



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**ENVIRONMENT & LAND COURT**

**ELC JR NO. 28 OF 2017**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT, 2012**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**PATEL RAVJI LALJI**

**DEVVAL RANJI LALJI.....EX PARTE APPLICANTS**

**VERSUS**

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

**CHIEF LAND REGISTRAR.....2<sup>ND</sup> RESPONDENT**

**AND**

**TOM OWINY.....1<sup>ST</sup> INTERESTED PARTY**

**AMSA KEITTANY.....2<sup>ND</sup> INTERESTED PARTY**

**KABARNET TRADING CO. LTD.....3<sup>RD</sup> INTERESTED PARTY**

**JUDGEMENT**

1. The Ex-Parte Applicants are the registered owners of LR No. 209/11309 (Suit Property). The Ex parte Applicants purchased the suit property from the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties on 6<sup>th</sup> October, 2013. The suit property was duly transferred to the Ex –parte Applicants on 11<sup>th</sup> October, 2013.

2. On the 22<sup>nd</sup> June, 2016 the 1<sup>st</sup> Respondent made a determination which revoked the grant in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties and directed that the grant be registered in the name of the 3<sup>rd</sup> Interested Party. The determination of the 1<sup>st</sup> Respondent was published in the special issue of the Kenya Gazette Notice Vol CXIX – No. 97 of 17<sup>th</sup> July, 2017. In this Gazette Notice, the 1<sup>st</sup> Respondent made further directions that the title to the suit property in the name of the Ex-parte Applicants be cancelled.

3. The action by the 1<sup>st</sup> Respondent prompted the Ex-parte Applicants to move to Court under certificate of urgency for leave to commence judicial review proceedings. On the 7<sup>th</sup> of August, 2017 the Court granted the Ex-parte Applicants leave to commence judicial review proceedings. Such leave operated as stay of the decision of the 1<sup>st</sup> Respondent. The Ex-parte Applicants thereafter filed Notice of Motion

dated 21<sup>st</sup> August, 2017 in which they seek an order of certiorari to bring to this Court for quashing the decision of the 1<sup>st</sup> Respondent to revoke the Ex-parte Applicants' title to the suit property and for an order of prohibition prohibiting the 2<sup>nd</sup> Respondent from effecting the decision of the 1<sup>st</sup> Respondent contained in Kenya Gazette of 17<sup>th</sup> July, 2017 regarding the suit property.

4. The Ex-parte Applicants contend that the 1<sup>st</sup> Respondent had no jurisdiction to revoke their title and that they were not involved in the process leading to the recommendation for revocation or cancellation of their title. The Ex-parte Applicants further contend that they were not notified of the proceedings before the 1<sup>st</sup> Respondent and that the Gazettement of the 1<sup>st</sup> Respondent's decision was made after its mandate had expired. The Ex-parte Applicants further argue that despite the proceedings before the 1<sup>st</sup> Respondent showing that the title to the suit property had been transferred to them, the 1<sup>st</sup> Respondent never bothered to involve them but instead, it proceeded to recommend the cancellation of their title.

5. The Ex-parte Applicants' application has been supported by the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties through a Replying Affidavit sworn on 24<sup>th</sup> September, 2018 and filed in Court on 2<sup>nd</sup> October, 2018. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties contend that the complaint which led to the decision of the 1<sup>st</sup> Respondent was started by one David Gitau who wrote a complaint letter to the 1<sup>st</sup> Respondent on behalf of the 3<sup>rd</sup> Interested Party asking for investigation of the title to the suit property. The 1<sup>st</sup> Respondent without notice to the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties or the Ex-parte Applicants caused a caveat to be registered against the title. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties contend that the transaction between them and the Ex-parte Applicants is governed by private law and therefore the 1<sup>st</sup> Respondent had no jurisdiction to inquire into private transactions.

6. The Ex-parte Applicants' application is opposed by the 1<sup>st</sup> Respondent through grounds of opposition dated 10<sup>th</sup> October, 2017 and filed in Court on 19<sup>th</sup> October, 2017. The 1<sup>st</sup> Respondent contends that it has jurisdiction to investigate on how public land was converted into private property and that under Section 14 of the National Land Commission Act, it had jurisdiction to inquire into how the suit property was allocated to the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties. The 1<sup>st</sup> Respondent also contends that the Ex-parte Applicants' application does not meet the threshold for Judicial Review and that the Ex-parte Applicants should have appealed against the decision instead of coming to Court by way of Judicial Review and that in any case, the Ex-parte Applicants are complaining about the merits of the decision rather than the process leading to the decision.

7. The 3<sup>rd</sup> Interested Party has opposed the Ex-parte Applicants' application through a Preliminary Objection dated 30<sup>th</sup> January, 2018 and a Replying Affidavit sworn on 30<sup>th</sup> January, 2018. The 3<sup>rd</sup> Interested Party contends that the Ex-parte Applicants' application is defective for failure to follow the provisions of order 53 Rule 3 of the Civil Procedure Rules and Section 7 of the Fair Administrative Action Act.

8. The 3<sup>rd</sup> Interested party argues that the 1<sup>st</sup> Respondent had jurisdiction to inquire into how title to the suit property was granted to the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties and that had the Ex-parte Applicants carried out due diligence, they would have noted that the title to the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties was fraudulent. The 3<sup>rd</sup> Interested Party further argues that the Ex-parte Applicants' application should not be allowed as they did not exhaust the mechanisms provided under Section 9 (2) of the Fair Administrative Action Act.

9. I have carefully considered the Ex-parte Applicants' application, the support to the same by the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties as well as the opposition to the same by the 1<sup>st</sup> Respondent and the 3<sup>rd</sup> Interested Parties. I have also considered the submissions by the parties herein. The only issues for determination in this application is whether the 1<sup>st</sup> Respondent had jurisdiction to inquire into the title to the suit property and whether the Ex-parte Applicants were given a fair hearing before the title to the suit property was recommended for cancellation.

10. On the issue of jurisdiction, I have no difficulty in finding that the 1<sup>st</sup> Respondent had jurisdiction to inquire into how the grant to the suit property was registered in the name of the 1<sup>st</sup> and 2<sup>nd</sup> Interested Party. The suit property was initially public land. It was later allotted to the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties. There was a complaint made to the 1<sup>st</sup> Respondent that the suit property had been allotted to the 3<sup>rd</sup> Interested Party but for some reasons the grant was given to the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties. The 1<sup>st</sup> Respondent therefore had jurisdiction to inquire into how the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties were given the grant. The complaint before the 1<sup>st</sup> Respondent was on who was given an allotment by the Government.

11. Having disposed the issue of jurisdiction, I now turn to the issue of whether the decision by the 1<sup>st</sup> Respondent was arrived at following the proper process. This is because in Judicial Review matters, the concern of the Court is on the decision making process and not on the merits of the decision. In the case of **Pastoli Vs Kabale District Local Government Council and Others [2008] 2EA 300**, it was held as follows:-

***“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety... Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. 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”.***

12. There is no evidence at all to show that the Ex-parte Applicants were invited by the 1<sup>st</sup> Respondent to give their side of the story on how they purchased the suit property and how it was finally registered in their names. The advertisement in the Star of 18<sup>th</sup> November, 2014 only named the 3<sup>rd</sup> Interested Party. A look at the letter dated 24<sup>th</sup> November, 2016 which forwarded the determination by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent was only copied to the Governor, Nairobi County, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties. This determination was not copied to the Ex-parte Applicants though the determination clearly shows that the 1<sup>st</sup> Respondent was aware that the suit property had been transferred to the Ex-parte Applicants.

13. The 1<sup>st</sup> Respondent appears to blame the Ex-parte Applicants of not providing adequate proof of purchase. The Ex-parte Applicants would not have proved their case when they were not made aware of the proceedings. The determination by the 1<sup>st</sup> Respondent only shows that submissions considered were from the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties on the one part and the 3<sup>rd</sup> Interested Party on the other part. There is no evidence that the submissions of the Ex-parte Applicants were considered if at all they were present during the hearing.

14. The determination was clear that the title which was revoked is that of the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties. As at the time of the 1<sup>st</sup> Respondent's decision, the title was in the name of the Ex-parte Applicants. The only time the title of the Ex-parte Applicants was mentioned is in the Gazette Notice of 17<sup>th</sup> July, 2017 where cancellation is recommended. The determination seems to suggest that the Ex-parte Applicants did not pay stamp duty. There are annexures to the Notice of Motion which show that the Ex-parte Applicants purchased the suit property for Kshs.50,000,000/= and they paid stamp duty of Kshs.2,000,000/=. There is no Replying Affidavit which disputed this. It is therefore clear that the 1<sup>st</sup> Respondent's finding which informed the decision was irrational and incapable of any logical conclusion.

15. The Ex-parte Applicants were condemned unheard. The 1<sup>st</sup> Respondent concluded that they were not innocent purchasers without hearing them. A fair hearing is very fundamental in any decision making process. If it is shown that a party was not heard and that the decision was irrational, that decision cannot stand. I find that the Ex-parte Applicants Notice of Motion dated 21<sup>st</sup> August, 2017 is well founded. I allow the same with the result that an order of certiorari is hereby issued brining the decision of the 1<sup>st</sup> Respondent dated 22<sup>nd</sup> June, 2016 as contained in the special issue of the Kenya Gazette Notice Vol CXIX-No.97 of 17<sup>th</sup> July, 2017 to this Court which is hereby quashed. An order of prohibition is hereby issued prohibiting the 2<sup>nd</sup> Respondent from effecting the decision of the 1<sup>st</sup> Respondent as contained in the special issue of the Kenya Gazette Vol. CXIX – No 97 of 17<sup>th</sup> July, 2017 as regards L.R. No. 209/11309 Nairobi.

**Dated, Signed and Delivered at Nairobi on this 27<sup>th</sup> day of March, 2019.**

**E.O.OBAGA**

**JUDGE**

Signed in the absence of parties who were duly notified of the date and time of delivery of Judgement.

**E.O.OBAGA**

**JUDGE**