



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT KISUMU**

**JUDICIAL REVIEW MISC. APPLICATION NO. 47 OF 2017**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT**

**AND**

**IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW**

**ORDERS OF CERTIORARI & PROHIBITION**

**BETWEEN**

REPUBLIC.....APPLICANT

AND

NATIONAL LAND COMMISSION.....RESPONDENT

AND

1. MICHAEL ODHIAMBO ONG'AWO
2. ARGWINGS MUGA OSANO
3. AMBROSE OCHIENG OCHOLA
4. YONA RAMOGI
5. MICHAEL OKOTH OSANO
6. SAMUEL ONYANGO ONYANGO
7. AGNES AGUYO
8. JOHANES ABWAO
9. JORAM OKOTH
10. TOBIAS AJODE
11. PAUL OTIENO ADIPO

12. JOSEPH ADIPO
13. DOMINIC OMONDI
14. DOMINIC ALOO
15. FREDRICK OKUKU OCHUKA
16. TABITHA OBUL
17. SAMUEL OWENGA OSUMO
18. JOSEPH ODHIAMBO MARERO
19. HENRY OUMA MAGERO
20. HENRY NGESO OYOMBE
21. BONFACE RIAGA KAIKO
22. MAURICE GENGA AOKO
23. BENARD OMOLLO KERE
24. ABRAHAM ODHIAMBO
25. JUDITH AKINYI OMONDI
26. SYLVANUS AWILI
27. FREDRICK OLAN'G
28. LAWRENCE AYIEKO
29. DOMINIC JAWA
30. JOHANES NYANGLA
31. PHOEBE OMBEWA
32. JANE ONYANGO OTOTA
33. BEATRICE OKEYO
34. WILLIAM OTIENO NYASUKE
35. MACRINE ACHIENG
36. JOSEPH NYAWIR
37. JAMES MIGADI
38. MERCELINE NYANJUA
39. BARACK OMONDI
40. SAMUEL MBOGO
41. ROBERT OLOO KAIKO
42. SYMON OOKO AWITI
43. GEORGE ABUOR

44. SIMEON OOKO
45. PIUS OKENE
46. RAMADHAN SAID
47. GEORGE ONYANGO
48. GEORGE OTIENO
49. HILARY OCHIENG OKUNGU
50. ALFRED ODHIAMBO NGESO
51. SHEM AKELLO OLWENY
52. BEATRICE ACHIENG LILA
53. LILIAN ONYANGO
54. WALTER OKOTH OJOWI
55. LEAH MUSEMBI
56. MONICA ADHIAMBO
57. LORNA AWUOR
58. LEONARD OCHIENG OTULA
59. PATRICK OUMA OLWAL
60. MAURICE OTIENO AGUTU
61. MICHAEL OTURI ATINDA
62. RESSY KHASAI
63. NELSON ONGARO AROKO
64. JACKLINE OLENYO
65. DAVID OTIENO OTULA
66. ERICK ODHIAMBO OTULA
67. JOHN ONYANGO AMITO
68. NANCY AWUOR
69. WASHINGTON DOLA OWINO
70. MICHAEL OMONDI AKELLO
71. CHARLES OWINO AKELLO
72. GEORGE OGINGA LILA
73. KEVIN ODUOR AKELLO
74. GRACE ACHIENG OTIENDE
75. CHRISTINE OPIYO

76. ZACHARIA NALO
77. JOSEPH DOLA ALOO
78. EMMACULATE OMONDI ALOO
79. CAROLYNE ODUMO ALOO
80. MARTHA ADOYO ONUONG'A
81. STEPHEN AMOYO
82. GEORGE OCHIENG OLIAWO
83. GORDON SAMBUKA
84. JACOB KITOTO
85. JAMES OCHOLA ASUDI
86. SAMUEL JUMA
87. JOHN ORIKO
88. JOHANES OKENE
89. BONFACE NYAWIR
90. SAMUEL OKOTH
91. JOSEPH ONYANGO
92. JACTON OLANDO
93. AGNES KUNGU
94. DORCAS OYUCHO
95. MAURICE OKULO
96. JOHN AGAI OCHOM
97. LOYCE LANG'O
98. JULIUS OKOTH OMENYA
99. EZEKIEL ODUMO
100. MICHAEL NDALO ADIPO
101. MAURICE ABAYO AKEYO
102. VITALIS ANJAO AKECH
103. MICHAEL OWINO ABWAO
104. SYLVANUS OUMA WAYUMBA
105. MAURICE OGOT ABIERO.....EXPARTE APPLICANTS

