



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

JR MISC. CIVIL APPLICATION NO.8 OF 2018

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE LAND ACT, 2012, THE NATIONAL LAND COMMISSION ACT, 2012; ORDER 53 CIVIL PROCEDURE RULES AND ALL OTHER ENABLING PROVISIONS AND PROCEDURES OF THE LAW

AND

IN THE MATTER OF: LAND REFERENCE NO. MOMBASA/MAINLAND SOUTH/BLOCK/1818 SITUATED IN MOMBASA COUNTY

AND

IN THE MATTER OF: THE DECISION OF THE NATIONAL LAND COMMISSION CONTAINED IN THE STANDARD NEWSPAPER DATED 23RD JANUARY, 2018

REPUBLIC.....PROSECUTOR

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

KINNOCK LIMITED.....EX PARTE APPLICANT

(CONSOLIDATED WITH JR NO.6 NO 7 OF 2018)

JUDGMENT

1. Pursuant to leave granted to the ex parte Applicants Kinnock Limited on 10th July, 2018, the Applicant filed the Notice of Motion application dated 17th July 2018 seeking orders as follows:

1. There be and is hereby issued an order of judicial review of certiorari to remove into the Environment and Land Court and quash the decision of the Respondent contained in the Standard Newspaper of 23rd January 2018 directing the Applicant to vacate its property known as MOMBASA/MAINLAND SOUTH/BLOCK 1/1818 situate in Mombasa within 90 days.

2. There be and is hereby issued an order of prohibition to prohibit the Respondent or any other person acting on its behalf from evicting the Applicant or the Applicant’s tenant, agent or assign from the property known as MOMBASA/MAINLAND SOUTH/BLOCK 1/1818 situate in Mombasa County and from revoking the Applicant’s title to the said property.

3. The costs of these proceedings be borne by the Respondent.

2. From the papers filed in court, the Applicant’s case is that it is the registered owner of the leasehold interest in the property known as

MOMBASA/MAINLAND SOUTH/BLOCK 1/1818 situate in Mombasa County (hereinafter referred to as the suit property) having been granted a lease by the Government of Kenya for 99 years from 1st February 1997. The Applicant acquired the leasehold interest in the suit property from Doshicom Developers Limited who had acquired the same from the original allottee, one Abdallah Abdulkadiri. The applicant avers that it duly paid the requisite fees for the transfer of the suit property from Doshicom Developers limited to itself and has always paid the requisite land rates and land rents respecting the suit property.

3. The Applicant states that despite the legal ownership and possession of the suit property, the Respondent through a notice advertised and published in the Standard Newspaper on 23rd January 2018 directed the Applicant to vacate from the suit property within 90 days of the said notice in default of which the Applicant shall be evicted therefrom. The Applicant avers that in the said Notice, the Respondent mistakenly indicated the owner of the suit property as Doshicom Developers Limited yet the same had been sold to the Applicant. The reason cited by the Respondent for ordering the Applicant to vacate the suit property was that the same was illegally occupied by the Applicant in a manner that was interfering with safe navigation of Kenya Water by vessels, thereby threatening marine safety and operations. That the Respondent alleged in the impugned notice that it had received complaints from the Kenya Maritime Authority, toured and inspected the suit property and confirmed that indeed that the suit property was one of those properties occupying and interfering with ship navigational aids at Kilindini Port and that the Applicant was illegally occupying the suit property in a manner that was interfering with the safe navigation of Kenya Waters by vessels.

4. The Applicant avers that it has never received any complaint from the Kenya Maritime Authority or any other person or entity to the effect that its ownership and possession of the suit property had adverse effect on the safe navigation of Kenya waters. It is the Applicant's case that the Respondent's decision is illegal, made without jurisdiction and against the rules of natural justice for reasons that:

a. The decision of the Respondent is an affront to the Constitution and in particular Article 40 which guarantees right to own property.

b. The said decision is defective and procedurally improper for being arrived at without involving the Applicant who is the registered owner of the suit property.

c. The said decision made by the Respondent was unilateral and an abuse of Articles 47 and 50 of the Constitution as the Applicant was never given an opportunity to be heard.

d. The Respondent failed to follow the procedure laid down in Section 14 of the National Land Commission Act before arriving at this decision.

e. The Respondent's decision is defective and unprocedural as the Newspaper advertisement/notice did not give reasons or the findings or results of the investigation allegedly conducted by the Respondent and that such findings have never been supplied to or shared with the Applicant.

f. The Respondent's decision is defective and unprocedural as the Respondent did not abide by the provisions of Sections 131 and 151 of the Land Act which provides for how the Applicant ought to have been served with the requisite notices.

g. That the Respondent did not publish its decision in the Kenya Gazette or through radio announcement as required by Section 152 C of the Land Act (as amended) by the Land 6)

h. The Respondent's action is an attempt to usurp the powers of a court of law by purporting to make declarations on ownership of the suit property.

i. The decision of the Respondent is ultra vires as the Respondent is not empowered by the constitution and statute to delve into the matters complained of.

