



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**JR NO. 3 OF 2018**

**KENYA RE-INSURANCE CORPORATION.....APPLICANT**

**VERSUS**

**NATIONAL LAND COMMISSION.....RESPONDENTS**

**JUDGMENT**

1. Pursuant to leave granted by the court on 26<sup>th</sup> February, 2018, the Ex-parte Applicant herein, Kenya Reinsurance Corporation Limited filed the Notice of Motion dated 5<sup>th</sup> March, 2018 brought under Order 53 Rule 3 of the Civil Procedure Rules, Articles 165(6) & (7) of the Constitution and Sections 8 & 9 of the Law Reform Act Cap 26 Laws of Kenya.

2. The Ex-parte Applicant seeks the following orders:

**i. An order of certiorari be and is hereby issued to remove into this court and quash the Notice of eviction issued by the National Land Commission dated 19<sup>th</sup> January, 2018 in respect of all that parcel of land known as Land Reference Number MN/1/9141 Shanzu and as referred to in the said Notice of eviction as Plot No.MN/1/9141 and directed to the ex-parte Applicant.**

**ii. An order of Certiorari be and is hereby issued to remove into this court and quash any and or all Publication(s), proceeding(s) and/or decision(s) of the National Land Commission, its agents, employees and/or and other person(s) whosoever or howsoever acting on, with and/or under its instructions preceding and/or culmination of which is the Notice of eviction issued by the National Land Commission dated 19<sup>th</sup> January, 2018 in respect of all that parcel of land known as Land Reference Number MN/1/9141 Shanzu and referred to in the said Notice of eviction as PLOT NO.MN/1/9141 and directed to the exparte Applicant.**

**iii. An order of prohibition be and is hereby issued forbidding the National Land Commission by itself, its agents, employees and/or any other person(s) whomsoever or howsoever acting on, with and/or under its instructions from conducting any hearing, review or action in respect of all that parcel of land known as Land Reference Number MN/1/9141 SHANZU and referred to in the said notice of eviction as PLOT NO.MN/1/9141 and directed to the ex-parte Applicant.**

**iv. That costs of this suit be borne by the Respondent.**

3. The application is supported by a verifying affidavit sworn on 13<sup>th</sup> February, 2018 by Jadhah Mwarania, the managing director of the Applicant. According to the deponent, the applicant is the registered owner of all that parcel of land known as Land Reference **NUMBER MN/1/9141 SHANZU** measuring approximately 7.0 hectares, the same having been allotted to the applicant vide **Allotment Letter Reference Number TP3/2/XIV/278** dated 10<sup>th</sup> December, 1993 and the title of the property was registered in the Applicant's name on 5<sup>th</sup> June, 1997.

4. It was deposed that the entire suit property was handed over to the applicant on vacant possession with clear boundaries and the applicant, since the allotment and issuance of title of the suit property, has enjoyed quiet possession of the same until in the year 2010 when the Prisons Service Department, Shimo la Tewa Prisons also claimed interests in respect to the suit land.

5. The deponent averred that the applicant has engaged various ministerial departments of the government including the permanent secretary ministry of lands in order to solve the issue between the applicant and the Prisons Service Department but the same remains unresolved to date.

6. However, on 30<sup>th</sup> January, 2018 the applicant was slapped with an eviction Notice dated 19<sup>th</sup> January, 2018 issued by the Respondent

which was published in the local newspaper on 30<sup>th</sup> January, 2018. The said eviction notice was directed to the applicant and required the applicant to surrender the suit land ownership documents to the Respondent within fourteen (14) days of the said notice and prepare to vacate the said land within ninety (90) days of the said notice failure of which the applicant would be forcefully removed.

7. The applicant's case is that prior to the issuance of the said notice of eviction by the Respondent, it had never or at all been notified, invited and or attended any proceeding(s) from which a valid legal decision was made ordering the eviction of the applicant from the suit property which it is the registered owner. The applicant contends that its possession of the suit property has never been held or declared as an unlawful trespass or occupation by any competent judicial or quasi-judicial body or entity and that the suit property has never been vested onto the Prisons Department by any competent legal entity or body whatsoever or at all.

8. The deponent avers that the applicant through its advocates have made efforts to secure understanding, information on the origin, basis, factual, legal and/or constitutional justification of the eviction notice through a demand letter dated 5<sup>th</sup> february, 2018 in which the respondent was asked to afford the applicant a response to the request made, but to date the Respondent has never offered a response.

9. The applicant therefore contended that the Respondent's decision are a monumental unmitigated breach of the rules of natural justice, ultra vires, without jurisdiction, abuse and misuse of statutory and constitutional power, malicious, unreasonable, biased, grossly illegal, oppressive, a breach of the applicant's constitutional right to own property and that the Respondents actions are of no consequence and legal effect, invalid, null and void.

