



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. JR. NO. 32 OF 2016

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: LAND REFERENCE NUMBERS 3863/SECTION VI/MAINLAND NORTH, 3864/SECTION VI/MAINLAND NORTH, 3865/SECTION VI/MAINLAND NORTH, 3866/SECTION VI/MAINLAND NORTH, 3867/SECTION VI/MAINLAND NORTH, 3868/SECTION VI/MAINLAND NORTH.

IN THE MATTER OF: SECTION 14(1), (2) AND (3) OF THE NATIONAL LAND COMMISSION ACT 2012

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE NATIONAL LAND COMMISSION.....RESPONDENT

AND

HONOURABLE OMAR MWINYI.....INTERESTED PARTY

FLORA IMPEX LIMITED.....INTERESTED PARTY

EX-PARTE: KENSINGTON LIMITED

RULING

1. This is the Notice of Motion dated 25th October, 2016. It is brought under Order 53 Rule 1(i), 2, 3(i) and 4 of the Civil Procedure Rules, Section 3A, of the Civil Procedure Act, Chapter 21 Laws of Kenya, Section 8 and 9 of the Law Reform Act Chapter 26 Laws of Kenya and all other enabling provisions of the law.

2. It seeks orders;

a) That an order of certiorari to bring to this Honourable Court for the purposes of quashing and annulling all the proceedings and/or orders by the Respondent purporting to investigate and/or review the Applicants titles to the properties known as 3863/Section VI/Mainland North, 3864/Section VI/Mainland North, 3865/Section VI/Mainland North, 3866/Section VI/Mainland North, 3867/Section VI/Mainland North, 3868/Section VI/Mainland North.

b) That an order of prohibition to prohibit the Respondent from continuing with the investigation and/or review of the Applicant's titles to the suit properties known as 3863/Section VI/Mainland North, 3864/Section VI/Mainland North, 3865/Section VI/Mainland North, 3866/Section VI/Mainland North, 3867/Section VI/Mainland North, 3868/Section VI/Mainland North and from interfering in any manner with the Applicant's ownership of the suit properties.

c) That costs of this application be provided for.

3. The grounds are on the face of the application and are listed as in paragraph (i-ix) I do not need to reproduce them here.

4. The application is supported by the affidavit sworn by Aasheet Mahesh Sanghrajka, a director of the Applicant, sworn on the 7th October, 2016.

5. By an application dated 9th February, 2017, the Exparte Applicant was allowed to serve the Respondents and the Interested parties by way of substituted service by means of advertisement in any daily newspaper with nationwide circulation. The orders were granted on 9th February, 2017.

The same was done vide the Daily Nation of Tuesday 28th February, 2017. An affidavit of service was filed in this effect.

6. On the 11th April, 2017 the court directed that the Exparte Applicant do file written submissions in respect of the Application.

7. The Respondent and the Interested parties despite being served did not file any responses.

8. It is the Exparte Applicant's case that it is the registered proprietor of the leasehold interest in the suit properties.

That it filed ELC NO. 173 of 2013 *Kensington Limited –versus- Flora Impex Limited And 2 Others* contending that the said Defendants had colluded and irregularly and fraudulently registered the 1st Interested Party herein as the owner of the suit properties.

9. That in May 2016 during the pending of ELC NO 173 of 2013 the Respondent commenced parallel proceedings intended to investigate and/or review the Applicants' title to the suit properties pursuant to a complaint lodged by the 1st Interested Party.

That the Exparte Applicant was not issued with the mandatory written prior notice before the proceedings by the Respondents were commenced.

10. That the proceedings of the Respondent are in breach of Article 40, 47 and 67 of the Constitution of Kenya, 2010 and Section 14 of the National Land Commission Act.

11. I have considered the Exparte Applicant's submissions. The issues for determination is;

i) Whether the National Land Commission breached the rules of National justice.

ii) Whether the National Land Commission acted ultra vires.

12. I have looked at Article 67 of the Constitution of Kenya, 2010 and Section 14 of the National Land Commission Act.

I agree with the Exparte Applicant's submissions that the Respondent acted at the behest of the Interested Parties, who are the Defendants in ELC NO. 173 OF 2013, a case which raised the same issues of ownership between the Exparte Applicant and the Interested Parties and which the Environment And Land Court is called upon to determine. I am guided by the authority of *Republic versus- National Land Commission And Pius Nguqi (Interested Party) (2015) eKLR* in which the Court held that;

“..... the parties had already submitted themselves to the jurisdiction of the Court, which has the mandate to deal with the matter. The Respondent had no business commencing parallel proceedings over the same parcel of land. The Environment and Land Court is in a position to determine the rival interests of the Applicant and the Interested parties as well as the legality of the grant.”

13. I am of the same view that nothing bars the Respondent from participating in ELC NO. 173 of 2013.

The Exparte Applicant not having participated in the proceedings in the National Land Commission was denied an opportunity to be heard. By failing to issue the Applicant with the mandatory written prior notice, the Respondent breached a fundamental principle under Article 47 and 50 of the Constitution of Kenya, 2010 and Section 14(3) of the National Land Commission Act.

14. In the case of *Municipal Council of Mombasa –versus- Republic And Umoja Consultants Limited Civil Appeal No. 185 of 2001* cited in the case of *Republic –versus- Chief Magistrate Milimani Commercial Court And 2 Others Exparte Violet Ndanu Mutinda And 5 Others (2014) eKLR* it was held;

“Judicial review is concerned with the decision making process not with the merits of the decision itself. The court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters....”

15. I am guided by the above authority in finding that the Respondent failed to afford the Exparte Applicant an opportunity to be heard. Failure to comply with the rules of natural justice is a valid ground for granting judicial review.

As I stated earlier the application is not opposed hence the Exparte Applicant's case is controverted.

16. I do grant orders sought namely;

a) That an order of certiorari do hereby issue to bring to this Honourable Court for the purposes of quashing and annulling all the proceedings and/or orders by the Respondent purporting to investigate and/or review the Applicant's titles to the properties known as 3863/Section VI/Mainland North, 3864/Section VI/Mainland North, 3865/Section VI/Mainland North, 3866/Section VI/Mainland North, 3867/Section VI/Mainland North, 3868/Section VI/Mainland North.

b) That an order of prohibition do hereby issue to prohibit the Respondent from continuing with the investigation and/or review of the Applicant's titles to the suit properties known as 3863/Section VI/Mainland North, 3864/Section VI/Mainland North, 3865/Section VI/Mainland North, 3866/Section VI/Mainland North, 3867/Section VI/Mainland North, 3868/Section VI/Mainland North and from interfering in any manner with the Applicant's ownership of the suit properties.

c) Costs of the application be in the cause.

It is so ordered.

Dated, Signed and Delivered at Mombasa on the 25th day of April 2018.

L. KOMINGOI

JUDGE

25/4/2018.