



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MILIMANI

ELC NO. MISC. 6 OF 2017

**IN THE MATTER OF AN APPLCIATION FOR JUDICIAL REVIEW BY WAY OF ORDERS OF CERTIORARI,
PHOHIBITION AND MANDAMUS**

=AND=

**IN THE MATER OF THE REVOCATION OF THE TRANSFER OF THE PROPERTY TO MAPEMA HOLDINGS DATED TH
DAY OF OCTOBER, 2016**

=AND=

IN THE MATTER OF THE CONSTITUTION OF KENYA, FAIR ADMINISTRATIVE ACTION ACT, 2015

=AND=

IN THE MATTER OF THE LAW REFORM ACT CAP 9 OF THE LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

=VERSUS=

REGISTRAR OF LANDS.....RESPONDENT

THIKA DIARIES LIMITED.....INTERESTED PARTY

PATRICK KARIUKI MUIRURI.....2ND INTERESTED PARTY

EX-PARTE

MAPEMA HOLDINGS LIMITED

JUDGEMENT

1. The proceedings herein were triggered by a sale agreement entered into between the first interested party and the Ex-parte Applicant on 10th March 2008. The second interested party is one of the directors of the first interested party. The agreement related to sale of *LR No.4953/2414*. (Suit property). In that agreement, the first interested party offered to sale the suit property to the Ex-parte Applicant at a consideration *Ksh.9,000,000*. It was a term of the agreement that the Ex-parte Applicant was to pay a deposit of *Kshs.2000,000/=* through the second interested party. The balance of the purchase price was to be paid by 31st March 2008.

2. The Ex-parte Applicant contends that it paid the entire purchase price as agreed and had the suit property transferred to it on 14th March 2012. Unknown to the Ex-parte Applicant, the Respondent at the behest of the interested parties revoked the transfer in its favour pursuant to provisions of Section 79(2) of the Land Registration Act. The Ex-parte Applicant contends that the cancellation was contrary to the provisions of Article 47 of the Constitution as well as the provisions of the Fair Administrative Action Act 2015, in that it was neither given notice of the intended cancellation nor the reasons for the cancellation. It is on this basis that the ex-parte applicant has prayed for the orders of certiorari, prohibition, and mandamus.

3. The interested parties opposed the Ex-parte Applicant's motion through a replying affidavit sworn on 10th February 2017 by the second interested party. The interested parties contend that the suit property is registered in the name of the first interested party pursuant to a cancellation made by the Registrar under Section 79(2) of the Land Registration Act. The first interested party had entered into a sale agreement with the Ex-parte Applicant for sale of the suit property. Upon payment of Kshs.2000,000/= deposit, original title documents were given to the ex-parte applicant's advocates.

4. The Ex-parte Applicant defaulted in paying the balance of the purchase price but despite this, the Ex-parte Applicant went ahead to fraudulently transfer the suit property to itself by presenting ID Card numbers, pin certificates and photographs not belonging to the director of the first interested party purporting the same to be from the directors of the first interested party. The signatures of the directors were forged. This matter became a subject of criminal investigations where the director of the Ex-parte Applicant and its lawyers were charged for among others offences forgery and making false documents.

5. The interested parties contend that the cheques which the Ex-parte Applicant purportedly gave to the second interested party were non-existent and that the Ex-parte Applicant's application is an abuse of the process of the court which should be dismissed as the Ex-parte Applicant was informed of the impending cancellation but never acted and that when the cancellation was made, the Ex-parte Applicant was accordingly informed.

6. The Respondent opposed the Ex-parte Applicant's application through a replying affidavit sworn on 25th September 2017. The respondent received a complaint letter dated 3rd August 2016 from the interested parties. The letter contained allegations that the Respondent had registered a fraudulent transfer based on forged documents. On 19th September 2016 the Respondent wrote to the Ex-parte Applicant intimating that the Chief Land Registrar was going to cancel the transfer in favour of the Ex-parte Applicant on grounds of fraud. There was no response from the Ex-parte Applicant. The respondent proceeded to cancel the transfer and informed the Ex parte applicant through letter dated 14th October 2016. The respondent denies that its action was contrary to the law. The Ex-parte Applicant had been given opportunity to explain but it did not.

7. The parties herein were directed to file their written submissions in respect of the Ex-parte Applicant's motion. The Ex-parte Applicant filed its submissions on 24th October 2017 and further submissions on 15th December 2017. The Respondent filed its submissions on 16th November 2017. As at the time of writing this Judgement the interested parties had not filed their submissions. I have gone through the Ex-parte Applicant's application as well as the opposition thereto by the Respondent and interested parties. I have also considered the submissions by the Respondent and those of the Ex-parte Applicant. The purpose of judicial review proceedings was well captured in the case of **Republic Vs Kenya National Examinations Council ex-parte Geoffrey Gathenji & 9 others Civil Appeal No.266 of 1996** where it was held as follows:-

“ The remedies of quashing orders certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment”.

