



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC. NO. 38 OF 2019

NATIONAL BANK OF KENYA LTD.....PLAINTIFF

VERSUS

INSPECTOR GENERAL OF POLICE NATIONAL POLICE SERVICE.....1ST DEFENDANT

DIRECTOR GENERAL OF POLICE, NATIONAL POLICE SERVICE.....2ND DEFENDANT

LANDS REGISTRAR-MOMBASA.....3RD DEFENDANT

RULING

1. Pursuant to leave granted on 30th September, 2019, the ex-parte applicant filed a Notice of Motion dated 22nd October, 2019 brought under Section 8(2) & (4) & 9 of the Law Reform Act Cap 26, Section 7 (a) & 9(1) of the Fair Administrative Action Act No. 4 of 2015 and Order 53 Rule 1 (3) of the Civil Procedure Rules seeking the following orders:

1. That an order of certiorari be and is hereby issued to remove into this Honourable Court for purposes of being quashed the decision and orders of the National Police Service- Directorate of Criminal Investigations and the banking Fraud Investigation Department contained in the letter dated 21st April, 2017 addressed to the Chief Lands Officer- Lands Office- Mombasa directing that a restriction be placed over the properties known as MOMBASA/BLOCK XXVI/658, MOMBASA/BLOCK XV/648, MOMBASA/BLOCK XVI/862 APARTMENT NO.102, 201A, & 202B, KILIFI/JIMBA/1342, LR. NO.2415 CR 37286, LR.NO7949/II/MN CR 54833, LR.NO.7951/III/MN CR 54834, LR NUMBER 24880 CR 55630, LAMU/BLOCK IV/189, LR NO.3150/I/MN CR 22728,LRNO.29322 CR 57749, INDENTURE PLOT NO.4236/6 GROUP 1/TAKAUNGU,LRNO.209/9791/2IR41385,KILIFI/MBARAKA/CHEMBE/555,KILIFI/MTWAPA/3234,KILIFI/MTWAPA/3257,KILIFI/MTWAPA/3233, KILIFI/MTWAPA/3256, LR NO 29190 CR 57638, LR NO.2096/III/MN CR 24697, KILIFI/MBARAKA CHEMBE/694, KILIFI/MBARAKA CHEMBE/675, LR NO.17329 CR 59137, LR NO.29181 CR 57126, LR NO.KWALE/MBUGUNI PHASE I/S.S./644.

2. That an order of certiorari be and is hereby issued to remove into this honourable court for purposes of being quashed the consequential decision and orders or the Chief Lands Registrar- Mombasa to implement the directive contained in the aforementioned letter dated 21st April 2017 in respect of the properties known as MOMBASA/BLOCK XXVI/658, MOMBASA/BLOCK XV/648, MOMBASA/BLOCK XVI/862 APARTMENT NO.102, 201A, & 202B, KILIFI/JIMBA/1342, LR. NO.2415 CR 37286, LR.NO7949/II/MN CR 54833, LR.NO.7951/III/MN CR 54834, LR NUMBER 24880 CR 55630, LAMU/BLOCK IV/189, LR NO.3150/I/MN CR 22728, LR NO.29322 CR 57749, INDENTURE PLOT NO.4236/6 GROUP 1/TAKAUNGU, LR NO.209/9791/2 IR 41385, KILIFI/MBARAKA/CHEMBE/555,KILIFI/MTWAPA/3234,KILIFI/MTWAPA/3257,KILIFI/MTWAPA/3233, KILIFI/MTWAPA/3256, LR NO 29190 CR 57638, LR NO.2096/III/MN CR 24697, KILIFI/MBARAKA CHEMBE/694, KILIFI/MBARAKA CHEMBE/675, LR NO.17329 CR 59137, LR NO.29181 CR 57126, LR NO.KWALE/MBUGUNI PHASE I/S.S./644.

3. That each party to bear their own costs of this motion.

2. The application is premised on the grounds set out therein and those in the statutory statement dated 30th September, 2019 and the verifying affidavit sworn by Wanda Atsiaya on the same date and the documents annexed thereto. The ex-parte applicant is a bank licensed as such to conduct banking business, which includes lending money to borrowers and taking securities for the loans granted to the borrowers.

