



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC. APPLICATION NO. 44 OF 2019

THE REPUBLIC.....APPLICANT

VERSUS

1. CABINET SECRETARY, FOR THE MINISTRY OF INTERIOR &

COORDINATION OF NATIONAL SECURITY IN KENYA

2. THE INSPECTOR GENERAL, NATIONAL POLICE SERVICE

3. THE NATIONAL LAND COMMISSION.....RESPONDENTS

LIGHT HOUSE INVESTMENTS LIMITED.....EX-PARTE APPLICANT

JUDGMENT

1. Pursuant to leave granted by the court on 30th October, 2019, the Ex-Parte Applicant herein, Light House Investment Limited filed the Notice of Motion dated 11th November, 2019 brought under Section 8 of the Law Reform Act and Order 53 Rule 3 of the Civil Procedure Rules.

2. The Ex-Parte Applicant seeks the following orders:

1. An order of certiorari do issue to remove and bring before this Honourable Court for purposes of quashing the Respondents’ individual and/or collective decision dated and/or communicated on 28th October, 2019 being the ultimatum issued to the Ex-Parte Applicant and their Tenant to immediately vacate, and the forceful take-over of possession of and the intended revocation of the titles to the 3 premises known as MOMBASA/BLOCK XXVI/629, MOMBASA/BLOCK XXVI/630 & MOMBASA/BLOCK XXVI/631 situate in Mombasa Island, Mombasa County (hereinafter referred to as the “suit premises”);

2. An order of certiorari do issue to remove and to bring being before this Honourable Court for purpose of quashing the 3rd Respondents’ decision (s) in respect to any investigation and/or inquiry and/or any hearing and/or any holding and/or any finding (s) arising therefrom in respect to the suit premises;

3. An order of certiorari do issue to remove and to bring before this Honourable Court for purposes of quashing the Respondents’ decision(s) to subject the ownership, title and proprietary status of the suit premises known as the 3 suit premises known as MOMBASA/BLOCK XXVI/629, MOMBASA/BLOCK XXVI/630 and MOMBASA/BLOCK XXVI/631 to inquiry and/or an investigation and/or a hearing and/or a public hearing before the National Land Commission and/or any of its organs and/or officers and any holdings, findings and/or decisions arising or issuing as a result thereof;

4. An order of certiorari do issue to remove and to bring before this Honourable Court for purposes of quashing any proceedings, authority, ruling, decision and/or order of the Respondents and/or any of them and/or their officers, servants, agents, subordinates and/or employees together with any issuance of and/or publication of any notice emanating from the National Land Commission prejudicially touching on and or affecting or otherwise in reference to the 3 suit premises known as MOMBASA/BLOCK XXVI/629, MOMBASA/BLOCK XXVI/630 & MOMBASA/BLOCK XXVI/631;

5. An order of prohibition do issue prohibiting the Respondents and/or any of them and/or their officers, servants, agents, subordinates and/or employees from taking any further steps or action in any manner whatsoever prejudicial toward the title, ownership, possession and/or control over and in respect to the 3 suit premises known as MOMBASA/BLOCK

6. An order of prohibition do issue prohibiting the Respondents and/or each one of them and/or their officers, servants, agents, subordinates and/or employees from taking further steps or action in furtherance of the intentions to hear, consider, deliberate on, discuss and/or make any decisions, issue instructions, direction and/or otherwise attempt to either conclusively or in any other manner deal with the matter; or investigate, view, consider, compel or require any further or any submission, documentary evidence and/or any other means of collection of evidence with respect to the question of ownership and/or registered proprietorship, allotment; assignment or any other means of proprietary disposal surrounding the 3 suit premises known as MOMBASA/BLOCK XXVI/629, MOMBASA/BLOCK XXVI/630 & MOMBASA/BLOCK XXVI/631;

7. An order of Mandamus do issue requiring the Respondents and/or each one of them and/or their officers, servants, agents, subordinates and/or employees to remove themselves and/or any other 3rd party from the 3 suit premises known as MOMBASA/BLOCK XXVI/629, MOMBASA/BLOCK XXVI/630 & MOMBASA/BLOCK XXVI/631 and to return them fully to the title and/or ownership and/or possession and/or control of the Ex-Parte Applicant and to reinstate the status quo prevailing before the actions of the Respondents complained of;

8. That the Respondents and each or any of them and/or their officers, servants, agents, subordinates and/or employees be permanently restrained from in anyway, manner, shape or form interfering with the Ex-Parte Applicant Titles and ownership and possession of the suit premises and/or from revoking, cancelling and/or in any manner whatsoever interfering with the titles to the 3 premises known as MOMBASA/BLOCK XXVI/629, MOMBASA/BLOCK XXVI/630 & MOMBASA/BLOCK XXVI/631 situate in Mombasa Island, Mombasa County.