#### JUDGEMENT

1. The 105 Exparte Applicants seek, vide the notice of motion dated the 16<sup>th</sup> August 2017, for an order of Certiorari removing into this court and quashing the determination made by National Land Commission, the Respondent, published in the Kenya Gazette of 17<sup>th</sup> July 2017 at

page 4258 and contained at clauses 1, 4 and 5 thereof. They also seek for an order of prohibition restraining the Respondent or anybody acting upon its instructions or authority from acting on or implementing clause 5 of the determination. Finally the Exparte Applicants seek for costs to be provided for. The motion is supported by the affidavit sworn by Samuel Owenga Osumo, the 17<sup>th</sup> Exparte Applicant, on his own behalf and on behalf of the other Exparte Applicants who had given him consent.

2. The application came up for hearing on the 8<sup>th</sup> October 2018 when Mr. Nyasimi, Learned Counsel for the Exparte Applicants, made his submission. The Counsel submitted that the Respondent had been served with the motion and other court processes and had not entered appearance. That the Exparte Applicants were relying on the grounds on the application, the verifying affidavit, statement of facts and the order granting leave. The Counsel further submitted that the Exparte Applicants were relying on the grounds of irregularity unfairness and irrationality in the way the Respondent took the administrative decision to evict them, in their thousands, from their land situated in several divisions. That the Exparte Applicants had been residing on the land in question for years and ought to have been given notice in accordance with **Article 50 and 47 of the Constitution of Kenya 2010**, before the eviction order could issue. That the Respondent's decision is in breach of **Sections 4 and 5 of the Fair Administration Act 2015**. That the Respondent's decision was irrational as the affected people were not given alternative land before being ordered to be evicted. The Learned Counsel referred the court to the decision of Mutungi J, in **Republic vs National Land Commission & , Exparte Hellen Kemunto Obaga [2018] eKLR**.

3. The following are the issues for the court's determination;

**a) Whether the Exparte Applicants have established a case for the issue of the orders of certiorari and prohibition against the Respondent.**

**b) Who pays costs.**

4. The court has considered the notice of motion dated the 16<sup>th</sup> August 2017, the supporting affidavit sworn on the same date, submission by the Counsel, the record and come to the following findings;

a) That before the filing of the notice of motion dated the 16<sup>th</sup> August 2017, the Exparte Applicants had filed the Chamber Summons application brought under **Order 53 Rule 1 (3) of Civil Procedure Rules 2010** dated the 2<sup>nd</sup> August 2017 seeking for leave. The application had been filed contemporaneously with an Exparte Chamber Summons under **Rule 3 (1), 2 & 3 of the High Court (Practice & Procedure ) Rules** under Certificate of urgency seeking to have it heard during the court's vacation (recess). The Chamber Summons application for leave was granted by Mutungi J, of Environment and Land Court Kisii, who was the duty Judge at the time in terms of prayers 2 (a) and (b) with further directions that the substantive application (Notice of Motion) be filed within 21 (twenty one) days.

b) That the Chamber Summons application for leave was filed as **Kisumu Environment and Land Court Judicial Review Misc. Application No. 47 of 2017** which is the same reference of this file. That it is important to point out that upon the leave to file for the judicial review orders being granted on the 3<sup>rd</sup> August 2017, that matter become finalized and file became ripe for closure. That is what the court understands to be envisaged under **Order 53 Rule 3 (1) of the Civil Procedure Rules**. That it follows that the substantive application (Notice of Motion) to be filed pursuant to the leave obtained is to be filed in a separate or new file with a different reference from the one the Chamber Summons for leave was filed and obtained. That superior courts have pronounced themselves on similar situations like in the case of **Republic vs Funyula Land Disputes Tribunal & 3 Others [2004] eKLR** where Serگون J, in a ruling on preliminary objection held that;

***“Under Order LIII Rule 3 (1), the Substantive Motion can only be filed after leave has been obtained. The law does not envisage a situation where the motion is filed under the file which leave was issued. The Chamber Summons application is considered as spent when leave has been granted. The Applicant in this case should have originated the proceedings by filing the notice of motion in a separate miscellaneous application. In my humble view, the failure to adhere to this practice renders the whole motion fatally defective for being improperly before the court.”***

That the filing of the notice of motion (substantive application or motion) dated the 16<sup>th</sup> August 2017 under the same file and reference that the Chamber Summons for leave dated the 2<sup>nd</sup> August 2017 had been filed and obtained, which file for all practical purposes is finalized, makes the motion fatally defective for not being properly before the court.

