



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

JUDICIAL REVIEW NO. 9 OF 2016

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF THE LETTER DATED 13TH OCTOBER 2016 BY THE NATIONAL LAND COMMISSION

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT NO. 5 OF 2012

BETWEEN

REPUBLICAPPLICANT

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

AND

PACIFICA MWANGO1ST INTERESTED PARTY

PAULINE MORAA ARASA (LEGAL REPRESENTATIVE OF THE

ESTATE OF SOSPETER N. ARASA)2ND INTERESTED PARTY

AND

DR. ANIL RATILAL TAILOR EX PARTE APPLICANT

J U D G M E N T

1. After leave had been sought and granted on 27th October 2016, to institute judicial review proceedings, the ex parte applicant by a Notice of Motion dated 16th November 2016 filed in court on 17th November 2016 sought the following reliefs:

i. An order of judicial review in the nature of prohibition to prohibit be and is hereby issued to prohibit the respondent, the County Commissioner of Kisii, the Chief Executive Committee member for land, Kisii county and /or any other person or entity acting under the respondent's directions or otherwise from expunging the applicant's certificate of lease over land parcel Kisii Municipality/ Block III/330 and/or evict the exparte applicant from land parcel Kisii Municipality/ Block III/330;

ii. An order of judicial review in the nature of certiorari be and is hereby issued to remove into the High Court and quash the decisions encapsulated in the letter dated 13th October, 2016 demanding the surrender of the certificate of lease held by the applicant over land parcel Kisii Municipality/Block III/330 and vesting the said parcel of land in the estate of the late Simon Kegesa;

iii. The applicant be at liberty to apply for any or all further necessary and / or consequential orders as may be expedient in the circumstances; and

iv. Costs of and incidental to this application do abide the substantive notice of motion for judicial review.

2. The ex parte applicant swore an affidavit in support of the application on 16th November 2016 where he deponed that he purchased land parcel **Kisii Municipality/Block III/330** from one Edward Mainga Kagora who in turn had purchased the land from Messrs Kennedy, Ishmael and Charles. He contended that he acquired the land for good consideration and after paying the requisite charges and having the transfer duly processed, title passed to him. He averred that the respondent notified him by summons dated 27th April, 2016 of a complaint by the 2nd interested party alleging that he had acquired the land fraudulently and asked him to attend a public hearing. The applicant averred that the hearing which was scheduled for 16th May, 2016 did not take place and that he was instead sent a letter by the respondent informing him that its decision would be communicated to him in due course.

3. The applicant further stated that on 23rd September, 2016 the respondent sent him further summons to attend a public hearing at Kisumu on 5th October 2016. Subsequently, the respondent, by a letter dated 13th October 2016, made the following demands of him;

i. Demanded the surrender of the certificate of lease over parcel 330 within seven (7) days;

ii. Directed the expunging of his certificate of lease; and

iii. Stated that it would seek to restitute parcel 330 to the estate of the late Simon Kegesa.

4. The applicant was apprehensive that the respondent would direct his physical eviction from the land and decried the fairness of the procedure adopted by the respondent which he argued was a ploy meant to illegally divest him of his title. He further averred that the respondent had no jurisdiction to hear and determine any complaint relating to the alleged fraudulent acquisition of the land and stated that the respondent acted *ultra vires*.

5. The respondent's Deputy Director, Legal Affairs and Enforcement responded to the ex parte applicant's assertions in an affidavit sworn on 21st June, 2018. He averred that pursuant to its mandate to review all grants and dispositions of public land, the respondent had received a complaint from the beneficiaries and administrators of the estate of the late Simon Kegesa concerning attempts to fraudulently take ownership of properties falling within the estate of the deceased. He deponed that the respondent had sent letters to all affected parties inviting them to make written submissions and oral representation if need be. The respondent had also put up an advertisement in all dailies with nationwide circulation inviting all interested parties for hearing at Kisumu Tom Mboya Labour College on 5th October 2016.

6. The Deputy Director averred that the ex parte applicant replied through his advocates on 3rd October 2016 stating that he had already put in his response to the allegations made and did not wish to make further submissions. Thereafter, the respondent had reviewed the legality of the grant and communicated its findings to all the interested parties vide a letter dated 13th October 2016. The respondent contends that it exercised its mandate in accordance with Section 14 of the National Land Commission Act, and thus could not be faulted.

7. On her part, the 1st interested party, stated that the subject property belonged to her father Simion Kegesa and that they had been living on the land since 1949. Upon her father's demise on 1st March 2000, they began experiencing problems. On 21st September 2011, the Permanent Secretary in the Office of the Deputy Prime minister and Ministry of Local Government wrote to the town clerk, Kisii halting all dealings with the land. Despite this, the land was sold and the ex parte applicant was issued with a title. She questioned the ex parte applicant's prudence and contended that he could not be an innocent purchaser for value and urged the court to uphold the respondent's decision.

