



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC JUDICIAL REVIEW NO. 1 OF 2017**

**BENSON WEKESA MILIMO.....APPLICANT**

**VERSUS**

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

**AND**

**THE BOARD OF MANAGEMENT,**

**SITATUNGA SECONDARY SCHOOL.....1<sup>ST</sup> INTERESTED PARTY**

**CHRISTOPHER MUKHWANA.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGMENT**

1. The Ex parte applicant filed his Chamber Summons dated 29/9/2017 at the Constitutional and Judicial Review Division in Nairobi whereupon it was received and allocated Miscellaneous Civil Application No. 600 of 2017 (JR). On 2/10/2017 the Hon Odunga J, issued an order transferring the matter to the Environment and Land Court. On 3/10/2017, the Hon. Justice S. Okongo, Presiding Judge, Environment and Land Court, issued an order transferring this matter to Kitale for hearing and final determination.

2. The matter first came up before me on 13/10/2017 when I granted prayers 1, 2 and 3 for the Chambers Summons dated 29/9/2017. The substantive notice of motion for Judicial Review dated 23/10/2017 was filed on 31/10/2017. It seeks the following orders:-

**(1) An order of certiorari do issue to remove into this court and quash the notice of eviction issued by the National Land Commission dated 27<sup>th</sup> July, 2017 in respect of the whole or part of all that parcel of land known as Land Reference Number Trans-Nzoia/Sinyerere/66 and as wholly or partly referred to in the said notice of eviction Plot 354, Sinyerere Settlement Scheme and directed to the applicant.**

**(2) An order of certiorari do issue to remove into this court and quash any and or all publication (s), proceeding(s) and or decision(s) of the National Land Commission, its agents, employees and or any other person(s) whosoever or howsoever acting on, with and or under its instructions preceding and or culmination of which is the notice of eviction issued by the National Land Commission dated 27<sup>th</sup> July, 2017 in respect of the whole or part of all that parcel of land known as Land Reference Number Trans-Nzoia/Sinyerere/66 and as wholly or partly referred to in the said notice of eviction as Plot 354, Sinyerere Settlement Scheme and directed to the applicant.**

**(3) An order of prohibition do issue forbidding the National Land Commission by itself, its agents, employees and or any other person(s) whosoever or howsoever acting on, with and or under its instructions from conducting and hearing, review or action in respect of the whole or part of all that parcel of land known as Land Reference Number Trans-Nzoia/Sinyerere/66 and as wholly or partly referred to as Plot 354, Sinyerere Settlement Scheme.**

**(4) That the costs of this application be borne by the Respondent and the Interested Parties.**

**The Applicant's Case**

3. The applicant's case is that he is the absolute registered owner of **LR. No. Trans-Nzoia/Sinyerere/66** (hereinafter also simply referred to as "**plot number 66**") having purchased it for value in the year 2014 and he has established his home thereon and has been using the land for agricultural purposes. Despite that, the respondent has served the applicant with an eviction notice dated 27/7/2017 requiring him to vacate a plot it specified as "**Plot 354**" within 90 days of the notice in or default he be forcefully removed. The applicant believes that though the notice specifies Plot No. 354, the eviction notice was deemed as directed to his land, **LR No. Trans-Nzoia/Sinyerere/66**.

4. The applicant avers that he was never invited and he never attended any proceedings from which a valid legal decision was made ordering his eviction, and that his occupation or possession of the land has never been declared as an unlawful trespass or occupation by any competent judicial or quasi-judicial body or entity, or vested onto the interested parties by any such competent legal entity or quasi-judicial body at all.

5. The applicant further states that his efforts to secure any information on the origin or constitutional justification of the eviction notice, through physical visits to the respondent's office or through a demand letter have been in vain. Therefore, the applicant states, the notice as well as any preceding and subsequent proceedings or decisions related thereto are a breach of the Rules of Natural Justice, are ultra vires, without jurisdiction, an abuse and misuse of statutory and constitutional power, malicious, unreasonable, biased, grossly illegal, oppressive and a breach of the applicant's constitutional right to own property and to a decision that is procedurally fair, proportionate and just. He avers that the respondents actions are of no consequence, or legal effect, are invalid, null and void, and in contravention of **Article 40(1) 40(2)(1) and 40(2)(3), 47(1), 47(2) and 50(1)** of the *Constitution*.

6. Further the applicant states that the intended eviction is in violation of the applicant's rights protected by **Section 24(a), 25(1) and 26(1)** of the *Land Registration Act 2012* and **Section 4** of the *Fair Administrative Actions Act 2015*. The withholding of reasons is said to be in violation of **Section 6** of that *Act*.

7. The notice of motion is supported by the applicant's sworn affidavit dated 29/9/2017. The further facts that emerge from that affidavit are as follows: That the land was handed over to the applicant in vacant possession, that the applicant was born and grew up within the locality, and he knows that the 1<sup>st</sup> interested party has at all times occupied Plot No. Trans-Nzoia/Sinyere/361, and that that land and his do not share a common boundary and are separated by a "large public road".

8. The applicant relied on the following cases:-

**The Chairman Land Disputes Tribunal - Uriri Division Migori District & Another Exparte Charles Okinyi Oloo (suing as Legal Rep. of the Estate of Richard Oloo Oketch (Deceased) [2017] eKLR, Sceneries Limited -vs- National Land Commission [2017] eKLR, Republic -vs- National Land Commission & 2 Others Exparte Airways Holdings Limited [2015] eKLR, Republic -vs- National Land Commission & 2 Others Exparte Cecilia Chepkoech Leting & 3 Others [2016] eKLR, Administrative Law, Sixth Edition, Paul Craig, London Sweet & Maxwell, 2008 page 395 to 416, Administrative Law, Sixth Edition, Paul Craig, London Sweet & Maxwell, pages 437 to 440, Linus Nganga Kiongo & 3 Others -vs- Town Council of Kikuyu [2012] eKLR, John Kaberia Lichoro -vs- M'Mwereria M'Ithiria & 3 Others [2012] eKLR.**

#### **The Respondent's Defence**

9. The application is opposed. The respondent filed a replying affidavit sworn by one Zachari Ndege, Principal Land Officer working with the respondent. In the affidavit, he states that the mandate of the respondent is to administer public land on behalf of the National and County Governments, as well as exercising oversight over land use planning throughout the country; that Parcel No. Trans-Nzoia/Sinyere/354 (Old No. P1 No. 815) forms part of such land; that the same measures 1.4 Hectares and is currently registered under the Settlement Fund Trustees since the year 1985 and was reserved as a permanent improvement within the Sinyere Settlement Scheme and is therefore deemed to be public land; that the applicant owns Plot No. Trans-Nzoia/Sinyere/66 since 2014, which measures approximately 10.6 Hectares; that Sitatunga Primary School, a public institution occupies LR.No. Trans-Nzoia/Sinyere/358 and it neighbours the other 2 parcels mentioned above; that on 24/10/2008, the District Development Committee unanimously approved occupation of Parcel No. 354 by Sitatunga Secondary School; that in the process of issuing a title deed for the Secondary School, the respondent issued the applicant with a notice of eviction dated 27/7/2017 which the applicant responded to through his lawyer, denying the alleged encroachment and also arguing that Plot No. 354 is non-existent, that the respondent then, understanding that the issue is a boundary dispute, engaged the County Land Registrar and the County Surveyor Trans-Nzoia and notified all the interested parties in order to undertake survey of the parcels in question and to delineate the boundaries; that the ensuing **report** from the County Land Surveyor states that the applicant had totally encroached on LR. No. Trans-Nzoia/Sinyere/354 and that he should vacate the said plot. Annexed to the said affidavit are copies of Certificate of Official Search for LR. No. Trans-Nzoia/Sinyere/354 and Trans-Nzoia/Sinyere/66, a copy of a section of the Registry Index Map, showing the lay-out of the parcels, District Development Committee Meeting Minutes of 24/10/2008, the respondent's notice of eviction dated 27/7/2017, a notice from the Land Registrar to the applicant dated 19/9/2017 notifying him of a visit to the disputed land scheduled for 4/10/2017 and a County Land Surveyor's Report dated 11/10/2017.

10. The respondent relied on the following cases in its submissions:- **Isaac Gathungu Wanjohi And Another Versus The Attorney General And 6 Others EKLR [Petition 154 Of 2011]**, and **Samuel Kamere Vs Lands Registrar Kajiado Civil Appeal No 28 Of 2005**.

#### **The Interested Parties' Case**

11. The Interested Parties filed their response by way of a sworn affidavit of the 2<sup>nd</sup> interested party dated 21/11/2017 on 21/11/2017. In that affidavit it is stated as follows: that the 2<sup>nd</sup> interested party is the Secretary to the Board of Management of the 1<sup>st</sup> interested party; that it is true that the applicant is the absolute proprietor of LR. No. Trans-Nzoia/Sinyere/66 measuring 10.6 Ha; that Parcel No. Trans-Nzoia/Sinyere/354 measuring 1.4 Ha, had its green card opened on 3/10/1985 in the name of the Settlement Fund Trustees and it was reserved for a public purpose; that in 1996 the 1<sup>st</sup> interested party applied to the Director of Land Adjudication and Settlement for allocation of Trans-Nzoia/Sinyere/354 to it and the request was acknowledged vide a letter dated 5/6/1997; that a ground status report conducted on 17/9/2017 revealed that the land LR. No. Trans-Nzoia/Sinyere/354 is public land; that subsequently after request by the Director of Land Adjudication and Settlement contained in letters dated 26/4/2004, 11/8/2004 and 8/9/2008, the District Development Committee approved the allocation of the said parcel of the 1<sup>st</sup> interested party; that the original allottee of LR. No. Trans-Nzoia/Sinyere/66 knew and acknowledged the existence of LR. No. Trans-Nzoia/Sinyere/354 and until around the year 2015, the boundary between the two parcels remained intact; that however in 2015 the applicant interfered with the boundary, and his acts were discussed by the 1<sup>st</sup> Interested Party's Board of Management; that a complaint against the applicant was made to the respondent and other authorities; and the Land Registrar, after issuing a notice for boundary dispute determination which was acknowledged by the applicant, the

determination of the boundaries was made in the absence of the applicant which confirmed that the boundary on the ground between parcel Trans-Nzoia/Sinyerere/66 and Trans-Nzoia/Sinyerere/354 had been removed and that the applicant had encroached on public utility land; that based on this report the County Coordinator of the respondent in charge of Trans-Nzoia recommended that the Ex parte applicant vacates from the said public utility land.

12. According to the interested parties, the respondent's action is justified in view of the provisions of **Article 67(2)(e)** and **Article 65(4)** of the **Constitution, Section 6(2)** of the **National Land Commission Act 2012**, and **Section 15(9)** of the **National Land Commissioner Act 2012**. It is further stated that the respondent has the mandate to recommend restitution in such instances as the one created by the applicant's encroachment and that this is exactly what it did in the notice.

13. Further, the interested parties claim that the Notice of Motion does not meet the threshold for the grant of orders of Judicial Review as it is a case of ownership of land and a boundary dispute. Further the grounds relied on do not support the prayers for Judicial Review.

14. There was no reply by the Applicant to the allegations contained in the replying affidavit of the Respondent and the Interested Parties. The applicant filed submissions on 23/11/2017, which were accompanied by a bundle of authorities; he also filed supplementary written submissions on 7/12/2017 and "second supplementary" submissions on 30/1/2018. The respondent filed its written submissions on 1/2/2018 and the interested parties on 7/12/2017.

15. The interested parties rely on the following cases :- **R Vs Public Procurement Administrative Review Board & 2 Others Ex Parte Sanitam Services EA Ltd 2013 ECLR**, **Municipal Council Of Mombasa Vs The Republic & Umoja Consultants Ltd Civil Appeal No 185 Of 2001**, **Sanghani Investments Ltd Vs Officer In Charge Nairobi Remand And Allocation Prison 2007 eCLR**, **Seventh Day Adventist Church Limited Vs Permanent Secretary Ministry of Nairobi Metropolitan Development And Another- Judicial Review Case No 112 Of 2011**, **Redcliff Holdings Limited Versus The Registrar Of Titles & Others 2017 ECLR** and urges that by virtue of the definition of judicial review in those cases, the instant dispute does not fall under the ambit of judicial review.

16. The interested parties also cite the cases of **HTV Ltd vs Price Commissions [1976] ICR 170**, **Western Fish Products Ltd Vs Penwith District Council & Another, 19812 ALLER 204**, **Peter Bogonko Versus National Environment Management Authority 2006 ECLR**, **Maritime Electric Co Ltd Vs General Dairies Ltd Qb 227**, **And Republic Versus Judicial Service Commission Ex Parte Pareno 2004 1 Klr 203**, **Republic Versus County Assembly Of Nakuru Ex Parte Samuel Waithuku Njane & 21 Others, Jr 19 Of 2016**; **Kenya National Examinations Council Vs Geoffrey Gathenju Njoroge Ca No 266 Of 1996**. **Republic Versus Kenya National Commission On Human Rights, Ex Parte Uhuru Muigai Kenyatta, 2010 ECLR**, **And Republic Vs Minister For Agriculture & 2 Others Ex Parte Equatorial Nuts Processors Ltd And 3 Others 2013 ECLR**,

17. I have considered the motion, the statement, the verifying affidavit, the replying affidavit and the submissions. In my view, the issue that arise in this matter are as follows:-

***(1) Does the Notice of Motion reveal violation of the applicant's rights by the respondent as claimed to warrant the orders of Judicial Review sought?***

***(2) What orders should issue?***

The issues are discussed hereunder:-

**(1) Whether the Notice of Motion reveals violation of the applicant's rights.**

18. One pivotal fact on which this decision will rest is the status of the suit lands. According to the applicant the respondent and the interested parties' acts affect Parcel No. Trans-Nzoia/Sinyerere/66, which he claims is his land.

19. On the contrary, and evidence will demonstrate that to be the correct position, the respondent and the interested parties do not dispute the applicant's ownership of LR. No. Trans-Nzoia/Sinyerere/66. They expressly admit he owns it.

20. The respondents do not also assert that Parcel No. Trans-Nzoia/Sinyerere/66 is public land; instead, they aver that Parcel No. Trans-Nzoia/Sinyerere/354 is public land.

21. On the other hand, the applicant does not claim Parcel No. Trans-Nzoia/Sinyerere/354 is his, he claims that it does not exist; and therein begins the applicant's uphill journey in proving his case, for the official custodian of the Land Register in Trans-Nzoia, the County Land Registrar has by an uncontroverted certificate of search reports dated 9<sup>th</sup> October 2017 annexed to the replying affidavits of the respondent, given evidence of the existence of plots number 66 and 354 as separate parcels. According to the records Plot No. 66 remains 10.6 Hectares as per the title the applicant holds.

22. It is the concerted position of the respondent and the interested parties that the land comprised in Trans-Nzoia/Sinyerere/354 is public land. There is no express denial of this fact by the applicant. Even though the applicant had hypothetically alluded to such a denial in his documents before a response was filed by other parties, he never responded to the allegations in the replying affidavit, and ipso facto this denied his case considerably, for the court must consider the statements of the respondents made on oath to be undisputed and therefore, correct.

23. The question that arises would be whether if the applicant has not established that parcel number 354 does not exist or that he has any legal interest in it, and it is established that parcel 354 does truly exist as a distinct parcel separate from parcel no 66, can establish any violation of rights if an eviction notice is issued against him in respect of parcel no 354 by the respondent.

24. If the actions of the respondent and the interested parties were undertaken in respect of Plot No. Trans-Nzoia/Sinyerere/354, and the applicant does not even claim that the said plot was amalgamated with his land or that it was sold to him by the person who sold him Plot No. 66, or that it was registered in his name, this court can only believe it to be the case that the applicant's act of purchase related only to parcel number 66;
25. The applicant's greatest stumbling block in this case is that he failed to establish any legal claim to plot number 354. The applicant's own evidence is that the eviction notice did not indicate that he should vacate parcel number 66 but parcel number 354 and that in his view the notice was directed at his occupation of parcel number 66.
26. In view of the revelation of the existence of the boundary dispute, it would be normal for the applicant to deem the eviction notice as directed at his occupation of parcel no 66 for the reason that, at least according to the evidence on the record, he has merged both parcels and illegally occupied the 1.4 acres comprising of Plot No. 354.
27. Can the respondent be deemed to be the person before whom the applicant's case was dealt? Did the respondent sit in a quasi-judicial capacity over the applicant's issue? The answer, in my view, is an emphatic "no".
28. The proceedings that the applicant should be complaining about were not before the respondent but before the County Land Registrar and the County Land Surveyor. They are the ones who invited the parties and gave a verdict as to the status of the land and established the true position of the boundaries between the plaintiff's plot and parcel number 354.
29. As such the respondent in his position of manager of public land who was dependent on the County Land Registrar's findings and the County Land Surveyor's Report, was just in the position of a complainant in the matter and there was no decision it could make on the subject land that could be subjected to judicial review orders in this matter.
30. In my view, the claim by the applicant to the effect that there were no prior proceedings in the matter is not correct. The evidence by affidavit of the respondent and the interested parties which I have set out hereinbefore in **paragraphs 8 to 11** of this judgment shows there were previous proceedings, though not before the Respondent, but before the District Development Committee and later before the Land Registrar. Now it is no wonder that the applicant has persistently stated that he has not been invited to a hearing before the respondent!
31. The proceedings which were most proximate in time to the respondent's notice of eviction were the County Land Registrar's determination of the boundary and the subsequent Report by the County Surveyor recommending that the applicant vacates Plot No. 354.
32. There were no proceedings before the respondent or the county Land Surveyor of Land Registrar that related to the validity of the applicant's title to plot number 66 as they recognized it as being legally in existence with the applicant as the proprietor.
33. As to whether the applicant was aware of these proceedings, the answer is in the positive as he caused his Advocate to respond by way of a letter as stated in **paragraph 11** of the respondent's replying affidavit and **paragraph 16** of the interested parties replying affidavit. I find that upon the service of notice relating to a boundary dispute the applicant was formally notified of the true nature of the case of the respondent and the interested parties against him. He should therefore have attended the boundary determination session and made his own representations. As things stand now, he squandered that opportunity. He had therefore been treated fairly in the circumstances. In the case of **Republic v President & 7 others Ex parte Wilfrida Itolondo & 4 others [2014] eKLR** it was stated as follows:
- "74. In Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60."**
34. The question would be: does the fact that that notice of boundary dispute was issued after the eviction notice affect the determination herein? The answer, in my view, is that it does not, for the reason that the land was not registered in the name of the applicant and indeed he had denied its very existence while the respondent and the interested parties in their impugned activities, had proceeded from the very commencement of the dispute upon the very assurance of the existence of that land parcel as a public utility which the applicant has failed to disprove.
35. The situation, I believe, would be different had the applicant acknowledged the existence of the plot and laid claim to it. In my view, in the absence of that legal claim by the applicant, the respondent and the interested parties, in a capacity equivalent to that of any other ordinary land owner, were only laying claim to what they believed was public land and could not be faulted; the actions of the respondent must be viewed in the light of the respondent's mandate to manage public land as outlined in the Constitution and the National Land Commission Act.
36. The arguments by the applicant lack logic. The applicant's wish appears to have been that this court would ignore the issue of his encroachment of public land simply because he has brought down the fence and remained in occupation thereof and, having merged it with his land, ascended into a cloud of blissful amnesia of the existence of plot number 354.
37. The applicant has not even tabled before this court an iota of evidence of how that occupation came into being and in the face of the evidence brought by the respondent's and the interested parties, that occupation must be deemed illegal. I must point out that even **Article 40** of the Constitution frowns upon property that has been illegally obtained.

38. This court refuses to convert an ordinary boundary dispute between the applicant and the interested parties into a case of claims against the respondent relating to allegations of denial of the applicant's rights to Natural Justice, excess of jurisdiction, an abuse and misuse of statutory and constitutional power, and an host of other unsubstantiated allegations as it would be absolutely absurd to do so in the face of the uncontroverted evidence on the record.

39. All in all, I find a considerable measure of lack of candour on the part of the applicant herein. In the case of **Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR Judicial Review No. 378 OF 2017** the court stated as follows:

**“101. The law on this issue is clear that where a party, at the ex parte stage of an application fails to disclose relevant material to court and thus obtains an order from the court by disguise or camouflage the court will set aside the ex parte orders so obtained. This was appreciated by Ibrahim, J (as he then was) in Republic vs. Kenya National Federation of Co-Operatives Limited ex Parte Communications Commission of Kenya[27] where the learned Judge held that:-**

**“It is of fundamental importance that applications for judicial review should be made with full disclosure of all material available to the claimant. This is a case which I can properly use in order to send a message to those who are making applications to this court reminding them of their duty to make full disclosure; failure to do so will result, in appropriate cases, in the discretion of the Court being exercised against (a claimant) in relation to the grant of (a remedy).”**

40. Any person who approaches the court for judicial review orders needs establish that he has rights and that those rights would be affected by the actions of a quasi-judicial or administrative body. That much was said in the case of **Sceneries Limited Vs National Land Commission [2017] eKLR** when the court cited the case of **R Vs Electricity Commissioners Board 1924 1 KB 171** as follows:

**“Whenever anybody of persons having legal authority to determine questions affecting the rights of subjects and having a duty to act judicially acts in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.”**

41. I therefore find that the interested parties' contention that this ought to have been merely a boundary dispute which was finally resolved by the Registrar, is correct. The orders of Judicial Review should not have been sought in the circumstances.

**(2) What orders should issue?**

I have already found that the applicant's case is fatally defective. The orders sought cannot therefore issue. I therefore vacate the orders of stay granted in this matter on the **13<sup>th</sup> October 2017** and I dismiss the Notice of Motion dated **23/10/2017** with costs to the Respondent and the interested parties.

**Dated, signed and delivered at Kitale on this 20<sup>th</sup> day of March, 2018.**

**MWANGI NJOROGI**

**JUDGE**

**20/3/2018**

Coram:

Before - Mwangi Njoroge - Judge

Court Assistant - Picoty

Mr. Musamia holding brief for Njuguna for 1<sup>st</sup> respondent

Ms. Mufutu holding brief for Odongo for 1<sup>st</sup> interested party

Ms. Bett holding brief for Mr. Kefa for applicant

**COURT**

Judgment read in open court.

**MWANGI NJOROGI**

**JUDGE**

**20/3/2018**