



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT & LAND COURT

ELC (JUDICIAL REVIEW) NO. 1246 OF 2016

RIVERA PROPERTIES LIMITED.....APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

AND

ARMSTRONG FRED KASUKU.....INTERESTED PARTY

JUDGEMENT

1. The Ex-parte Applicant is the registered owner of L.R No. 1/1357 (Original Number 1/390) hereinafter referred to as **“the suit property.”** The Respondent is a Commission established pursuant to the provisions of Article 67 of the Constitution and its mandate is spelt out under the National Land Commission Act [Respondent]. The Interested Party is a male adult [Interested Party].

2. The Ex-parte Applicant filed a Notice of Motion dated 10th October, 2016 in which it sought the following orders:-

1. An Order of Prohibition do issue, directed at the National Land Commission, the Respondent, its agents, servants and/or employees restraining them from investigating, determining, conducting an inquiry, seeking Written Statements from the Rivera Properties Limited’s Officers, agents and/or employees in relation to an alleged complaint lodged by Armstrong Fred Kasuku, the Interested Party in respect of All that property known as Land Reference Number 1/1357 (Original Number 1/390), Nairobi County.

2. An Order of Prohibition do issue directed at the National Land Commission, the Respondent, its agents, servants and/or employees restraining them from exercising or purporting to exercise jurisdiction and/or employees restraining them from exercising or purporting to exercise jurisdiction and/or powers over All that property known as Land Reference Number 1/1357 (Original Number 1/390), Nairobi County.

3. An Order of Certiorari do issue, removing into this Court for purposes of quashing the decision made by the National Land Commission to conduct any inquiry or investigations on the all that property known as Land Reference Number 1/1357 (Original Number 1/390), Nairobi County.

4. The costs of this Application be paid by the Respondent and Interested Party.

3. The suit property was originally known as L.R 1/390 and was owned by James Osogo and Maria Osogo (the Osogos). The two had guaranteed a loan advanced to Veritas Agencies Ltd. There was a problem in repayment of the loan. National Bank of Kenya Ltd which had advanced the loan advertised the property for sale through public auction. The Osogos approached the Interested Party who managed to talk to National Bank who rescheduled the loan and it was agreed that the loan be fixed at Kshs.4,521,676.75/= at no interest. The loan was to be repaid over a period of 60 months provided that a sum of Kshs.200,000/= was paid on acceptance of the offer and the balance paid by monthly instalments of Kshs.75,000/=.

4. The Osogos were unable to repay the loan which had been rescheduled. The bank threatened to sell their property. The Osogos once more approached the Interested Party who agreed to assist them. An agreement was reached that the Osogos were to subdivide their land and ¼ acre was to be transferred to the Interested Party.

5. The Osogos did not subdivide their property. They instead transferred it to the Ex-parte Applicant. A joint venture agreement was reached whereby Kings Developers Limited was to put up apartments. Prior to the joint venture agreement being sealed, the Osogos and the Interested Party had agreed on the number of apartments the Interested Party was to get from the share the Osogos were to be given in the joint venture. It is apparent that all these proposals never worked. The disagreement between the Osogos and the Interested Party led the Interested Party to file ELC No. 40 of 2014 against the Osogos as the first and 2nd Defendants and the Ex-parte Applicant as the third Defendant.

6. The Interested Party sought through ELC No. 40 of 2014 a mandatory injunction compelling the Ex-parte Applicant to transfer five (5) apartments to him and 0.4 share to be held in common in one other apartment erected on L.R No. 1/390. While ELC No. 40 of 2014 was pending in Court, the Interested Party made a complaint to the Respondent who then summoned the Directors of the Ex-parte Applicant with a view to commencing inquiry into the Interested Party's complaint.

7. It is this letter from the Respondent which made the Ex-parte Applicant to move to Court for Judicial Review orders. The Ex-parte Applicant was granted leave to commence Judicial Review Proceedings on 5th October, 2016. The leave granted was to operate as stay of proceedings intended by the Respondent.

8. The Ex-parte Applicant contends that the Respondent had no jurisdiction to commence the investigations which were based on the allegation that the Interested Party was a creditor of the Ex-parte Applicant within the meaning of Sections 50, 51, 52 and 53 of the Land Registration Act and therefore the Respondent had jurisdiction to entertain the complaint. The Ex-parte Applicant further argues that the aforementioned sections refer the Court as the Environment and Land Court and therefore the Respondent cannot purport to exercise its jurisdiction on a matter which is before the Environment and Land Court.

9. The Ex-parte Applicant contends that since there is a case before the ELC Court which touches on the same dispute, the Respondent cannot against start parallel proceedings on grounds that it is investigating a complaint by the Interested Party. The Osogos are named as the Defendants in the suit pending before the ELC Court. The Ex-parte Applicant is also named as a third Defendant. The Ex-parte Applicant argues that the Interested Party moved to the Respondent to lodge a complaint after he failed to secure an injunction which he had sought in ELC 40 of 2014.

10. The application by the Ex-parte Applicant is opposed by the Respondent through a Replying Affidavit sworn by Brian Ikol on 29th March, 2017. The Respondent contends that it has mandate to investigate the complaint by the Interested Party and further that it acted when the Interested Party complained that there were leases being transferred to other parties without his interest being taken into account. The Respondent further argues that it was asked to investigate and stop issuance of the leases and transfer until the dispute over his interest is determined.

11. The Interested Party opposed the Ex-parte Applicant's application based on his affidavit sworn on 31st January, 2019. The Interested Party contends that its petition to the Respondent was based on Article 67 (2) and (3) and Article 60 (1) (b) and (d) of the Constitution as well as Sections 5 and 6 of the National Land Commission Act which provisions confer the Respondent with jurisdiction to deal with the complaint which he made.

12. The Interested Party argues that he is at liberty to seek alternative remedies and that there is no allegations or complaint that the Respondent is acting ultra vires and further that the reliefs sought from the Respondent are not in conflict with reliefs sought in ELC 40 of 2014 because the relief in ELC 40 of 2014 is founded on an agreement dated 7th October, 2009.

13. I have carefully considered the application by the Ex-parte Applicant as well as the opposition to the same by the Respondent and the Interested Party. I have also considered the submissions filed by the Ex-parte Applicant and those of the Interested Party. The only issue for determination in this matter is whether the Respondent had jurisdiction to entertain the complaint by the Interested Party.

14. In the case of *Pastoli Vs Kabale District Local Government Council & 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”.

15. In the instant case, the Interested Party's complaint was based on the ground that he is a creditor within the meaning of Sections 50, 51, 52 and 53 of the Land Registration Act. This is clear from the Respondent's letter dated 15th September, 2016 in answer to the letter dated 9th September, 2016 by the Advocate for the Osogos. The Interested Party's complaint was not based on any historical injustice whether past or present. The Interested Party's complaint to the Respondent was that he is a creditor. The Land Registration Act gives mandate to the Environment and Land Court to deal with those issues. The jurisdiction touching on those sections is not given to the Respondent. It is therefore clear that the Respondent's purported move based on sections 50, 51, 52 and 53 was without jurisdiction.

16. The Interested Party has tried to argue in his submissions that the letter of 15th September, 2016 was not annexed. This letter is annexed to the application for leave and there is no requirement that the same ought to have been annexed to the main application for Judicial Review. Leave was granted in the same file where the main motion was filed. As the letter by the Respondent clearly shows that it moved to start investigations based on the aforesaid Sections of the Land Registration Act it was clearly acting without jurisdiction and was clearly acting contrary to provisions of a law which does not grant it jurisdiction.

17. The Respondent had been informed that the same matter it purported to investigate was subject of a case pending before the Court. Despite knowledge that there was a pending case, the Respondent went ahead to summon the Directors of the Ex-parte Applicant. The decision to summon the Directors of the Ex-parte Applicant was irrational in view of the pending proceedings before the Environment and Land Court.

18. It is now clear that the Ex-parte Applicant's Notice of Motion is well founded. I allow the Notice of Motion dated 10th October, 2016 in terms of prayers 1, 2, 3 and 4.

Dated, Signed and Delivered at Nairobi on this 10th day of April, 2019.

E .O.OBAGA

JUDGE

In the presence of Ms. Mueni for Ex-parte Applicant.

Court Assistant: Hilda

E.O.OBAGA

JUDGE