



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
JUDICIAL REVIEW APPLICATION NO. 2 OF 2017
IN THE MATTER OF THE CONSTITUTION OF KENYA 2010
(ARTICLES 40 & 47 THEREOF)

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT, 2012

AND

IN THE MATTER OF THE LAND ACT & LAND REGISTRATION ACT

AND

IN THE MATTER OF THE FAIR ADMINISTRATION ACT 2015

AND IN THE MATTER OF AN APPLICATION

BETWEEN

REPUBLIC.....APPLICANT

AND

NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE LAND REGISTRAR KISII.....2ND RESPONDENT

AND

HELLEN KEMUNTO OBAGA.....EX PARTE

J U D G M E N T

1. On 8th September 2017, **Munyao Sila, J.** granted to the ex parte applicant herein Hellen Kemunto Obaga leave to institute Judicial Review proceedings for orders of Certiorari and Prohibition against the respondents, the National Land Commission and the Land Registrar Kisii. The ex parte applicant was directed to file the substantive motion within 21 days from the date the leave was granted.

2. On 11th September 2017, the ex parte applicant filed the substantive Notice of Motion and sought the following Judicial Review orders:-

a. A judicial Review Order of prohibition be granted, to prohibit the Respondents both by themselves, their employees, servants and or agents or any other persons acting in pursuant to their authority, from REVOKING the Ex parte Applicant's registration as Lessee of property known as Kisii Municipality/Block III/282 registered in the name of the Ex parte Applicant on the 4th September 2014 or to in any other manner whatsoever interfere with the Ex parte Applicant's possession and ownership of the said property.

b. A Judicial Review Order of Certiorari be granted to call for and bring to this court, the decision of the 1st Respondent to revoke the Ex parte Applicant's Leasehold interest contained in a certificate of Lease in the Ex parte Applicant's name over

Property known as Kisii Municipality/ Block III/282 issued on the 4th September 2014, which decision for revocation is contained in the Kenya Gazette Notice, Vol. CXIX-No.97 dated 17th July 2017 being Gazette Notice Number 6862 at Table 10-Kisii County, and having so called the same to this court to Quash the said DECISION OF THE 1st Respondent specifically described herein.

c. Costs of these proceedings be awarded to the Applicant.

3. The application was grounded upon the facts set out in the statutory statement and verifying affidavit accompanying the application for leave and a supporting affidavit sworn by the ex parte applicant Hellen Kemunto Obaga dated 30th August 2017. The ex parte applicant's case is that she is the registered owner of the property known as **Kisii Municipality/Block III/282 ("the suit property")** and has annexed a copy of the certificate of lease dated 4th September 2014 which shows the applicant is registered as the owner. The applicant avers that she purchased the suit property from one David Anunda who was previously the registered owner of the suit property.

4. The ex parte applicant furnished the undernoted documents which illustrate how she acquired the suit property before the purported revocation of the title by the 2nd respondent:-

a. A letter of Allotment dated 26th July 2000, the Government of Kenya allotted the suit property to Gusii County Council.

b. A Sale Agreement dated 21st August 2000 entered into between Gusii County Council and one David Anunda whereby, the council transferred the leasehold interest in the property to David Anunda at a consideration of Kshs. 1,000,000.

c. A transfer dated 22nd February 2001 from the Gusii County Council to David Anunda and a certificate of lease issued to him on 17th April 2001.

d. Kenya Gazette dated 19th March 2010 whereof the 2nd Respondent as the Land Registrar Kisii issued a Gazette Notice No. 2654 in which it revoked various Titles among them, the suit property which property is registered in her name.

5. The ex parte applicant further averred that as a result of the revocation referred to above, David Anunda who was the registered lessee of the suit property at that time brought Judicial Review Proceedings in High Court Miscellaneous Civil Application No. 30 of 2010 against the Commissioner of Lands and the Land Registrar to quash the order of revocation of the title. The ex parte applicant further stated that she became the registered lessee of the suit property on 4th September 2014 after exercise of careful due diligence and verification of the documents leading to the registration of the suit property in the name of David Anunda. Some of the documents which are annexed to the verification affidavit pages 38 to 39 of The Chamber Summons are:-

a. An extract of minutes of the Gusii County Council dated 2000 passing a resolution to sell the immovable properties of the Council, including the suit property.

b. A letter from the Ministry of Local Authorities dated 10th August 2000 allowing Gusii County Council to dispose of the subject properties.

c. A letter dated 24th August 2000 in which the Commissioner of Lands acknowledged the Consent of the Government given to Gusii County Council, allowing the Council to sell five of its properties, including the suit property.

6. The ex parte applicant further stated that on the 16th of March 2016, the 1st respondent placed an advertisement in The Star Newspaper indicating that it was going to review grants and dispositions of Public Land in Kisii and among the Public land to be reviewed was the suit property. That on 29th March 2016, at Kisii Culture Hall in Kisii the applicant submitted to the 1st respondent her submission illustrating how she became the registered lessee of the suit property. During the proceedings the applicant stated that she noted the following:-

a. There were other property owners, numbering in excess of one hundred persons, all in attendance for purposes of the review.

b. No formal method was used in hearing and recording the evidence of any person.

c. There was no procedure to be followed in dealing with any particular grant. No organizational structures were put in place during those hearings.

d. Although the Commission insisted that the review was as a result of complaints received by it, it never disclosed or revealed the identity of any complainant who was to establish his/her case before requiring the applicant to respond.

7. The ex parte applicant further stated that the 1st respondent by the provisions of section 14(2) of the National Land Commission Act was by law enjoined to **"make rules for the better carrying out of its functions"** under the Act but as at 27th April 2016 (the time of hearing) the 1st respondent had not made any rules as required of it by the law and only made the said rules as at 21st April 2017. The ex parte applicant further stated that on 17th July 2017, the 1st respondent published in the Kenya Gazette, Vol. CXIX NO. 97 under Table 10 Kisii County, the following:-

‘Title Grant in favour of David Onsare Anunda revoked.

The parcel of land to reinstate to the National Government.’

The ex parte applicant in response to the purported revocation notice carried in the Kenya Gazette publication pointed out the following anomalies:-

- a. The suit property was no longer registered in the name of David Onsare Anunda, as at the date of the revocation as he ceased to be the lessee thereof upon her registration as Lessee on the 4th September 2014.**
- b. There was no title issued in respect of the suit property. What was issued at all times is a certificate of lease.**
- c. The 1st respondent was using a revocation relating to a stranger to the Certificate of lease as presently registered to affect her property rights in the suit property.**

8. It is the ex parte applicant’s case that no reasons were given by the 1st respondent in revoking her leasehold interest to the suit property and though vide her letter dated 7th August 2017, annexed to the verifying affidavit she requested to be given reasons in writing for the revocation, the 1st respondent has failed and/or neglected to furnish the applicant with any reasons for the decision made. That in view of the above, the applicant contends the respondents unilaterally violated the ex parte applicant’s rights under the Constitution to own and enjoy property and that the respondents’ action amounts to unfair administrative action. The respondents on their part never appeared and filed no response to this application. On the court’s directions the application was argued by way of written submissions and only the ex parte applicant filed submissions.

9. After considering the ex parte applicants judicial review application and written submissions the issues for determination in the instant matter are:-

- 1. What is the scope of a judicial review application?**
- 2. Whether the 1st respondent had the mandate to determine the legality of the ex parte applicants Grant over the suit property.**
- 3. Whether the 1st respondent in view of the ruling/decision in Kisii Misc. Application No. 30 of 2010 quashing the Commissioner of Lands revocation of the title to the suit property had jurisdiction to deal with the suit property under Section 14(2) of the National Land Commission Act.**
- 4. Whether the 1st respondent violated the ex parte applicants right under Article 47 of the Constitution or any other Article?**
- 5. What reliefs should the court grant?**

10. Judicial review is not concerned with the merits of the decision sought to be reviewed but rather the propriety of the decision making process. This view was aptly set out in the case of **Republic -vs- National Transport and Safety Authority & 10 Others Ex parte James Maina Mugo eKLR 2015** where the judge quoting **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**, stated thus:

“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...The court should not act as a Court of Appeal over the decider which 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...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but is a statutory body which can only do what is authorized by the statute creating it and in the manner authorized by statute.”

11. Judicial review as expressed by the court in the case is concerned not with private rights or the merits of the decision being challenged but with the decision-making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See **Republic -vs- Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285**. The ex parte applicant thus properly invoked judicial review procedure to subject the process through which the 1st respondent arrived at the decision to revoke her title to the suit property to scrutiny by the court to determine whether it was fairly arrived at after due process.

12. In regard to whether the 1st respondent had the mandate to determine the legality of the ex parte applicants grant over the suit property, the Petitioner contends that in the absence of rules and regulations to guide the process of reviewing Grants, the 1st Respondent should not have embarked on the process of reviewing the Grant over the suit property. Faced with a similar situation and issue, **Lenaola, J. (as he then was) in Compar Investment Limited -vs- National Land Commission & 3 Others [2016] eKLR** observed as follows:-

“In that regard, I note that the 1st Respondent is a constitutional commission established under Article 67 of the Constitution and whose functions are set out under the said Article as well as the NLC Act. These functions inter alia are; to manage public land on behalf of the National and County Governments and to monitor and have oversight responsibilities over land use and planning throughout the country. The Commission under Section 5(2) of the NLC Act also bears other responsibilities including power to alienate public land on behalf of, and with the consent of the National and County Governments, monitoring the registration of all rights and interests in land and ensuring that public land and land under the management of designated state agencies are sustainably managed for their intended purpose and for future generations.

Under Article 68 (c) (v) of the Constitution, Parliament has been granted the mandate to enact a legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality. Pursuant to that provision, Parliament enacted Section 14 (1) of the National Land Commission Act. For avoidance of doubt, this Section provides thus;

“Subject to Article 68(c) (v) of the Constitution, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.”

Section 14(2) of the NLC Act then obliges the 1st Respondent to make rules for the better carrying out of its functions in relation to review of grants or dispositions of public land.

It is not in dispute that the 1st Respondent at the time of carrying out the review of the Petitioner’s Grant had not promulgated the rules envisaged under Section 14(2) of the Act. Did the 1st Respondent therefore act unlawfully by doing so in the absence of rules? I do not think so.

I say so because the lack of the envisioned rules under Section 14(2) of the NLC cannot divest the 1st Respondent of its constitutional mandate to review grants or dispositions of public land and that mandate cannot be defeated or ousted by lack of rules envisaged under Section 14(2) of the NLC Act. It is therefore not true that the 1st Respondent has, by choice, elected to dishonor and disobey its own Statute as alleged by the Petitioner.”

13. In the instant case, the ex parte applicant complained firstly, that there were other property owners numbering in excess of one hundred persons all in attendance for purposes of the review; secondly, that no formal method was used in hearing and recording the evidence of any person; and thirdly, that there was no procedure to be followed in dealing with any particular grant. Nonetheless, the ex parte applicant appeared before the 1st respondent and she presented her evidence on how she came to be registered as lessee of the suit property. As **Lenaola, J.** (as he then was) observed in the **Compar Investments Ltd** case (supra) the ex parte applicant did not in the present case plead with any degree of precision how the failure of the application of the rules envisaged under Section 14(2) of the National Land Commission Act was detrimental to her so as to result in unfairness. In my view the 1st respondent notwithstanding the absence of the rules had a constitutional mandate to carry on the exercise it was undertaking and the issue would turn on whether or not they treated the parties who appeared before it fairly and in accordance with the law.

14. On the issue as to whether the 1st respondent had jurisdiction to entertain the dispute having regard to the court decision in Kisii HC Misc. civil Application No. 30 of 2010 where the court dealt with the same subject matter following revocation of the title to the suit property then registered in the name of David Onsare Anunda, my view is that the 1st respondent acted without jurisdiction. The mandate of the National Land Commission did not extend to reviewing decisions that had been made by the court. The ruling by Lady Justice Sitati in the High Court matter was brought to the attention of the 1st respondent. The ruling in considerable detail set out the mandate of the Commissioner of Lands (who the National Land Commission succeeded) and the land registrar in regard to revocation and/or cancellation of registered titles. The ruling by the learned Judge clearly upheld the contention by the registered owner that he had regularly and procedurally acquired the suit property. In the said ruling the learned judge at paragraph 19 observed thus:-

“It would appear to me, and as rightly contended by the applicant herein that the respondents’ actions resulted in deprivation of applicant’s property without following due process and in contravention of the provisions of the Constitution of Kenya whether it is Section 75 of the repealed Constitution or Article 40 (1) of the Constitution of Kenya 2010. The applicant contends, and quite rightly so in my view that it is only in cases where the property in question is found to have been unlawfully acquired that the protection afforded by Section 75 of the repealed Constitution and Article 40 of the Constitution of Kenya, 2010 can be taken away. The applicant’s case does not fall among the exceptions of the said provisions.”

15. The 1st respondent’s attention having been drawn to this ruling by the court which had dealt with an earlier revocation of the same property by the 1st respondent’s predecessor, the Commissioner of Lands, the 1st respondent could not properly ignore the High Court decision and proceed to make a determination without even a mention of the same. My view is that the 1st respondent exceeded its mandate and acted without jurisdiction. The 1st respondent’s determination and decision amounted to over-ruling the decision of the High Court which it could not properly do.

16. Lastly, the Petitioner contended that the 1st Respondent, during the review proceedings, violated her (the ex parte applicant’s) rights to fair administrative action as stipulated under **Article 47** of the **Constitution**. Her complaint in that regard was specifically that: -

d. Although the Commission insisted that the review was as a result of complaints received by it, it never disclosed or revealed the identity of any complainant who was to establish his/her case before requiring her to respond.

Article 50 of the Constitution provides that;

“Every person has the right to have any dispute that can be resolved by application of the law decided in a fair and public hearing before a Court or if appropriate another independent and impartial tribunal or body”.

It was not contested that the 1st Respondent was exercising a quasi-judicial function during the review process and was required to give the Petitioner a fair hearing before making a decision affecting it. Article 47 of the Constitution provides for the right to a procedurally fair administrative process as follows;

“(1)Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

17. In the case of *Sceneries Limited v National Land Commission* [2017] eKLR Mativo, J. held:-

“The right to be heard requires not only that the party concerned be given prior notice of the precise purpose of the inquiry or hearing but also that the person be given sufficient information to prepare his/her case. As to the disclosure of information, this implies that the party concerned be apprised of reports and documents in the body’s possession that may be prejudicial to his/her case. He/she should at least have access to all the information the tribunal or body relied upon when it made its decision. See *S.E.P.Q.A. v. Canada (C.C.D.P.)*, [1989] 2 S.C.C. 897. That information should also be disclosed in due time since the party must have sufficient time to prepare for the hearing.

Apart from the need for independence and impartiality, the right to a fair hearing under Article 50(1) of the Constitution encompasses several aspects. These include, the individual being informed of the case against her/him; the individual being given an opportunity to present her/his side of the story or challenge the case against her/him; and the individual having the benefit of a public hearing before a court or other independent and impartial body. In this regard, the respondent’s complaints are that it was not informed of the complaints against it nor was the applicant supplied with details of the complaint filed by the first interested party.....

Our constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person’s rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it. See *Kioa -vs- West* (1985), Mason, J.

Our courts have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. In *Onyango -vs- Attorney General* [1986-1989] EA 456 Nyarangi, JA asserted at page 459 that:-

“I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly.” At page 460 the learned judge added:-“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.”

And in *Mbaki & others -vs- Macharia & Another* [2005] 2 EA 206 at page 210, the Court stated as follows:-

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

Section 4 of the Fair Administrative Act No. 4 of 2015 re-echoes Article 47 of the Constitution and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In all cases where a person’s rights or fundamental freedoms is likely to be affected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action. It is noteworthy that some of these elements are mandatory while some are only required where applicable.

Subsection 4 of the Fair Administrative Act further obliges the administrator to accord affected persons an opportunity: to attend proceedings in person or in the company of an expert of his choice; a chance to be heard; an opportunity to cross-examine persons who give adverse evidence against him; and request for an adjournment of proceedings where necessary to ensure a fair hearing.

Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise, especially when decisions lie outside the effective control of the political process. The primary role of the Courts is to uphold the

fundamental and enduring values that constitute the rule of law. As with any other form of governmental authority, discretionary exercise of public power is subject to the Courts supervision in order to ensure the paramouncy of the law. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. I emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature. These are:-

a. **Illegality** - Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal".

b. **Fairness** - Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.

c. **Irrationality and proportionality** - The courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute 'irrationality' or 'perversity' on the part of the decision maker. The onus is on the applicant to establish irrationality or perversity.

18. The ex parte applicant's evidence was never rebutted, she was not supplied with details of the complaint or afforded an opportunity to face the complainant and cross-examine him on the complaints and adduce evidence to rebut the allegations. The manner in which the proceedings were undertaken was a clear breach of the well-established rules of natural justice, oppressive and an infringement on the rights of the ex parte applicant who is constitutionally entitled to a decision that is procedurally fair and just. The 1st respondent's decision was likely to adversely affect the ex parte applicant as she stood to be deprived of her property rights over the suit property and therefore was entitled to a fair process.

19. Having carefully evaluated the material placed before the court, I am persuaded that the ex parte applicant has demonstrated sound grounds for the court to grant the reliefs sought. The ex parte applicant has demonstrated that she was not served with sufficient details of the complaints against her in advance to enable her to prepare her defence and/or response and was, as it were, left to second guess what the complaint was, yet it was clear she was likely to be adversely affected by the decision that the 1st respondent may make. I find that the 1st respondent flouted the known principles of natural justice. A decision arrived at in breach of the rules of natural justice is *ultra vires*, null and void and cannot be allowed to stand.

20. I therefore find and hold that the ex parte applicant's Notice of Motion dated 11th September 2017 has merit and I allow the same in terms of prayers (a) and (b). I award the costs of the application to the applicant.

JUDGMENT DATED, SIGNED and DELIVERED at KISII this 11TH DAY of MAY, 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Ms. Shitwatso for Buti for the applicant

N/A for the 1st and 2nd respondents

Ruth court assistant

J. M. MUTUNGI

JUDGE