8. The 2nd interested party, Pauline Moraa Arasa, a legal representative of the estate of the late Sospeter Arasa Nyangwansa, swore an affidavit in support of the respondent's decision to recall the applicant's Certificate of Lease over Land parcel Kisii Municipality/Block III/330 but was opposed to the respondent's intention to restitute the land to the Estate of the late Simon Kegesa. She averred that her deceased husband was allocated UNS, Residential Plot No. 43 and an allotment letter issued to him on 16th May, 1991. The deceased had made all necessary payments to the Commissioner of Lands and to the Municipal Council of Kisii and had paid the requisite land surveyor's fees. A survey had been conducted and the beacons confirmed but he was never issued with the title document despite lodging several complaints. The deceased had conducted a search and had discovered that the land had been reallocated and a lease document issued to the ex parte applicant who had assumed occupation of the land. The 2nd respondent had thereafter instituted ELC No. 82 of 2017 in a bid to resolve the issue of ownership, which matter was still pending in court.

9. The parties argued the matter by way of written submissions. Having considered the judicial review application, the affidavits on record together with the parties' rival submissions, I deduce the following issues for determination:

i. Whether the respondent had jurisdiction to investigate and determine the legality of the applicant's title to the suit property;

ii. Whether the respondent violated the applicant's right to Fair Administrative Action in conducting the review of the title;

iii. Whether the applicant is a *bonafide* purchaser for value of the suit property without notice; and

iv. Whether the orders sought should issue.

10. Before addressing the substantive issues enumerated above, I will first dispense with preliminary questions raised by the 2nd interested party in her supplementary submissions dated 16th June 2018.

11. It is the 2nd interested party's contention that the entire proceedings are fatally defective for failure by the ex parte applicant to adhere to the requirements as to form provided in Section 8 and 9 of the **Law Reform Act Cap 26 of the Laws of Kenya** and the provisions of **Order 53 of the Civil Procedure Rules**. The 2nd interested party submits that leave was sought and obtained in the name of the Republic and the substantive Notice of Motion filed in the name of the Applicant's instead of the Republic contrary to the aforementioned provisions. The 2nd Interested Party relied on the case of **Welamondi -vs- The Chairman, Electoral Commission of Kenya (2002)1 KLR 486** where **Ringera J.** (as he then was) cited the case of **Farmers Bus Service & Others -vs- Transport Licensing Appeal Tribunal [1959] EA 779** and held:

“The East Africa Court of Appeal held that prerogative orders are issued in the name of the crown and applications for such orders must be correctly instituted. On Kenya's assumption of Republican status on 12th December 1964, the place of the crown in all legal proceedings was taken by the Republic. Accordingly, the orders of certiorari, mandamus or prohibition now issue in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue.”

12. The 2nd interested party also drew the court's attention to the Statement of facts which erroneously sought orders of leave to commence judicial review proceedings as opposed to seeking the substantive judicial review orders as required. According to the 2nd interested party these defects are incurable thus the entire application is beyond redemption.

13. In response, the ex parte applicant argues that the errors pointed out were not substantive and are curable by dint of article 159 (2) of the Constitution. He urges the court to determine the suit on its merit rather than technicalities. He relied on the cases of **Naomi Muthoni Muniu -vs- Attorney General & 4 Others Judicial Review Case No 126 of 2011 [2014]eKLR** and **Kiscoba Association (acting through John Maina-Chairman James Ndiba - Originating Secretary -vs- Nairobi City County Government [2018]eKLR** in support of this argument.

14. As much as I agree with the 2nd interested party's contention that the recitals in both the application for leave and the substantive motion were incorrectly drawn and that the Statement of facts should have set out the reliefs to be sought in the substantive motion, I am inclined to agree with the ex parte applicant that these are defects as to form that are not fatal to the application. First, the 2nd interested party did not demonstrate the prejudice suffered or that she was likely to suffer as a result of the errors. Having regard to the responses made to the application, it is apparent that all parties fully understood and responded to the application despite its flaws and no prejudice was occasioned to any of the parties.