9. The costs of these proceedings be provided for.

3. The Application is based on the grounds shown thereon and set out in the statutory statement dated 29th October, 2019 and the Verifying Affidavit sworn by Abdalla Ali on 29th October, 2019 and the documents annexed thereto. It is averred that the Ex-Parte Applicant is and was at all times material to this suit the registered, legal and beneficial owner and entitled to possession of the three suit premises containing by measurement 0.0877 hectares, 0.0883 hectares and 0.0870 hectares or thereabouts respectively and holds certificates of Lease for each of the three plots issued by the Lessor the Government of Kenya at a rent of Kshs.6,000/- per annum for a term of 99 years from 1st March 1991. That the Ex-Parte Applicant is also in respect to the County and Central Government thereof a taxpayer and a ratepayer.

4. It was deposed that the Ex-Parte Applicant has been the registered, legal and beneficial owner of the 3 suit premises since the year 2012. The Deponent averred that the Ex-Parte Applicant obtained the said 3 suit premises for good and valuable consideration from the previous registered owner of the same, Bajaber Investments Limited, which in turn had been the registered, legal and beneficial owner of the 3 suit premises for 19 years since year 1993 when it in turn bought the said properties for good and valuable consideration from Moledina Enterprises Limited which was the owner of the said properties before that. It is averred that it is now over 28 years since the leasehold to the 3 suit premises were issued by the Government of Kenya and the same have changed hands for the 4th time and the Ex-Parte Applicant obtained the same lawfully, for good value and consideration and is an innocent purchaser for value. It is further averred that the title, ownership and possession of the Ex-Parte Applicant is protected by both the constitution and the law and is sacrosanct. It is stated that the Ex-Parte Applicant has every right in law to ownership and title of the 3 suit properties and there does not exist or has not existed any legal proceedings known to the Ex-Parte Applicant filed in court or lawful tribunal as against the Ex-Parte Applicant challenging in any way their title, ownership and/or possession of the 3 suit premises or any one of them or at all. That no court of law or lawfully constituted tribunal has ever heard and/or determined any dispute in respect to the claims of the Respondents or any other parties in relation to the questions of the title, ownership and/or proprietary rights of the Ex-Parte Applicant over the said 3 suit premises. Further, that no court of law or lawfully constituted tribunal has ever passed any judgment or ruling or decision that in any way prejudices the title, ownership and/or proprietary rights of the Ex-Parte Applicant.

5. The Ex-Parte Applicant avers that the Respondents have collectively and/or individually and contrary to the constitution, contrary to law, contrary to procedure and contrary to the rules of natural Justice, ordered and issued the Ex-Parte Applicant and their tenants with an ultimatum to immediately vacate the 3 suit premises, and forcefully taking-over possession of and further intend to effect a revocation of the titles to the 3 suit premises claiming that they belonged to the National Police Service, unless stopped by an order of this court. The Ex-Parte Applicant states that following the harassment by the Respondents, the Applicant's tenants have moved out of the suit premises and would no longer be paying any rent to the Ex-Parte Applicant. It is the Ex-Parte Applicant's contention that the actions of the Respondents are unlawful and prejudicial as against the Ex-Parte Applicant and or its tenants. That the suit premises are likely to be developed and/or taken over by the Respondents and especially the 2nd Respondent.

