



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

JUDICIAL REVIEW NO. 4 OF 2017

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW, PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF GAZETTE NOTICE VO. CXIX – NO. 97 OF 17TH JULY 2017

AND

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

AND

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

BETWEEN

REPUBLIC..... APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

CHIEF LAND REGISTRAR2ND RESPONDENT

AND

PACIFICA MWANGO INTERESTED PARTY

AND

A. JIWA SHAMJI LIMITEDEX PARTE APPLICANT

J U D G M E N T

1. The Ex Parte Applicant pursuant to leave granted by the Court on 31st October 2017 filed the substantive Notice of Motion for Judicial Review dated 9th November 2017 and sought the following orders:-

1) An order of judicial review in the nature of prohibition do and is hereby issued to prohibit the 2nd Respondent or any other person or entity acting under his direction and/or authority howsoever constituted or otherwise from howsoever implementing and/or revoking, the Ex parte Applicant's title to land parcel No. Kisii Municipality/Block III/157.

2) An order of judicial review in the nature of Certiorari do and is hereby issued to remove into the High Court and quash Gazette Notice Vol. CXIX – No. 97 of 17th July, 2017.

3) The Ex parte Applicant be at liberty to apply for any or all further, necessary and/or consequential orders as may be expedient in the circumstances.

4) Costs of and incidental to this application do abide the substantive notice of motion.

2. The application was supported on the grounds set out in the statement of facts and on the face of the application and the verifying affidavit sworn in support of the Notice of Motion by Jamaludin S. A. Shamji on 9th November 2017. Amongst the grounds upon which the Ex parte Applicant seeks judicial review are as follows:-

1. Land parcel No. Kisii Municipality/Block III/157 (hereinafter referred to as “parcel No. 157”) originally owned by George Stephenson Obegi Ongweny, jajpheth Obegi Ongweny, John Mokaya Ongweny and Gilbert Ombogo Ongweny (hereinafter jointly and severally referred to as “the Chargors”) was charged vide a Charge dated 18th October 1983 (hereinafter referred to as “the said Charge”) to secure financial accommodation to the Chargors by Kenya Finance Corporation Limited (hereinafter referred to as “the Chargee”).

2. The Chargee sold parcel No. 157 to the Ex parte Applicant (hereinafter referred to as “Shamji”) at a consideration of kshs. 140,000/= in exercise of its statutory power of sale upon default by the Chargors to pay secured liabilities.

3. Upon sale of parcel No. 157 the Chargee transferred title thereto to Shamji whereupon Shamji acquired proprietary rights thereto.

4. The 1st Respondent (hereinafter referred to as “the Commission”) after purported hearing of a complaint by the Interested Party (hereinafter referred to as “Pacifica”) made a recommendation which it published in Gazette Notice Vol. CXIX – No. 97 of 17th July, 2017 that Shamji’s title be revoked by the 2nd Respondent (hereinafter referred to as “the Registrar”) and the same be vested in Pacifica in her capacity as “administrator” of the Estate of the Late Simon Kegesa (hereinafter referred to as “Kegesa”).

5. Parcel No. 157 is private property.

6. An unspecified complaint, the particulars of which are strange to Shamji was purportedly lodged with the Commission by Pacifica in her capacity, purportedly, as administrator of the Estate of the Late Kegesa against the title held by Shamji.

7. Neither Kegesa nor Pacifica has any interest in whatever form and description over parcel No. 157.

8. Particulars of the purported complaint by Pacifica have never been communicated to Shamji.

9. Shamji has never been served with any notice or any summons of whatever description calling upon it to respond to the purported complaint made by Pacifica.

10. The Commission acted ultra vires its constitutional and statutory powers by exercising jurisdiction over parcel no. 157 as if the same was public land when the same is in law and fact private land.

11. By its default to furnish Shamji with particulars of the purported complaint by Pacifica and by defaulting to summon Shamji to a hearing of the complaint, rules of natural justice were infringed upon.

12. The Commission, by making a recommendation without affording Shamji a hearing over the purported complaint of Pacifica adopted a process which was tainted with procedural impropriety and gross unfairness.

13. The Commission’s actions are an infringement of Section 4 of the Fair Administrative Action Act No. 4 of 2015.

14. The recommendation of the Commission is:-

(1) Unfair in so far as Shamji is a bona fide proprietor for value without notice of defect in title held by the Chargors who were the original proprietors who the Commission never called upon to respond to the purported complaint by Pacifica.

