



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. MISCELLANEOUS APPLICATION NO. 39 OF 2017 (JR)

IN THE MATTER OF AN APPLICATION BY PAULINE ANYANGO DOLA, TOM DOLA & SAMUEL DOLA FOR WRIT/ORDERS OF JUDICIAL REVIEW IN THE NATURE OF (CERTIORARI AND PROHIBITION)

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF NATIONAL LAND COMMISSION ACT

AND

IN THE MATTER OF FAIR ADMINISTRATION OF ACTIONS ACT 2015

AND

IN THE MATTER OF LAND REGISTRATION ACT NO. 1 OF 2012

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION

BETWEEN

TOM DOLA

SAMUEL DOLA

PAULINE ANYANGO DOLA.....APPLICANTS

VERSUS

THE CHAIRMAN

(NATIONAL LAND COMMISSION).....1ST RESPONDENT

THE NATIONAL LAND COMMISSION.....2ND RESPONDENT

THE CHIEF LAND REGISTRAR.....3RD RESPONDENT

THE COUNTY LAND REGISTRAR

(KISUMU COUNTY).....4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....5TH RESPONDENT

AND

LAKE BASIN DEVELOPMENT AUTHORITY.....INTERESTED PARTY

JUDGEMENT

1. Pauline Anyango Dola, Tom Dola and Samuel Dola, the Exparte Applicants, sought this court's leave to file Judicial Review proceedings seeking the orders of certiorari and prohibition through the Chamber Summons dated 16th March 2017. That application was granted on the 20th March 2017 with directions that the substantive application be filed and served in 21 days. That the court further directed that the Chamber Summons be served in Seven (7) days for hearing on prayer 4 for the order that leave granted operate as stay. That the Chamber Summons application was duly served and prayer 4 granted when it came up for hearing on the 4th April 2017, as no replying papers had been filed in opposition.

2. The Exparte Applicant filed the notice of motion dated 21st March 2017 seeking for the following prayers;

1) "The Honourable court be pleased to grant and/or issue writ and/or order of judicial review in the nature of Certiorari, removing into this Court and Quashing, the proceedings of the 1st and 2nd Respondents of 5th day of October 2016, and determination of the 1st and 2nd Respondents reached and conveyed vide letter dated the 20th day of February 2017, directing the Chief Land Registrar (3rd Respondent herein) to revoke and/or annul the title in respect of parcel of land otherwise known as LR NO. KISUMU MUNICIPALITY/BLOCK XI/210, and directing that the same be registered in the name of the Lake Basin Development Authority (the interested party herein), and also decreeing the 3rd Ex-parte Applicant to vacate the property the subject of the impugned decision within 3 months, effective the 20th day of February 2017."

2) The Honourable Court be pleased to grant and/or issue a writ and/or order of judicial review in the nature of Certiorari, removing into this Court and quashing any administrative step (s), action or measures initiated or put in process/motion by the Respondents, upon the determination of the 1st and 2nd Respondents being reached and conveyed vide the letter dated the 20th day of February 2017, with a view of giving effect, perfecting or altering the entry in the records and registers held by the Respondents, in particular, the 2nd and 3rd Respondents, in an attempt or in bid to implement or give effect to the impugned decision of the 1st and 2nd Respondents as conveyed vide the letter dated the 20th day of February 2017, or cause the name of the Ex-parte Applicants to be de-registered by the 3rd Respondent and the names of the interested party herein be registered or substituted in lieu thereof.

3) The Honourable Court be pleased to grant writ of judicial review in the nature of prohibition, against the Respondents, prohibiting the same from dealing with the impugned decision of the 1st and 2nd Respondents in howsoever or whatsoever manner or implementing the same, as Decreed vide the decision conveyed or contained in the letter dated the 20th day of February 2017."

4) Costs of this Application be borne by the Respondents and the interested party."

The application is based on the seventeen (17) grounds on its face, as ground number (n) has been repeated in number (P) (r) (t) and (u). The application is supported by the affidavits sworn by Tom Dola, one of the Exparte Applicants, on the 21st March 2017 and 28th July 2017.

3. The Exparte Applicants notice of motion is against The Chairman National Land Commission, the National Land Commission, The Chief Land Registrar, The County Land Registrar, Kisumu and the Honourable Attorney General as the 1st to 5th Respondents respectively and Lake Basin Development Authority as the Interested Party.