5. In support of the Applicant's case, counsel submitted that investigations purportedly conducted by the Respondent to reach its decision did not involve the Applicant who is the registered owner of the suit property. That the Applicant was condemned unheard contrary to Articles 47 (2) and 50 (1) of the Constitution, Section 4 of the Fair Administrative Action Act, Section 14 (8) of the National Land Commission Act and the rules of natural justice. The case of **Republic –v- National Land Commission Ex Parte Krystalline Salt Limited (2015) eKLR** was cited by the Applicant to demonstrate that judicial review is available where a public body or tribunal has acted illegally, unreasonably or failed to comply with the rules of natural justice. The case of **Republic –v- National Land Commission & Another (2016)eKLR** was also cited by the Applicant to demonstrate that non compliance with the Rules of Natural justice is a fertile ground for granting judicial review orders. It was the Applicant's submission that the directive that the Applicant submits its documents of ownership after the Respondent had made a decision is against the rules of natural justice and the Applicant's constitutional right to fair hearing. Further, that the newspaper advertisement did not give reasons or the findings or results of the investigation allegedly conducted by the Respondent and that such findings have never been supplied or shared with the Applicant. The Applicant submitted that the decision to revoke its title violates its constitutional right to fair administrative action.

6. It is also the Applicant's position that the Respondent failed to follow the procedure laid down in Section 14 of the National Land Commission Act before arriving at its decision and also did not abide by Sections 131 and 151 of the Land Act which make provisions on service of Notice upon the Applicant. The Applicant further submitted that the decision was in violation of Section 152C of the Land Act and therefore riddled with procedural lapses as the Respondent did not publish the same in the Gazette or announced in the radio. The Applicant contends that it was not an illegal occupant of the suit property as it has a valid title. The applicant submitted that the Respondent had no jurisdiction to make the decision it made and therefore a decision made without jurisdiction or legal backing is illegal. The applicant cited the decision of this court in JR. No. 17 of 2018, **Republic –V- Supernova Properties Ltd**

7. On the Respondent's contention that the application is incompetent as it challenges the merits of the decision itself and not the decision making process, the Applicant submitted that the case does not challenge the merits of the Respondent's decision but rather the process of arriving at the decision. Relying on the case of **Super Nova Properties & Another –v- The District Land Registrar Mombasa & 2 Others, Civil Appeal No.98 of 2016 (unreported)**, the Applicant argued that even if it had challenged the merit of the impugned decision, the court of appeal in the above case has since expanded the scope of judicial review to include the merits of the concerned decision.

8. The Respondent opposed the Application through grounds of opposition filed on 26th September 2018 in the following grounds:

i. That the application is scandalous, frivolous, and vexatious and abuse of the court's process.

ii. That the Respondent is mandated by the Constitution to manage public land on behalf of the state, and the constitution grants the state the power to regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning.

iii. That the Respondent is mandated by the Constitution to monitor and have oversight responsibilities over land use planning throughout the country.

iv. That through its public notice which forms the subject of this application, the Respondent is exercising its constitutional mandate in the interest of the public safety.

v. That judicial review is concerned with the decision making process and not the merits of the decisions itself. The application is hence incompetent as it challenges the merits of the decision made by the Respondent and not the process that led towards the making of the impugned decision.

vi. That from the evidence on record, the applicant was given fair and reasonable opportunity to be heard.

vii. That the respondent has jurisdiction in law under the provisions of the constitution of Kenya 2010, the Land Act and the National Land Commission Act to make the decision in question.

9. The respondent submitted that the Applicant was given notice to vacate the suit property and that the respondent had jurisdiction to issue eviction notice pursuant to the provisions of sections 152A, 152B and 152C of the Land Act and that it adhered to the mandatory period of three(3) months. It is the Respondent's submission that the Applicant has not established any illegality, irrationality or procedural impropriety in the procedure followed by the Respondent. The Respondent cited the case of **Penina Madako Kilishwa –v- Independent Electoral Boundaries Commissions & 2 Others (2015)eKLR**; and **Municipal Council of Mombasa –v- Republic & Umoja Consultants Ltd Civil Appeal No.185 of 2001** in which it was decided that judicial review is concerned with decision making process, not with the merits of the decision itself. The Respondent also cited the case of **Pastoli –v Kabali District Local Government Council & Others (2008) 2 EA 300-301** in which it was stated that 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 or procedural impropriety. On the issue that an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with, the Respondent relied on the case of **Kenya National Examination Council –v- Republic Ex-parte Geoffrey Gathenji Njoroge & 9 Others (1997)KLR**.

10. I have considered the Application and the rival submissions made. In my view, the main issue for determination by the court is whether the judicial review remedies of certiorari and prohibition should be granted as sought by the applicant.

11. The purview of judicial review was clearly set by Lord Diplock in the case of **Council for Civil Services Unions –vs- Minister for Civil Service (1985) AC 374 at 401D** when he stated that:

“Judicial review I think developed to a stage today when.... One can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call illegality, 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 has 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. ”

12. Article 47 of the Constitution provides:

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.

13. 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 law decided in a fair and public hearing before a court of law or, if appropriate, another independent and impartial tribunal or body’ while 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.**
 - f. –**
 - g. Information, materials and evidence to be relied upon in making the decision or taking the administrative action.”**

14. Section 14 (8) of the National Land Commission Act provides that in the exercise of its power under that Section, the commission shall be guided by the principles set out under Article 47 of the Constitution while Sections 131 and 151 of the Land Act make provision on service upon persons that may be affected by the commission’s action. Further, Section 152 C of the Land Act requires the National Land Commission to cause a decision relating to an eviction from public land to be notified to all affected persons, in writing, by notice in the Gazette and in one newspaper with nationwide circulation and by radio announcement.

15. That the issuance of the notice published in the Standard Newspaper of 23rd January 2018 was an administrative action by the Respondent is not in dispute. The Respondent was therefore under a duty to ensure that its action was expeditious, efficient, lawful, reasonable and procedurally fair. Procedural fairness necessarily requires that persons who are likely to be affected by the decision be afforded an opportunity of being heard before the decision is taken. Further, in my view, the law as stated above contemplates valid notification.

16. In this case, the notice published in the standard newspaper on 23rd January 2018 required the Applicant to vacate the Suit Property within 90 days failure to which they should be evicted. The Act required the Respondent to publish its decision in the Kenya Gazette and make an announcement by a radio. There was no evidence that such publication and announcement were done as required by Section 152 C of the Land Act.

17. Furthermore and more importantly, Section 14 of the National Land Commission Act required the Respondent to give the Applicant an opportunity to appear before it before arriving at the decision to evict. In my view, the Respondent failed to follow the procedure laid down in Section 14 of the National Land Commission Act before arriving at the impugned decision that the Applicant was illegally occupying the Suit Property and that the Applicant’s ownership and possession was interfering with safe navigation of Kenya Waters. The Respondent should have given the Applicant notice that it was either investigating or reviewing its title and occupation of the Suit Property and give the Applicant an opportunity to explain itself before the impugned decision was arrived at. Additionally, the newspaper advertisement did not even give reasons or the findings or results of the investigations allegedly conducted by the Respondent. The Applicant has stated that no such findings have been supplied to it. Of course none has been filed in this court as the Respondent did not file any replying affidavit.

18. The Respondent was obliged to afford the Applicant a hearing before it made its decision which decision was, undoubtedly bound to adversely affect the rights and interests of the Applicant over the Suit Property. In the case **of Onyango Oloo –v- Attorney General (1989) EA 456**, 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 they cannot act 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 to 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 decisions would have been arrived at....”

19. Where a party has not been heard, a decision made in breach of the rules of natural justice are null and void *ab initio*.

20. There is no doubt that the Applicant is the registered proprietor of the Suit Property. The Land Act does not give the Respondent power

to revoke the Applicant's title. The Respondent could only direct the Registrar to do so. The Respondent's decision to revoke the Applicant's title was made without jurisdiction or legal backing and therefore illegal.

21. It is therefore my view that the rules of natural justice were flouted and the decision made without jurisdiction, and all actions taken pursuant thereto were null and void.

22. On 31st January, 2019, the parties agreed to consolidate Judicial Review Misc. Civil Application No.8 of 2018 with No. 6 of 2018 and No.7 of 2018. This ruling therefore will apply to JR No. 6 of 2018 and No.7 of 2018.

23. Consequently, I find merit in the Notice of Motion dated 17th July 2018 and grant the following orders:

a. There be and is hereby issued an order of Judicial Review of Certiorari to remove into this court and quash the decision of the Respondent contained in the Standard Newspaper of 23rd January 2018 directing the Applicants to vacate their properties known as MOMBASA/MAINLAND SOUTH/BLOCK 1/1818; MOMBASA/BLOCK XLVII/150; MOMBASA/MAINLAND SOUTH/BLOCK I/1795; MOMBASA/MAINLAND SOUTH/BLOCK I/1796; AND MOMBASA/MAINLAND SOUTH/BLOCK 1/1814 all situate in Mombasa

b. There be and is hereby issued an order of prohibition to prohibit the Respondent or any other person acting on its behalf from evicting the Applicants or their tenants, agents or assigns from the said properties and from revoking the Applicant's titles to the said properties without following the due process of the law.

c. The Applicants will have the costs of these proceedings.

d. Orders to apply to JR No.6 of 2018 and JR No.7 of 2018.

Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 23rd day of May 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Mwanazuma holding brief for Oluga for Applicant

No appearance for Respondent

Yumna Court Assistant

C.K. YANO

JUDGE