



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO.31 OF 2018 (FORMERLY NRB MISC 152 OF 2018)**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF JUDICIAL REVIEW OF MANDAMUS,**

**CERTIORARI AND PROHIBITION AGAINST THE CHIEF LAND REGISTRAR AND**

**THE REGISTRAR OF TITLES AND THE NATIONAL LAND COMMISSION**

**IN THE MATTER OF THE LAND REFERENCE NUMBER THIKA MUNICIPALITY BLOCK 6/1062**

**REPUBLIC.....APPLICANT**

**AND**

**THE NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE REGISTRAR OF TITLES.....2<sup>ND</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR.....3<sup>RD</sup> RESPONDENT**

**AND**

**GASKI INVESTMENTS LIMITED.....INTERESTED PARTY**

**GEORGE GATHUKI NGANGA.....EXPARTE**

**JUDGEMENT**

The matter for determination is the **Judicial Review Application** dated **16<sup>th</sup> May 2019**, by the Ex parte Applicant seeking for orders that;

- 1. THAT this Honourable Court be pleased to issue an order of Certiorari to remove to the High Court for purposes of quashing the 1<sup>st</sup> Respondent’s decision made on 11<sup>th</sup> July 2018 declaring that the registration of the Applicant as the owner of Thika Municipality/ Block 6/1062 was obtained through deceit and misrepresentation.**
- 2. THAT the Honorable Court be pleased to issue an order of mandamus directed at the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to rescind to remove and to vary the decision by the 1<sup>st</sup> Respondent made on the 11<sup>th</sup> July, 2018 revoking the Ex Parte Applicant’s lease and reinstating the said Lease /title deed forthwith.**
- 3. THAT an order do issue directing that the proceedings leading to the decision of the 11<sup>th</sup> July , 2018 be vacated, set aside , quashed and or expunged from the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent’s records.**
- 4. THAT an order of Certiorari do issue to quash decision of the 1<sup>st</sup> Respondent to review the Applicant’s lease / title deed to Thika Municipality /Block 6/1062 and declaring that the Interested Party as the legitimate registered owner.**
- 5. THAT the costs of this Application be paid by the Respondents.**

The Judicial Review Application is premised on the grounds that the 1<sup>st</sup> Respondents mandate to review grants had come to an end by dint

of the provisions of **Section 14 of the National Land Commission Act, 2012**, and that the 1<sup>st</sup> Respondent was exercising a non-existent powers or abuse of office and their determination of the **11<sup>th</sup> July 2018**, is ripe for quashing vide a certiorari order. Further that the Ex parte Applicant is the registered owner of the suit property vide a letter of allotment dated **10<sup>th</sup> September 1992**, and pursuant to transfer from the Government of Kenya. That the Applicant applied to be allocated the suit property from the Commissioner of Lands through a letter dated **18<sup>th</sup> May 1992**. That the Applicant complied with conditions given by the Commissioner of Lands and subsequently took possession of the same on **26<sup>th</sup> November 1997**, Further that the Ex parte Applicant paid **Kshs. 181.516.60** as acceptance fees for the allotment. That on **28<sup>th</sup> July 1999**, the Ex parte Applicant received a **Land Rent Notice** which he paid and that the same covered **Land Rents for 8 years**. Further that the Ex parte Applicant has since been receiving his **Land Rents demands** annually and paying for them including the one dated **1<sup>st</sup> December 2010**, and that he was entered as the registered proprietor of the suit property.

Further that vide a letter dated **11<sup>th</sup> August 2010**, the Ministry of Land Department of Survey appointed a surveyor and forwarded allotment letter to confirm whether the allotment letter was authentic and vide a letter dated **9<sup>th</sup> March 2011**, the Commissioner of Land confirmed to the Director of Surveys that the letter of Allotment was authentic. It was further contended that vide a letter dated **11<sup>th</sup> August 2010**, the Ex Parte Applicant's Surveyor, presented cheques of **Kshs. 2,300/=** to the Director of Surveys being payment for survey checking fees.

Further that vide a letter dated **10<sup>th</sup> September 2010**, the Commissioner of Lands authorized the Director of Surveys to amend the **Registry index Map (RIM)** for the Unsurveyed Residential Plot No. A, Thika Municipality, to be referred to as **Block 6/1062 Thika Municipality (suit property)**, which amendment was confirmed by the

Director of Surveys. It was further contended that the Commissioner of Lands requested the Ex parte Applicant to forward his full official names, backed by a copy of his National Identity Card, which he indicated was pursuant to the letter of Allotment **No. 23136/ XXXIII/ 103** and the applicant vide a letter dated **4<sup>th</sup> February 2011**, responded by stating the requested particulars.

Further that upon completion of all prerequisite legal formalities the Ex parte Applicant applied for registration of the lease for the suit property and the same was registered on **3<sup>rd</sup> January 2012** and **Ex Parte Applicant** was issued with a Certificate of Lease. Further that the **Ex Parte Applicant** lodged the Lease Document for Registration and paid for it and registered the suit property.

It was further contended that **Silas Kiogora Mburugu**, a Director of the Interested Party acting illegally in collusion with one **Mr. Kahuhu**, a Senior Deputy Commissioner of Lands, hid the correct file for the suit property and created a fraudulent parallel titles now held by the Interested Party. The Ex parte Applicant lodged a complaint to the 1<sup>st</sup> Respondent, but was not afforded a reasonable opportunity to ventilate his complaint before an illegal declaration was made on **11<sup>th</sup> July 2018**, that the Ex parte Applicant acquired an illegal title and lease. It was contended that the Ex parte Applicant's applied for and paid for the allotment much prior to **Gaski Investment Ltd**, and therefore the property was no longer available for re-allocation. Further that an officer of the National Land Commission has been acting contrary to the expected high standards of probity and integrity and has suspiciously purported to validate a questionable issuance of a parallel title in favor of **Gaski Investment Limited** when it is uncontrovertibly and clearly known that at the period when the **Company Gaski Investment Ltd.** purportedly got its parallel allocation, there was a moratorium declared by the Government of Kenya against issuance of any allocation for public Land. It was further contended that the entire process adopted by the Respondents in cancellation of the Ex Parte Applicant's title was flawed, unfair and opaque. Further that there wasn't a hearing committee which is always chaired by the vice chairman and there weren't proceedings typed or otherwise from the said committee sitting and that the then Chairman of the **National Land Commission** made impugned decision without a full Commission hearing as provided by the law and procedure. Further that though the Ex Parte Applicant requested to be provided with the minutes of the meeting, none was provided.

It was further contended that the complaint filed was with regard to abuse of office by **Silas Kiogora Mburugu**, and the Chairman instituted investigations without issuing the **Ex Parte Applicant** with a demand letter. Further that the impugned decision was reached at without an inquiry. It was further contended that on **15<sup>th</sup> May 2018**, the Ministry of Lands and Physical Planning confirmed that the suit property was issued to the Ex Parte Applicant. Further that the 1<sup>st</sup> Respondent's has mandate to review grants that had come to an end by dint of the provisions of **Section 14 of the National Land Commission Act 2012**, and the 1<sup>st</sup> Respondent was therefore exercising non existent powers. It was also contended that the dispute regarding the suit property has been heard by **Justice Ongondo** and the parties have submitted to litigation of the matter and have by their conduct disowned the validity of the impugned illegal determination by the Chairman of the National Land Commission.

The Application is also grounded on the Ex Parte Applicant's Verifying Affidavit sworn on **17<sup>th</sup> December 2018**, in which he reiterated the contents of the grounds in support of the Application. He averred that after he had already registered the land and was issued with all requisite documents as proof of ownership, he was informed that another party from the Interested Party had gone to register the lease. That he reported the matter to the CID Headquarters and also lodged a complaint with the 1<sup>st</sup> Respondent dated **27<sup>th</sup> July 2017** for the **National Land Commission** to investigate the abuse of office and authenticity of title over the suit property held by the Interested Party. He further averred that the decision by the **National Land Commission** repeats a flow of words and phrases which had been reproduced from a letter instigated by **Silas Kiogora Mburugu's t/a Gaski Investments Limited** and dated **8<sup>th</sup> January 2013**. It was his further contention that the **Cabinet Secretary, Ministry of Lands** further ordered that the Certificate of Lease issued on **10<sup>th</sup> April 2018**, to him was authentic. It was therefore his contention that the Respondents actions are oppressive and unconscionable.

