



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC JR NO. 1 OF 2019

REPUBLIC.....APPLICANT

VERSUS

1. THE INSPECTOR GENERAL OF POLICE NATIONAL POLICE SERVICE

2. THE DIRECTOR BANKING FRAUD INVESTIGATION DEPARTMENT

3. THE CHIEF LAND REGISTRAR- MOMBASA.....RESPONDENTS

NATIONAL BANK OF KENYA LIMITED.....EX-PARTE APPLICANT

JUDGMENT

1. The Ex-parte Applicant pursuant to the leave granted by this court on 2nd January, 2019 filed the substantive motion dated 22nd January 2019. The applicant prays for orders

1. That an order of Certiorari be and is hereby issued to remove into this Honourable Court for purposes of being quashed the decision and orders of the National Police Service – Directorate of Criminal Investigations and the Banking Fraud Investigations Department contained in the letter dated 21st April 2017 addressed to the Chief Lands Registration Officer – Lands Office – Mombasa directing that a restriction be placed on the properties KNOWN AS MSA/BLOCK I/167, TITLE NO. MN/I/5208, MSA/BLOCK I/392, MSA/BLOCK I/270, MSA/BLOCK I/190, LR NO. 5207 (CR. NO. 18628), MSA/BLOCK I/198, LAMU/BLOCK IV/2, MSA/BLOCK XXXII/10, 11,12, 16,& 19, MSA/BLOCK XI/897, MSA/BLOCK I/373, MSA/BLOCK XXIV/19, MSA/BLOCK XXVI/612, MN/I/1348, 1285,3150, 5229, 13574, 18446 & 18447, MN/I/11911, MN/III/9035, MSA/BLOCK XXIV/53, MSA/BLOCK XX/146, MV/VI/3982.

2. That an order of certiorari be and is hereby issued to remove into this Honourable Court for purposes of being quashed the consequential decisions and orders of the Chief Lands Registrar – Mombasa to implement the directive contained in the abovementioned letter dated 21st April, 2017 in respect of the properties known as MSA/BLOCK I/167, TITLE NO.MN/I/5208, MSA/BLOCK I/392, MSA/BLOCK I/270, MSA/BLOCK I/190, LR. NO. 5207 (CR. NO. 18628), MSA/BLOCK I/198, LAMU/BLOCK IV/2. MSA/BLOCK XXXII/10, 11, 12, 16 & 19, MSA/BLOCK XI/897, MSA/BLOCK I/373, MSA/BLOCK XXIV/19, MSA/BLOCK XXVI/612, MN/I/1348, 1285, 3150, 5229, 13574. 18446 & 18447, MN/I/11911, MN/III/9035, MSA/BLOCK XXIV/53, MSA/BLOCK XX/146, MV/VI/3982.

3. That each party to bear their own costs of this motion.

2. The Application is premised on the grounds set out in the motion and supported by the grounds set out in the statutory statement dated 31st December, 2018, the verifying affidavit sworn by Wanda Atsiaya on 31st December 2018 and the document annexed thereto. It is deposed that in the ordinary conduct of its business the Applicant granted various loan facilities to borrowers and obtained various securities for the granted loans. Copies of the charge and further charge documents as well as title deeds in respect of various charged properties have been annexed. The applicant avers that in the premises, it is the holder of registered rights and interest as chargee over the said properties. It is deposed that Article 40 of the Constitution protects the property rights and interest of the applicant over the suit properties from any arbitrary act, omissions or decisions whose effect is to deprive, deny, violate, infringe or threaten the property rights and interests of the Applicant over the aforementioned properties. That one of the rights to the applicant over the said properties is the right to exercise its contractual and statutory power of sale as chargee over the said properties.

3. The applicant avers that by way of a letter dated 21st April 2017, the 1st Respondent made a decision and ordered the 2nd Respondent to place a restriction over the properties known as MSA/BLOCK I/167, TITLE NO.MN/I/5208, MSA/BLOCK I/392, MSA/BLOCK I/270,

MSA/BLOCK I/190, LR. NO. 5207 (CR. NO. 18628), MSA/BLOCK I/198, LAMU/BLOCK IV/2. MSA/BLOCK XXXII/10, 11, 12, 16 & 19, MSA/BLOCK XI/897, MSA/BLOCK I/373, MSA/BLOCK XXIV/19, MSA/BLOCK XXVI/612, MN/I/1348, 1285, 3150, 5229, 13574. 18446 & 18447, MN/I/11911, MN/III/9035, MSA/BLOCK XXIV/53, MSA/BLOCK XX/146, MV/VI/3982 which included the properties charged to the Applicant as securities for loans. The letter has been annexed and marked “NBK -2”

4. The applicant avers that the 1st and 2nd Respondents failed to grant a hearing to the Applicant prior to making the decision of and ordering the 3rd Respondent to place restriction over the suit properties. That in the foregoing premise, the decisions and orders of the 1st and 2nd respondents directing the 3rd Respondent to place a restriction over the suit properties without according the Applicant fair hearing is tainted with illegality and is therefore amenable to a judicial review order of certiorari.

5. The Applicant avers that pursuant to the decisions and orders of the 1st and 2nd Respondents contained in the letter dated 21st April, 2017, the 3rd Respondent proceeded to implement the directive of the 1st Respondent over the suit properties. That as at the time the 1st and 2nd respondents issued the letter dated 21st April, 2017 and at the time the 3rd Respondent implemented the directive contained in the letter dated 21st April, 2018 and placed the impugned restriction over the properties, the rights of the Applicant to exercise its contractual and statutory power of the sale had already crystalized and that the applicant had indeed commenced recovery actions by way of exercising its power of sale of the suit properties. Wanda Atsiaya deposed that he was aware of the existence of various suits filed in various courts in which the applicant herein and various chargors and borrowers herein are litigating over the rights of the Banks to realize its securities in exercise of its statutory power of sale which include some of the properties contained in the letter dated 21st April 2017. It is stated that some of the suits include Mombasa High Court Civil Case Number 69 of 2017- **Juja Coffee Exporters Limited –v- National Bank of Kenya Limited** and Malindi ELC case number of 90 of 2017 – **Juja Coffee Exporters Limited –v- National Bank of Kenya Limited**. Copies of the pleadings filed by the parties in those cases are annexed and marked “NBK-3”.

6. The applicant avers that the actions of the Respondents herein aided the Borrowers in the aforementioned suits by making an order and decision whose effect is to restrain the Bank from realizing its securities by way of craft. That essentially the respondents’ decision granted the Borrowers restraining orders through the backdoor. The applicant avers that the provisions of Section 76 (1) of the Land Registration Act provide that the Registrar, may either with or without the Application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order prohibiting or restricting dealings with any particular land, lease or charge. It is the Applicant’s contention that one of the persons considered fit for purposes of directing enquiries, serving notices to, and being heard under Section 76 (1) of the said Act are chargees such as the Applicant who holds the statutory right and power to dispose of the suit properties as the chargee thereof. In addition the provision of Section 77(1) of the said Act provide that the Registrar shall give notice, in writing, of a restriction to the proprietor affected by the restriction. That therefore, the 3rd Respondent herein is not only under an obligation to direct inquiries, serve notices to and accord the Applicant a fair hearing as required by Section 76(1) aforesaid prior to placing a restriction over the suit properties, but the 3rd Respondent is also under an obligation to give a notice in writing to the Applicants once the 3rd Respondent placed a restriction over the suit properties.

7. The applicant states that contrary to the mandatory provisions of Section 76 and Section 77 aforesaid, the 3rd Respondent failed to direct any inquiry arising out of the aforementioned letter dated 21st April, 2017, failed to serve any notices upon the applicant, and failed to hear the applicant prior to making the decision and order of placing a restriction over the abovementioned suit properties, and failed to give any or any notice in writing to the Applicant of a restriction placed over the suit properties, thereby arriving at an erroneous decision. It is deposed that on various occasions, the Applicant visited the 3rd Respondent and presented instruments for registration but the 3rd Respondent declined to make any entries in favour of the Applicant citing the letter dated 21st April, 2017 together with its contents as the reason for refusal. That in fact, the Applicant has subsequently been unable to even carry out a search over some of the suit properties.