4. The Principal Litigation Counsel entered appearance for the 3rd to 5th Respondents through the Memorandum of appearance dated 24th March 2017 but opted not to file any replying papers or submissions.

5. M/s Amondi & Co. Advocates entered appearance for the Interested Party through the Memorandum of appearance dated 20th April 2017. The Interested Party opposed the notice of motion through the replying affidavit sworn by Clifford Obiero, a legal officer with the Interested Party, sworn on the 21st June 2017.

6. That when the notice of motion came up for hearing on the 13th June 2017, the court directed that written submissions be filed and exchanged after hearing Mr. Otieno, Nyauma and Achira, learned counsel for the Exparte Applicants, 3rd to 5th Respondents and Interested Party respectively. That the learned counsel for the Exparte Applicants filed their written submissions dated 29th July 2017 and the Interested Party's counsel filed theirs dated 20th December 2017.

7. The 1st and 2nd Respondents opposed the notice of motion through the replying affidavit sworn by Brian Ikol, an advocate and Deputy Director Legal Affairs and Enforcement, on the 9th April 2018. The 1st and 2nd Respondents filed their written submissions dated 25th May 2018 through their learned counsel, Njuguna Jacqline, Advocate.

8. That this being an application for Judicial Review orders of Certiorari and Prohibition, the court's concern is on the process leading to the decision sought to be impugned and not its merit. That accordingly, the following are the issues for the court's determinations;

a) Whether the 1st and 2nd Respondents have jurisdiction to investigate the title to Land Parcel Kisumu Municipality/Box 11/210, the suit land.

b) Whether the 1st and 2nd Respondents accorded the exparte Applicants a fair hearing in the process of investigating the title to the suit land.

c) Who pays the costs of these proceedings.

9. The court has after considering the grounds on the notice of motion, statement, affidavit evidence by The Exparte Applicants, Interested Party, the 1st and 2nd Respondents, written submissions and the authorities cited therein, come to the following findings;

a) That from the written submissions filed by the three learned counsel for the Exparte Applicants, Interested Party, the 1st and 2nd Respondents, it is not contested that the 1st and 2nd Respondents have jurisdiction pursuant to **Article 67 (3) and 68 (c) (v) of the Constitution; Sections 14 of the National Land Commission** to review grants or dispositions of public land to establish their legality. That Kisumu Municipality/Block 11/210 was according to the Exparte Applicants allocated to Pauline A. Dola, Esther Chebet and S. C. Kipkoech by the Commissioner of Lands through the letter of allotment dated 5th June 1998 and attached to the statement of Judicial review. The letter of allotment under reference **30973/LXVIII/45** describes the land allocated and measuring 0.24 hectares of land as **“RESIDENTIAL PLOT - KISUMU MUNICIPALITY”** and was offered for 99 years from 1st June 1998. That the said Exparte Applicants have also annexed a copy of the lease for Kisumu Municipality/Block II/210 dated 18th January 2002 in favour of the three allottees and a certificate of lease issued on the 23rd April 2002 in their names.

b) Though the lease and certificate of lease referred to above are in the names of four private individuals and not public bodies, the 1st and 2nd Respondents had the legal duty to investigate how the title document vesting the formerly public land was issued to determine its propriety and legality. That a similar position was taken by the superior courts in the case of **Republic Vs National Land Commission Exparte Holborn Properties Limited [2016] eKLR, Republic V National Land Commission and Another Exparte Muktar Saman Olow (2015) eKLR, Republic –V- National Land Commission & 3 Others Exparte Safeway Hypermarkets Limited [2017] eKLR, Joseph Mungai & Another –V- Mathaara Mwangi & Others Petition NO. 530 of 2016 that under Section 14 of the National Land Commission Act No. 5 of 2012**, the Commission is given jurisdiction to enforce **Article 68 (c) (v) of the Constitution 2010** and review all grants and dispositions of public land to establish their propriety or legality. That the jurisdiction conferred can only be discharged by probing, querying or investigating the process under which the public land was converted and registered as private land. That it would defeat the purpose of the Constitution to imagine that unlawfully and irregularly acquired public land, ones registered as private property, is no longer within the reach of the Commission.

c) That as correctly submitted by counsel for the Exparte Applicants and the 1st and 2nd Respondents, the National Land Commission has a duty to give every person who appears to have an interest in a grant or disposition that is under investigations and or review an opportunity to appear before it, to produce and inspect any relevant documents. That in discharging the jurisdiction to investigate and review grants and dispositions, the National Land Commission therefore exercises quasi-judicial mandate and its processes and determinations are subject to the supervision of this court through grant of judicial review orders as provided under **Article 22 and 23 (3) (f) of the Constitution and Section 13 (7) (b) of Environment and Land Court Act No. 19 of 2011**.

d) That the Exparte applicants have in their grounds (d) to (g), (k) and (i) complained that the 1st and 2nd Respondents did not give them fair hearing before arriving at the decision sought to be impugned. That at grounds (h) to (j) and (m), the Exparte Applicants claims that the 1st and 2nd Respondents action was ultra vires the Constitution and other Statutory Provisions; illegal and irrational; constitute gross act of impropriety, impunity and abuse of power; and unconstitutional. The Exparte Applicants through the deposition sworn by Tom Dola on the 21st March 2017, depone that he only got to know of review hearing of the 5th October 2016 on that same day when a friend informed him of its publication in the Daily Nation Newspaper. The deponent added that the other exparte Applicants, namely Pauline Anyango Dola and Samwel Dola, were never notified of the hearing though they are owners in common of the suit land. That the Interested Party refuted the Exparte Applicants’ claim especially that of Tom Dola’s, and annexed copies of the National Land Commission letter dated 24th March 2016 and 3rd June 2016 asking him to submit documents in his possession relating to the suit property and to attend the hearing on the 14th June 2016 and 30th August 2016. That the letters are signed by the Secretary, County Land Management Board Kisumu who also signed the letter dated 5th August 2016 addressed to the Interested Party and also annexed to the said affidavit. That the letter at paragraph 2 states that “...meeting of 14th June 2016, when the agenda was discussed for the 2nd time and Mr. Dola appeared in person.” The letter further asked the Interested Party to send an officer who is conversant with the matter in order to shed more light on it to facilitate its speed resolution. The letter at paragraph 3 informs the Interested Party that the matter has been rescheduled for the 30th August 2016 and that they should avail all relevant documentation about the land on or before that date. That another letter of the same date, 5th August 2016, addressed to Mr. Tom Dola is annexed referring to the meeting of 14th June 2016 which he attended and made submissions. The letter details eight (8) documents which he is requested to avail on or before the 23rd August 2016, and invites him to attend the meeting scheduled for that date. That the 1st and 2nd Respondents annexed to their deposition the copy of the Daily Nation Newspaper advertisement of the Public Notice. The notice shows the hearing in respect of Kisumu Municipality/Block II/210 was for 4th October 2016 and the identified parties to attend or to be heard are named as Tom Dola and Lake Basin Development Authority. That the said Tom Dola attended the hearing as confirmed in ground (f), paragraph 10 of his affidavit sworn on 21st March 2017 and paragraph 9 of the verifying affidavit sworn on the 16th March 2017. That in view of the various notices to produce relevant documents served upon Mr. Tom Dola by the Secretary County Land Management Board, Kisumu and invitations to attend the meetings of 14th June 2016 and 23rd August 2016 and the fact that the said Exparte Applicant indeed attended at least the meeting of 14th June 2016, it would not be true for him to claim that he did not know of the complaint surrounding the acquisition of the suit land. That further he admits to having known of the grants review meeting that had been advertised through the Daily Nation Newspaper and indeed, attended and he cannot turn around and allege that he was not given a fair hearing. That the claim by Mr. Tom Dola that he was not given a

fair hearing before the decision he complains of was made has no basis and cannot suffice to impugn the process through which the decision thereof was made.

e) That Pauline Anyango Dola and Samwel Dola (minor) are registered with Tom Dola as owners of the leasehold interest in the suit land, subject matter of these proceedings. That they are also part of the Exparte Applicants herein and they claim that they were not given an opportunity to be heard before the decision divesting them of the land was made. That the Interested Party and the 1st and 2nd Respondents replying affidavits have not availed any notices, letters or other correspondence addressed to the two Exparte Applicants to either produce their documents, attend any of the hearings or make written submissions before the decision sought to be impugned was made. That the 1st and 2nd Respondents deposition at paragraph 14 of the affidavit states that the two Exparte Applicants knew of the proceedings and that “in utter disregard of the Commission and the review process failed to participate in any of the proceedings and or furnish the 2nd Respondent with any documents that would assist it to reach an informed decision” cannot be verified in the absence of any documentary evidence of the notices and invitations. That such a failure to serve notices or invitation would ordinarily be sufficient to impugn the process through which the decision was made. That however, in this case the court has taken note of the letter dated 14th May 2002 addressed to Mr. Tom Dola by the Managing Director Lake Basin Development Authority headed “Suspension” under reference LBDA/K/PF/C1518 (104). That letter is attached to the Interested Party’s replying affidavit at paragraph 3, it discloses that the two other proprietors of the suit land registered on the 23rd April, 2002 are wife and son to him. That though the Exparte Applicants filed the supplementary affidavit sworn by Tom Dola on the 28th July, 2017, they did not dispute that they are husband, wife and son. That accordingly and considering the primary role Mr. Tom Dola must have played in the initial acquisition of the allotment in the name of Pauline Anyango Dola and two others as borne by the correspondence on disciplinary process addressed to him by the Interested Party and attached to their replying affidavit; the pivotal role he continues to exercise in this proceedings with the consent of the two other Exparte Applicants, there is no way that Mr. Tom Dola would have failed to notify the two co-registered proprietors of the suit , about the notices and invitations for the meetings and to produce documents relating to the land in dispute. That in any case Mr. Tom Dola could have produced whatever additional documents the two others had, and even avail them as witnesses if they had any relevant evidence in support of their common interest over the land. That even if the court was to allow the application, the 1st and 2nd Respondents would still be at liberty to commence their investigations and review of the title documents of the suit land afresh with adequate notices to all interested persons,

f) including Pauline Anyango Dola and Samuel Dola. That the Exparte Applicants have not disclosed what other documents may be in their possession that they would have produced that would have led the Commission to a different decision. That in the case of **Republic –v- National Land Commission & 3 Others Exparte Safeway Hypermarkets Limited [2017] eKLR**, the court at paragraph 98 referred to **Halsburys Laws of England 4th Edition Vol. 1 (1) paragraph 27** which states;

“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 the 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 fulfillment. 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. Accounts 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 in retrospect by declaratory orders.’”

The court at paragraph 99 made reference to the case of **Jocinta Wanjiru Raphael –v- William Nangulu – Divisional Criminal Investigations Officer Madadara & 2 Others [2014] eKLR** where it was held that;

“...it must always be remembered that judicial review orders being discretionary are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles...The court does not issue orders in vain even where it has jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfill its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized, even if merited. They would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance.”

That in view of the foregoing, and considering this proceeding is not about the merit of the decision complained of, the court find and hold that the notices to produce, and invitations to attend the Commission hearing on the 14th June 2016, 23rd August 2016 and 4th October 2016 made to Mr. Tom Dola were sufficient notices and invitations to the other two co-proprietors of the suit proprietors of the suit property. That therefore the exparte Applicants ground of failure to be accorded fair hearing fails.

g) That this proceeding is not about the merit of the decision made by Commission, but the process. That the finding in (e) shows that the exparte Applicants were accorded a fair hearing. That as found in (b) above, the Commission is with Jurisdiction to investigate and review all grants or dispositions on public land and the investigations they undertook in respect of Kisumu

Municipality/Block II/210 was within their Constitutional and statutory powers. That should the Exparte Applicants have an issue or complaint on the merit of the decision taken by the Commission, their legal recourse could better be served through a suit rather than a judicial review proceedings.

10. That flowing from the foregoing, the court finds that the Exparte Applicants notice of motion dated 21st March 2017 is without merit. That the said application is therefore dismissed with costs to the 1st and 2nd Respondents plus the Interested Party. That further, the stay order issued in terms of prayer 4 of the Chamber Summons dated 16th March 2017 on the 4th April 2017 is hereby vacated.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 24TH DAY OF OCTOBER 2018

In the presence of:

Exparte Applicants Absent

Respondents Absent

Interested Party Absent

Counsel Mr. Osodo for Otieno for Exparte Applicants

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE