



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

JR MISC. APPLICATION NO. 8 OF 2019

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW FOR ORDERS OF CERTIORARI & PROHIBITION

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF TITLE NO. KILIFI/JIMBA/409 & TITLE NO. KILIFI/JIMBA/411

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE NATIONAL LAND COMMISSION.....RESPONDENT

PIERRE LOPORTE LIMITED.....EX-PARTE

JUDGMENT

1. By this Notice of Motion application dated 22nd May 2019, Pierre Loporte Ltd (the Ex Parte Applicant) prays for Judicial Review orders of Certiorari and Prohibition to issue to quash and prohibit the recommendations of the National Land Commission (the Respondent) contained in Gazette Notice No. 1547 and dated 15th February 2019 in their entirety in regard to Title No. Kilifi/Jimba/409 and Title No. Kilifi/Jimba/411.
2. The application is supported by a Statutory Statement filed in support of the application for leave and the averments contained in the Verifying Affidavit of Roberto Lenzi, a director of the Applicant Company.
3. It is the Ex-parte Applicant's case that it is the registered proprietor of both parcels of land situated at Watamu within Kilifi County. The Applicant avers that title No. Kilifi/Jimba/409 was previously owned by one Mohamed Ahamad Athumani having been granted the same pursuant to an application for a Settlement Plot from the Ministry of Lands in the year 1999. In or about the year 2002-2003, the said Mohamed Ahamad Athumani sold the said parcel of land to the Applicant who took over occupation subsequently and resides on the parcel of land to-date.
4. In regard to Title No. Kilifi/Jimba/411, the Ex-parte Applicant asserts that it was previously registered in the name of one Shaibu Shosi Famau who obtained the same by way of allocation from the Settlement Fund Trustees in the year 2003. The said Shaibu subsequently sold and transferred the property to the Applicant in the year 2003. The Applicant took possession and has since occupied the property having been issued with a Title Deed in its name on 15th January 2003.
5. The Ex-parte Applicant states that sometime in October 2018, the Respondent herein undertook inquiries into land disputes in Kilifi County pursuant to its mandate under Section 5(1) (e) of the National Land Commission Act. It is the Applicant's case that at no time during the said inquiries did the Respondent invite the Applicant to make representations in regard to the two parcels of land registered in its name.
6. At the conclusion of the said inquiries however, the Respondent made recommendations vide the impugned Gazette Notice dated 15th

February 2019 as follows:-

a) Kilifi/Jimba/409-“Regularize in favour of Shaibu Shosi. Revoke title to Baya Kadenge, Joyce Sidi Chome and Anitochia Ltd.

b) Kilifi/Jimba/411-“Regularize in favour of Daniel Gilbert Kimani.

7. Arising from the foregoing the Ex-parte Applicant is now apprehensive that the effect of the implementation of the said recommendations will have the adverse effect of unprocedurally extinguishing the Applicant’s proprietary interest in the said parcels of land without the Applicant being granted an opportunity to be heard or to make any representations and hence the orders sought herein.

8. The Respondent was served with the Substantive Motion but neither entered appearance nor filed a response to the Substantive Motion.

9. As it were, for a decision to be amenable to judicial review, it must affect an individual’s interests and should arise out of the exercise of a public function. In this regard, where a public officer has been granted statutory powers, the exercise of such powers is subject to the supervisory jurisdiction of the Court. Where it is established that the decision made by such a public officer affects the rights of an individual, it is the duty of the Court to ensure that the exercise of such powers is legal, rational and compliant with the principles of natural justice.

10. The rationale for the Court’s supervisory role in this regard was explained by J.B Ojwang J (as he then was) in **Leonard Sitamze –vs- The Minister for Home Affairs & 2 Others, (Nairobi High Court Misc. Civil Application No. 430 of 2004)** as follows:-

“Dr. Khaminwa for the Applicant submitted that the Powers granted to the Minister of Home Affairs under Section 3 and 8 of the Immigration Act were well and truly amenable to abuse. On this argument, I am in agreement with Counsel. He then submitted that in such a situation, where powers granted under the law are open to abuse, to the detriment of the individuals in the matter of fundamental right, then intrinsically and as of the very essence of judicialism and of the well accepted principles of the rule of law in a common law system such as that applicable in Kenya, the Judicial Review jurisdiction of this Court is, perforce, applicable and indeed mandatory. This with respect, is the correct statement of the most elemental principle of law governing the jurisdiction of the High Court, in all situations where an abuse of public powers is alleged to have come to pass. Powers of this nature are quasi-judicial. They are potentially inimical to the fundamental human rights of the individual and in civilized society, there must be an agency of state in place to protect those rights, and thus to call to order any public officer who treads rough-shod upon them. That agency of the State is this Court, it has full jurisdiction to exercise review powers over all public bodies which make decisions with impacts on the sphere of individual liberty.”

11. In explaining the scope and purpose of Judicial Review in **Municipal Council of Mombasa –vs Republic & Umoja Consultants Ltd, (2002)eKLR**, the Court of Appeal observed as follows:-

“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, ie the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision-maker take into account relevant matters or did he take into account irrelevant matters. 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 over the decider would involve going into 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.”

12. In the matter before me, the Ex-parte Applicant does not question the jurisdiction of the Respondent as conferred under Section 5(1) (e) of the Respondent’s constitutive Act. The Applicant is however outraged that a decision was made touching on property for which it was the registered owner without it being given a hearing.

13. I have perused and considered the impugned Gazette Notice No. 1547 dated 15th February 2019 in regard to the two suit properties. There is no indication that the Respondent heard and/or gave the Applicant an opportunity to be heard in regard to the claims made thereon before it arrived at its decision. The Respondent was served with the Motion herein in order to enable them come to Court and clarify the circumstances in which they arrived at their decision. They have not done so.

14. The Ex-parte Applicant has annexed to this application Title Deeds indicating it was the registered owner of the parcels of land in question. The Title deed for Kilifi/Jimba/409 was issued in the Applicant’s name on 23rd August 2002 while that for Kilifi/Jimba/411 was issued on 15th January 2003. In the absence of any evidence of revocation of the titles, I think it was incumbent upon the Respondent in conducting its inquiry as by law mandated to give an opportunity to the Applicant to be heard.

15. Failure to do so is not only unfair but violates the Applicant’s right to own property as provided under Article 40 of the Constitution. It violates the Applicant’s right to fair administrative action as stipulated under Article 47 of the Constitution and offends the provisions of Section 4 of the Fair Administrative Action Act.

16. In the premises, this Court finds that the Applicant’s Notice of Motion dated 22nd May 2019 is merited. The same is accordingly allowed in terms of prayers ‘a’ and ‘b’ thereof.

17. The Respondent shall meet the costs of this application.

Dated, signed and delivered at Malindi this 24th day of October, 2019.

J.O. OLOLA

JUDGE