10. The applicant further contended that being denied a chance to participate in the proceedings which resulted to the issuance of the eviction notice amounts to violation of the applicant's rights under Article 50 (2)(K) of the Constitution. That the respondent is acting contrary and in violation of section 14 of the National Land Commission Act No.5 of 2012. The applicant further avers that Article 40 of the Constitution guarantees the protection of the right to property and that the Respondent herein cannot seek to have the applicant's property be deprived without due process of the law. The applicant argues that the respondent controverted the applicant's legitimate expectation that it would be accorded a fair hearing and not be subject to unfair decision which was arrived at without adherence to the due process of the law.

11. The applicant contends that it is in the wider and overriding interests and dictates of justice that the orders sought herein are granted and urged the court to exercise its unfettered discretion and jurisdiction to grant the orders sought to bring to an end the aggression and provocation by the Respondent which have no factual and or legal foundation. It is further the applicant's contention that no prejudice shall be visited upon the respondent or other intended interested parties as they have never occupied, possessed and or held any proprietary interests in respect of the suit property.

12. In response to the application, the Respondent filed grounds of opposition dated 17<sup>th</sup> July, 2018 on the following grounds:

**1. That the Application is scandalous, frivolous, vexatious and abuse of the court's process.**

**2. That judicial review is concerned with the decision making process and not the merits of the decision itself. The Application is hence incompetent as it challenges the merits of the decision made by the Respondent and not the process that led towards the making of the impugned decision.**

**3. That from the evidence on record, the applicant was given fair and reasonable opportunity to be heard.**

**4. That the applicant has jurisdiction in law under the provisions of the Land Act and the National Land Commission Act to make the decision in question.**

13. Mr. Millimo Counsel for the applicant filed submissions dated 11<sup>th</sup> May, 2018 which he highlighted on 17<sup>th</sup> July, 2018. He reiterated the grounds in support of the application and added that the Respondent in exercise of its statutory power has a duty to observe the fundamental rules of natural justice. Mr. Millimo submitted that the power to investigate the regularity or otherwise of ownership rights over parcels of land was prescribed and limited to five years under the National Land Commission Act and was to commence in May, 2012 and lapse in May, 2017. He referred the court to Section 14 of the National Land Commission Act. It was Mr. Millimo's submission that at the time the respondent was purporting to issue the impugned notice, its power to investigate had expired and therefore the exercise was without jurisdiction. He cited the case of ex-parte **Samuel Githigi Mbugua & 5 Others (2018) eKLR** in which the court was of the view that the Respondent cannot purport to review any grant or disposition of public land after the expiry of its mandate under Section 14 of the Act whether such review is pursuant to a new complaint or a complaint that was pending at the time its mandate expired unless parliament extends its mandate under that Section of the Act. The applicant's counsel also relied on other authorities filed herein on 15<sup>th</sup> May, 2018.

14. In his submissions, Mr. Mbuthia counsel for the Respondent submitted that Section 6 of the National Land Commission Act gives the Respondent power to conduct inquiries while Section 152A, 152 B, and 152C permits eviction of unlawful occupiers of land. He added that there was no decision before court for quashing and therefore the matter was premature.

15. I have considered the application before me together with the statutory statement and verifying affidavit filed in support thereof. I have also considered the grounds of opposition filed and the submissions of counsel as well as the authorities that were cited.

16. Having considered the foregoing it is clear that the factual basis of the ex-parte applicant's case is not challenged in light of the fact that the Respondent has opted not to controvert the same by way of affidavit evidence yet the allegations are directed at it.

17. In the case of **Municipal Council of Mombasa –v- Republic & Umoja Consultants Ltd Civil Appeal No.185 of 2001** it was held:

*“Judicial review proceedings 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 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.”*

18. It was also held in Republic –v- Kenya Revenue Authority ex-parte Yaya Towers Limited (2008)eKLR that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is not part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question.

19. Accordingly, this court will only concern itself with the process followed by the Respondent in arriving at the impugned decision and therefore will not dwell on whether the title held by the applicant is genuine or otherwise. That is an issue which can only be resolved in a merit hearing before court.

20. Section 24 of the Land Registration Act provides as follows:

Subject to this Act: -

**a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and**

**b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.**

21. Under the provisions of Article 40 (6) of the Constitution, property rights protected under Article 40 of the Constitution do not extend to any property that has been found to have been unlawfully acquired. The crucial words in Article 40 (6) are “found to have been unlawfully acquired.” Therefore there must be a finding that the property in question was unlawfully acquired.

22. Section 14 of the National Land Commission Act 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 complainant 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 Article 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.**

**5) Where the commission finds that the title was acquired in an unlawful manner, the commission shall, direct the Registrar to revoke the title.**

**6) Where the commission finds that the title was irregularly acquired, the commission shall take appropriate steps to correct the irregularity and may also make consequential orders.**

**7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.**

**8) In the exercise of its power under this section, the commission shall be guided by the principles set out under Article 47 of the constitution.**

**9) The commission may, where it considers it necessary, Petition Parliament to extend the period for undertaking the review specified in subsection (1).**

23. There is no dispute that the respondent had power under Section 14 of the National Commission Act on its own motion or upon a complaint to review all grants or dispositions of public land to establish their propriety or legality. However, it is implicit from the foregoing that the rules of natural justice apply when the Respondent in exercising its power under Section 14 of the said Act, pursuant to which it purported to have been acting when it made the impugned decision.

24. Article 40 (3) of the constitution provides:

The state shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation –

a) Results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter five; or

b) Is for a public purpose or in the public interest and is carried out in accordance with this constitution and any Act of Parliament that –

i. Requires prompt payment in full, of just compensation to the person; and

ii. Allows any person who has an interest in, or right over, that property a right of access to a court of law.

25. Article 40 (3) accordingly protects the right of any person to own property. That article must be read with the provision of Article 47 of the same constitution which provides:

**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 likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

26. From the foregoing provisions it is clear that the right to property is constitutionally protected and a person can only be deprived of that right as provided under the constitution. It is therefore clear that under the constitution and the relevant statutory provisions a registered proprietor's title to land cannot be revoked without the proprietor being afforded an opportunity of being heard.

27. All courts have been consistent on the importance of 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 –v- Attorney General (1986-1989) EA EA 456, Nyarangi, JA asserted at page 459 -460 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.....A decision in breach of the rules of natural justice is not cured by holding that 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.”*

28. It has also been held by the courts that the right of a person to defend himself/herself in the face of a decision potentially affecting his/her rights or interests necessarily implies that the person must receive prior notice of the facts on which the decision will be based. Failure to give proper notice is itself a denial of natural justice and of fairness. The notice must be communicated to the interested party, preferably in writing. In addition to specifying the date and place of the hearing, the notice must be sent in a timely matter (i.e. sufficiently in advance of the hearing) adequately describing the relevant facts and allegations so that a party may respond to them and outlining who will be present at the hearing, what the hearing will entail and the possible effects the decision may have on the rights of the person. See Sceneries Limited –v- National Land Commission (2017)eKLR.

29. In the present case, the Respondent published the notice of eviction in local daily newspaper and even then only the land reference number was published. To me that did not constitute sufficient notice. It does not in my view qualify to be adequate notice that complies with the principles of natural justice.

30. Having analyzed the facts of this case, it is clear that no notice was served upon the applicant. Details of the complaint were not availed to it in advance, yet its rights were bound to be affected by the decision. The alleged publishing of the Land Reference Number in a local daily is in my view not proper notice. It is my finding that the Respondent violated the rules of natural justice by failing to serve the applicant with adequate notice and the details of the complaint and on those grounds alone, I am inclined to allow the notice of motion before me.

31. Furthermore, the decision by the Respondent which was published in the newspaper does not show how the matter was determined. It shows that the said decision was arrived at without affording the applicant the opportunity to defend itself. This violated the provisions of Article 50 of the Constitution. A decision given without observing the principles of natural justice is void.

32. Article 67 (2)(e) of the Constitution and Section 5 of the National Land Commission Act stipulates the functions of the Respondent which include to initiate investigation on its own initiative or on a complaint into present or historical land injustice and recommend appropriate redress. It is clear that the Respondent is mandated to investigate and recommend appropriate redress. In the impugned notice, the Respondent purported to render “a determination” as opposed to a “recommendation” where it stated that the applicant's title shall be revoked.

33. In the result, I am persuaded that the applicant has demonstrated sound grounds for the court to grant the reliefs sought.

Consequently, I grant the following orders:

**i) An order of certiorari be and is hereby issued to remove into the court and quash the Notice of eviction issued by the National Land Commission dated 19<sup>th</sup> January, 2018 in respect of all that parcel of land known as Land Reference Number**

MN/1/9141 SHANZU and as referred to in the said notice of eviction as PLOT NO. MN/1/9141 and directed to the ex-parte applicant.

ii) An order of certiorari be and is hereby issued to remove into this court and quash any and or all publication(s), proceeding(s) and or decision(s) of National Land Commission, its agents, employees and or any other persons whatsoever or howsoever acting on, with or under its instructions preceding and or culmination of which is the Notice of eviction issued by the National Land Commission dated 19<sup>th</sup> January 2018 in respect of all that parcel of land known as Land Reference Number MN/1/19141 Shanzu and referred to in the said Notice of eviction as Plot No. MN/1/9149 and directed to the ex-parte applicant.

iii) An order of prohibition be and is hereby issued forbidding the National Commission by itself, its agents, employees and or any other person(s) whomsoever or howsoever acting on, with and or under its instructions from conducting any hearing, review or action in respect or all that parcel of land known as Land Reference Number MN/1/9141 SHANZU and referred to in the Notice of eviction as PLOT NO.MN/1/9141 and directed to the ex-parte applicant.

iv) That the costs of this suit be borne by the respondent.

DATED, DELIVERED and SIGNED at MOMBASA this 15<sup>TH</sup> day of October, 2018

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C. YANO

JUDGE