c) That **Orders 53 Rule 4 of Civil Procedure Rules** requires the notice of motion to be served with statement of facts and the affidavit verifying facts used in the Chamber Summons for leave. That though the notice of motion herein at paragraph 5 indicates that ***“this motion is based on the grounds set out in the exparte applicants' statutory statement dated 2<sup>nd</sup> August 2017 accompanying their application for leave to apply for judicial review, the affidavit verifying facts thereto sworn on 2<sup>nd</sup> August 2017 by Samuel Owenga Osumo and such further affidavits, pleadings and or evidence as may be permitted or directed by the Court”***, no such documents are annexed. That the only document filed with the notice of motion is the supporting affidavit containing four paragraphs sworn by Samuel Owenga Osumo on the 16<sup>th</sup> August 2017. That the failure to comply with the mandatory requirement of the law in filing and serving notice of motion makes it fatally defective.

d) That though the other 104 Exparte Applicants had signed and filed with the Chamber Summons for leave dated the 2<sup>nd</sup> August 2017, the document titled **“Authority to plead, Act And or swear Affidavits on behalf of Applicants”** pursuant to **Order 1 Rule 13 (1) & (2) of Civil Procedure Rules, 2010**, no such authority was obtained and filed with the notice of motion dated the 16<sup>th</sup> August 2017. That it therefore follows that there is no evidence to support the deposition by Samuel Owega Osumo at paragraph 1 of his affidavit sworn on the 16<sup>th</sup> August 2017 that he was ***“competent to swear this affidavit on ....behalf of the rest of the applicants herein who have given their authority to do so.”***

e) That even though the Exparte Applicants alleged that they had served the notice of motion and other relevant court processes upon the Respondent, the court has upon perusing the record seen only two affidavits of service sworn by Kennedy Nyamori Nyasimi on the 22<sup>nd</sup> March 2018 and 28<sup>th</sup> September 2018. That the affidavit of service sworn on the 22<sup>nd</sup> March 2018, at paragraph 2, talks about service of 17<sup>th</sup> August 2017 of “***copies of Notice of Motion, supporting affidavit both dated 16<sup>th</sup> August 2017 (sic) and order dated 17<sup>th</sup> August 2017***” while at paragraph 3 it refers to service done on the 28<sup>th</sup> August 2018 of “***copies of certificate of urgency, Exparte Chamber Summons, Supporting Affidavit, Chamber Summons, Supporting Affidavit, Statutory Statement, Affidavit Verifying facts all dated 2<sup>nd</sup> August 2018 and authority to plead***”. That at paragraph 4 it is depend that “***on both dates they received and accepted service by signing and stamping our return copies at the front which are attached herewith***”. That the court has not seen the front pages, or any other pages for that matter, of the documents listed at paragraphs 2 and 3 of the affidavit with or without the respondent’s signature and or receiving stamp. That accordingly, the alleged service of the documents listed at paragraphs 2 and 3 of the said affidavit, on the 17<sup>th</sup> August 2017 and the 28<sup>th</sup> August 2018, cannot be verified and or confirmed. That further, at paragraph 5 of the same affidavit it is deponed that the Respondent was served on the 22<sup>nd</sup> March 2018 with “***notice of mention***”, which the court takes to mean “***mention notice***”, dated 21<sup>st</sup> March 2018. That indeed a copy of the mention notice dated 21<sup>st</sup> March 2018 with a received stamp and a signature of the Respondent is attached and that service is therefore confirmed. That the affidavit of service sworn on the 28<sup>th</sup> March 2018 is about service of a hearing notice dated 13<sup>th</sup> July 2018. That a copy of the hearing notice with received stamp and signature of the Respondent has also been attached. That service is therefore also confirmed. That from the foregoing, the only documents/processes evidenced to have been served upon the Respondent through the two affidavits of service are the mention and hearing notices whose copies have been attached to the affidavits. That it follows that the Exparte Applicants’ Counsel set down the notice of motion for hearing and prosecuted it without ensuring that the Respondent had been served with the application. That the absence of evidence of service may explain their failure to enter appearance, file replying papers and participate in the hearing. That accordingly the court, being a court of law that is obligated by the Constitution and the statutes to accord all parties in matters before it an opportunity to be heard, cannot issue any adverse **order (s)** against the Respondent, without evidence of their being served with the notice of motion being availed.

5. That flowing from the foregoing, the court finds that the Exparte Applicants notice of motion dated the 16<sup>th</sup> August 2018 is without merit. The application is dismissed with no order as to costs.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 30<sup>TH</sup> DAY OF JANUARY 2019**

**In the presence of:**

**Exparte Applicants Present**

**Respondent Absent**

**Counsel Mr. Kowinoh for Nyasimi for Exparte Applicants**

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**