6. The Ex-Parte Applicant avers that none of the Respondents and particularly the 3rd Respondent, in any way informed the Ex-Parte Applicant of the existence of any proceedings, investigation, inquiry and/or hearing as against it in respect of the 3 suit premises and/or in respect of any premises whatsoever and in particular the Respondents and each one of them failed, refused and/or to provide the Ex-Parte Applicant with any or any formal communication of the existence of a problem or question or issue; any or any formal communication of the specific accusations in sufficient detail or at all in respect of which the Ex-Parte Applicant was required to defend itself against; any communication as to the identity of the accuser; any communication of the evidence tendered against the Ex-Parte Applicant by the complainant to enable them to study and adequately respond to the same; any formal communication with respect to the documents and or evidence that the commission claims it uncovered in their proceedings and/or investigations thereby leading them to hold that the suit premises did not belong to the Ex-Parte Applicant; and copies of the certified proceedings or any copies of any proceedings leading up to and including the current status of the matter, discussions and findings of the Respondents and/or any one of them in relation to the 3 suit premises. That neither of the Respondents has the capacity or authority or power to set aside and/or to revoke the title of the Ex-Parte Applicant in the suit premises. The Ex-Parte Applicant contends that the 3rd Respondent has no jurisdiction to entertain any investigation and/or hearing and/or proceedings in respect to the 3 suit premises since they are private land and not public land, and were such before the effective date of 27th August, 2010 when the constitution came into operation. That furthermore, by law the title of the Ex- Parte Applicant as proprietor shall not be challenged, except on grounds of fraud or misrepresentation to which the person is proved to be a party, or where

the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. The Ex-Parte Applicant avers that no evidence was produced and/or presented to any lawfully constituted court of law and/or tribunal proving fraud or misrepresentation on the part of the Ex-Parte Applicant or proving that the Ex-Parte Applicant acquired the certificates of title either illegally or unprocedurally and/or through a corrupt scheme as required by law.

7. The Ex-Parte Applicant contends that the Respondents acted unreasonably, irrationally, contrary to the provisions of the constitution and its safeguards, ultra vires the law and against the rules of natural justice. That the Respondents acted without any notice whatsoever to the Ex-Parte Applicant, and that they acted as prosecutor, judge and executioner all rolled up into one. The Ex-Parte Applicant further contends that this matter is barred by the law on limitations, the original leases and certificates of lease having been issued over 28 years ago, with no persons subjecting the same to any challenges before any court of law or lawfully constituted tribunal. The Ex-Parte Applicant accuses the 3rd Respondent of going beyond its mandate as set out in Articles 67 and 68 of the Constitution and purporting to extend its mandate and investigations outside the ambit of public land as defined under Article 62 of the constitution. The Ex-Parte Applicant contends that the 3rd Respondent has acted in breach of Article 50 of the constitution by denying and/or refusing to inform the Applicant of the full scope of the complaint against it; by refusing and/or denying the Ex-Parte Applicant an opportunity to review the evidence submitted by the complainant and or the evidence and documents as uncovered by the commission so as to allow the Applicant be properly versed with the issues in the suit; and by holding the Ex-Parte Applicant guilty of some or other illegality and requiring it to prove its innocence rather than requiring the complainant to prove their claim.

8. The Ex-Parte Applicant further contends that the Respondents acted and continue to act in breach of Article 47 of the constitution by denying the Applicant reasonable, procedurally fair and lawful proceedings as they failed, refused and/or neglected to furnish the Applicant with the complainant and evidence tendered against it, denied the Applicant certified copies of the proceedings of the matter thus far; denied the Applicant access to the exact specifics as contained in the complaint and or denied it reasonable access to the documentary evidence as uncovered by the 3rd Respondent itself as to allow it a fair and reasonable opportunity to prepare and respond to any claims. The Ex-Parte Applicant accuse the Respondents of acting and continue to act in breach of Article 47 by denying the Applicant a fair and impartial hearing, noting that the 3rd Respondent has stated unequivocally that the Applicant herein is illegally on the suit premises yet the 3rd Respondent has not allowed and/or even reviewed a single shred of evidence by the Applicant. That the 3rd Respondent has made a decision on the matter without affording the Applicant a fair chance at being heard and therefore is only holding a public hearing to justify and regularize their already pre-determined outcome. The Ex-Parte Applicant avers that the Respondents are unreasonably withholding material facts from the Applicant yet are quick to issue eviction orders and other threats to the Ex-Parte Applicant. The Ex-Parte Applicant accuses the Respondents of showing bias towards it by declaring what they call the rightful owner of the suit premises. The Ex-Parte Applicant avers that the suit premises are likely to be the subject of future public hearings before the National Land Commission contrary to the law; contrary to procedure; and contrary to the Rules of Natural Justice, unless stopped by an order of this court.