(2) Irrational because by its decision the Commission purported to determine land rights without any legal basis.

(3) In the premises, illegal, null and void ab initio and cannot therefore be acted upon by the registrar.

15. Shamji has been in use of parcel no. 157 for thirty (30) years and still counting) since purchasing in the year 1987 and now runs the risk of illegal deprivation of its title warranting protection by this Honourable court.

16. The Respondents are persons/entities who exercise quasi judicial authority subject to the supervisory jurisdiction of this honourable court.

3. The affidavit sworn in support of the Notice of Motion basically reiterates the grounds set out in support of the application. The issues thus are whether the 1st Respondent had the jurisdiction and mandate to render the decision that it did; whether the Ex Parte Applicant was given notice of the hearing of the matter by the 1st Respondent as statutorily required; and further whether the ex parte applicant was afforded a fair hearing as provided under the Constitution and the Fair Administrative Action Act, 2015.

4. The Applicant through its Director, Jamaludin S. A Shamji, deposes in the affidavit in support of the application for judicial review that it acquired the suit property at a public auction sale carried out by the chargee of the property consequent to a failure by the chargors to service a loan facility secured by a charge over the property. The Applicant stated that following the purchase and transfer by the chargee of the charged property, it was registered as the owner of land parcel **Kisii Municipality/Block III/157** on 2nd December 1998 and a Certificate of Lease issued in its name. Henceforth the ownership interests and rights over the property were vested in the Applicant.

5. The Applicant further deposed that it was given no notification of any complaint touching on its said property by the 1st Respondent and neither was it served with any notice of hearing and/or summoned to any hearing where its said property was the subject of investigation and/or inquiry. The Applicant averred that it was sometimes on 10th October 2017 when someone drew its attention to a Gazette Notice Published on 17th July 2017 in which the Applicant's land parcel No. **Kisii Municipality/Block III/157** was indicated as one of the properties whose titles had been recommended for revocation by the 1st Respondent.

6. The 1st Respondent swore a replying affidavit dated 10th September 2018 through Brian Ikol, its Deputy Director Legal Affairs and Enforcement. The 1st Respondent outlined the basis of its mandate to investigate the propriety of dispositions of public land and explained that in the instant matter the Respondent had received a complaint from one, Pacifica Mwangi, the Interested Party herein which prompted its investigation in regard to the Applicant's title to land parcel No. 157 Kisii Municipality.

7. The 1st Respondent has deposed that all the provisions of the law relating to the service of Notice and affording the interested party of the opportunity to appear and to be heard were complied with and that the Applicant was given the opportunity to appear before it and to inspect any relevant documents. The Respondent under paragraphs 12, 13 and 14 of the replying affidavit sets out its basis for asserting there was compliance with the provisions of Article 50 of the Constitution, Section 14 of the National Land Commission Act and the Fair Administrative Action Act of 2015.

8. The 1st Respondent states letters were sent out to the affected parties and in particular a letter dated 23rd September 2016 and public notices were published in local dailies notifying parties of the hearing at the Kisumu Tom Mboya Labour College on 5th October 2016. The 1st Respondent further relies on an affidavit of service sworn by one, Henry Motanya Oyugi on 4th October 2016 to contend that the Applicant was served with the complaint and the hearing notice.

9. The Applicant in a supplementary affidavit sworn on 25th October 2017 in response to the 1st Respondent's replying affidavit maintained that no service at all was effected upon the Applicant before the 1st Respondent rendered the decision that is under challenge by the Applicant. The Applicant reiterated there was no evidence whatsoever that the Applicant was served with any notice. Further the Applicant stated the process server retained by the 1st Respondent did not serve any document on the Applicant as the persons he was detailed to serve did not include the Applicant.

10. The Interested party, Pacifica Mwangi swore a replying affidavit in response to the judicial review application on 24th July 2018 which sets out her basis for claiming an interest on the suit land as the administratrix of her late father's estate. The Applicant stated the Interested party's replying affidavit did not have any bearing on the matter before the court where the Applicant was merely challenging the process and procedure through which the 1st Respondent arrived at the decision that it did to revoke the Applicant's title to the suit property.

11. The parties argued the Notice of Motion application for judicial review by way of written submissions. I have considered the pleadings and the submissions and it is clear that the issues in the instant judicial review are twofold. Firstly, whether the 1st Respondent acted within the scope of its mandate and jurisdiction in making the decision to revoke the Ex parte Applicant's title, and secondly, whether the 1st Respondent followed due process in reaching the decision that they did. The Applicant contends that their right to fair administrative action guaranteed under Article 47 of the Constitution was violated and therefore the decision of the 1st Respondent violated the cardinal rules of natural justice and that the same ought to be quashed.

12. The scope of judicial review was ably articulated by the Court of Appeal in the case of **Municipal Council of Mombasa -vs- Republic & Another CA No. 185 of 2001 [2002]eKLR** where the court while approving its decision in the earlier case of **Kenya National Examination Council -vs- Republic ex parte Geoffrey Gathenji Njoroge & Nine Others (Civil Appeal No. 266 of 1996)** (unreported) stated as follows:-

“...judicial review is concerned with the decision making process, not with the merits of the decision itself...”

The court further stated:-

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e the jurisdiction to make it? Were the persons affected by the decision heard before it was made? These are the kind of questions a Court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going to the merits of the decision itself - such as whether there was or there was not sufficient evidence to support the decision and that, as we have said is not the province of judicial review.”

13. It is thus clear that this court cannot interrogate the merits of the decision on the basis of the availed evidence and is restricted to considering whether the Applicant was given fair treatment by the 1st Respondent and whether due process was followed.

14. Respecting the mandate and jurisdiction of National Land Commission to review grants or dispositions of public land to establish their propriety or legality, the Commission is under Article 67(2) of the Constitution which sets out its functions and Section 14 of the National

Land Commission Act, 2012 conferred with the jurisdiction and mandate to carry out those functions.

15. The functions of the National Land Commission are set out under Article 67 (2) of the constitution of Kenya and include:

- a) to manage public land on behalf of the National and County governments;**
- 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.**

16. Section 14 of the *National Land Commission Act*, on the other hand outlines the mandate of the Commission and provides as follows:

(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.

(2) Subject to Articles 40, 47 and 60 of the Constitution, the Commission shall make rules for the better carrying out of its functions under subsection (1).

(3) In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.

(4) After hearing the parties in accordance with subsection (3), the Commission shall make a determination.

(5) Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.

(6) Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.

(7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.

(8) In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the Constitution.

(9) The Commission may, where it considers it necessary, petition Parliament to extend the period for undertaking the review specified in subsection (1).

17. Jurisdiction of the National Land Commission was considered in the case of **Republic -vs- National Land Commission Ex parte Holborn Properties Ltd [2016] eKLR**, where the court held that the Commission had power to review titles that are privately held where such titles were initially public land and were converted to private holdings with a view of ascertaining whether the title was properly and legally acquired.

18. The question this Court is called upon to determine is whether the 1st Respondent in carrying out its mandate to investigate the title infringed the rights of the Applicants. Article 47 of the Constitution of Kenya makes provision for the threshold to be met by any institution that exercises any administrative function that has the potential to impact or affect the interest of a person adversely. Article 47 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.

19. The Court of Appeal in the case of **Judicial Service Commission -vs- Mbalu Mutava & Another [2015] eKLR** held as follows:

“In exercise of its powers under the Constitution or under legislation, public officers, state officers, state organs and independent bodies or tribunals may make decisions which may be characterized as judicial, quasi-judicial or administrative depending on the empowering provision of the Constitution or the law. The landmark decision of the House of Lords in Ridge v. Baldwin [1964] AC 40 clarified the law, that the rules of natural justice, in particular right to fair hearing, (audi alteram partem rule) applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties. In that case, Lord Hodson at page 132 identified three features of natural justice as:

- i. the right to be heard by an unbiased tribunal.
- ii. the right to have notice of charges of misconduct.
- iii. the right to be heard in answer to those charges.

20. The 1st Respondent deponed that the Applicant was vide a letter dated 23rd September 2016 invited to attend hearing and that public notice was given in the newspapers inviting interested parties to appear before them at Kisumu Tom Mboya Labour College for a review hearing on 5th October 2016 with a view of establishing the legality of the title documents held by the affected parties as published in the notice. The Applicant denied receipt of any notice from the Respondent and therefore stated they could not have attended the hearing in regard to which they had no notification. The Applicant further contended they had no information and/or documentation that would have enabled them to know the basis of the complaint against them.