3. It is the ex-parte applicant's case that the suit properties were charged to the Bank, therefore the bank had proprietary interest in the suit properties as the chargee thereof. Copies of the title deeds and certificates of title as well as certificates of official search confirming that the

suit properties have been charged to the bank have been annexed. It is deposed that as chargee over the suit properties, the ex-parte applicant is the holder of registered right and interest over the said properties, including the right to exercise its contractual and statutory power of sale.

4. The ex-parte applicant avers that by way of a letter dated 21st April 2017, the 1st and 2nd respondents, made a decision and ordered the 3rd respondent to place a restriction over the suit properties. The ex-parte applicant contends that the respondents did not give the bank any notice nor hearing prior to placing the impugned restriction over the suit properties. It is further contended that the respondents did not comply with the statutory procedure set out in the Land Act, 2012 prior to placing the impugned restriction over the suit properties and that the impugned restriction is prejudicial to the bank. It is further contended that the respondents did not have any basis to place the impugned restriction over the suit properties.

5. The applicant contends that the decision of the respondents was unreasonable and contrary to express statutory provisions that require the 1st and 2nd respondents to grant the bank a hearing before placing a restriction on the said properties. The applicant avers that as at the time the 1st and 2nd respondents issued the letter dated 21st April, 2017 to the 3rd respondent, and at the time the 3rd respondent implemented the directive contained in the said letter and placed the impugned restriction over the suit properties, the rights of the applicant to exercise its contractual and statutory powers of sale had crystallized and the applicant had commenced recovery of sale of the suit properties. That there are various suits filed in various courts in which the applicant herein and various chargors and borrowers are litigating over the rights of the Bank to realize its securities in exercise of its statutory power of sale which include some of the properties contained in the letter dated 21st April, 2017. Some of the suits are stated to include **Mombasa High Court Civil Case No.35 of 2017- KAAB Investments Limited & 5 Others –v- National Bank of Kenya Limited, Mombasa HCCC No.47 of 2017 – Zein Ahmed Mohamed & 2 Others –v- National Bank of Kenya, Mombasa ELC Case No. 101 of 2018 – Kenya Revenue Authority –v- Osman Said, National Bank of Kenya Limited, Registrar of Titles Mombasa & Another**. Copies of the pleadings in those cases have been annexed.

6. It is stated that the actions of the respondents herein aided the borrowers in the aforementioned suits by making an orders and decision whose effect is to restrain the bank from realizing its securities by way of craft. That essentially, the respondents' decision granted the borrowers restraining orders of injunction through the backdoor. The applicant contended that the 3rd respondent violated the provisions of Sections 76 (1) of and Section 77 (1) of the Land Registration Act, 2012. That the 3rd respondent is not only under an obligation to direct inquiries, serve notices to and accord the applicant a fair hearing as required by Section 76 (1) of the Land Registration Act prior to placing a restriction over the suit properties, but the is also under an obligation to give a notice in writing to the applicant once he placed restriction over the suit properties. The applicant avers that contrary to the mandatory provisions of Section 76 (1) and 77 (1) aforesaid, the 3rd respondent failed to direct any inquiry arising out of the aforementioned letter dated 21st April, 2017, failed to serve any notices upon the applicant and failed to hear the applicant prior to making the decision and order of placing a restriction over the suit properties thereby arriving an erroneous decision. The applicant argues that it was condemned unheard contrary to the provisions of the Fair Administrative Action Act and the dictates of Natural Justice and the decision was therefore unprocedural and tainted with illegality and is therefore amenable to judicial review and being quashed.

7. It is further averred that there are criminal proceedings commenced in Mombasa Criminal Case No.220 of 2017 in which the properties listed in the letter dated 21st April, 2017 are mentioned. Copies of the charge sheet as well as proceedings have been annexed. The applicant states that it is not a party, suspect, witness or even a complainant in the said criminal proceedings. Further that the securities held by the applicant over the suit properties are not the subject of those criminal proceedings and that no orders have been issued by the trial court restricting the registration of any dispositions by or in favour of the Applicant in respect of the suit properties. The applicant states that the borrowing which is the subject matter of the said criminal case is a borrowing of kshs.1,530,500,000 (one Billion five hundred and thirty million five hundred thousand) from Kenya Commercial Bank Limited and not the applicant. That in addition, the wording of the letter dated 21st April 2017 indicates that a restriction was to be placed against titles to the properties pending investigation, and that it is now apparent that the 1st and 2nd respondents completed their investigations culminating to the charging of the accused persons in the aforementioned **Criminal Case No. 220 of 2017** the purpose and import of the letter dated 21st April 2017 has been spent. The applicant states that in the foregoing premises, the decision of the 3rd respondent of continuing to implement the directions of the 1st and 2nd respondents as contained in the letter dated 21st April, 2017 to the detriment of the applicant is also unfair, unprocedural and illegal. That if the prayers sought by the applicant are not granted as prayed then the applicant will continue to stand condemned by actions tainted with illegality. The applicant contends that it is in the interests of justice and fairness that the court grants the orders sought herein.

