



THE REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT THIKA
MISCELLENEOUS APPLICATION 11 OF 2017
IN THE MATTER OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT 2012
BETWEEN
REPUBLIC.....APPLICANT
STEPHEN KIMANI MIHIU (EX PARTE APPLICANT)
AND
NATIONAL LAND COMMISSION.....1ST RESPONDENT
CHIEF LAND REGISTRAR2ND RESPONDENT
JUDGMENT

The matter for determination is the Exparte Applicant's *Notice of Motion* application dated **7th November 2017**, brought under **Order 53 Rule 1(2)** of the *Civil Procedure Rules, Sections 1A 1B 3* and *3A* of the *Civil Procedure Act* and all enabling provisions of law and seeks for the following orders:-

- 1. That the Honourable Court be pleased to grant an order of certiorari to bring to the High Court for quashing the decision of the 1st Respondent contained in the Kenya Gazette of 17th July 2017 that directed he Chief Land Registrar to revoke the Applicants' title to land parcel Ruiru Township 20.**
- 2. That the costs of the suit be provided for.**

The application is supported on the grounds stated on the face of the application and on the Supporting Affidavit of Stephen Kimani Mihiu. These grounds are:-

- i. That the Applicant is the registered owner of that property known as Ruiru Township 20 having been purchased for good consideration of Kshs.4,300,000/= in the year 2012***
- ii. That the 1st Respondent made a decision to revoke the Applicant's title to Ruiru Township 20 vide Kenya Gazette Notice of 17th July, 2017***
- iii. That the decision of the 1st Respondent was made despite the complainant before the National Land Commission having withdrawn its complaint citing that they had an issue with Ruiru/Ruiru East Block 7/20 and not Ruiru Township 20 which is owned by the Applicant.***
- iv. That the matter was formally withdrawn in writing vide a letter dated 12th April 2017 where it appears that the confusion was caused by the almost similar land reference number.***

v. That it is therefore clear that the Applicant's property was not the intended subject of the complaint before the National Land Commission, hence the decision to revoke the title for Ruiru Township 20 was in error.

vi. That the decision of the 1st Respondent was an error on its part since the complaint against the Applicant's title of Ruiru Township 20 was formally withdrawn and the matter closed.

vii. That the implementation of the revocation would curtail the Applicants' rights to property as enshrined in Article 40 of the Constitution of Kenya 2010 and lead to loss of the original investment of Kshs.4,300,000/=.

In his **Supporting Affidavit, Stephen Kimani Mihiu** the Applicant, reiterated the averments made on the grounds in support of the application. He urged the Court to allow the application. The application is unopposed.

The Applications was canvassed by way of written submissions which this Court has carefully considered.

Issues for Court's Determination

1. Whether the Applicant is the absolute proprietor and registered owner of the two parcels of land.

The applicant contends that he is the absolute proprietor of the suit property. He further argues that the revocation of his title was due to an error in confusing two different parcels of land **Ruiru Township/20** and **Ruiru/Ruiru East Block 7/20**.

The Applicant sought to have the revocation quashed arguing that it was gross error of law and fact, erroneous, unreasonable, irrational and made in excess of jurisdiction.

He relied on the case of **Pastoli...Vs...Kabale District Government Council& Others [2008] 2 EA 300**, where the Court stated that:

"in order to succeed in an application for judicial review, the Applicant has to show that act the complained of is tainted with illegality, irrationality and procedural impropriety..."

The Applicant further relied on **Re Hebtulla Properties Ltd [1979] KLR 96 1 KLR 1195** in which it was stated that:

"The Tribunal is a creature of statute and drives its powers from the statute that creates it. Its jurisdiction being limited by statute it can only do those things, which the Statute has empowered it to do since its powers are expressed and cannot be implied."

He further argued that the 1st Respondent obtains its authority from **Article 67** of the **Constitution** and **Section 14** of the **National Land Commission Act**. The Applicant also argued that in seeking to exercise powers on the basis of a claim that had already been formally withdrawn the 1st Respondent failed to validly and reasonable exercise its powers.

He further contends that even if the 1st Respondent had had valid grounds to revoke the title, it did not comply with the procedure set out in **Section 14** of the **National Land Commission Act**. The Section provides for the right to be heard. The Applicant points out that even though a notice was given to the Applicant for the hearing, the matter never proceeded.

The Applicant reiterated the importance of the right to be heard as enshrined under **Article 50** of the **Constitution** and set out various cases outlining the importance of the right to be heard as an element of natural justice and procedural fairness.

The Applicant prayed that the order revoking the title be quashed for the reasons set out above.

The Court has now carefully considered the pleadings herein and the annexures thereto. The Court has also considered the written submissions as filed by the Applicant herein. It is evident that the Respondent did not file any response to this Judicial Review and therefore the same is unopposed. However, the court will nevertheless determine whether the same is merited.

In his **Notice of Motion**, the Exparte Applicant **Stephen Kimani Mihiu** has sought for orders of *certiorari* to bring to this court for quashing the decision of the 1st Respondent contained in the **Kenya Gazette** of 17th July 2017, that directed the **Chief Land Registrar** to revoke the Applicant's title to land parcel **No.Ruiru Township/20**.

From the annexure **SKM-1(a)**, there is no doubt that **Stephen Kimani Mihiu** is the registered owner of the land parcel **No.Ruiru Township/20**, which was issued to him on 8th November 2012.

As provided by **Section 26(1)** of the **Land Registration Act**, the said **Certificate of Lease** is a *prima-facie* proof that the said registered proprietor is the absolute and indefeasible owner of the suit property and the said Certificate can only be challenged if it was acquired through **fraud, misrepresentation, illegally, irregularly** or through **corrupt scheme**. See **Section 26(1)(a) & (b)** of **Land Registration Act**, which provides:-

"The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the

proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:-

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party: or

(b) Where the certificate of title has been acquired

illegally, unprocedurally or through a corrupt scheme.

It is evident that the *Exparte Applicant* bought the said parcel of land from one *Jackson Kabingu Gichuchi* on 10th July 2012, as is evident from the *Sale Agreement* dated 10th July 2012. There is also no doubt vide a *Kenya Gazette Notice No.6865* of 17th July 2017, the 1st Respondent, **National Land Commission** directed the Chief Land Registrar to revoke title *No.Ruiru Township/20*, which is in favour of the *Exparte Applicant* herein *Stephen Kimani Mihiu*, on allegations that the said land was reserved for use as a *Market* and *Shopping Centre*.

It is evident that a complaint had been lodged against the *Exparte Applicant* by *Versityville Residents Association*, who alleged that the *Exparte Applicant's* parcel of land was reserved for Market and Parking Space. However, before the hearing of the complaint, the said complainant through their advocates *Wamae & Allen Advocates*, withdrew the said complaint vide a letter dated 12th April 2017. The said complainant alleged that their property was *Ruiru/Ruiru East Block 7/20* but not *Ruiru Township/20*. The said *Versityville Residents Association* averred that they had no claim against title *No.Ruiru Township/20* held by the *Exparte Applicant*.

However, the 1st Respondent went ahead and directed the Chief Land Registrar to revoke the title held by the *Exparte Applicant* as the said land was reserved for Market and Parking Space. The *Exparte Applicant* alleged that it was never given an opportunity to be heard and so the decision of 1st respondent condemned him unheard which is against the rule of natural justice.

The issue now for determination is whether the *Exparte Applicant* has met the grounds for granting of Judicial Review Order of *Certiorari*.

The circumstances under which the Orders of Judicial Review can be issued were elaborated by Justice Kasula in the Ugandan case of *Pastoli...Vs...Kabale District Local Government Canal & Others 2008 2EA, Justice Kasula* elaborated as follows:-

“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

Illegality, is when the decision making authority commits an

error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality----

Irrationality, is when there is such gross unreasonableness in

the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

Procedural impropriety, is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice to act or to act with procedural fairness towards one to be affected by the decision – it may also involve failure to adhere and observe procedural rules, expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehidswi... Vs...Secretary of State for the Housing Department (1990) AC 876*”).

Further, it is evident that in Judicial Review, the court is only concerned with the process leading to the making of the decision and whether the persons affected by the decision were heard before it was made. (See *Municipal Council of Mombasa...Vs..Republic Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007 (2012)eKLR*, the Court of Appeal held that:-

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who make the decision have the power i.e the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of judicial review”.

The Order of *Certiorari* is issued to quash a decision already made. The *Exparte Applicant* has alleged that he was never given an opportunity to be heard before the decision to revoke his title was rendered. Further that the complaint by *Versityville Residents Association* was not a valid complaint to prompt the 1st Respondent to take the decision it took since the said Association had already stated vide its letter dated 12th April 2017 by its advocates that it had no claim over the suit property *Ruiru Township/20*.

The Respondents did not file any documents to confirm to this Court why the Exparte Applicant's title was revoked even after the complainant alleged that they had no claim over the said parcel of land. Further the 1st Respondent did file any response to the allegations that the

title was revoked without having heard the Exparte Applicant.

Without any response from the Respondents, the Court finds that indeed the Exparte Applicant was condemned unheard and the 1st Respondent's decision was illegal since it was made without any claim by anyone and therefore the 1st Respondent exceeded its jurisdiction and acted *ultra vires*.

It is evident that **Section 14(3)** of the **National Land Commission Act** enjoins the 1st Respondent to give the person affected an opportunity to appear and inspect any relevant documents. The 1st Respondent did not do so and its decision was tainted with illegality and procedural impropriety.

For the above reasons, the Court finds that the Exparte Applicant has established the grounds for grant of a Judicial Review Order of *Certiorari*.

Consequently, the Court finds that the Exparte Applicant's **Notice of Motion** application dated **7th November 2017** is **merited and the same is allowed entirely in terms of prayer No.1 with costs to the Exparte Applicant to be met by the Respondents**.

It is so ordered.

Dated, Signed and Delivered at Thika this 16th day of November 2018.

L. GACHERU

JUDGE

16/11/2018

In the presence of

Mrs. Kahindi holding brief for Mr. Mutiso for Exparte Applicant

No appearance for 1st Respondent

No appearance for 2nd Respondent

Lucy - Court clerk

L. GACHERU

JUDGE

Court – Judgment read in open court in the presence of the above stated advocates.

L. GACHERU

JUDGE

16/11/2018