8. The Applicant avers that as a result of the decision and orders of the 3rd Respondent placing a restriction over the suit properties contrary to the provisions of Sections 76(1) and 77 (1) aforesaid, the Applicant was condemned unheard contrary to the provisions of the Fair Administrative Action Act Number 47 of 2015 and the dictates of Natural justice. That the decisions of the 3rd Respondent of placing a restriction over the suit properties without serving any Notice upon the Applicant and without according the Applicant the right to be heard prior to placing the restriction is unprocedural and tainted with illegality and is therefore amenable to judicial review and being quashed. That the direct and cumulative effect of the actions of the respondents as complained of hereinabove is the impeding of the rights of the Applicant to exercise its statutory right and contractual power of sale over the suit properties contrary to the provisions of the Fair Administrative Action Act and the dictates and doctrines of natural justices.

9. It is further deposed that in addition to the above, the Applicant is aware that criminal charges were commenced in Mombasa Criminal Case Number 220 of 2017 in which the properties listed in the letter dated 21st April 2017 are mentioned. Copies of the charge sheet is annexed and marked “NBK - 4”. The applicant states that it is not a party, suspect, witness or even a complainant in the said criminal proceedings, that the securities held by the applicant over the suit properties are not the subject of the aforementioned criminal proceedings and that no orders have been issued by the trial court restricting the registration of any dispositions by or in favour of the applicant in respect of the suit properties. The applicant avers that the subject of the said criminal case is a borrowing of Kshs.1,530,500,000 from Kenya Commercial Bank Limited and not the applicant. That in addition, the wording of the letter dated 21st April 2017 indicates that a restriction was to be placed against the titles to the properties pending investigations, and that it is now apparent that the 1st and 2nd respondents completed their investigations culminating to the charging of the accused persons in the aforementioned criminal case number 220 of 2017 the purpose and import of the letter dated 21st April 2017 has been spent. The applicant states that in the foregoing premises, the decision of the 3rd respondent of continuing to implement the directives of the 1st and 2nd respondents as contained in the letter dated 21st April, 2017 to the detriment of the Applicant is also unfair, unprocedural and illegal. That if a stay of the decisions and orders of the 1st and 2nd Respondents as contained in the letter dated 21st April 2017 as well as the consequential decision and orders of the 3rd Respondent placing a restriction over the suit properties are not granted as prayed and if the prayers sought are not granted, then the applicant will continue to stand condemned by actions tainted with illegality. The applicant contends that it is in the interests of justice and fairness that the court grants the orders sought herein.

10. The respondents opposed the motion and filed grounds of opposition dated 9th April 2019 which raises the following grounds

1. That there are several parcels of land charged by the applicant as securities for the loans granted.
2. The registered owner of the parcels of land the late Tahir Sheikh Said never approved any of the charges thus had reported the case to Urban Police in Mombasa
3. That the complaint led to launching of investigations by the DCI Office Urban Mombasa and the Criminal case Number 220 of 2017.
4. That the letter under reference CID/BFI/SEC/4/4/VOL.285/98 dated 21st April, 2017 addressed to the Chief Lands Registrar directing that a Restriction be placed over the several parcels of land was to prevent any dealings until the investigations were concluded.
5. That a judicial review orders cannot be issued to quash the restriction as the reason for the restriction is to preserve the Estate of the Late Tahir Sheikh Said until the conclusion of the Criminal Case Number 220 of 2017.
6. That a judicial review order cannot be issued to quash the restriction as a process of law which is preserving the estate of the Late Tahir Sheikh Said until the conclusion of the criminal case number 220 of 2017.
7. That if the court grants the judicial review orders quashing the restriction, the orders will frustrate the mandate of the police officers involved in the pending investigations.
8. That the National Bank of Kenya should furnish the police with a confirmation that the Estate of the Late Tahir Sheikh Said approves the respective charges for the respective parcels of land as securities.
9. That each of the parcels of land subject to this suit be treated separately.
10. That the investigations culminating to the charging of the accused persons in the criminal case number 220 of 2017 still continue thus the Restriction should remain in force.
11. That by quashing the Restriction, the National Bank of Kenya will in turn frustrate the outcome of the Criminal Case Number 220 of 2017 upon exercise of its statutory power of sale, should the accused persons be found guilty of forgery of deeds of guarantee and indemnity in the names of the TSS companies which enabled them get the bank loans.

11. Directions were given that the motion be canvassed by way of written submissions. The applicant filed its submissions through M/s Munyao, Muthama & Kashindi Advocates on 6th June, 2019. The Respondents counsel did not file submissions within the time granted or at all.

12. In their submissions the applicant's counsel submitted that the facts are neither in dispute nor contested hence not controverted as the Respondents have only opposed the Motion by way of Grounds of Opposition. They relied on the case of **Republic –v- National Land Commission Ex-parte Satellite Industrial Supplies Limited (2018)eKLR** in which the court held that “it is trite law that grounds of opposition raise issues of law and not of fact.” They also relied on the case of **Kennedy Otieno Odiyo & 12 Others -v- Kenya Electricity Generating Company Limited (2010)eKLR**. It was reiterated that the suit properties were charged to the Bank as securities for loans granted by the bank to various borrowers, and that the bank is the holder of registered rights and interest as chargee over the suit properties. That one of the rights that the Banks holds over the suit properties is the right to exercise its contractual and statutory power of sale as chargee over the suit properties. It was further submitted that Article 40 of the Constitution of Kenya protects the property rights and interests of the Banks as chargee over the suit properties from any arbitrary act, omissions or decision whose effect is to deprive, deny, violate, infringe or threaten the property rights and interest of the Bank over the suit properties. That the respective borrowers defaulted in their loan repayment obligations and as a result the bank became entitled to realize its securities by way of sale of the suit properties.

13. It was the applicant's submission that the respondents did not give the bank any notice nor hearing prior to placing the impugned restrictions over the suit properties therefore failing to comply with the mandatory procedure set out under the provisions of Sections 76 and 77 of the Land Registration Act. This is because the 3rd respondent failed to direct any inquiry arising out of the letter dated 21st April 2017 upon the Bank, failing to serve any notices upon the bank prior to placing the impugned restrictions over the suit properties, failing to give the bank a fair hearing let alone a chance to be heard prior to placing the impugned restrictions on the suit properties and failure by the Respondents to comply with the provisions of Section 76 and 77 aforesaid. The Applicant's counsel relied on the case of **Ezekiel Misango Mutisya –v- National Land Commission & 6 Others (2014)eKLR** and the case of **Itrade Company Limited –v- Jane Mukami Mwangi & Another(2015)eKLR..**

14. It is the Applicant's submission that it was prejudiced by the unprocedural, irregular and unlawful actions of the respondents and that the effect of the impugned Restrictions is that the applicant has been unable to register any disposition over the suit properties as chargee. It is the applicant's submission that the respondents did not have any basis to place the impugned restriction over the suit properties. It was submitted that the 1st and 2nd respondents are misleading the court by saying the suit properties are owned by Tahir Sheikh Said, adding that if the respondents intended to challenge this fact, they should not have done so by way of a grounds of opposition. They relied on the case of **Kennedy Otieno Odiyo & 12 others –v- Kenya Electricity Generating Company Limited (2010)eKLR** where the court held that “Grounds of opposition addressed only issue of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond the issues raised by the application in the supporting affidavit, thus what was deposed to was not entered nor rebutted by the respondents. It must be taken to be true.” The Applicant further relied on the case of **Kenya Akiba Micro Financing Limited –v- Ezekiel**

Chebii & 14 Others (2012) eKLR in which the court held as follows: “in my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not, it remains a fact and the truth of the matter.” It is therefore the applicant’s submissions that these cited cases settles the fact that the suit properties are not registered in the name of the late Tahir Sheikh Said. That the alleged investigations in respect of the suit properties proceeded from an irrational and faulty premises and as such, the actions that proceed on the basis of such irrational and faulty premises which affected the rights of the bank as chargee over the suit properties should not be left to stand, and should be quashed as prayed by the applicant.

15. It was further submitted that the respondents failed to consider relevant factors prior to placing the impugned restriction over the suit properties. That the respondents failed to consider the fact that various suits had already been filed litigating on the issue as to whether the bank was entitled to realize its securities by way of sale of the suit properties, including Mombasa High Court Civil Case No.69 of 2017-**Juja Coffee Exporters Limited –v- National Bank of Kenya Limited** in which in the pleadings the chargor confirms that it took a loan from the bank and charged the suit properties as security for the loan and that now owes the bank outstanding amounts. The applicant submits that it is evident that the respondents failed to address their minds on the existence of those suits. That the respondents knew that once the restriction is placed by the 3rd respondent then bank was effectively restrained from realizing its securities by way of sale of the suit properties. It was further submitted that the respondents argument that quashing the restriction placed over the suit properties will interfere with investigations beats logic as the investigations were long completed and criminal charges filed in court, to wit Mombasa Criminal Case Number 220 of 2017. Further, that 1st and 2nd respondents directive that the impugned restrictions be placed over the suit properties on the basis of ‘pending investigation’ in respect of a criminal case which was already proceeding in court is evidently stranger than fiction. In addition, it was submitted that there is no correlation between the offences in the charge sheet in criminal case no.220 of 2017 and the securities created in favour of the bank over the suit properties, or even the suit properties themselves. That the allegation that quashing the restriction placed over the suit properties will jeopardize criminal case no.220 of 2017 does not have any legal or factual basis, and illogical. It is further submitted that it was unreasonable and irrational for the 1st and 2nd respondents to direct the placing of the impugned restriction well knowing that the bank has charges over the suit properties, and well knowing that the offences in Criminal Case No.220 of 2017 do not relate to the securities held by the bank. That these are relevant factors which the 1st and 2nd respondents failed to consider before making their decision of directing 3rd respondent of placing the caveat. It is the applicant’s submission that the decision to direct the placing of a restriction over the suit properties was accentuated by other extraneous reasons outside criminal case 220 of 2017 and was calculated at granting the defaulting borrowers an injunction through the back door. The applicant’s submission is that the decisions and actions of the respondent of placing the impugned restriction over the suit properties are clearly irregular, illegal and therefore unlawful. It is the applicant’s submission that it has established a case for the issuance of the prerogative orders sought in the motion and urged the court to grant the prayers sought in the notice of motion dated 22nd January 2019.

16. I have considered the application. The issue that arises for determination is whether the orders sought herein should be granted or not. The purview of judicial review was clearly set by Lord Diplock in the case of *Civil Service (1985) AC 374* at 401D when he stated that:

“Judicial review has 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 had 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.”

17. 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.

18. 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 the 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) Notice of the right to legal representation, where applicable; or
- 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 proceeding, 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 fairing hearing.

19. In this case, it is not in dispute that the suit properties were charged to the bank, therefore the bank had proprietary interest in the suit properties as chargee. Article 40 of the constitution of Kenya no doubt protects the proprietary rights and interests of the applicant as a chargee over the suit properties from any arbitrary act, omission or decision whose effect is to deprive, deny, violate, infringe or threaten the property rights and interests of the Applicant over the suit properties.

20. It is not disputed that by way of a letter dated 21st April 2017 the 1st and 2nd Respondents directed the 3rd respondent to place a restriction over the suit properties, and the 3rd respondent proceeded to place a restriction over the suit properties as directed in the said letter. That the placing of the restriction over the suit properties was an administrative action by the respondents is not in dispute. The respondents were therefore under a duty to ensure that their actions were expeditious, efficient, lawful, reasonable and procedurally fair. Procedural fairness necessarily requires that the persons who are likely to be affected by the decisions be afforded an opportunity of being heard before the decision is taken. Further the provisions of the law must be adhered to.

