



REPUBLIC OF KENYA

IN THE ELC COURT AT MAKUENI

ELC JR 8 OF 2017

REPUBLIC.....APPLICANT

VERSUS

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

COUNTY LAND MANAGEMENT BOARD.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

AND

ASHA BILAL MSELLEM NASIB..... INTERESTED PARTY

KIBWEZI MUSLIM ASSOCIATIONS EX-PARTE APPLICANT

JUDGMENT

1) By its Notice of Motion application dated 8th April, 2016 and filed in court on even date pursuant to leave granted on the 4th April, 2016 the Ex-parte Applicant prays for orders;

1. That certiorari do issue to remove to this honourable Court and quash the decision by the National Land Commission contained in its Chairman letters dated 27th January and 9th March, 2016 unilaterally conferring ownership of the Applicant's parcel of land to the Interested Party.

2. That prohibition do issue prohibiting the 2nd Respondent or any other office from implementing the said decision of the 1st Respondent.

3. That Mandamus do issue to compel the Respondent to implement the Part Development Plan referred as No. MKN/193/97/03 and thereby confer the ownership documents to the Applicant Kibwezi Muslim Association.

4. That the costs of this application be provided for.

2) The application is accompanied by the Ex-Parte chamber summons, statements and verifying affidavits. The Respondents and the interested party were served with this application as can be seen from the affidavits of service sworn on the 27th September, 2017 and 20th May, 2016 respectively.

3) By the time the 3rd Respondent was filing his grounds of opposition on the 3rd November, 2017 the same being dated 2nd November, 2017 the court had on the 28th September, 2017 directed that the Ex Parte Applicant do proceed with the matter as undefended. The 1st, 2nd Respondents and the interested party did not file any papers to defend/and or oppose the claim. The 3rd Respondent did not file his submissions.

4) The submissions by the counsel for the Ex-Parte Applicant were that from the Ex-Parte applicant's statement and verifying affidavit both dated 17th October, 2016 which have stated inter alia that the Ex-parte Applicant is an Association registered under section 10 of the Societies Act as confirmed by a certificate of Registration No. 23531 dated 4th May, 2004 annexed and marked as SA-1. Said About who in the verifying affidavit sworn on the 30th March, 2016 describes himself as a trustee of the Applicant deposed that the Applicant is the rightful owner of a surveyed but unregistered piece of land in Kibwezi town measuring 0.83 hectares or thereabouts reserved for Kibwezi Muslim Centre as can be seen from a copy of map of the location annexed and marked as SA-2.

5) Further from their affidavit evidence, the Ex-Parte Applicant states that it has the relevant documents to prove ownership of the aforementioned piece of land which include:-

- A letter dated 26th June, 2003 from the Ministry of Lands and Settlement through its Department of Physical Planning, Makueni confirming that the said piece of land had been reserved for Kibwezi Muslim Association (the Ex-Parte Applicant). The Ex-Parte Applicant stated that the letter which is marked as SA-3 confirms that the Department had initiated the process for issuance of letter of allotment and a lease to it certificate by the Commissioner of Lands.
- A letter dated 8th August, 2013 and marked as SA- 4 confirming that an allotment letter reference no. 11306/4 was issued to the trustees of Kibwezi Muslim Association as per the records of the Registrar of Societies.
- The Makueni County Assembly report/resolution recommending inter alia that the Ex-Parte Applicant be issued with title deed to the land subject of this application as can be seen from the report marked as S-SA in the supplementary affidavit sworn on the 12th October, 2017 by Said About.

6) The counsel went on to submit that the Ex-Parte Applicant has averred that there was a looming land dispute over the said parcel of land between the Ex-Parte Applicant and the family of Aisha Bilal Msellem Nasib (the interested party). He submitted that the office of the County Land Management Board Makueni County, through the chief officer, Ministry of Mining and Planning made a recommendation signed on 12th September, 2015 revoking the setting a part of the land in question for Kibwezi Muslim Association (the Ex-Parte Applicant) and purported to award the same to the interested party herein and subsequently, the National Land Commission issued a letter dated 27th January, 2016 and 9th March, 2016 acknowledging the above decision signed on 12th September, 2015 as can be seen from annexures SA-5, SA-6(a) and (b) respectively.

7) The counsel went on to submit that the Ex-Parte Applicant verily believes that the National Land Commission and the office of the County Land Management Board - Makueni , through the chief officer, Ministry of Mining and Physical Planning acted unilaterally, against the rules of natural justice and ultra vires their jurisdiction in making their decision to award the land in dispute to the interested party without involving the Ex-Parte applicant.

8) On whether or not this court has jurisdiction to issue judicial review remedies sought the Ex-Parte applicant's counsel submitted that judicial Review Proceedings are governed by Article 165(6) and (7) of the Constitution which provides as follows:-

(6) the High Court has supervisory jurisdiction over the Subordinate Court and over any person, body or authority exercising a judicial or quasi judicial function, but not over a Superior Court.

(7) for the purposes of clause (6) the High Court may call for any record of any proceedings before any subordinate court or person, body or authority referred to in clause (6) and may make any order or give any order or give any direction it considers appropriate to ensure the fair administration of justice.

9) The counsel went on to submit that Article 47(1) and (2) of the Constitution states that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The counsel pointed out that in compliance with Article 68(as read with Article 67) of the Constitution Parliament enacted the National Land Commission Act, 2012 and at section 5(1) of the Act, the functions of the Commission as set out in the Constitution are reiterated and include monitoring the registration of all rights and interests in land.

10) The counsel further submitted that Article 260 of the Constitution defines a person as including “**a company, association or other body of persons whether incorporated or unincorporated**”. The counsel went on to submit that the High Court has been mandated by the Constitution to protect and prohibit any tribunal or authority from acting contrary to the rules of natural justice and in this matter, the expulsion of the Ex-Parte Applicant from it's land against the rules of natural justice.

11) The counsel correctly submitted that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. The counsel went to submit that the purpose of judicial review is to ensure that the person concerned is given fair treatment by the authority to which he has been subjected . The counsel relies on the cases of **Bahaji Holdings Ltd Vs Abdo Mohammed Bahaji &Company Ltd and Another in Nairobi Civil Application no 97 of 1998** where the court of appeal held that

“ the limits of judicial review continue expanding so as to meet the changing condition and demands affecting administrative decisions”

and **Republic Vs the Commissioner of Lands Ex parte Lake Flowers Limited in Nairobi HC Misc Application No 1235 of 1998** where it was held that:-

“ Judicial review is a tool of Justice , which can be made to serve the needs of a growing society on a case-to-case basis. The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society”

12) The counsel further relies on the **Fair Administrative Action Act, 2015** which was enacted to give effect to the provisions of Article 47 of the Constitution, and for connected purposes.

13) Arising from the foregoing, the Ex-Parte applicant's counsel submitted that the Respondents herein are liable to be subjected to judicial review reliefs.

14) The Ex-Parte Applicant's counsel further submitted that the Ex-Parte Applicant through its trustees, as mandated under their Constitution have been making endless efforts to ensure that the title documents are issued to the land in question. The counsel pointed out that without just cause and acting in bad faith, the Respondents ignored all these requests and went ahead to revoke allocation of land in question to the Applicant and purported to award the same to the interested party herein. The counsel added that the Respondents did not involve the Applicant in its purported process which led to the revocation of the allocation of the land in question to the Applicant. The counsel further submitted that by revoking the allocation of the land in question to the Applicant, the Respondents did this without affording the Applicant a fair hearing. The counsel added that this is a failure of their duties to ensure that their actions complied with the rules of natural justice. The counsel correctly submitted that Article 40 of the Constitution and section 26 of the Land Registration Act only protects lawfully acquired property. He also correctly submitted that judicial review involves an assessment of the manner in which the decision is made and the jurisdiction is exercised in a supervisory manner to ensure that public powers are exercised in accordance with the basic principles of legality, fairness and rationality.

15) On the issue of unreasonable, irrational and unfair decision, the Ex-Parte applicant's counsel submitted that :-

i. The Applicant who are a religious organization were allocated the aforementioned piece of land on 10/7/1997 which is close to 20 years ago.

ii. The allocation was reserved for construction of Kibwezi Muslim Centre which would benefit the Muslim community in the area as opposed to individuals.

iii. The Ministry of Lands and Makueni County Assembly confirmed allocation of the said land to the Applicant.

iv. On the strength of the said allocation, the applicant's trustees have been making endless efforts to ensure title deed is issued to the applicant.

16) Regarding fair hearing and bias, the counsel pointed out that :-

i. The Respondents did not give the applicants a fair hearing and the decision reached was contrary to the Rules of Natural Justice.

ii. The Respondents action as aforesaid was also biased against the ex parte applicants.

iii. Whether or not a person was given a fair hearing of his case will depend on the circumstances and the type of the decision to be made. The minimum requirement is that the person gets the chance to present his case. If the Applicant has certain legitimate expectations, the rules of natural justice also require that they are given an oral hearing and that their request many not be rejected without giving reasons.

iv. The essential components of fairness in any administrative hearing are reasonable advance notice, reasonable opportunity to be heard and an impartial, competent and independent decision maker.

v. In granting the Judicial review orders sought, the court in Republic of Kenya Vs Registrar of Trade Unions [1988] eKLR (misc. Civil Application No. 298 of 1986) quoted in approval the celebrated case of Ridge Vs, Baldwin [1964] AC 40 where it was held that the body with the power cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case. By not affording this to the ex parte applicant, this was an apparent sign bias.

vi. The 1st and 2nd Respondents had a duty to seek out the Applicant through its trustees and give them satisfactory reasons as to why the title would not be issued in the form that they (Applicants) had applied. This went against the doctrine of natural justice.

vii. In the case of Inner City properties Limited vs County government of Nairobi [2016] eKLR Nairobi Judicial Review Application No. 359 of 2015, court noted that:-

Therefore the Respondent was obliged to afford the Applicant a hearing before it made its decision which decision, undoubtedly, affected the interest of the Applicant by depriving it of its rights to the enjoyment of a property to which it lay claim by developing the same...

It is settled law that a benefit cannot be withdrawn until the reason for withdrawal has been given and the person concerned has been given an opportunity to comment on the reason. Therefore, apart from the ex parte Applicant herein, there was a requirement that those who had acquired interests in the subject developments be similarly notified before an action adversely affecting their interests could be undertaken.

viii. The court, in republic vs Commissioner of Lands & 2 others ex parte Antiocha Limited & 2 others [2016] eKLR, addressed the issue of natural justice as follows:-

The failure by the Respondents to invite the Applicant to defend its title, after giving is sufficient reasons and documents as to why they think they should cancel the title, falls a foul against the provisions of Article 47 of the Constitution and the rules of natural justice.

It is now settled law that a benefit cannot be withdrawn until the reason for withdrawal has been given and the person concerned has been given an opportunity to comment on the reason (see R vs Nairobi City County Ex parte ELMC LTD (2014) eKLR).

17) Regarding rules of natural justice, the Ex-Parte Applicant's counsel referred the court to Court of Appeal decision in **Onyago Oloo vs Attorney General (1986 -1989) EA 456** where it was held that ,

“the principle of natural Justice applies where ordinary people would reasonable expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to acted fairly without giving an opportunity to be heard ... a decision in breach of the rules of natural Justice is not cured by holding that the decision would have otherwise been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...”

The counsel further cited **Halsbury's Laws of England (Administrative Law) Fourth Edition 2001 Reissue, at page 218, paragraph 95** where natural Justice is defined as follows:-

“ Natural Justice comprises two basic rules; first that no man is to be a judge in his own cause (nemo judex in causa sua) , and second that no man is to be condemned unheard (audi alteram partem) These rules are concerned with the manner in which the decision is taken rather than with whether or not decision is correct. The rules of natural Justice Must be observed by courts, tribunals, arbitrators and all persons and bodies having duty to act judicially, save where the application is excluded expressly or by necessary implication, or by reason of other special circumstances”

18) The counsel submitted that the Applicant who was allocated the property in question in 1997 which is over 20 years ago and developed it, had a legitimate expectation that the Respondents would issue them with title deed to the land the subject of this application. The counsel added that it is only the issuance of title deed that as hindred the development of the proposed Muslim center.

19) In conclusion, the Applicant's counsel submitted that the applicants right to be heard was breached by the decision and/or action of the 1st Respondent and by extension, the 2nd Respondent. The counsel termed the decisions by the Respondents ultra vires, contrary to the rules of natural justice and improper and is amenable to the judicial review orders of certiorari.

20) Having read the affidavit evidence filed by the Ex-Parte Applicant as well as the submissions filed by his counsel on record, I do note that there is uncontroverted evidence that the suit land was allocated to the Ex-Parte Applicant by the Ministry of Lands for construction of Kibwezi Muslim centre as confirmed by part development plan prepared on 10th July, 1997. Indeed subsequent letters from the same Ministry dated 26th June, 2003 and 8th August, 2013 confirm the said allocation of the suit land to the Ex-Parte applicant. There is also evidence to show that the Makueni County Assembly on 2nd August, 2016 passed a resolution recommending among other things that the Ex-Parte Applicant be issued with a title deed to the land which is the subject matter of this application.

21) I have looked at the grounds of opposition dated 2nd November, 2017 and filed in court on even date by the 3rd Respondent. They hold no water since there is evidence to show that the Ex-Parte Applicant is an association registered under section 10 of the Societies Act as confirmed by the certificate of registration no. 23531 dated 4th May, 2004 (see *annexture SA 1 to the verifying affidavit*). As such, I hold that the Ex-Parte Applicant has locus standi, to file and prosecute this suit as it is a legal entity. The Ex-Parte Applicant has also demonstrated its proprietary rights that it holds over the suit property capable of protection by this court. Besides, the grounds of opposition were filed by the 3rd Respondent without memorandum of appearance. The interested party though served with the application never filed any response.

22) It is clear that the decision and action taken by the 1st and the 2nd Respondents without affording a hearing to the Ex-Parte Applicant was unreasonable, irrational and unfair.

23) The Respondents did not afford the Ex-Parte Applicant a fair hearing and their decision smirks of bias. I am in agreement with the Ex-Parte Applicant's counsel that the Ex-Parte Applicant had a legitimate expectation that the Respondents would issue it with a title deed to the land which the subject of this application. I am satisfied that the application has merits and in the circumstances, I hereby proceed to allow the notice of motion application in terms of prayers 1,2,3 and 4. It is so ordered.

Signed dated and delivered at **Makueni** on **6th** day of **April , 2018**

MBOGO C.G

JUDGE

In the presence of:

Mr. Hassan holding brief for Mr. F.M Mulwa for the Ex Applicant

No appearance for the Respondents

No appearance for the interested party

Mr. Kwemboi Court Assistant.

MBOGO C.G

JUDGE

6/4/2018