



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

JUDICIAL REVIEW APPLICATION NO. 31 OF 2016

BETWEEN

REPUBLIC.....APPLICANT

AND

THE NATIONAL LAND COMMISSIONRESPONDENT

AND

THE ESTATE OF THE FRED KUBAI.....INTERESTED PARTY

EX PARTE: COMPLY INDUSTRIES LIMITED

JUDGMENT

1. Having obtained leave to commence judicial review proceedings, the ex parte applicant filed Notice of Motion dated 24th November 2016 in which it sought the following orders:

a. That the honourable court be pleased to issue an order of certiorari to bring into the honourable court for purposes of being quashed the resolution of the respondent communicated to the applicant on the 8th November 2016 to review title to LR No. 4807, from which its title No. L.R No. 116118 and LR No. 116119 respectively derived.

b. That the honourable court be pleased to issue an order of prohibition directed at the respondent and the interested parties herein prohibiting them or any of them from reviewing the applicant's titles over land title No. LR.116118 and LR 116119 to the extent that the same are derivatives of what was originally known as title No. 4807 or from convening any session for any review, hearing, discussion, determination or inquiry there-into or from making any determination, review or decision thereon.

c. The costs of this application be granted to the applicant.

2. The application was supported by statutory statement of facts as well as verifying affidavit of Stephen C. Kihumba all of which were filed alongside the application for leave. It was deposed in the verifying affidavit that the ex parte applicant is a limited liability company and that pursuant to a Sale Agreement dated 19th March 2008, it bought 2 portions of land known as LR No. 4807 situated on the Northern part of Njoro Township at a consideration of KShs 77,500,000 from the estate of the late Walter Kiprono Kilele. Upon successful completion of the transaction, the two new parcels were given reference numbers LR No. 116118 and LR

No. 116119 and certificates of titles in respect thereof duly issued in the name of the ex parte applicant. The ex parte applicant was granted possession of the premises on 20th March 2008 and proceeded to set up a big industrial complex thereon.

3. Pursuant to letter dated 8th November 2016, the respondent informed the ex parte applicant that it had received a complaint “from the family of the late Fred Kubai” concerning title to LR No. 4807 and that it be resolved to review the title to the said parcel of land under **Section 14** of the **National Land Commission Act**. Aggrieved by the respondent’s action as communicated in the said letter, the ex parte applicant commenced the present proceedings.

4. The respondent opposed the application through a replying affidavit sworn by Brian Ikol, its Deputy Director Legal Affairs and Enforcement. He deposed that the respondent has the mandate to review all grants and dispositions of public land to establish its legality and proprietary. He added that in the present case, the respondent received a complaint to the effect that the land formed had changed hands and title issued without the knowledge and consent of the family of the late Fred Kubai. He further deposed that the respondent’s preliminary investigations showed that there were transfers effected to Kiprono Kilele then to the ex parte applicant but the process of such transfers was not clear.

5. On its part, the Interested Party opposed the application through a replying affidavit sworn by Mary Sidi Rose Kubai who described herself as a shareholder of Kubai Investment Limited (the company). She deposed that the late Fred Kubai (deceased) passed away on 1st June 1996. Prior to his death, he incorporated Kubai Investments Limited on 25th November 1970. The deceased acquired a 21% undivided share of LR No. 4807 on 11th February 1965. Besides the deceased, the other owners of the property were Gordhandas Narandas Shah (42%), Kibunja Mutego (5%), and Bal Dev Moolraj (32%). On 21st June 1974, the deceased’s aforesaid share was transferred to the company. She added that the family discovered that all the land including the company’s interest was illegally transferred to Walter Kiprono Kilele on 2nd November 1982 and that the estate of Walter Kiprono Kilele transferred the land to the ex parte applicant without the authority of the company. She therefore welcomed the respondent’s intervention which was pursuant to the family’s request.

6. The application was heard by way of written submissions. The ex parte applicant filed submissions on 17th March 2017, the respondent on 5th September 2017 and the Interested Party on 3rd November 2017. I have considered the application, the affidavits filed and the submissions. The issues that arise for determination are firstly whether the respondent has jurisdiction review the ex parte applicant’s titles in respect of LR No. 116118 and LR No. 116119; and secondly, whether the ex parte applicant is entitled to the relief sought.

7. The respondent herein is a commission established pursuant to **Article 67** of the **Constitution**. The article lists functions of the commission as:

- (a) to manage public land on behalf of the national and county governments;**
- (b) to recommend a national land policy to the national government;**
- (c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;**
- (d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;**
- (e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;**
- (f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;**
- (g) to assess tax on land and premiums on immovable property in any area designated by law; and**
- (h) to monitor and have oversight responsibilities over land use planning throughout the country.**

8. Pursuant to Article 67 of the Constitution, parliament enacted the **National Land Commission Act No. 5 of 2012, section 14** of which provides:

14. Review of grants and dispositions

(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 complaint 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 Articles 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). [Emphasis supplied]

9. The respondent's involvement in the matter traces back to a written complaint dated 6th November 2016 said to be from "The Family of the Late Freedom Fighter Fred Kubai" and signed by one Andrew Kubai. The complaint was that the land known as LR No. 4807 was fraudulently transferred from Kubai Investments Ltd by Walter Kiprono Kilele on 2nd November 1982 without the consent of the directors of the company, that an entry in the register in respect thereof being entry No. 7 was never signed, that the entry was repeated on the same date and then signed and finally that on 12th February 2009 a total of 7 different entries were made on the register leading to transfer of the land to the ex parte applicant.

10. It immediately becomes clear upon reading the complaint that it related to the manner in which land was transferred from one private entity or citizen to another. There was absolutely no aspect in which it could be said that the state had any interest in the said transfers or transactions. The complaint that was presented to the respondent purely concerned private land. There was no suggestion in the complaint that what was sought was that the grant from the government comprised in LR No 4807 be entirely revoked and the title to revert to the government. Instead, what was presented before the respondent was purely a private dispute between various private competing interests based on titles created subsequent to LR No 4807.

11. While I agree that the respondent can in its review mandate enquire into a grant of public land to an individual, nowhere in the law is the respondent given mandate to review a grant from one private individual to another. That is the remit of the court. The respondent's main function is to manage public land on behalf of the national and county governments. That function has been widened by section 14 of the Act to include reviewing grants or dispositions of public land to establish their propriety or legality. The reasoning behind that is clear: if public land has been improperly converted to private land then the respondent has the mandate to revert it to the public. That jurisdiction does not extend to being arbiter in entirely private disputes. Besides, the respondent's

limited resources, which are public resources, must be utilised prudently, to protect public land which is facing threat left right and centre. In the circumstances, I am persuaded that the respondent has no jurisdiction to review the ex parte applicant's titles in respect of LR No. 116118 and LR No. 116119.

12. The final issue for determination is whether the ex parte applicant is entitled to the reliefs of certiorari and prohibition sought. The scope of such orders was discussed by the Court of Appeal in the case of **Kenya National Examination Council v Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** as follows:

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 of natural justice. ...

... Only an order of CERTIORARI can quash a decision already made and 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 for such like reasons.

13. I have already found that the respondent has no jurisdiction to review the ex parte applicant's titles in respect of LR No. 116118 and LR No. 116119. Its purported resolution to commence the review process is amenable to being quashed through an order of certiorari. Similarly, the respondent must be stopped from ever attempting to review the ex parte applicant's said titles.

14. In view of the foregoing, I am satisfied that the ex parte applicant is entitled to the reliefs of certiorari and prohibition. I therefore make the following final orders:

a. An order of certiorari is hereby issued quashing the resolution of the respondent communicated to the ex parte applicant on the 8th November 2016 to review title to LR No. 4807, from which the ex parte applicant's title No. L.R No. 116118 and LR No. 116119 are respectively derived.

b. An order of prohibition is hereby issued directed at the respondent herein prohibiting it from reviewing the ex parte applicant's titles over land title No. LR.116118 and LR 116119 to the extent that the same are derivatives of what was originally known as title No. 4807 or from convening any session for any review, hearing, discussion, determination or inquiry there-into or from making any determination, review or decision thereon.

c. The costs of these proceedings are granted to the ex parte applicant and shall be paid by the respondent. The Interested Party who lodged the complaint with the respondent and supported the respondent's actions, shall bear own costs.

15. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 27th day of November 2018.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the ex parte applicant

No appearance for the respondent

No appearance for the Interested Party

Court Assistants: Gichaba & Lotkomoi



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