8. The respondents opposed the motion and filed grounds of opposition dated 12th February 2019 which raises the following grounds

1. **That there are several parcels of land charged by the applicant as securities for the loans granted.**
2. **That registered owner of the parcels of land the late Tahir Sheikh Said never approved any of the charges thus had reported the case to Urban Police in Mombasa**
3. **That the complaint led to launching of investigations by the DCI Office Urban Mombasa and the Criminal Case Number 220 of 2017.**
4. **That the letter under reference CID/BFI/SEC/4/4/VOL.285/98 dated 21st April, 2017 addressed to the Chief Lands Registrar directing that a Restriction be placed over the several parcels of land was to prevent any dealings until the investigations were concluded.**
5. **That a judicial review orders cannot be issued to quash the restriction as the reason for the restriction is to preserve the Estate of the Late Tahir Sheikh Said until the conclusion of the Criminal Case Number 220 of 2017.**
6. **That a judicial review order cannot be issued to quash the restriction as a process of law which is preserving the estate of the Late Tahir Sheikh Said until the conclusion of the criminal case number 220 of 2017.**

7. That if the court grants the judicial review orders quashing the restriction, the orders will frustrate the mandate of the police officers involved in the pending investigations.

8. That the National Bank of Kenya should furnish the police with a confirmation that the Estate of the Late Tahir Sheikh Said approves the respective charges for the respective parcels of land as securities.

9. That each of the parcels of land subject to this suit be treated separately.

10. That the investigations culminating to the charging of the accused persons in the criminal case number 220 of 2017 still continue thus the Restriction should remain in force.

11. That by quashing the Restriction, the National Bank of Kenya will in turn frustrate the outcome of the Criminal Case Number 220 of 2017 upon exercise of its statutory power of sale, should the accused persons be found guilty of forgery of deeds of guarantee and indemnity in the names of the TSS companies which enabled them get the bank loans.

9. Directions were given that the motion be canvassed by way of written submissions. The firm of M/s Munyao, Muthama & Kashindi Advocates for the applicant filed their submissions on 2nd July, 2020 while the Honourable Attorney General for the respondents filed his on 17th September, 2020. Counsel for applicant submitted that the facts as set out in the ex-parte Chamber Summons dated 30th September 2019, the statutory statement dated 30th September, 2019, the verifying affidavit sworn by Wanda Atsiaya on 30th September, 2019 together with the documents annexed thereto are neither in dispute nor contested. This is because the respondents only filed grounds of opposition which raises only issues of law and not of fact. The applicant's counsel relied on the case of **Republic-v- National Land Commission Ex parte Satellite Industrial Supplies Limited (2018)eKLR** in which the court held that "it is trite law that grounds of opposition raise issues of law and not of fact." They also relied on the case of **Kennedy Otieno Odiyo & 12 Others -v- Kenya Electricity Generating Company Limited (2010) eKLR** in which the court held as follows:

"The respondents only filed Grounds of Opposition to the application reproduced elsewhere in this ruling. Grounds of Opposition address only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the application in the supporting affidavit. Thus what was deposed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant"

10. The applicant's counsel reiterated that the Bank as the holder of registered right and interest as chargee over the suit properties holds the right to exercise its contractual and statutory power of sale. That Article 40 of the Constitution of Kenya protects the property rights and interests of the bank as chargee over the suit properties from any arbitrary act, omission or decision whose effect is to deprive, deny, violate, infringe or threaten the property rights and interests of the bank over the said properties. That because the respective Borrowers defaulted in their loan repayment obligations, the Bank became entitled to realize its securities by way of sale of the suit properties.

11. Counsel for the applicant further submitted that the respondents did not give the Bank any notice nor hearing prior to placing the impugned restriction over the suit properties. That the respondents failed to comply with the provisions of Section 76 and 77 of the Land Registration Act prior to placing the impugned restriction over the suit properties. The applicant's counsel relied on the case of **Ezekiel Misango Mutisya -v- National Land Commission & 6 Others (2014)eKLR** in which the court held as follows: "In this case, in the absence of any evidence that he 2nd respondent complied with the provisions of Sections 76 and 77 of the Land Registration Act, this court has no option but to find that the 2nd Respondent's action in placing a restriction on the suit land was tainted with procedural irregularity. It follows that the applicant's application is merited." Counsel for the applicant also relied on the case of **Itrade Company Limited -v- Jane Mukami Mwangi & Another (2015)eKLR** in which the court held as follows: "The law is quite clear that the Registrar is required to give the affected proprietor a chance to make representations to him prior to proceeding to enter a restriction on any property. This was not done. Further, the registrar is bound by the law to notify the affected proprietor of a restriction which has been entered against their property. This was also not done in this case. Clearly, the applicant was condemned unheard and has suffered great financial loss as a result."

12. It was submitted that the applicant has been prejudiced by the unprocedural, irregular and unlawful actions of the respondents and that the effect of the impugned restriction is that the applicant has been unable to register any disposition over the suit properties as chargee. It was the applicant's submission that the respondents did not have any basis to place the impugned restriction over the suit properties. The applicant submitted that the 1st and 2nd respondents are misleading the court by stating that the suit properties are owned by Tahir Sheikh Said as some of the properties are registered in different names. That in any case, the 1st and 2nd respondents have not challenged the facts of the case herein as they only filed grounds of opposition which legally do not respond to issues of fact raised by the application in the supporting affidavit. It was further submitted by the applicant's counsel that the respondents failed to consider relevant factors prior to placing the impugned restriction over the suit properties. That the respondents failed to consider the fact that various suits had already been filed litigating on the issue as to whether the bank was entitled to realize its securities by way of sale of the suit properties, including Mombasa High Court Civil Case No.69 of 2017- **Juja Coffee Exporters Limited -v- National Bank of Kenya Limited** in which in the pleadings the chargor confirms that it took a loan from the bank and charged the suit properties as security for the loan and that now owes the bank outstanding amounts. The applicant submits that it is evident that the respondents failed to address their minds on the existence of those suits. That the respondents knew that once the restriction is placed by the 3rd respondent then bank was effectively restrained from realizing its securities by way of sale of the suit properties. It was further submitted that the respondents argument that quashing the restriction placed over the suit properties will interfere with investigations beats logic as the investigations were long completed and criminal charges filed in court, to wit Mombasa Criminal Case Number 220 of 2017. Further, that 1st and 2nd respondents directive that the impugned restrictions be placed over the suit properties on the basis of 'pending investigation' in respect of a criminal case which was already proceeding in court is evidently stranger than fiction. In addition, it was submitted that there is no correlation between the offences in the charge sheet in criminal case no.220 of 2017 and the securities created in favour of the bank over the suit properties, or even the suit properties themselves. That the allegation that quashing the restriction placed over the suit properties will jeopardize criminal case no.220 of 2017 does not have any legal or factual basis, and illogical. It is further submitted that it was unreasonable and irrational for the 1st and 2nd

respondents to direct the placing of the impugned restriction well knowing that the bank has charges over the suit properties, and well knowing that the offences in Criminal Case No.220 of 2017 do not relate to the securities held by the bank. That these are relevant factors which the 1st and 2nd respondents failed to consider before making their decision of directing 3rd respondent of placing the caveat. It is the applicant's submission that the decision to direct the placing of a restriction over the suit properties was accentuated by other extraneous reasons outside of Criminal Case 220 of 2017 and was calculated at granting the defaulting borrowers an injunction through the back door. The applicant's submission is that the decisions and actions of the respondents' of placing the impugned restriction over the suit properties are clearly irregular, illegal and therefore unlawful. It is the applicant's submission that it has established a case for the issuance of the prerogative orders sought in the motion and urged the court to grant the prayers sought in the notice of motion dated 22nd October, 2019.

13. It was the respondents' submission that a judicial review order cannot be issued to quash a process of law which is ongoing. The respondents submitted that Section 76 (1) and (2) of the Land Registration Act, 2012 is clear on when a restriction can be placed and relied on the case of **David Macharia Kinyuru –v- District Land Registrar, Naivasha & Another, Nakuru ELC Misc. Appl No.331 of 2016** where the court held:

“.....the purpose of a restriction is aimed essentially at stemming fraud or improper dealings over land. The Land Registrar may also place a restriction where there is other sufficient cause. Restrictions are to endure for a particular time or until the occurrence of an event, or the making of a further order. It is not the purpose of this section of the law to have restrictions remain indefinitely. The reason is that a restriction should only hold a property in abeyance as the underlying issue leading to the restriction is being resolved; since restriction by itself does not solve a dispute....”

14. The respondents' counsel submitted that in the current situation, investigations are still ongoing and therefore the process as started by the investigative bodies should be concluded before the restrictions can be lifted so as not to render the process futile. The respondents counsel further submitted that a complaint was made to the police on the basis that the late Tahir Sheikh Said had not approved any charges on the land and the DCI swung into action to preserve the estate of the late Tahir Sheikh Said. The respondents' counsel cited Section 51 of the National Police Service Act No. 11A of 2011 which stipulates the functions bestowed upon the police and relied on the case of **Republic –v Commissioner of Police and Another Ex-Parte Michael Monari & Another (2012)eKLR** where Warsame J (as he then was) stated that:

“The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime.”

15. I have considered the application, the submissions made as well as the authorities cited. The issue that arises for determination is whether the orders sought herein should be granted or not. In **Mombasa ELC Misc. JR. No. 1 of 2019- Republic –v- Inspector General of Police & 2 Others Ex-Parte National Bank of Kenya Limited**, I dealt with a similar application and stated as follows:

“ the purview of judicial review was clearly set by Lord Diplock in the case of Civil Service (1985) AC 373 at 401D when he stated that:

Judicial review as I think developed to a stage today when....one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call illegality, the second irrationality, and the third “procedural impropriety....” By illegality as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it.... By ‘irrationality’ I mean what can now be succinctly referred to as “Wednesbury unreasonableness.” It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it... I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”

16. In the same case, I went on and stated:

“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.**
- 3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-**
 - a) Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and**
 - b) Promote efficient administration.**

Article 50 (1) of the constitution provides that ‘every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court of law or, if appropriate, another independent and impartial tribunal or body’ while section 4 of the Fair Administrative Action Act provides as follows:

1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
2. Every person has the right to be given written reasons for any administrative action that is taken against him.
3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person the administrator shall give the person affected by the decision-
 - a. Prior and adequate notice of the nature and reason for the proposed administrative action;
 - b. An opportunity to be heard and to make representations in that regard;
 - c. Notice of a right of review or internal appeal against an administrative decision where applicable;
 - d. Statement of reasons pursuant to Section 6
 - e. Notice of the right to legal representation, where applicable; or
 - f. Notice of the right to cross-examine or where applicable; or
 - g. Information, materials and evidence to be relied upon in making the decision or taking the administrative action.
4. The administrator shall accord the person against whom administrative action is taken an opportunity to-
 - h. Attend proceeding, in person or in the company of an expert of his choice;
 - i. Be heard
 - j. Cross-examine persons who give adverse evidence against him; and
 - k. Request for an adjournment of the proceedings, where necessary to ensure a fairing hearing.”

17. In this case, it is not in dispute that the suit properties were charged to the bank, therefore the bank had proprietary interest in the suit properties as chargee. Article 40 of the constitution of Kenya no doubt protects the proprietary rights and interests of the applicant as a chargee over the suit properties from any arbitrary act, omission or decision whose effect is to deprive, deny, violate, infringe or threaten the property rights and interests of the Applicant over the suit properties.

18. It is not disputed that by way of a letter dated 21st April 2017 the 1st and 2nd Respondents directed the 3rd respondent to place a restriction over the suit properties, and the 3rd respondent proceeded to place a restriction over the suit properties as directed in the said letter. That the placing of the restriction over the suit properties was an administrative action by the respondents is not in dispute. The respondents were therefore under a duty to ensure that their actions were expeditious, efficient, lawful, reasonable and procedurally fair. Procedural fairness necessarily requires that the persons who are likely to be affected by the decisions be afforded an opportunity of being heard before the decision is taken. Further the provisions of the law must be adhered to.

19. Section 76 of the Land Registration Act No. 3 of the 2012 provides as follows:

76. Restrictions

- 1) **For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land or charge.**
- 2) **A restriction may be expressed to endure –**
 - a. **For particular period;**
 - b. **Until the occurrence of a particular event; or**
 - c. **Until the making a further order is made, and may prohibit all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.**
- 3) **The registrar shall make a restriction in any case where it appears that the power of the proprietor to deal with the land, lease or charge is restricted.**

Section 77 (1) provides that “The Registrar shall give notice, in writing, of a restriction to the proprietor affected by the restriction. ”

20. From the provisions referred to hereinabove, it is clear that one of the persons considered fit for purposes of directing inquires, serving notices to, and being heard and to be given notice in writing are chargees such as the Applicant herein, which holds statutory right and power to dispose of the suit properties as chargee. The 3rd Respondent was under an obligation to direct inquiries, serve notice to and to accord the Applicant a fair hearing as required by Section 76(1) aforesaid prior to placing a restriction over the suit property. In this regard, I wish to adopt the holding in the case of **Ezekiel Misango Mutisya –v- National Land Commission & 6 Others (2014)eKLR** in which the court held as follows: “In this case, in the absence of any evidence that the 2nd respondent complied with the provisions of Section 76 and 77 of the Land Registration Act, this court has no option but to find that the 2nd respondent’s action in placing a restriction on the suit land was tainted with procedural irregularity. It follows that the Applicants’ application is merited.”

21. The applicant has stated that it has been prejudiced by the unprocedural, irregular and unlawful actions of the respondents. That the effect of the impugned restriction is that the applicant has been unable to register any disposition over the suit properties. In this case, the respondents filed grounds of opposition in response to the application. As was held in the case of **Kennedy Otieno Odiyo & 12 Others –v- Kenya Electricity Generating Company Limited (supra)** “*Grounds of opposition addressed only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the application in the supporting affidavit. Thus what was deposed to was not countered nor rebutted by the respondents. It must be taken to be true.*” Therefore, in my view, the facts deposed to by the applicant have not been challenged and remain facts and the truth for that matter. The respondents chose not to file any statement on oath in answer to the applicant’s averments. Moreover even if the restriction was placed over the suit properties until investigations were concluded, the applicant has laid before this court documents in the form of charge sheet in criminal case 220 of 2017. That people have already been arraigned in court and there being no denial that the hearing is already underway, is an admission that investigations were long concluded and the criminal charges filed in court. The respondents’ submission that investigations are still ongoing is untrue.

22. In my considered view, the respondents failed to follow the procedure laid down in Section 76 and 77 of the Land Registration Act before arriving at the impugned decision of placing restriction over the suit properties. Moreover, the respondents were obliged to afford the Applicant a hearing before they made their decision which decision was, undoubtedly bound to adversely affect the rights and interests of the applicant over the suit properties. In my view, the decision was materially influenced by an error of law and was disproportionate to the interests of the Applicant and also infringed upon the applicant’s right to property as guaranteed by Article 40 of the Constitution. The said decision violated the legitimate expectations of the Applicant that the respondents would act in good faith and be just in implementing the law. Further, in my view, the said decision was unlawful, unreasonable and procedurally unfair in that the applicant, who had an interest and right in the suit properties as chargee was not given substantive written reasons for the decisions by the respondents and that no prior and adequate notice were given and therefore the applicant was not accorded an opportunity to be heard and to make representations regarding the said decision contrary to the provisions of sections 4 (3) (a) and (b) and 4(4) (a) and (b) of the Fair Administrative Action Act.

23. In the case of **Onyango Oloo –v- Attorney General (1989)EA**, the Court of Appeal held that:

“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.... There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so apply the principles of natural justice.... A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at....”

Where a party has not been heard, a decision made in breach of natural justice are null and void.

24. There is no doubt that the Applicant is the chargee of the suit properties. The Land Registration Act does not give the respondents power to place restrictions over charged property without notifying the chargee. The respondent’s decision, in my view was tainted with procedural irregularity and therefore illegal. Further, it is my view that rules of natural justice were flouted and the decision cannot stand. Consequently, I find merit in the Notice of Motion dated 22nd October 2019 and the same is allowed in its entirety.

DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 7th day of October 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE