



**Republic v National Land Commission & another; Kimani & 3 others (Exparte Applicants)
(personal representative of the Estate of Robert Ndiguri Mweka) (Environment and Land
Judicial Review Case 98 of 2019) [2023] KEELC 16035 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 16035 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 98 OF 2019
OA ANGOTE, J
FEBRUARY 23, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

REGISTRAR OF TITLES (NBI) 2ND RESPONDENT

AND

NANCY WANJIRU KIMANI EXPARTE APPLICANT

FRANCIS KURIA MWAURA EXPARTE APPLICANT

HAMCO KENYA LTD EXPARTE APPLICANT

MARINAH JOSEPH CENTRA EXPARTE APPLICANT

**PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT NDIGURI
MWEKA**

JUDGMENT

Background

1. Before this court for determination is the ex-parte applicants’ notice of motion dated June 24, 2019 and brought under Order 53 Rule 3(1) of the *Civil Procedure Rules* and section 13 of the *Environment and Land Court Act*. The Applicants are seeking for the following orders:
 - a. The court be pleased to remove unto the court and quash the decision of the 1st Respondent made on March 1, 2019 through Gazette Notice No. 1995 of March 1, 2019 and quash the said Gazette Notice as concerns



L.R NO. 25484/6, L.R NO. 25484/11, L.R NO. 25484/12, L.R NO. 25484/16, L.R NO. 25484/5, L.R NO. 25484/22, L.R. NO. 25484/2, L.R NO. 25484/4. L.R NO. 25484/7, L.R NO. 25484/9, L.R NO. 25484/10 and L.R NO. 25484/15 (hereinafter the ‘suit properties’) recommending that the Certificates of Title to the above mentioned parcels of land be revoked/ cancelled by the 2nd Respondent.

- b. The court be pleased to issue an order prohibiting the 2nd respondent from revoking/cancelling the Certificates of Title for the suit properties.
 - c. Spent.
 - d. Costs of the application be borne by the 1st Respondent and Interested Party.
2. In a verifying affidavit sworn on June 10, 2019 by the 1st ex-parte Applicant, Nancy Wanjiru Kimani, on her own behalf and on behalf of the other Applicants, the Applicants stated that they are the registered owners of the suit properties which were transferred to them by the 3rd ex-parte Applicant on August 5, 2002 and that the 3rd Interested Party became the registered owner of the original property on March 8, 2002 vide Grant No. I.R 88625. It is the Applicants’ case that they took possession and developed the suit properties.
 3. According to the Applicants, in May 2019, they were informed that their Certificates of Title had been revoked vide a Gazette Notice dated March 1, 2019; that they were not served with any letter or notice requiring them to appear before the 1st Respondent on matters relating to the suit properties and that the decision made by the 1st Respondent was illegal, unconstitutional and against the rules of natural justice.
 4. In conclusion, they stated that unless the orders sought are granted, the 2nd Respondent would implement the decision of the 1st Respondent which will gravely affect their property rights.
 5. The interested party filed a replying affidavit sworn by its Secretary and Head of Public Service, Dr. Martin N. Mbugua in opposition to the application. It was deponed that the interested party as a custodian of public land had the right to raise complaints about the same with the 1st respondent.
 6. According to the interested party, the 1st respondent was mandated to investigate complaints relating to historical land injustices and make recommendations on the same. In conclusion, it was deponed that the interested party did not act in an illegal or unprocedural way.

Submissions

7. The matter was heard by way of written submissions. The ex-parte applicants submitted that the 1st and 2nd respondents had not challenged the application. Relying on the cases of *Sceneries Limited vs National Land Commission* [2017] eKLR and *Super Nova Properties Limited vs The National Land Commission* [2019] eKLR, the Applicants submitted that the decision of the 1st Respondent ought to be quashed as it contravened the rules of natural justice.
8. It was submitted that the case of *Kenya National Examination Council vs Republic Ex Parte Geoffrey Gatbenji Njoroge & 9 others* [1997] eKLR that was cited by the Interested Party supported the application and that the decision of the 1st respondent should be quashed because the applicants were not given notice nor an opportunity to be heard before the decision was made by the 1st respondent.
9. The interested party submitted that the applicants are not entitled to the reliefs sought. Relying on the case of *OJSC Power Machines Limited, TransCentury Limited, and Civicon Limited (Consortium) v*



Public Procurement Administrative Review Board Kenya & 2 others [2017] eKLR, the Interested Party argued that judicial review orders are sought where legally recognized interests have been infringed by public bodies.

10. However, it was submitted, in the present case, that was not the case because firstly, article 67(2) (e) of the Constitution and sections 6 and 15 of the National Land Commission Act authorized the 1st Respondent to carry out investigations for complaints relating to historical land injustices; and secondly, the impugned gazette notice stated that the 1st Respondent had invited all complainants, Respondents and interested parties to appear before it and make representations and submissions before a decision was made.
11. In conclusion it was submitted that the Applicants had not demonstrated that they were not served with the above mentioned notice to appear before the 1st Respondent.

Analysis and Determination

12. Based on the foregoing, the following issues arise for determination:
 - a. Whether the ex-parte Applicants have met the requirements for Judicial Review.
 - b. Whether the ex-parte Applicants should be granted an order of certiorari.
 - c. Whether the ex-parte Applicants should be granted an order of prohibition.
13. The ex-parte Applicants have argued that they are entitled to the orders sought as they were not given an opportunity to be heard before the decision to revoke their titles was made. On the other hand, the Interested Party has argued that the 1st Respondent acted within its powers in revoking the titles.
14. According to the Interested Party, the ex-parte Applicants were invited to appear before the 1st Respondent but they did not honour the invitation. The 1st Respondent did not oppose the application.
15. Article 67 2 (e) of the Constitution provides as follows:

“The functions of the National Land Commission are to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.”
16. So, while I agree with the Interested Party that the 1st Respondent had the authority to investigate the titles in furtherance to a complaint filed by the Interested Party, the issue in question is whether such authority was exercised properly. In the Sceneries Limited Case (supra) it was stated as follows:

“One principle of natural justice is that no man should be condemned unheard or that both sides must be heard before passing any order. A man cannot incur the loss of or liberty for an offence by a judicial proceeding until he has a fair opportunity of answering the case against him. But what is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not.”
17. It therefore follows that although the 1st Respondent has a constitutional mandate to investigate titles, and initiate investigations, on its own initiative or on a complaint, into present or historical land



injustices, and recommend appropriate redress, it should do so in a manner that does not offend the principles of natural justice.

18. The said principles are applicable even when they are not expressly stated in statute. Where the principles of natural justice are not followed, the court ought to intervene. The terms of intervention were stated as follows in the case of *Republic vs Principal Kadhi, Mombasa Ex-parties Alibhai Adamali Dar & 2 others; Murtaza Turabali Patel (Interested Party)* [2022] eKLR:

“In a nutshell Judicial Review is the means by which High Court judges scrutinize public law functions intervening as a matter of discretion to quash, prevent, require and/or classify not because they disagree with the judgement but so as to right a recognizable public law wrong. This public law wrong could be unlawfulness, Wednesbury unreasonableness or irrationality, unfair hearing, ultra vires bad faith, unfairness, made or arrived at out of excess powers (ultra vires) biasness, capriciousness or unjudicially.”

19. In the instant case, the public law wrong of unfair hearing has been pleaded. The importance of a fair hearing were stated by the court in *Sceneries Limited Case (supra)* as follows:

“The right to be heard requires not only that the party concerned be given prior notice of the precise purpose of the inquiry or hearing but also that the person be given sufficient information to prepare his/her case. As to the disclosure of information, this implies that the party concerned be apprised of reports and documents in the body’s possession that may be prejudicial to his/her case. He/she should at least have access to all the information the tribunal or body relied upon when it made its decision. That information should also be disclosed in due time since the party must have sufficient time to prepare for the hearing.”

20. The ex-parte Applicants have produced certificates of title proving on a balance of probability that they are the owners of the suit properties.
21. The decision of the 1st Respondent concerning the suit properties was therefore a matter of concern to them. They were therefore entitled to a fair hearing, the terms of which have been set out above.
22. There is no evidence on record to show that they were given a written notice by the 1st Respondent nor an opportunity to present their case before the decision to revoke their titles was made. It therefore follows that they were not accorded a fair hearing.
23. Having not been accorded a fair hearing, the jurisdiction of the court to right a public wrong by way of judicial review comes into play. Indeed, it is trite that an order of certiorari can and should quash a decision made without or in excess of jurisdiction, or where the rules of natural justice are not complied with.
24. Having established in the preceding paragraphs that the rules of natural justice were not complied with as there was no fair hearing, I find that the ex-parte Applicants are entitled to an order of certiorari quashing the 1st Respondent’s decision to revoke their titles.
25. The ex parte Applicants have also prayed for an order of prohibition. A prohibition order in judicial review proceedings is an order from the High Court (ELC) 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.



26. An order of certiorari lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of 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.
27. The rules of natural justice having not been followed by the 1st Respondent in recommending the cancellation of the certificates of title by the 2nd Respondent, and the 2nd Respondent having not yet cancelled the titles of the ex-parte Applicants, it is the finding of this court that the ex-parte Applicants are entitled to an order of prohibition directed at the 2nd Respondent.
28. For those reasons, the Applicants' application dated 24th June 2019 is allowed as follows:
 - a. The Court hereby removes and quashes the decision of the 1st Respondent made on 1st March 2019 through Gazette Notice No. 1995 of 1st March 2019 concerning L.R NO. 25484/6, L.R NO. 25484/11, L.R NO. 25484/12, L.R NO. 25484/16, L.R NO. 25484/5, L.R NO. 25484/22, L.R. NO. 25484/2, L.R NO. 25484/4. L.R NO. 25484/7, L.R NO. 25484/9, L.R NO. 25484/10 and L.R NO. 25484/15 recommending that the Certificates of Title to the above mentioned parcels of land be revoked/cancelled by the 2nd Respondent.
 - b. The court hereby issues an order prohibiting the 2nd respondent from revoking/cancelling the Certificates of Title of the suit properties.
 - c. Costs of the application be borne by the 1st Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 23RD DAY OF FEBRUARY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Mwaura for Applicants

No appearance for Respondents

Court Assistant- June