8. In judicial review applications, the Court is not concerned with the merits of the decisions which are questioned but rather with the decision making process. In the case of **Chief Constable of North wales Police Vs Evan (1982) All ER 141 at 154 Lord Brightman** stated as follows:-

“Judicial review is concerned not with the decision but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view under the guise of preventing abuse of power be itself guilty of usurping power”.

Similarly in the case of **Commissioner of Lands Vs Kunste Hotel Ltd (1995-1998) EA 1 at page 6** the judges of Appeal stated as follows:-

“ But it must be remembered that judicial review is concerned not with the private rights or the merits of the decision being challenged but with the decision making process “.

9. Judicial review orders are discretionary. The court has wide discretion whether to grant the same or not. The factors which the court has to take into account in considering whether to grant the orders or not were set out in **Halsbury's laws of England at para 12 page 270 as follows:-**

“ The remedies of quashing orders (formerly known as orders of certiorari),prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus),are all discretionary . The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in Court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow contemporary decisions to take their course, considering the complaint and intervening if at all, later and retrospect by declaratory orders”.

10. In **Halsbury's Law of England 4th Edition Vol. II page 805 para 1508** it was stated as follows:-

“Certiorari is a discretionary remedy which a court may refuse to grant even when the requisite grounds for its grant exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles”.

11. Having set out the scope under which judicial review can be granted or refused, I have now to decide whether the respondent complied with the provisions of the Fair Administrative Action Act. The Ex-parte Applicant was not given a hearing before the Respondent reached a decision to cancel a transfer in its favour and after the cancellation, there were no written reason given as required.

12. I have looked at the Chief Land Registrar's letter of 19th September 2016. It is clear from this letter that the chief land registrar had arrived at a conclusion that the transfer in question had been made fraudulently as the directors of the first interested party had not signed it. The photographs which were on the transfer were not of the directors of the first interested party. There is no evidence that the directors of the Ex-parte Applicant had been given an opportunity to comment on the allegations against the company. It is clear that a decision to cancel the transfer had been arrived at based on reports from the first interested party as conformed by investigations from the criminal investigations Department.

13. Section 79(4) gives the National Land Commission the power to prescribe regulations which are to guide the Land Registrar when carrying out rectification under sub-section (2). Even though such regulations may or may not have been put in place as the time the action complained of was taken, it is clear that a process of investigations has to be carried out, parties affected notified and hearing of matters raised and the criteria to be followed in reaching the decision spelt out. In the instant case, there is nothing which shows that the Ex-parte Applicant was given a hearing. To this extent, I find that the principles of natural justice were not followed.

14. The ex-parte applicant was entitled to be given written reasons for the decision by the Land Registrar. There is no evidence that such written reasons were given. What the respondent refers to as reasons is a letter dated 14th October 2016 which communicated the decision to cancel the transfer in the register. This letter referred to the one of 19th September 2016 which referred to the issue of the transfer bearing photographs which did not belong to the directors of the first interested party. That letter alluded to confirmation of the allegations by the Criminal Investigations Department. There are no grounds indicated, upon which the Criminal Investigations Department found that there was forgery. Reference to a previous letter which did not given clear reasons for the decision does not amount to giving written reasons for the action as contemplated in the Fair Administrative Action Act.

15. The question which then follows is whether the orders sought ought to be granted. As has been said hereinabove the remedy of certiorari may be refused even where there exists grounds for its grant. This being an issue of discretion, the court has to weigh one thing against the other and see whether the said remedy is the most efficacious. In the instant case, the issue in contention which culminated into this application is the genuiness of a transfer which led to the suit property being registered in the Ex-parte Applicant's name which registration was cancelled. The grounds for the cancellation was fraud. It is alleged that the photographs on the transfer are not those of the directors of the first interested party. Already there is a case in court being ELC No 1400 of 2013 which is touching on the suit property. One of the issues in that suit is whether the registration of the suit property in the name of the Ex-parte Applicant was obtained fraudulently.

16. Even if the decision by the Registrar was quashed, it will not mark the end of this matter. Still the parties have to litigate in the pending civil suit on whether there was fraud or not. The remedies of judicial review will therefore not be effective in the circumstances. This being the case, I therefore find that none of the orders can be granted. The upshot of this is that the Ex-parte Applicant's application is hereby dismissed with costs to the respondent and the interested parties.

Dated, Signed and Delivered at **Nairobi** this **9th** day of **April 2018**.

E.O .OBAGA

JUDGE

In the presence of :-

M/s Mugiuro for Ex-parte Applicant

Mr Kamau for Respondent

Court Assistant: Hilda

E.O .OBAGA

JUDGE