21. The 1st Respondent responding to the Applicant’s assertion that they were not served deponed under paragraph 14 of their replying affidavit that one Henry Motanya Oyugi a process server effected service on all the interested parties as per the affidavit of service sworn by him on 4th October 2016 exhibited as annexure **“B1-3”**. The Court has reviewed the affidavit of service and has noted that the process server stated he received the complaint letters for service on the affected parties on 3rd October 2016 and that he apparently on the same date served all the 6 interested persons named therein. The letter of complaint dated 13th October 2016 and the letter dated 23rd September 2016 giving the notice of hearing did not carry the Applicant’s name as one of the parties to be served and it is not clear if the Applicant was served at all. The affidavit lacks any details as to how each of the interested persons were served. The notice vide the Commission’s letter dated 23rd September 2016 constituted the statement of the complaint/charges and notice of hearing on 5th October 2016. This is the notice the process server allegedly served on the Applicant on 3rd October 2016. The affidavit of service does not specify in what manner and who was served and where the service was effected. Apart from the notice of hearing being too short as to be unreasonable the affidavit of service is deficient and the court cannot hold that there was any valid service of the notice of hearing on the Applicant.

22. In the case of **Republic -vs- National Land Commission & Tropical Treasure Limited Ex-parte Krystaline Salt Limited (2015) eKLR** Korir J. held as follows:

“[68.] The notice in the newspapers did not have the name of the complainant and neither did it disclose the complaint against the Applicant’s titles. In order for the Applicant to prepare its defence it ought to have been served with the particulars of the allegations by the Interested Party and informed of the manner in which it allegedly obtained grants to public land in an illegal or improper manner.

[69.] In a matter that eventually led to the revocation of the Applicant’s title, a notice in the newspapers without any useful information was not sufficient...”

23. The 1st Respondent’s replying affidavit affirms that the Applicant amongst other persons were served with the Notice of the Commission’s intention to review their Grants and/or titles vide a letter dated 23rd September 2016 and a public notice carried in local dailies inviting the Applicant and other persons named to attend hearing at Kisumu Tom Mboya Labour College on 5th October 2016. The notice through the Newspaper and the said letter dated 23rd September 2016 were deficient to the extent that they did not set out any particulars of the facts constituting any alleged illegality, irregularity and/or fraud in the alienation and/or acquisition of the property held by the Applicant. The notices did not afford the Applicant the opportunity to know the allegations and/or case they were required to answer and as observed this notice is not shown to have been directed to the Applicant. The notice in my view did not satisfy the provisions of Article 47(1) of the Constitution which provides that:

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

The 1st Respondent was in actual sense carrying out an administrative function as per its mandate yet it did not avail to the Applicant the relevant information and/or any documents to enable them to respond appropriately. The 1st Respondent’s actions and the process of review they adopted was more or less in the nature of trial by ambush whereby the 1st Respondent furnished no information, documents and/or particulars of the allegations/charges and yet one was supposed to respond to the allegations. There could be no fairness in such circumstances.

24. The Fair Administrative Action Act 2015 Section 4(3) and (4) provides as follows:

4(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.**

In the instant matter the 1st Respondent was exercising an administrative duty and was bound to act in compliance with the provisions of Article 47 of the Constitution and the provisions of Section 4 of the Fair Administrative Action Act which gives effect and expression to Article 47 of the Constitution. I am not satisfied the 1st Respondent acted in conformity with these provisions when they subjected the Applicant to administrative action. I am not able to find in the circumstances of this case, that the Applicant was given a fair hearing before the recommendation to revoke their title was made.

25. Justice G. V. Odunga in the case of **Republic -vs- Registrar of Titles & Another Ex parte David Gachira & Another [2014]eKLR** stated as follows in a situation where a party had not been given an opportunity to be heard:

“...It is clear that the right to property is constitutionally protected and a person can only be deprived of that right as provided under the Constitution. Both under the Constitution and relevant statutory provisions a registered proprietor’s title to land cannot be arbitrarily cancelled without the proprietor being afforded an opportunity of being heard. A decision by the Registrar to unilaterally cancel or revoke a title even if he had such powers would fly in the face of the express constitutional provisions.”

26. The net result is that I find the decision by the 1st Respondent respecting the recommendation to revoke the title to land parcel **LR No. Kisii Municipality/Block III/157** conveyed vide Kenya Gazette Notice No. 6862 published on 17th July 2017 is unsustainable and has to be quashed. I accordingly allow the Applicant’s Notice of Motion dated 9th November 2017 in terms of prayers (a) and (b) of the Notice of Motion to the extent that the Gazette Notice No. 6862 relates to and affects land parcel **Kisii Municipality/Block III/157**. The costs of the application are awarded to the Ex parte Applicant.

27. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT KISII THIS 19TH DAY OF JULY 2019.

J. M. MUTUNGI

JUDGE