



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

JUDICIAL REVIEW NO.4 OF 2017

SAMUEL NJOROGE GITUKUI & 4 OTHERS.....PLAINTIFFS

-VERSUS-

THE ATTORNEY GENERAL.....1ST DEFENDANT

THE NATIONAL LANDS COMMISSION2ND DEFENDANT

JUDGEMENT

The *Ex-parte Applicants* herein have brought this application under various provisions of law and have sought for these orders:-

- a) That the Honourable Court be pleased to bring before the court and squash the decision of the National Land Commission made on 4th day of August 2016, against the exparte Applicants herein*
- b) That the Court be pleased to grant such further orders that it may deem just and expedient in the circumstances.*
- c) That costs of the suit be borne by the Respondents.*

The application is premised on the grounds stated on the face of the

application and on the *Supporting Affidavit* of *Julius Kiiru Mwaura, one of the Exparte Applicant*. The grounds in support are:-

- 1) The ex-parte applicants are registered as the lawful and bonafide owners of all those parcels of land known as Muguga/Gitaru/143, Muguga/Gitaru/1379, Muguga/Gitaru/1745, Muguga/Gitaru/2108, Muguga/Gitaru/2263, Muguga/ Gitaru/2268, Muguga/Gitaru/2273*
- 2) The subject titles were granted and/or transferred to the ex-parte applicants herein with a demarcated boundary and beacons clearly placed by the Government Surveyor and the beacons are subsisting to date as per the particular Deed Plans and Sheet Maps 3 and 6 detailing the locations and size of the subject parcels of land herein.*
- 3) The ex-parte applicants have been enjoying their proprietary rights upto and until they were served with a letter dated 17th August 2016, by the Deputy County Commissioner, Kikuyu*

directing the ex-parte applicants to remove their developments/fences bordering link Road E1507 or else the same would be forcefully demolished.

4) The ex-parte applicants had however not encroached upon the said Link Road E1507 and were occupying their parcels of land within the delineates as contained in the title deeds and their attendant deed plans and sheet maps no.3 and 6 thereto.

5) Without according the ex-parte applicants a hearing on the issue of the location of the boundary between the subject parcels of land and link road E1507 the 2nd Respondent made an order on the 4th August 2016, to the effect that the ex-parte applicants had encroached upon the Link Road E1507 and directed the ex-parte applicants to remove all their developments erected thereon.

6) The ex-parte applicants erected their developments within their boundaries in accordance with the official sheet map no.3 and 6 within the knowledge of the 2nd Respondent.

7) The 2nd Respondent purported to review the boundaries of the ex-parte applicants' parcels of land in excess of their jurisdiction and mandate as provided by Section 14 of the National Land Commission Act No.4 of 2015.

8) As per the provisions of Section 16, 17, 18 and 19 of the Land Registration Act, it is only the Land Registrar who is mandated to hear and arbitrate in a boundary dispute and not the 2nd Respondent.

9) Under section 149 of the Land Act, it is only the Honourable court which has been mandated to enforce public rights of way (if any) and not the Respondents and/or the interested parties herein.

10) In making a determination directing that the beacons of the Road should be re-established in accordance with Deed Plan no.33992 of 1935, the 2nd Respondent exceeded their mandate as they were purporting to re-survey the boundaries of private property contrary to law and in the absence of any authenticated survey plan by the authority responsible for survey of both the National and County Government offices.

11) As provided by the provisions of the Land Act, the 2nd Respondent can only review boundaries of any leased public land and not of those privately owned as freehold property as detailed by ex-parte applicants herein.

12) The National Lands Commission acted in excess of their jurisdiction by determining that the ex-parte applicants had encroached the said Link Road E1507 and that they should remove any development on their land herein.

13) The ex-parte applicants were not granted a right to be heard in the boundary delineations of their land vis a vis the boundaries of the said Link Road E1507 as contemplated by law.

14) That unless the order sought are granted, a dangerous, unjust precedent and irreparable harm shall be visited upon the ex-parte applicants herein to their greater detriment and loss.

In his **Supporting Affidavit**, **Julius Kiiru Mwaura** averred that he had been authorized by his co-applicants to swear the affidavit. He also averred that they own their respective parcels of land as shown in **JKM1** and that they settled in their respective parcels within the delineated boundaries as per sheet **maps no.3 and 6** covering the subject area. He averred that on **17th August 2016**, the **Deputy County Commissioner, Kikuyu** informed the **exparte Applicants** that they had encroached on link **Road E1507** and directed them to remove their developments. He however denied that the **exparte Applicants** had encroached upon the said link **Road E1507**, but averred that they were occupying their parcels of land

within the delineations as contained in the title deeds and Deed Plans thereto.

It was his contention that without according the *ex parte Applicants* a hearing, the 2nd Respondent made an Order on **4th August 2016**, to the effect that the *ex parte Applicants* had encroached upon the link **Road E1507** and directed the *ex parte Applicants* to remove all their developments erected thereon. It was therefore his contention that the 2nd Respondent purported to review the boundaries of the *ex parte Applicants*' parcels of land in excess of their jurisdiction and mandate, pursuant to Section 14 of the National Land Commission Act No.4 of 2015.

Further that by directing that the beacons of the road should be re-established in accordance with **Deed Plan No.33992 of 1935**, the 2nd Respondent exceeded their mandate as they were purporting to resurvey the boundaries of private property contrary to law and in absence of any authenticated survey plan by the authority responsible for both the National and County Survey Government offices. He also contended that as provided by the Land Act, the 2nd Respondent can only review boundaries of any leased public land and not those privately owned as freehold property. It was his contention that in purporting to render its verdict, the 2nd Respondent infringed upon Articles 40,47 and 60 of the Constitution.

Further that the 2nd Respondent acted in excess of its jurisdiction by determining that the *ex parte Applicants* had encroached on the said link **Road E1507** and that they should remove any development on their land. Further that the *ex parte Applicants* were not granted a right to be heard in the boundary delineations of their land. He further contended that the process culminating to the decision delivered **on 4th August 2016** was unfair, unreasonable and arbitrary against the rules of natural justice, irresponsible and an abuse of office and hence null and void. It was his contention that the *ex parte Applicants* stand to suffer irreparable loss and/or harm if the orders sought herein are not granted. He contended that it is in the wider interest of justice that the orders sought herein be granted.

The 1st and 2nd Respondents filed their *grounds of opposition* on **13th February 2017** and averred that:-

- 1) That the 2nd Respondent acted within their jurisdiction under Section 14 of the National Land Commission Act no.4 of 2015 in reviewing the boundaries of ex-parte applicants parcels of land.**
- 2) That the Constitution under Article 22 requires anybody to enforce public rights not just the courts.**
- 3) That the 2nd Respondent did not exceed their power in making a determination directing beacons of the road to be re-established in accordance with deed plan 33992 of 1935.**
- 4) That the Respondents could review this land as public land which was encroached by the ex-parte applicants.**
- 5) That the power under Section 14 of the National Land Commission Act would apply to this land as a grant and disposition of public property to establish propriety or legality of acquisition because it is the ex-parte applicants who had encroached on public land, the road reserve.**
- 6) That as much as the Constitution protects the right to own property the same does not protect property unlawfully acquired like the encroachment by the ex-parte applicants.**
- 7) That even if the ex-parte applicants had title public interests outweighs their private interests since the road will serve the public.**
- 8) That the National Land Commission acted within thier jurisdiction by determining that ex-parte applicants had encroached on the said road and that they should remove any development on the land.**

9 That the Respondents decision and the process was legal, fair, not against natural justice and did not contravene any given provision of law.

10) That no harm shall be visited to the ex-parte applicants since they do not own the said public land having encroached portions of the road in the first place.

11) That it is the Respondents who will be prejudiced if the orders sought by the ex-parte applicants are granted and not the ex-parte applicants.

The Court directed the parties to canvass the application by way of written submissions. The **Law Firm of Kimathi Wanjohi Muli Advocates** for the **exparte Applicants**, filed their written submission on **28th July 2017**, and urged the Court to allow the application. However, the Respondents and the interested parties did not file their written submissions.

The Court has now carefully considered this **exparte** application for Judicial Review by the **exparte Applicants** and the annexure thereto. The Court has also considered the grounds of opposition by the 1st and 2nd Respondents, the written submissions, cited authorities and the relevant provisions of law and the Court renders itself as follows:-

There is no doubt that the **exparte Applicants** are the registered owners of the suit property as described in their pleadings. There is no doubt that the 2nd Respondent in its determination dated **4th August 2016**, found that the applicants herein had encroached on a link **Road E1057** and directed that they move their developments out of the alleged encroached road reserves to enable the interested parties carry on with the road construction of the link road. The **exparte Applicants** alleged that they were never given an opportunity to be heard and therefore the orders of 2nd Respondent was against the rule of natural justice and should be squashed through an order of *certiorari*. However, the 1st and 2nd Respondents alleged that they acted within their mandate and jurisdiction.

The Court finds that the issues for determination are as drawn by the **exparte Applicants**. These issues are:-

- a) Whether the applicants have met the grounds for granting of judicial review order of certiorari;**
- b) If so, whether the application dated 2nd February 2017 is merited.**
- c) Who is entitled to costs of these proceedings.**

From the outset, it is important to set out the purpose of Judicial Review.

In the case of **Municipal Council of Mombasa...Vs...Republic Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007(2002) 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”.

Further circumstances under which orders of judicial review can be issued were elaborated **by Justice Kasule in the Uganda case of Pastoli ...Vs..Kabale District Local Government Canal & Others (2008)**

“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”.

So what does the Judicial Review orders entails? This was elaborated in the case of Kenya National Examination Council...Vs...Republic Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No.266 of 1996, where the Court held that:-

“That now bring us to the question we started with, namely the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the council in this case. What does an Order of Prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules or natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See Halsbury’s Law of England, 4th Edition vol.1 at Pg.37 paragraph 128..”

The above cases have already established the applicable law in cases of Judicial Review. This Court will now consider the above applicable law and then juxtapose with the available facts to determine whether the *exparte Applicants* are deserving of the orders sought.

a) Whether the applicants have met the grounds or threshold for granting of judicial review order of certiorari.

As was stated in the case of Kenya National Examination Council...Vs...Republic (Exparty Geoffrey Gahenji & Another (Supra), the order of *certiorari* can quash a decision already made as an order of *certiorari* will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or so such like reasons.” So have the *exparte Applicants* established existence of the above condition to warrant this Court quash the decision of National Land Commission issued on 4th August 2016 ?

The Applicants alleged that when 2nd Respondent made a determination directing that the beacons of the road should be re-established in accordance with Deed Plan No.33992 of 1935, the 2nd Respondent acted

ultra vires or in excess of jurisdiction as they were purporting to re-survey the boundaries of private property contrary to the available laws as 2nd Respondent can only review boundaries of leased public land but not those of privately owned properties such as the suit properties herein.

The Court has indeed considered the provisions of Section 14(1) of the National Land Commission Act and the 2nd Respondent is granted powers to review all grants or disposition of public land to establish their propriety or legality. Further Section 14(3) enjoins the 2nd Respondent in giving the persons affected an opportunity to appear and to inspect any relevant documents. Further the 2nd Respondent is only to make a determination after hearing the parties. The Applicants alleged that they were not granted a right to be heard in the boundary delineating of their land. Though the Respondent alleged that the 2nd Defendant acted within their jurisdiction under Section 14 of the National Land Commission Act, they did not file their submissions and avail exhibits to show that they did give the *exparte Applicants* an opportunity to be heard.

In the case of *Republic...Vs...The Honourable The Chief Justice of Kenya & Others ...Vs...exparte Moijo Mataiya Ole Keiuwa, Nairobi HCM CA No.1298 of 2004*, the Court held that:-

“The rules of Natural justice are minimum standard of fair decision making imposed by the common law on persons, or bodies that are under a duty to act judicially”.

Therefore, if the *exparte Applicants* were not given an opportunity to be heard in the boundary delineation, then the 2nd Respondent went against the rule of natural justice and the provisions of Section 14(3) of the National Land Commission Act. Further Section 14 of the National Land Commission Act gives the 2nd Respondent power to deal with review of public land but not privately owned freehold titles.

The 2nd Respondent also arbitrated disputes involving determination of boundaries. However, this is a mandate exclusively reserved for Land Registrar as provided by Sections 16,17,18 and 19 of the Land Registration Act. The review of these boundaries ought to have been done by the Land Registrar. By reviewing the same, the Court finds that the 2nd Respondent acted in excess of its jurisdiction as provided by Section 14 of the National Land Commission Act.

Having found that the *exparte Applicants* were condemned unheard and that goes against the doctrine of Natural justice as was outlined in the *Halsbury Laws of England Volume 1(1) page 218*, which states as follows:-

“Natural justice comprises two basic rules; first that no man is to be a judge in his own cause (nemo iudex in causa sua), and second that no man is to be condemned unheard (audi alteram partem). These rules are concerned with the manner in which the decision is taken rather than with whether or not the decision is correct”.

Therefore, the Court finds that the *exparte Applicants* have established the ***threshold for granting of judicial review orders.***

b) Is the application dated 2nd February 2017 merited?

The *exparte applicants* herein are seeking an order of judicial review of *certiorari* to quash the decision of the 2nd Respondent dated ***4th August 2016***.

It is not in doubt that the *exparte Applicants* are the registered owners of the named suit properties and the 2nd Respondent made adverse decisions against their parcels of land. The Court has found that the 2nd Respondent acted in excess of its jurisdiction and without giving the *exparte Applicants* opportunity to be heard, thus going against the doctrine of natural justice. These are enough grounds to warrant the Court to issue an order of *certiorari* to quash the decision of the 2nd Respondent made on ***4th August 2016***. In the case of *Republic ...Vs...Kenya Revenue Authority Exparte Yaya Towers Ltd (2008) eKLR*, the

Court held 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. It is important to remember in every case that 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.....”

Having now carefully considered the facts of this case and the available provisions of law, the **Court finds that the *exparte Applicants* are deserving of the orders sought.**

c) Who is to bear costs of these proceedings?

Ordinarily, costs do follow the event. Section 27 of the Civil Procedure Act provides that **‘costs are granted at the discretion of the Court.’** The ***exparte Applicants*** have alleged that the Respondents and interested parties have disobeyed the *status quo* order issued by the Court. The Court finds that these proceedings have been occasioned by the actions of the Respondents and interested parties. Therefore ***the Respondents should bear costs of these proceedings.***

Having now carefully considered the available evidence and the written submissions herein, the Court finds that the ***exparte Applicants*** are ***deserving of the orders sought in the Notice of Motion*** dated ***2nd February 2017***, and ***proceed to enter Judgement in favour of the exparte Applicants in terms of prayers no.2 and 4 of the said Notice of Motion application.***

It is so ordered.

Dated, Signed and Delivered at Thika this **27TH** day of **October 2017.**

L. GACHERU

JUDGE

27/10/17

Before: HON. L. GACHERU, ELC J.

Court Assistant - Lucy

Ex-parte Applicants – present in person

No appearance for Respondents

No appearance for the interested parties.

Court – Judgement read in open court in the presence of Exparte Applicants in person

L. GACHERU

JUDGE

27/10/2017