21. Section 76 of the Land Registration Act No. 3 of the 2012 provides as follows:

76. Restrictions

- 1) **For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land or charge.**
- 2) **A restriction may be expressed to endure –**
 - a. **For particular period;**
 - b. **Until the occurrence of a particular event; or**
 - c. **Until the making a further order is made, and may prohibit all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.**
- 3) **The registrar shall make a restriction in any case where it appears that the power of the proprietor to deal with the land, lease or charge is restricted.**

Section 77 (1) provides that “The Registrar shall give notice, in writing, of a restriction to the proprietor affected by the restriction. ”

22. From the provisions referred to hereinabove, it is clear that one of the persons considered fit for purposes of directing inquires, serving notices to, and being heard and to be given notice in writing are chargees such as the Applicant herein, which holds statutory right and power to dispose of the suit properties as chargee. The 3rd Respondent was under an obligation to direct inquiries, serve notice to and to accord the Applicant a fair hearing as required by Section 76(1) aforesaid prior to placing a restriction over the suit property. In this regard, I wish to adopt the holding in the case of **Ezekiel Misango Mutisya –v- National Land Commission & 6 Others (2014)eKLR** in which the court held as follows: “In this case, in the absence of any evidence that the 2nd respondent complied with the provisions of Section 76 and 77 of the Land Registration Act, this court has no option but to find that the 2nd respondent’s action in placing a restriction on the suit land was

tainted with procedural irregularity. It follows that the Applicants' application is merited."

23. The applicant has stated that it has been prejudiced by the unprocedural, irregular and unlawful actions of the respondents. That the effect of the impugned restriction is that the applicant has been unable to register any disposition over the suit properties. In this case, the respondents filed grounds of opposition in response to the application. As was held in the case of **Kennedy Otieno Odiyo & 12 Others –v- Kenya Electricity Generating Company Limited (supra)** "Grounds of opposition addressed only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the application in the supporting affidavit. Thus what was deposed to was not entered nor rebutted by the respondents. It must be taken to be true." Therefore, in my view, the facts deposed to by the applicant have not been challenged and remain facts and the truth for that matter. The respondents chose not to file any statement on oath in answer to the applicant's averments. Moreover even if the restriction was placed over the suit properties until investigations were concluded, the applicant has laid before this court documents in the form of charge sheet in criminal case 220 of 2017. That people have already been arraigned in court and there being no denial that the hearing is already underway, is an admission that investigations were long concluded and the criminal charges filed in court.

24. In my considered view, the respondents failed to follow the procedure laid down in Section 76 and 77 of the Land Registration Act before arriving at the impugned decision of placing restriction over the suit properties. Moreover, the respondents were obliged to afford the Applicant a hearing before they made their decision which decision was, undoubtedly bound to adversely affect the rights and interests of the applicant over the suit properties. In my view, the decision was materially influenced by an error of law and was disproportionate to the interests of the Applicant and also infringed upon the applicant's right to property as guaranteed by Article 40 of the Constitution. The said decision violated the legitimate expectations of the Applicant that the 3rd respondent would act in good faith and be just in implementing the law. Further, in my view, the said decision was unlawful, unreasonable and procedurally unfair in that the applicant, who had an interest and right in the suit properties as chargee was not given substantive written reasons for the decisions by the respondents and that no prior and adequate notice were given and therefore the applicant was not accorded an opportunity to be heard and to make representations regarding the said decision contrary to the provisions of sections 4 (3) (a) and (b) and 4(4) (a) and (b) of the Fair Administrative Action Act.

25. In the case of *Onyango Oloo –v- Attorney General (1989)EA*, 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 be seen to have acted 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 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 decision would have been arrived at...."

Where a party has not been heard, a decision made in breach of natural justice are null and void

26. There is no doubt that the Applicant is the chargee of the suit properties. The Land Registration Act does not give the respondents power to place restrictions over charged property without notifying the chargee. The respondent's decision, in my view was tainted with procedural irregularity and therefore illegal. Further, it is my view that rules of natural justice were flouted and the decision cannot stand. Consequently, I find merit in the Notice of Motion dated 22nd January 2019 and the same is allowed in its entirety.

DATED, SIGNED and DELIVERED at MOMBASA this 29th day of October 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Omondi for Applicant

Mkok for Respondents.

Yumna Court Assistant

C.K. YANO

JUDGE