act**. Relying on **articles 23 (3) and 47 (1)** of the **constitution** of Kenya, **Section 4, 5 (1) and 7** of the **Fair Administrative Action Act**, it is argued that since the ex parte applicants as registered proprietors of land parcel L.R. No. Cis-Mara/Ilmotiok/195 were not involved in the process, the resulting consent to subdivide the said parcel of land is illegal and fraudulent, being a product of a process in which the ex parte applicants' constitutional rights to property were infringed and their title thereto defeated. Consequently, the ex parte applicants urged the court to grant the orders sought. They relied inter alia on the cases of **Republic v County Government of Kiambu Ex parte Robert Gakuru & another [2016] eKLR**, **Republic v Kiambu Land Control Board Ex-Parte Burnaby Properties Limited [2006] eKLR** and **Republic v County Government of Mombasa Ex-parte Outdoor Advertising Association of Kenya [2014] eKLR**.

12. For the 5<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> respondents, it is argued that the suit property was purchased by the Kipkoimet Set Kobor Self Help Group and not privately by the registered proprietors who only held it as trustees pursuant to **Section 28** of the **Land Registration Act** as well as the **Registered Land Act** (Cap 300) (now repealed). It is further argued that by making the present application on the basis that they are absolute proprietors of the suit property, the ex parte applicants are attempting to use the judicial process to orchestrate fraud against the other members of the Kipkoimet Set Kobor Self Help Group. That members of Kipkoimet Set Kobor Self Help Group authorized the application for consent to subdivide at the group's general meeting and consequently the consents to subdivide and transfer were properly granted. Further, that the ex parte applicants have not cited any legal provision that limits the geographic jurisdiction of a land control board other than as prescribed by the appointing authority. It is also argued that mutation and registration having been completed, the application ought to be dismissed with costs. The 5<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> respondents relied on the cases of **Munyu Maina v Hiram Gathiha Maina [2013] eKLR** and **Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR**, among others.

13. Finally, counsel for the 7<sup>th</sup> respondent argued that the 7<sup>th</sup> respondent's replying affidavit demonstrates that he collaborated with the 5<sup>th</sup> and 6<sup>th</sup> respondents to fraudulently acquire the title deeds that are subject of this suit by forging signatures and impersonating the ex parte applicant. That the affidavit exposes impropriety in the process adopted to obtain the title deeds issued to 5<sup>th</sup> to 10<sup>th</sup> respondents for the reason that the 1<sup>st</sup> to 4<sup>th</sup> respondents did not verify the identity of the persons who presented themselves for the exercise. It is therefore argued that the process violated the rules of natural justice thereby rendering the entire exercise a nullity *ab initio* and the court ought to nullify it by allowing the application. The 7<sup>th</sup> respondent relied on the Ugandan case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** and **Ideal Ceramics Ltd -v- Suraya Property Group Ltd HCCC No. 408 of 2016**(unreported).

14. State counsels appearing for the 1<sup>st</sup> to 4<sup>th</sup> respondents indicated that they would not file any submissions. Indeed, none was filed.

15. I have considered the application, the affidavits and the submissions. The grounds upon which the court exercises its judicial review jurisdiction were discussed in the Ugandan case of **Pastoli vs. Kabale District Local Government Council and Others** (supra) as follows:

*In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking 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. It is, for example, illegality, where a Chief*

*Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a 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.*

16. The scope of the court's jurisdiction in judicial review proceedings is limited to the process of decision making and not its merits, as was reiterated by the Court of Appeal in **Republic v Chairman Amagoro Land Disputes Tribunal & another Ex-parte Paul Mafwabi Wanyama** [2014] eKLR where the court stated:

*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.*

17. The ex parte applicants contend that the decision of the first respondent to grant consent to subdivide the suit property was made without jurisdiction and without regard to the identification, presence or consent of all registered owners. They maintain that they never signed the application for consent. **Section 17** of the **Land Control Act** is cited in support of the arguments as to lack of jurisdiction. The section provides in its material part as follows:

*(1) Where an application for consent or an appeal is before a board, the board may –*

*(a) require the applicant or appellant or any person interested in or affected by the application to attend before it;*

*(b) require the applicant or appellant to adduce evidence to its satisfaction as to the applicant's identity and as to the ownership of the land to which the application relates;*

*(c) require any person to produce any document or other evidence relating to the land, and shall allow such reasonable time as it may think fit for a person to appear before it or produce a document or other evidence.*

18. As is apparent, the section is couched in the permissive term "may" as regards persons who a board may require to attend before it. Further, from the material put before the court by the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> respondents, there is a suggestion that the ex parte applicants were registered as proprietors of the suit property not in their private capacities but as trustees of members of Kipkoimet Set Kobor Self Help Group. Put differently, the ex parte applicants' complaint is that the consent ought not to have been granted on the basis of the nature and contents of the application that was before the first respondent and the identity of the applicants in the said application. By extension, the court would have to enquire into who are or were the proprietors of the suit property. It is therefore clear to me that the question of who was to make the application or appear before the board is a contested matter of fact and one that goes to the merit of the decision, thus falling outside the scope of judicial review proceedings.

19. The ex parte applicants also argue that the second respondent did not have jurisdiction to deliberate on an application for consent to transfer emanating from a land control division outside its area of jurisdiction. Pursuant to **Section 5** of the **Land Control Act**, the minister responsible establishes a land control board for every land control area or where such area is divided into divisions, for each division through a notice in the Kenya Gazette. The same statute defines "land control area" to mean an area to which the minister has applied the Act. It follows therefore that the extent of the geographic jurisdiction of the second respondent is a question to be established through reference to the particular gazette notice defining the land control area in respect of which it was established. Beyond their allegations of lack of territorial jurisdiction, the ex parte applicants have not put before the court such evidence. There is simply no basis, on the material placed before the court, upon which to find that the second respondent did not have jurisdiction.

20. Yet another argument advanced by the ex parte applicants is that the signatures, executions and attestation by the 7<sup>th</sup> respondent that resulted into the subdivision of the suit property was fraudulent and forged thus rendering the consents and the process illegal *ab initio*. Heavy reliance is placed on the 7<sup>th</sup> respondent's replying affidavit in which he astoundingly claimed that he participated in what he termed "fraudulent signing" of the application for consent to subdivide the suit property "in cahoots with" the 5<sup>th</sup> and 6<sup>th</sup> respondents. Allegations of fraud are not limited to the ex parte applicants, the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> respondents also accuse the ex parte applicants of fraud. Fraud is a serious allegation which cannot be established on the basis of affidavit evidence only. Even in an ordinary civil suit, fraud must be pleaded, particularised and strictly proven. See **Kuria Kiarie & 2 others v Sammy Magera** [2018] eKLR. The burden of proof facing a party alleging fraud is higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See **John Mbogua Getao v Simon Parkoyiet Mokare & 4 others** [2017] eKLR. At the core of the dispute herein is the question of who owns the suit property. Suffice it to reiterate that judicial review proceedings cannot determine whether fraud exists, ownership of a disputed property or disputed matters of facts which in effect determine the merits of a dispute. See **Republic v Chairman Amagoro Land Disputes Tribunal & another Ex-parte Paul Mafwabi Wanyama** (supra). Owing to the nature of the dispute, the route of judicial review chosen by the ex parte applicants is certainly not a proper one.

21. In view of the foregoing discourse, I find no merit in the ex parte applicants' case. Judicial review orders of certiorari and prohibition are not in the circumstances available to the ex parte applicants. Notice of Motion dated 22<sup>nd</sup> May 2007 is dismissed with costs to the 5<sup>th</sup>, 6<sup>th</sup>,

8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> respondents. I do not award any costs to the 1<sup>st</sup> to 4<sup>th</sup> respondents since they did not file any response or submissions and the 7<sup>th</sup> respondent since he supported the application.

22. It is so ordered.

**Dated, signed and delivered at Nakuru this 8<sup>th</sup> day of October 2020.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr Kipkoech for the ex parte applicants

No appearance for the 1<sup>st</sup> to 4<sup>th</sup> respondents

No appearance for the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> respondents

No appearance for the 7<sup>th</sup> respondent

Court Assistants: Beatrice Jelimo & Julius Lotkomo