9. The Ex-Parte Applicant has annexed copies of a letter dated 22nd October, 2019 from the National Land Commission County Coordinator, Mombasa County to the A.G. Secretary, National Land Commission, copies of receipts of payments of Land Rates and Rent in respect of the suit premises; Copies of letters dated 24th May, 2016, from the National Land Commission addressed to the Managing Director of the Ex-Parte Applicant; copies of the certificates of Lease for the suit premises in the name of the Ex-Parte Applicant; copies of leases of the suit premises entered into between the Ex-Parte Applicant and Mombasa Khushi Motors Company Limited; copies of the titles of the three suit premises issued to Bajaber Investments Limited on 23rd July, 1993; and a copy of the transfer of lease in respect of the three suit premises dated 19th July 1993 evidencing the transfer of the three suit premises from the previous owner Moledina Enterprises Limited to Bajaber Investments Limited.

10. In his submissions, Mr. Taib A. Taib learned counsel for the Ex-Parte Applicant reiterated the grounds in support of the Application. He referred the court to the letters dated 24th May, 2016 annexed to the verifying affidavit and marked "AA006", "AA007" and "AA008" in which the National Land Commission the 3rd Respondent herein confirmed then that the suit properties belonged to the Ex-Parte Applicant herein, Light House Investment Limited. The Applicant's counsel urged the court to grant the orders sought herein.

11. None of the Respondents filed any response to the Application even though they were duly served with the Application and hearing notice.

12. I have considered the Application and the submissions made. The issue that arises for determination is whether the orders sought herein should be granted or not.

13. The purview of judicial review was clearly set by Lord Diplock in the case of Civil Services (1985) AC 374 at 401 D when he stated that:

"Judicial review as I think developed to a stage today when....one can conveniently classify three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call illegally, 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"

14. In the case of **Municipal Council of Mombasa –v- Republic & Umoja Consultants Ltd (2002)eKLR**, the Court of Appeal stated as follows:

"Judicial review proceedings is concerned with the decision making process, not with the merits of the decision itself; the court

would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters.... The court should not act as a court of appeal over the deciders which would involve going into the merits of the decision itself as whether there was or there was not sufficient evidence to support the decision. ”

15. Article 47 of the Constitution of Kenya provides as follows:

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.”

16. 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.”

17. Further, 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 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.”

18. In this case, the Ex-Parte Applicant avers that it is the registered, legal and beneficial owner and entitled to possession of the 3 suit premises known as **MOMBASA/BLOCK XXVI/629, MOMBASA/BLOCK XXVI/630 and MOMBASA/BLOCK XXVI/631** and holds certificates of lease for each of the 3 plots issued by the Government of Kenya as Lessor for a term of 99 years from 1st March, 1991. The Ex-Parte Applicant avers that it has been such registered, legal and beneficial owner of the 3 suit premises since the year 2012, having obtained the said properties for good and valuable consideration from the previous registered owner of the same, Bajaber Investments Limited which in turn had been the registered, legal and beneficial owner of the 3 suit premises for 19 years before that since 1993 when it in turn bought the same properties for good and valuable consideration from Moledina Enterprises Limited which in turn had been the

registered, legal and beneficial owner of the said properties before that. It is the Ex-Parte Applicant's contention that the properties have changed hands four times and has obtained the same lawfully for good value and consideration and is an innocent purchaser for value. The Ex-Parte Applicant contends that it has every right in law to ownership and title of the 3 suit premises and that there does not exist or has existed any legal proceedings known to the Ex-Parte Applicant filed in any court or lawful tribunal as against the Ex-Parte Applicant challenging in any way their title, ownership and or possession of the 3 suit premises or any one of them or at all. That no court of law or lawfully constituted tribunal has ever heard and/or determined any dispute in respect to the claims of the Respondents and/or any other parties in relation to the questions of the title, ownership and/or property rights of the Ex-Parte Applicant over the 3 suit premises. The Ex-Parte Applicant avers that to the best of its knowledge, no court of law or lawfully constituted tribunal has ever passed any judgment or ruling or decision that in any way prejudices the title, ownership and/or proprietary rights of the Ex-Parte Applicant.