The Judicial Review is contested and the Interested Party swore a Replying Affidavit on **19<sup>th</sup> June 2019**, through its Director **Silas Kiogora Mburugu**. It was his contention that the Application is an afterthought and an abuse of the Court process. He averred that **Section 14** of the **National Land Commission** does not limit the Commission to strictly review grants and disposition within the first five years but that it is an ongoing process. He further averred that after the Commission had found that the Ex Parte Applicant's title was irregularly issued, it cancelled it. He further alleged that as per the proceedings in **ELC case No. 192 of 2017**, the issue of the investigations by the 1<sup>st</sup> Respondent was dealt with and a report submitted in Court which investigations found that the Interested Party was the legal proprietor of the suit property. He contended that the Ex parte Applicant has not tendered any evidence to substantiate the allegations of the abuse of office

by him. He urged the Court to dismiss the Application.

The 1<sup>st</sup> Respondent through its acting Director, Legal Affairs and Enforcement **Brian Okol**, also swore a Replying Affidavit on **27<sup>th</sup> November 2019**, and averred that prior to **1<sup>st</sup> May 2017**, the 1<sup>st</sup> Respondent was mandated under **Section 14 of the National Land Commission Act** to review all grants and dispositions of public land either on its own motion or upon receipt of a complaint. He averred that the review entailed analysing process of public land that led to issuance of title. He further averred that the provisions of **Section 14 of the National Land Commission Act** ceased to exist from **1<sup>st</sup> May 2017**, as the mandate was only limited to a time period of 5 years. Further that following the said lapse, the 1<sup>st</sup> Respondent could neither legally review the legality of any grant or disposition of public land and neither could it make any recommendation to the Chief Land Registrar.

It was his contention that Vide a letter dated **27<sup>th</sup> July 2017**, the Exparte Applicant lodged a complaint with the 1<sup>st</sup> Respondent requesting investigation into the authenticity of the suit property held by **Gaski Investment Limited**, to determine its legality. He further averred that the investigations unearthed that the suit property was initially allocated to **George Gathuki Nganga** and the term of the allotment letter was that acceptance was required in writing within 30 days and the allottee was required to pay **Kshs 81,516.60** failure to which the offer would lapse. Further that the said **George Gathuki Nganga**, did not comply with the said terms and on **17<sup>th</sup> December 1997**, the Commissioner of Lands issued Notice of withdrawal of the letter of allotment. Further that on **16<sup>th</sup> September 2010** the Interested Party herein subsequently sought allocation and a letter of allotment was issued vide a letter dated **23<sup>rd</sup> December 2010**. That the Interested Party duly complied and a lease was issued in its favour. That while a preparation in favour of the Interested Party was ongoing, the Exparte Applicant presented to the lands office a copy of payment receipt dated **8<sup>th</sup> December 2017**, showing to have made payment in respect of the allocation of the suit property. That based on the said information, a parallel file was duly created and the process of preparation of title in favour of the Applicant commenced and was forwarded for registration at the Thika Registry.

He further contended that following the outcome of the Investigations, the 1<sup>st</sup> Respondent concluded that the title issued in favour of the Exparte Applicant had not been properly issued as the letter of allotment had since been formally withdrawn on **17<sup>th</sup> December 1997**. Further that the Respondent duly conveyed the outcome of its findings to the Exparte Applicant vide a letter dated **11<sup>th</sup> July 2018**. It was his contention that the letter is not a decision capable of being quashed as the contents of the letter only serve to communicate the report of the findings of the Respondent's Investigations. He further averred that the Exparte Applicant herein had moved the Court vide **Thika ELC 192 OF 2017**, and vide a Judgment delivered on **14<sup>th</sup> June 2019**, the Court held the Applicant's title as issued and registered on **3<sup>rd</sup> January 2012**, was irregular and the Application therefore has no merit.

The EX Parte Applicant **George Gathuki Nganga** swore a Supplementary Affidavit on **11<sup>th</sup> November 2019** and reiterated the contents of his Verifying Affidavit. He averred that he was never afforded a reasonable opportunity by the **National Land Commission** to ventilate his complaint before an illegal declaration was made on **11<sup>th</sup> July 2018**. It was his contention that there was no technical report by the technical Investigators, nor record of minutes. No ground verification and no hearing committee which is always chaired by the Vice Chairman. It was his contention that the internal process was not followed as the decision was hurriedly and unilaterally reached. Further that though his Advocates on record had requested the National Land Commission to provide them with minutes of the sitting, none was produced. He further averred that **Judicial Review** is concerned with the process not merits of the decision and that the impugned decision was reached at without an inquiry and that the same had been confirmed by the then acting Chairperson of the National Land Commission.

The Judicial Review Application was canvassed by way of written submissions which the Court has carefully read and considered. The Court has also carefully considered the Exparte Applicant's Judicial Review and the annexures thereto, the **Replying Affidavits** by the Respondents and the Interested Party and the cited authorities and the relevant provisions of law and the Court renders itself as follows:-

The issues for determination are;

- a) *Whether the Exparte Applicant has met the threshold for grant of Judicial Review Order of **Certiorari** and **Prohibition**.*
- b) *If so, whether the application dated **16<sup>th</sup> May 2019** is merited.*
- c) *Who is entitled to costs of these proceedings.*

From the outset, it is important to set out the purpose of Judicial Review. In the case of **Municipal Council of Mombasa...Vs...Republic Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007(2002) eKLR**, the Court of Appeal held that:-

*“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 make 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 they 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 this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review.”*

Further circumstances under which orders of Judicial Review can be issued were elaborated by **Justice Kasule in the Uganda case of Pastoli ...Vs..Kabale District Local Government Canal & Others (2008) 2EA 300 at pages 300-304.**

*“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 the decision or making the act, the subject of the complaint. Acting without jurisdiction or ***ultra vires*** or contrary to the provision 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.

***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 to act 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 legislature instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehidswi... Vs...Secretary of State for the Housing Department (1990) AC 876*”.

So what does the Judicial Review orders entails? This was elaborated in the case of ***Kenya National Examination Council...Vs...Republic Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No.266 of 1996***, where the Court held that:-

***“That now bring 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 Order of Prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules or 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, 4<sup>th</sup> Edition vol.1 at Pg.37 paragraph 128.”***

From the foregoing cases, the applicable law in cases of Judicial Review has already been established and this Court will not invent the wheel, but will consider the above applicable law and then juxtapose it with the available facts to determine whether the ***Exparte Applicant*** is deserving of the orders sought.

***a) Whether the Applicants has met the grounds or threshold for granting of Judicial Review Order of Certiorari and Prohibition.***

As was stated in the case of ***Kenya National Examination Council...Vs...Republic (Exparte Geofrey Gathenji & Another (Supra)***, the Order of *Certiorari* can quash a decision already made as an Order of *Certiorari* will only issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice have not been complied with or so such like reasons.

So have the ***Exparte Applicant*** established existence of the above condition to warrant this Court quash the decision of ***National Land Commission*** issued in the alleged letter dated **11<sup>th</sup> May 2018** and further grant an order of ***mandamus*** to vary the said decision?

It is the Applicant’s contention that the 1<sup>st</sup> Respondent i.e the ***National Land Commission*** was exercising nonexistent powers as it did not have jurisdiction to deal with the said matter since its mandate to review grants had come to an end. Further that he lodged a complaint with the ***National Land Commission*** but was not afforded a reasonable opportunity to ventilate his complaint. Given that the said Judicial Review is questioning whether the ***National Land Commission*** had jurisdiction and further whether the rules of natural justice were arrived at before the decision was made, the Court finds that the ***Ex parte Applicant*** herein is questioning the process through which the 1<sup>st</sup> Respondent arrived at its decision. Therefore, ***the Exparte Applicant*** has established the threshold for grant of the orders sought.

As to whether the Ex parte has met the threshold for grant of the said orders is a matter further of determination. It is trite that jurisdiction is everything and without it a Court or tribunal has no option but to down its tools. The Court will therefore first determine whether the ***National Land Commission*** had powers to review grants at the time. Both the Exparte Applicant and the 1<sup>st</sup> Respondent are in agreement that by dint of Section 14 of the National Land Commission, the Commission did not have jurisdiction to deal with the matter either by the time the complaint was filed on **28<sup>th</sup> July 2017**, or when the alleged impugned decision was made on **11<sup>th</sup> July 2018**. Section 14 of the National Land Commission Act provides for Review of grants and dispositions thus: -

***(1) Subject to Article 68(c)(v) of the Constitution, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.***

Therefore, this Court finds and holds that given that the 1<sup>st</sup> Respondent’s mandate expired on **1<sup>st</sup> May 2017**, it therefore had no jurisdiction to deal with the complaint presented by the Applicant and if indeed it made any decision, then the same was made ***ultra vires*** and ought to be quashed.

However, the 1<sup>st</sup> Respondent has submitted and averred that the letter dated **11<sup>th</sup> July 2018** was not a decision but rather just a letter communicating to the Exparte Applicant.

The Court must then determine whether the letter was a decision. A decision has been defined by the Blacks Law Dictionary 2<sup>nd</sup> edition as

***“A judgment or decree pronounced by a court in settlement of a controversy submitted to it.”***

Was the above letter a decision? The Court has carefully perused the said letter and notes that the letter by the then Chairman of the **National Land Commission** was written in response to a letter by the Exparte Applicant dated **16<sup>th</sup> May 2018**. The Court has not had the chance of perusing the letter. However, the Court notes that the Complaint by the Exparte Applicant was embodied in a document that may also be referred to as a complaint dated **27<sup>th</sup> July 2017**, and filed on **28<sup>th</sup> July 2018**. It is therefore the Court's considered view that the Controversy that was to be settled was contained in the complaint dated **27<sup>th</sup> July 2017**. However the letter dated **11<sup>th</sup> July 2018**, was in relation to a letter dated **16<sup>th</sup> May 2018**, which the contents are unknown, but not the complaint. From the above analysis, the Court finds and holds that as the letter was not in response to the complaint, it therefore cannot amount to a decision.

Further after perusal of the said letter, the court finds that the same was not a decision, but rather seemed more of an advise directed towards the Exparte Applicant. As already held the letter did not amount to a decision and thus it cannot be said that the Exparte Applicant was not afforded a fair hearing nor that the Commission did not have jurisdiction to make the said decision.

Having found that there was no decision made by the 1<sup>st</sup> Respondent, then the **Exparte Applicant** was accorded an opportunity to be heard and consequently the Court finds and holds that the **Exparte Applicant** has not established the **threshold for granting of Judicial Review Orders** sought.

***b) Is the application dated 1<sup>st</sup> September 2017 merited?***

The Exparte Applicant herein is seeking an Order of Judicial Review of *Certiorari* to quash the decision of the 2<sup>nd</sup> Respondent and an Order of **Mandamus** to vary the said decision. The Court has found that there is no decision to be quashed or be varied, and consequently, it further finds and holds that **the Exparte Applicant is not deserving of the orders sought and for the above reasons his Application is not merited**

***c) Who is to bear costs of these proceedings?***

Ordinarily, costs do follow the event. **Section 27** of the **Civil Procedure Act** provides that **'costs are granted at the discretion of the Court.'** Therefore **the Exparte Applicant should bear costs of these proceedings.**

The upshot of the foregoing is that this Court finds and holds that the **Exparte Applicant** is not **deserving of the orders sought in the Judicial Review Notice of Motion** dated **16<sup>th</sup> May 2019**, and **proceed to dismiss the said Judicial Review Application with costs to the 1<sup>st</sup> Respondent and the Interested Party.**

It is so ordered.

**Dated, signed and Delivered at Thika this 1<sup>st</sup> day of October 2020**

**L. GACHERU**

**JUDGE**

**1/10/2020**

**Court Assistant - Lucy**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**No Appearance for the Applicant**

**No Appearance for the 1<sup>st</sup> Respondent**

**No Appearance for the 2<sup>nd</sup> Respondent**

**No Appearance for the 3<sup>rd</sup> Respondent**

**No Appearance for the Interested Party**

**No Appearance for the Exparte Applicant (though aware of the judgement date**

**L. GACHERU**

**JUDGE**

**1/10/2020**