



**REPUBLIC OF KENYA**

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

**ELC MISC. APPLN. NO. 49 OF 2016**

**THE REGISTERED TRUSTEES OF**

**BAPTIST CONVENTION OF KENYA.....APPLICANT**

**-VERSUS-**

**1. THE NATIONAL LAND COMMISSION**

**2. CABINET SECRETARY, MINISTRY OF EDUCATION**

**3. PRINCIPAL SECRETARY,**

**MINISTRY OF EDUCATION.....RESPONDENT**

**JUDGEMENT**

1. By a Notice of Motion dated 1<sup>st</sup> December, 2018 the ex parte applicant herein, The Registered Trustees of Baptist Convention of Kenya, seeks the following orders:

***i. An order or prohibition do issue prohibiting the 1<sup>st</sup> Respondent from the purported review of the freehold title (certificate of ownership in fee) of the remainder of original Plot No. 169/11/MN (MN/11/169/2) now 811/11/MN;***

***ii. An order of certiorari to quash the 1<sup>st</sup> Respondent's Review Proceedings of 26<sup>th</sup> October, 2016 and 17<sup>th</sup> November, 2016 in relation to the freehold title (certificate of ownership in fee) of the remainder of original Plot No. 169/11/MN (MN/11/169/2) now 811/11/MN;***

***iii. Costs of the proceedings to be provided for.***

2. The application is supported by the statutory statement dated 30<sup>th</sup> November, 2016 and the verifying affidavit of Francis Njomo sworn on 30<sup>th</sup> November, 2016 filed together with the chamber summons application for leave on 30<sup>th</sup> November, 2016.

3. The applicant's case is that it purchased a property known as Plot No. 169/11/MN for valuable consideration and have attached a copy of the transfer, the certificate of ownership for estate in fee simple (freehold) and Deed Plan No. 12940. That over time since 1988 there has been constructed on the plot a church, polytechnic, nursery school and primary school.

4. The applicant avers that it is clear from entries in the certificate of ownership that the Government of Kenya had acquired a portion of land from the aforementioned title for purposes of water pipeline way leave measuring approximately 0.2826 acres by reason of which a sub-division which a sub-division took place which created the water pipeline way leave as Plot No. MN/11/169/1 measuring 0.2856 acres and the remainder of Title No. MN/11/169/2 was subsequently allocated Plot No. 811/11/MN which rendered it necessary that a new title as well as deed plan be processed and issued subject to surrendering or returning the original certificate of Title/ownership to the Land Registry for cancellation.

5. The applicant avers that it still holds the original mother certificate of ownership/title which was transferred and given out at the time of conclusion of purchase and hence the Title for the remainder MN/11/169/2 (new Plot No. 811/11/MN) has not been issued since the said mother certificate of Title/ownership has not been surrendered/returned for cancellation. The applicant states that it sought advice from the Registrar of Land, Mombasa and the Director of Survey's office that upon surrender for cancellation the original certificate of ownership for Plot No. MN/11/169 the applicant shall be issued freehold title/certificate of ownership in fee for the remainder MN/11/169/2 (Plot No. 811/11/MN) which is the resultant number pursuant to the aforementioned sub-division whereto a water pipeline way leave was excised from Title No. 169/11/MN as MN/11/169/1.

6. The applicant further avers that pursuant to a complaint from the Ministry of Education, the Respondents have commenced a process of purported review as to the legality of the applicant's aforementioned title. The applicant states that Section 14 of the National Land Commission Act that has been invoked by the Respondents does not empower the National Land Commission to review freehold titles (Estate in fee) subject of the proceedings which otherwise a High Court decision in High Court Petition No. 3 of 2006 given on 29<sup>th</sup> December, 2011 decreed in favour of the Applicant proprietary rights over plot No. 811/11/MN (original No. 169/11/MN). It is the applicant's contention that there has been jurisdictional challenge raised before National Land Commission's Review sittings touching on the subject land by the applicant's counsel but that the 1<sup>st</sup> Respondent Commissioners in the Review Panel have demonstrated unwillingness to entertain or rule on the same and have openly exhibited bias against the applicant in the matter even before hearing their witnesses contrary to the rules of natural justice. The applicant avers that an oral application by its counsel to be supplied with the Review proceedings of the National Land Commission on 17<sup>th</sup> November, 2016 was not entertained and that there was no response to a formal letter dated 18<sup>th</sup> November 2016.

7. Based on legal advice, the applicant avers that without any complaint from the previous registered owners the Commissioners of the panel involved in the review process in what it appears to be self-endearing to Government and have exceeded their mandate under Section 14 of the Act. The applicant states that the 1<sup>st</sup> Respondent has purported to take possession of the certificate of ownership for the applicant's freehold land towards subjecting the same to forensic examination so as to determine the legality of some of the entries yet it is not within their mandate to do so hence a waste of public resources and abuse of office. The applicant contends that the actions of the Respondents are unlawful, arbitrary, capricious, without jurisdiction and unconstitutional which ought to be checked, prohibited and quashed by an order of the court.

8. The Respondents were duly serve but did not file any response. When the matter came up for hearing, the applicant's counsel Mr. Mogaka in his submissions reiterated the facts of the case. He emphasized that there was a court dispute over Plot No. 811/11/MN (old plot No. 169/11/MN) between the applicant, the ministry of Education and the Municipal Council of Mombasa in High Court Petition No. 3 of 2006 which went to full trial where the court in its ruling made a finding that the applicant is the owner of the suit land and that the parents, students and community at large have no proprietary interest in it. He added that there was no appeal against that ruling. Counsel submitted that the review by the Respondents is intended to frustrate the ruling of the court yet the National Land Commission is not court of appeal and therefore are acting in excess of power, arbitrarily, capriciously and without jurisdiction. He pointed out that the facts have not been controverted and urged the court to grant the orders sought.

9. The purview of judicial review was clearly set by Lord Diplock in the case of Civil Service (1985) AC 374 at 401D when he stated that:

***“Judicial review has I think developed to a stage today when... one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call illegality, the second irrationality, and the third “procedural impropriety...”***

***By illegality as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it... By ‘irrationality’ I mean what can now be succinctly referred to as “wednesbury unreasonable”. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it... I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”***

10. Section 14 of the National Land Commission Act, 2012 provides:

***1. 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.***

***2. Subject to Articles 40, 47 and 60 of the Constitution, the commission shall make rules for the better carrying out of its functions under subsection (1).***

***3. In the exercise of the powers under subsection (1), the commission shall give every person who appears to the commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.***

***4. After hearing the parties in accordance with subsection (3), the commission shall make a determination.***

11. Article 47 of the Constitution provides:

***i. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

***ii. 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.***

12. That the review of the title to the suit property was an administrative action by the 1<sup>st</sup> Respondent is not in dispute. The 1<sup>st</sup> Respondent was therefore under a duty to ensure its action was lawful, reasonable and procedurally fair. Procedural fairness necessarily requires that persons who are likely to be affected by the decision be afforded an opportunity of being heard before the decision is taken. Further, an action made without jurisdiction is without doubt ultra vires.

13. It was held by the Court of Appeal in Republic –vs- Kenya National Examination Council ex-parte Geoffrey Gathenyi and 9 others that:

***“the remedies of 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 treatments.”***

14. Therefore where the law exhaustively provides for the jurisdiction of an administrative body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. Administrative bodies must act within their lawful authority and an act, whether it be a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. An administrative body or authority must operate within the law and exercise only those powers which are donated to it by the law or the legal instrument creating it.

15. In this case, the applicant’s title is freehold/ in fee simple and not a grant or disposition of public land. From a look at the provisions of section 14 of the National Land Commission Act, it is clear that the 1<sup>st</sup> respondent’s actions were without jurisdiction and ultra vires. Moreover, it is not in dispute that there was a dispute before the High court being Mombasa HC Petition No. 3 of 2006 between the applicant and the Ministry of Education, Science and Technology and the Municipal Council of Mombasa in which the court made a finding that the applicant is the owner of the suit land. Since there was no appeal against the decision of the court, the decision is still in force. The respondent’s cannot pretend to be sitting on appeal over the decision of the High Court.

By purporting to undertake review proceedings as regards the legality of the applicant’s title to the suit property in disregard of the court’s orders, the 1<sup>st</sup> respondent no doubt acted in excess of power and without jurisdiction.

16. Consequently, I find merit in the Notice of Motion dated 1<sup>st</sup> December 2016 and grant the orders as prayed. The applicant will have the costs of these proceedings.

It is so ordered.

**Dated delivered and signed at Mombasa this 9<sup>th</sup> May, 2018.**

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**C.YANO**

**JUDGE**