19. It is the case of the Ex-Parte Applicant that the Respondents have collectively and/or individually and contrary to the constitution, the law and procedure and contrary to the rules of natural justice, ordered and issued the Ex-Parte Applicant and their tenants with an ultimatum to immediately vacate the 3 suit premises and are forcefully taking over possession of and further intend to effect a revocation of the titles to the 3 suit premises. It is the Ex-Parte Applicant's contention that the actions of the Respondents are unlawful and prejudicial to it and or their tenants. The Ex-Parte Applicant accuse the Respondents of acting illegally, unreasonably, irrationally, ultra vires the law, without notice and against the rules of natural justice and contrary to the provisions of the constitution and its safeguards.

20. In this case, the Ex-Parte Applicant has exhibited titles indicating that the Ex-Parte Applicant has been the registered owner of the 3 suit premises since 19th March, 2012, having obtained ownership for valuable consideration from the previous registered owner, Bajaber Investments Limited which in turn had purchased the properties from Moledina Enterprises Limited. The Ex-Parte Applicant has also annexed copies of letters dated 24th May, 2016 from the National Land Commission, the 3rd Respondent herein, to the Ex-Parte Applicant confirming that all the 3 suit premises legally belong to the Ex-Parte Applicant herein.

21. From the material on record, there is no dispute that the Ex-Parte Applicant as the registered owner has proprietary interest in the suit premises. Article 40 of the constitution of Kenya no doubt protects the proprietary rights and interest of the Ex-Parte Applicant as the registered owner of the suit premises from any arbitrary act, omissions or decision whose effect is to deprive, deny, violate, infringe or threaten the proprietary rights of the Applicant over the suit premises. The Respondents were therefore under a duty to ensure their actions were lawful, reasonable and procedurally fair. It has been stated that procedural fairness necessarily requires that persons who are likely to be affected by the decisions of administrative bodies such as the Respondents be afforded an opportunity of being heard before the decision is taken. Further, an action done without jurisdiction is without doubt ultra vires.

22. In the case of **Republic –v- Kenya National Examinations Council Ex-Parte Geoffrey Gathenji and 9 Others**, the Court of Appeal stated as follows:

“The remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatments.”

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....”

24. Section 14 of the National Land Commission Act, 2012 provides:

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 county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.

2. Subject to Articles 40, 47 and 60 of the Constitution, the commission shall make rules for better carrying out of its functions under Subsection (1).

3. In the exercise of the powers under subsection (1), the commission shall give every person who appears to the commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.

25. In the instant case, there is no material placed before the court indicating that the 3rd Respondent reviewed the titles in respect of the suit premises and arrived at a decision that is prejudicial to the Ex-Parte Applicant. On the contrary, the letters of 24th May 2016 written by the 3rd Respondent confirmed that the properties belonged to the Ex-Parte Applicant. There was no evidence indicating at what stage that position changed. Moreover, where the law provides for the jurisdiction of an administrative body or authority, such as the Respondents, the body or authority must operate within the limits of the law and ought not to expand its jurisdiction through administrative craft or innovation, including taking over the suit properties forcefully. Administrative bodies must act within their lawful authority and an act, whether it be a judicial, quasi-judicial, or administrative nature, is subject to review of the courts on certain grounds. Administrative bodies or authorities must operate within the law and exercise only those powers which are donated to it by the law or the legal instrument creating it.

26. In this case, the Ex-Parte Applicants' titles have not been revoked or cancelled by a court of law. By law, the titles of the Ex-Partes Applicant as proprietor are not subject to challenge, except on the grounds of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. There is no evidence or material that has been placed before this court proving fraud or misrepresentation on the part of the Ex-Parte Applicant and no evidence was produced or presented proving that the Ex-Parte Applicant acquired the certificates of title either illegally or unprocedurally and or through a corrupt scheme as required by law. It is therefore clear that the Respondents' actions were without jurisdiction and ultra vires. Moreover, the Ex-Parte Applicant was not accorded a hearing and therefore the rules of natural justice were flouted and therefore the Respondents' actions cannot stand.

27. In the result, I am persuaded that the Ex-Parte Applicant has demonstrated sound grounds for the court to grant the reliefs sought. Consequently I find merit in the Notice of Motion dated 11th November 2019 and the same is allowed in its entirety.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 9th day of November 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE