



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC JUDICIAL REVIEW NO. 2 OF 2019**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE**

**JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF ARTICLES 23, 47 AND 50 OF THE CONSTITUTION 2010**

**AND**

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

**AND**

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

**AND**

**IN THE MATTER OF INQUIRIES AND HEARING**

**BY THE NATIONAL LAND COMMISSION ACT**

**AND**

**IN ACCORDANCE WITH ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

**IN THE MATTER OF AN APPLICATION**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**THE NATIONAL LAND COMMISSION.....RESPONDENT**

**AND**

**EPHRAIM MURIUKI WILSON.....1<sup>st</sup> EXPARTE APPLICANT**

**WILSON KARUNGARU.....2<sup>nd</sup> EXPARTE APPLICANT**

**SIMON MURIITHI KABURU.....3<sup>rd</sup> EXPARTE APPLICANT**

**JOSEPH MACHIRA.....4<sup>th</sup> EXPARTE APPLICANT**

**AND**

**THE COUNTY GOVERNMENT OF NYERI....1<sup>st</sup> INTERESTED PARTY**

**FREDRICK MURAGE.....2<sup>nd</sup> INTERESTED PARTY**

**IBRAHIM NDAMBI.....3<sup>rd</sup> INTERESTED PARTY**

**MUNDIA KARUMU.....4<sup>th</sup> INTERESTED PARTY**

**THUMBI WERU.....5<sup>th</sup> INTERESTED PARTY**

**KIANA GIKUHI.....6<sup>th</sup> INTERESTED PARTY**

**GEOFFREY NGUNYI.....7<sup>th</sup> INTERESTED PARTY**

**SAMUEL KIONGO KAMAU.....8<sup>th</sup> INTERESTED PARTY**

**SAMUEL MUNGA.....9<sup>th</sup> INTERESTED PARTY**

**RULING**

1. By a Notice of Motion dated 20<sup>th</sup> March, 2019, the Ex parte Applicants herein seeks an order of certiorari to quash the decision of the National Land Commission, the Respondents herein through its determination for Review of grants and dispositions of public land of Sofia Area Karatina Township dated the 21<sup>st</sup> January, 2019 through its former chairperson which revoked titles to block 1/422 1/426 1/428 1/433 1/435 1/438 1/441 1/444 1/448 1/450 1/421 1/423 1/424 1/425 1/427 1/429 1/430 1/431 1/432 1/436 1/437 1/439 1/440 1/442 1/422 1/443 1/445 1/446 1/447 and 1/449.
2. The Applicants also sought leave to apply for an order of certiorari to quash the decision of the Respondent for failing to involve them in the inquiries and hearing conducted by the Respondent thus violating their rights under Article 47 and 50 of the Constitution.
3. The Applicant also seeks an order of prohibition prohibiting the Respondent whether by themselves, agents, employees or whomsoever from taking any steps, action and/or measures to revoke the said titles from the ex parte Applicants as it does not have any mandate to revoke the said titles.
4. That the leave so sought do operate as a stay of the Respondents' impugned decision. There is also a prayer seeking provision for costs.
5. The application was supported by the chamber summons, statutory statements, annexures and verifying affidavit of Simon Murithi Kaburu and was disposed of by oral evidence.
6. It was the submission by Counsel for the Ex-Applicants that they had sought for prohibitory orders because the Respondent had revoked their titles without the mandate to do so, their mandate having had expired under Section 14 of the National Land Commission Act. At the same time there was a pending matter in ELC 256 of 2015 where the ruling had been delivered dismissing the matter.
7. That prior to that, the National Land Commission had made its decision through a determination of review of grants of disposition of public land of Sofia Area Karatina Township within Nyeri County as per the annexure 1 wherein the said determination was done on 21<sup>st</sup> January, 2014 when its mandate had expired.
8. That the Respondents had at the time failed to give the ex-parte applicants the right to be heard as they had been invited through a public participation at Karatina Railway grounds on 5<sup>th</sup> November, 2015 where the Applicants did not attend. Thereafter, the Respondents advertised their decision through the Standard Newspaper dated the 18<sup>th</sup> November, 2016 at the Kenya bankers Sacco center.
9. The ex-applicants had objected to the proceedings but their application was overruled. The proceedings could not proceed because they were not served with the complaint wherein they had proceeded to file a Judicial Review No. 12 of 2017 in Nairobi where they obtained a stay of proceedings.
10. On 25<sup>th</sup> January, 2017, they did not attend the hearing because there had been an order of stay of proceedings. On 6<sup>th</sup> June, 2018 despite there being a stay of proceedings, the Respondents invited the Applicants for a hearing which they objected to. The hearing did not proceed wherein on 27<sup>th</sup> June, 2018, the Judicial review No. 12 of 2017 was dismissed on the ground that the suit was related to ownership of the land and that the same had already been litigated upon in Nyeri HCC No. 68 of 1978 together with Nairobi Civil Appeal No. 426 of 2001, Nyeri HCCC Petition No. 2 of 2013 and Nyeri ELC 256 of 2015.
11. That the matter before court was based on revocation of titles through a determination dated 21<sup>st</sup> January, 2019 without involving the Applicants and whilst knowing that the Respondent's mandate had expired on May 2017.

12. The Application was opposed by Mr. Fredrick Murage the second interested party who was acting in person and on behalf of the 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> interested parties who submitted that they had filed their grounds of opposition to the chamber summons application on the 26<sup>th</sup> April, 2019.

13. He submitted that the 2<sup>nd</sup> – 8<sup>th</sup> interested parties had opposed the applicant's application to institute the Judicial Review on the following grounds:-

(i) That the application did not demonstrate a prima facie case which warrants the grant of leave. Based on the decision sought to be challenged by the applicant, it was clear that the Applicants had been afforded a chance to be heard by the Respondent by being requested to submit their submissions in response to the claim but they had elected not to present the same.

(ii) That the well-established conditions for grant of leave had not been met by the ex-parte applicants and that leave was not granted as a matter of cause.

(iii) That the instant suit was a gross abuse of the court process since the issues raised herein had already been subject of litigation and judicial pronouncement in Nairobi Judicial Review 12 of 2017 which was finally dismissed with costs.

(iv) That entire suit was a claim of ownership of land which was to be determined through a civil suit but was disguised as a Judicial Review in the instant case.

(v) That a Judicial Review was not a proper forum to determine issues touching on ownership of land and the proper cause of action would have been for the Applicants to appeal the decision and not filing the instant suit.

(vi) That the material put before the court was misguided, mis-interpreted, misinformed and was geared at witch-hunting.

14. Mr. Fredrick Murage thus prayed that the application for leave to file Judicial Review proceedings herein be dismissed because the application was not meritorious. He further submitted that during the hearing of this matter in the last 4 years, parties had been given a chance to participate but the Applicants had refused to participate in the proceedings and/ or submit their submissions before the commission.

15. Counsel for the 1<sup>st</sup> interested party reiterated the sentiments raised by Mr. Fredrick for the 2<sup>nd</sup> – 8<sup>th</sup> interested parties and further submitted that it was not denied that the Karatina defunct council had sub-divided the said area wherein they had proceeded to allot the 29 plots to persons who were issued with Temporary Occupation License (TOL).

16. That under Article 68(c) of the Constitution, the National Land Commission is mandated to proceed and review all grants and disposition of public land to establish their propriety or legality. Article 67 of the Constitution mandates the National Land Commission to manage public land on behalf of the National and County Governments.

17. That whereas Counsel for the Applicants had relied on Section 14 of National Land Commission to state that the National Land Commission mandate had already expired, yet the said Section 14 clearly states that within 5 years of commencement of the Act, the commission 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.

18. Their question therefore was if there had been a complaint raised within 5 years of coming into the Act to which they answered in affirmative to the effect that indeed there had been a complaint raised on 1<sup>st</sup> October, 2014 by Nyeri County Residents Association wherein the time line was within the coming into force of the National Land Commission.

19. That the fact that the Applicants chose to annex annexure 1 to their application, was proof that indeed a hearing was conducted wherein the Applicants chose not to respond on issues after they had been invited by the commission. It was therefore their humble submission that the decision by the National Land Commission was legal and that the Application for leave be dismissed.

20. In rebuttal, Counsel for the applicants' submitted that the complaint was not filed within the stipulated time. The National Land Commission was not to revoke the titles.

#### **Determination.**

21. I have considered the application herein as well as the submission brought forward by parties, I find that the Applicants' main concern is that the National Land Commission revoked its titles when their mandate under Section 14 of the National Land Commission Act had expired and without affording them a right to be heard.

22. I note that the ex parte applicants and the interested parties were involved in Nairobi High Court Judicial Review No. 12 of 2017 (**Republic v National Land Commission Ex-Parte Ephrahim Muriuki Wilson & others [2018] eKLR**) in which the Applicants were challenging the Respondent's power to hear and entertain complaints that had been lodged with it by interested parties with respect to *Plot No. S E.1 to E.18 (Now Block 1/422-450, Sofia Area, Karatina, Nyeri County. After analyses of the issues therein the learned Hon. Judge in his determination held as follows:*

*In this regard, it is important to mention that what emerges is that there is a land dispute, and this Court cannot allow itself to be used to resolve a land dispute disguised as a Judicial Review application. Behind the curtain of these Judicial Review proceedings is the real dispute, namely, ownership, use and or occupation of land. These questions call for the need for this Court to exercise caution, care and*

circumspection. First, there is the question of jurisdiction discussed earlier. Second, there is a real danger of this Court rendering a decision that will have the implication of determining ownership of the disputed land. I decline the invitation to venture into this forbidden territory.

The upshot is that I dismiss this Judicial Review application with costs to the Interested Parties. I award no costs to the Respondent since it did not participate in the proceedings.

23. In light of the said determination, the Applicants have again filed a similar application wherein they now seek for leave to file a Judicial Review by virtue of the fact that the Respondent revoked their titles despite the fact that their mandate had expired. With due respect, I find the present application to be Res judicata the Nairobi High Court Judicial Review No. 12 of 2017.

24. The requirement for leave was explained by a three judge bench comprising **Bosire, Mbogholi-Msagha & Oguk, JJ** in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** in which the Court held that it is supposed to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred. Similarly, in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321, Nyamu, J** (as he then was) held that leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralyzed for months because of pending court action which might turn out to be unmeritorious.

25. The Court of Appeal in **Meixner & Another vs. Attorney General [2005] 2 KLR 189** held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.

26. The circumstances which guide the grant of leave to apply for judicial review remedies were enumerated in **Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** as follows:

**“If he [the Applicant] fails to show, when he applies for leave, a *prima facie* case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers...”**

27. From the above narrative and the authorities herein cited, I find that this dispute touches on issues based on a claim of ownership of land as well as the jurisdiction of the National land Commission, issues which ought to be determined through a civil suit and therefore it need not be elevated to Constitutional matters otherwise such mundane issues as the grant or refusal of adjournments may soon find themselves being litigated as constitutional petitions.

28. Judicial review, it ought to be remembered, is a remedy of last resort and ought not to be applied for where there exist appropriate remedies to redress the grievance complained of.

29. In the premises, I decline to exercise my discretion in favour of the applicant as sought herein and disallow the application for leave. It follows that without leave being granted these proceedings are misconceived and are hereby struck out with costs to the interested party.

**Dated and delivered at Nyeri this 25<sup>th</sup> day of July 2019.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**