15. Secondly, judicial Review proceedings now fall under the ambit of the Fair Administrative Action Act No. 4 of 2015 which was enacted to give effect to Article 47 of the Constitution. **Section 10 of the Fair Administrative Action Act** provides that applications for judicial review are to be heard and determined without undue regard to procedural technicalities. In my view it would not serve the interest of justice to drive the ex parte applicant from the seat of justice unheard on these grounds alone given that the aforementioned irregularities may be taken into account when awarding costs. (See **Naomi Muthoni Muniu -vs- Attorney General & 4 others (supra)** and **Kiscoba Association -vs- Nairobi City County Government (supra)**)

16. Turning to the substantive issues, it is trite that judicial review proceedings are concerned with the probity and integrity of the process leading up to the decision sought to be impugned as opposed to the merits of the decision itself. In the case of the **Commissioner of Lands -vs- Kunste Hotel Ltd [1997]eKLR** the court of Appeal in laying the scope of judicial review observed as follows:

“But it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected.”

In the English case of **Chief Constable Evans [1982] 1WLR 1155** referred to with approval by the Court of Appeal in the case of Commissioner of **Lands -vs- Kunste Hotels Ltd (Supra)** Lord Hailsham of **St. Mary Lebone** stated thus:-

“The purpose of judicial review is to ensure that the individual receives fair treatment and not to ensure that the authority, after according fair treat reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court.”

17. There were facts/issues that are not disputed. It was not disputed that the respondent received complaints from the 1st and 2nd interested parties concerning the legality of the applicant's title to the subject property. By summons dated 27th April, 2016, the applicant was notified of the complaints and a hearing was scheduled to take place on 16th May 2017. The applicant filed a reply and was represented at the hearing which failed to take place. The applicant later received summons dated 23rd September informing him of a public hearing scheduled for 5th October, 2016. The respondent also advertised the notice in the dailies. The applicant wrote to the respondent on 3rd October 2016 notifying it that he had responded to the claim and had no additional documents to rely on.

18. By a letter dated 13th October, 2016, the respondent notified the applicant that **“all documentation, explanations and evidence”** had shown that the land had been procured illegally as it belonged to the family of the late Simon Kegesa and was not available for allocation. The respondent warned that it was giving a final call for the applicant to surrender his title within seven days failure to which the respondent would invoke provisions of the law to either expunge the title or evict the applicant physically or both in order to reconstitute the family of Kegesa.

19. The first question for determination is whether the respondent had jurisdiction to investigate and determine the legality of the applicant's title to the suit property. The respondent is an independent commission established under **Article 67(1) of the Constitution**. The respondent argued that it derives its mandate to review all grants or dispositions of public land from **Section 14 of the National Land Commission**

which was enacted to give effect to the provisions of **Article 68 (c) (v)** of the Constitution which provides:

68. Parliament shall-

(c) enact legislation-

(v) to enable the review of all grants or dispositions of public land to establish their propriety or legality;

Section 14 (1) of the National Land Commission Act provides:

14 (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.

20. A look at the applicant's certificate of lease marked "**ART- 03**" shows that title emanated from Gusii County Council. Having received a complaint regarding the propriety of the title issued to the applicant, the respondent was within its prerogative to review the manner in which the land was converted from public land to private land. In **Compar Investment Limited -vs- National Land Commission & 3 Others Petition 311 of 2014 [2016]eKLR** the court being of a similar opinion held:

"56. Despite the fact that the Petitioner's land is currently classified as private land because it holds a 99 years' leasehold tenure over the same, I do not think that fact alone bars the 1st Respondent from inquiring into its propriety. I say so because, all land in Kenya belongs to the Republic hence the leasehold title held by the Petitioner. The suit property has a history which history tells the procedure of its alienation and hence its legality or otherwise. The Government has powers to alienate its land and grant it to private individuals in forms of grants or leases."

21. On whether the respondent violated the applicant's right to Fair Administrative Action, the applicant submitted that the respondent did not act with procedural fairness in reaching its decision which was communicated to him vide the letter dated 13th October, 2016. He argued that the respondent did not conduct any hearing or consider his response and submissions with the result that the rules of natural justice were offended. The respondent argued that it gave the ex parte applicant an opportunity to address the allegations against him and that he had admitted that he received the complaint and notice of the hearing. The respondent argued further that its decision was reached upon due consideration of the respondent's submissions.

22. Section 14 (2) of the National Land Commission Act envisions the creation of a set of rules intended to guide the Commission in reviewing of grants or dispositions of public land subject to **Articles 40, 47 and 60** of the **Constitution**. In the absence of those rules, the procedure under **Section 4** of the **Fair Administrative Action Act** which was enacted to give force to Article 47 suffices to assess whether the respondent adhered to the rules of natural justice. The provision provides that in all cases where a person's rights or fundamental freedoms are likely to be affected by an administrative decision, the administrator must give the person to be affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action. (See **Sceneries Limited -vs- National Land Commission [2017] eKLR**).

23. 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 reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to Section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or 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-

- (a) attend proceedings, in person or in the company of an expert of his choice;
- (b) be heard;
- (c) cross-examine persons who give adverse evidence against him; and
- (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 41 of the Constitution, the administrator may act in accordance with that different procedure.

24. In the instant case, the respondent appears to have been conscious that the applicant had a right to fair trial. The applicant was informed of the complaint against him and given an opportunity to respond to them. Prior to the enactment of the Fair Administrative Action Act, 2015, an exchange of correspondence may have been sufficient. (See **Kenya Revenue Authority -vs- Menginya Salim Murgani Civil Appeal No. 108 of 2009, (2010) eKLR**). Presently, the Fair Administrative Action Act makes it mandatory for the administrator to accord the person against whom administrative action is taken an opportunity to attend proceedings; cross-examine persons who give adverse evidence against him; and be furnished with information, materials and evidence to be relied upon in making the decision. In the instant matter, the respondent failed to do that and therefore violated the ex parte applicant's right to fair trial. The ex parte applicant though entitled to be furnished with information and materials to be relied on by the complainants was not availed the materials. The letter dated 13th October 2013 communicating the decision did not carry any appropriate reasons to demonstrate the basis of arriving at the determination that the 1st respondent did and in that regard was in breach of Section 4(2) of the Fair Administrative Action Act which requires that a person be given written reasons for any administrative action that is taken against him.

25. The respondent proceeded to demand that the applicant surrender his title and threatened to expunge it and evict the ex parte applicant physically and reconstitute the family of the 1st interested party, which actions were clearly outside the scope of the 1st respondent's powers. **Section 14 (5)** of the National Land Commission Act provides that where the Commission finds that the title was irregularly acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title. In clarifying the respondent's role as defined in Article 67 of the Constitution, **Ndungu, SCJ. in The Matter of the National Land Commission Advisory Opinion Reference No. 2 of 2014 [2015] eKLR** stated as follows;

“To my mind, the language of Article 67(2)(b) to (h): as to the functions of the National Land Commission, is clear and specific:

“... ”

- (b) to recommend a national land policy to the national government;**
- (c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;**
- (d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;**
- (e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;**
- (f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;**
- (g) to assess tax on land and premiums on immovable property in any area designated by law; and**
- (h) to monitor and have oversight responsibilities over land use planning throughout the country” [emphasis supplied].**

The words ‘recommend, advise, research, investigate, encourage, assess, monitor and oversight’ – are all actions that provide a facilitative role rather than a primary one. The context in which those words are used, presumes that there is another body or organ whom such recommendations, advice, research, investigations, encouragement, and assessment shall be sent to, received by, and in relation to which the proposals shall be implemented. There is therefore a clear separation of roles between a body providing oversight, and a body upon which the oversight is to be conducted. In my opinion, this means that unless specified within the enabling constitutional provision, a body with oversight function, and a body that implements the recommendations of the former, are different, and their roles do not overlap.”

26. In a judicial review application such as the present one, the court cannot take oral evidence as that falls outside the scope of judicial review. Thus, the issue relating to the legality of the applicant's title and whether or not he was a bonafide purchaser for value without notice cannot be determined in these judicial review proceedings. Such an exercise would entail having to receive evidence and parties to be

availed the opportunity to cross examine witnesses to test the veracity of the evidence. That would fall outside the purview of judicial review which as stated earlier in this judgment is merely concerned with determining whether the process followed in reaching the impugned decision was fair.

27. For the foregoing reasons, I find the ex parte applicant's application dated 16th November 2016 merited and I hereby issue the following orders;

i. An order of judicial review in the nature of prohibition prohibiting the respondent or any other person or entity acting under the respondent's directions or otherwise from expunging the applicant's certificate of lease over land parcel Kisii Municipality/ Block III/330 or evicting the ex parte applicant from land parcel Kisii Municipality/ Block III/330;

ii. An order of certiorari removing into this Court for purposes of being quashed the decisions encapsulated in the letter dated 13th October, 2016 demanding the surrender of the certificate of lease held by the applicant over land parcel Kisii Municipality/ Block III/330 and vesting the said parcel of land in the estate of the late Simon Kegesa;

iii. The parties shall bear their own costs of the application.

JUDGMENT DATED, SIGNED AND DELIVERED AT KISII THIS 5TH DAY OF APRIL 2019.

J. M. MUTUNGI

JUDGE

In the Presence of:

Ms. Kebungo for the applicant

N/A for the respondent

1st interest party in person

Mr. Adawo for the 2nd interested party

Ruth Court Assistant

J. M. MUTUNGI

JUDGE