



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 100 OF 2017

MWANGI STEPHEN MURIITHI.....PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

KENYA POLICE SERVICE.....3RD RESPONDENT

PARLIAMENT OF KENYA.....4TH RESPONDENT

JUDGMENT

1. The Petitioner moved this Honourable Court vide petition filed on 22nd March 2017 seeking the following prayers:

i. A declaration that the Petitioner’s right to fair administrative action under Article 47 of the Constitution as read together with the Fair Administrative Action Act 2015 as well as his right to a fair hearing under Article 50(1) of the Constitution have been violated.

ii. A declaration and interpretation of Article 40(6) of the Constitution as regards the entity competent to make a binding finding as to whether property has been unlawfully acquired.

iii. An interpretation and distinction in the meanings of the terms “unlawfully acquired” and “irregularly acquired” as set out in the Constitution and National Land Commission Act or other legislation and the effect thereof as regards proprietorship of land that was previously public land.

iv. A declaration that in making a determination during the review of grants and disposition of land, the entity carrying out the Review is to apply the law prevailing at the time of the said grant rather than the present day law.

v. A declaration that Article 68(c) (v) of the Constitution neither empowered, nor envisaged that the National land Commission Act would be the entity empowered to review grants and dispositions of public land.

vi. A declaration that Section 14 of the National Land Commission Act is unconstitutional and contravenes Articles 40(2), 47,

60 & 68 (c) (v) of the Constitution.

vii. A declaration that any revocation of title must be sanctioned by a Court of Law or a Tribunal established under Article 68 (c) (v) of the Constitution.

viii. A declaration that Parliament has failed to pass legislation required under Article 68 (c) (v) of the Constitution.

ix. An Order be made under Article 261(c) of the Constitution directing Parliament to pass legislation required under Article 68 (c) (v) of the Constitution failure to which Parliament shall be dissolved.

x. The purported revocation and/or replacement of the Petitioner's proprietorship on L.R 209/13760 with the Kenya Police Service be quashed for being illegal, null and void.

xi. Compensation to the Petitioner for the violation of his fundamental rights and freedoms.

xii. Costs of this Petition.

xiii. Any other relief that this Honourable Court may deem just to grant.

PETITIONER'S CASE

2. The petitioner states that he lawfully acquired the said parcel of land in 1999 at a price of Kshs. 1,880,440/-, having successfully applied to the President through the Commissioner of Lands for an allotment. It later emerged that the original parcel of land L.R 209/13417 which was subsequently subdivided to give rise to L.R 209/13760 was initially registered in the name of Permanent Secretary to the Treasury of Kenya and was intended to be used by the Kenya Police for purposes of a driving school. The Petitioner however contends that the Kenya Police had surrendered the said plot in consideration of the grant of 100 acres elsewhere for the same purpose, and had therefore relinquished all their interest to the land. Hence the parcel had become unalienated public land by the time of allotment to the Petitioner in 1999.

3. The 1st Respondent issued a notice by way of print media in May 2015 to the effect that there were numerous complaints regarding various grants and dispositions of land including the said property. The said notice cited the Petitioner and the Kenya Police Service, the 3rd Respondent as interested parties in relation to the said property. The Petitioner alongside the 3rd Respondent were required to appear before the 1st Respondent to present their case as regards the property in question, which they did.

4. The petitioner argues that the entire process carried out by the 1st Respondent including the purported exercise of power to review grants and dispositions of public land, the publication of the notice calling for hearing, the conduct of the hearing and the purported revocation which has never been published was conducted in an unconstitutional manner that offends the principles of natural justice and the rights guaranteed under Articles 40, 47 and 50(1) of the Constitution. This the Petitioner attributes to the refusal by the NLC to furnish him with the Complaint, failure to carry out investigations / proper investigations and to render a decision and reasons subsequent to the hearing, inspite of secretly replacing the Petitioner as the proprietor of the subject land.

5. It is contended that the Constitution of Kenya 2010 did not vest the 1st Respondent with power to revoke titles, grants or dispositions of land. Further, that the 1st Respondent stepped into the shoes of the previous Commissioner for of Lands and that the 1st Respondent is better placed as a necessary party to any dispute regarding any inquiry rather than a referee in the Review since it is conflicted and biased and cannot be an impartial arbiter.

6. It is the Petitioner's case that the NLC was not the body contemplated under Article 68 (c) (v) of the Constitution of Kenya 2010, and that Section 14 of the National Land Commission Act is unconstitutional to the extent that purports to grant powers to the NLC that it cannot constitutionally perform. The Petitioner further argues that even though the instant petition touches on the subject of title to land, it also raises issues on constitutional interpretation and therefore this Court has congruent and concurrent jurisdiction with the Environmental Land Court.

1ST RESPONDENT'S CASE

7. In response to the Petition the 1st Respondent filed the Replying Affidavit of Brian Ikol on 14th November 2017. It is the 1st Respondent's case that it is an independent Commission established under Article 67(1) of the Constitution and operationalized by the National Land Commission Act No. 5 of 2012, with the fundamental function of management of public land on behalf of the National and County Governments. It is submitted that the 1st Respondent is mandated under Section 14 of the NLC Act to review all grants and dispositions of public land, either on its own motion or upon receipt of a complaint with a view to establish their legality or propriety. That, in fulfilling this mandate, the NLC operates as a quasi-judicial body within the context of Article 169(1) of the Constitution.

8. It is submitted that the 1st Respondent merely invoked its jurisdiction pursuant to Section 14(1) of the NLC Act following a complaint by the 3rd Respondent contesting the legality of the Petitioner's title to the land in question, and admitted the complaint for review. The NLC subsequently issued a public notice in print media and informed all interested parties of the intent to institute review proceedings to ascertain the legality of the title in question.

9. The 1st Respondent reiterated that it is the organ/ body contemplated under Article 68 (c) (v) of the Constitution. It is submitted that the review proceedings complied with the Constitution and the NLC Act, and following the conclusion of the proceedings, the Commission made a determination based on the parties' submissions, both oral and documentary (attached as annexure B1 2). It is submitted that the NLC is not bound by the strict rules of evidence pursuant to Section 6(3) of the NLC Act.

2ND AND 3RD RESPONDENTS CASE

10. The 2nd and 3rd Respondents filed written submissions on 6th November 2017. It is submitted that it is not disputed that the title to LR NO. 209/13760 is by its nature a leasehold which ordinarily have a specific term of 99 years, and is consequently owned by the Government of Kenya, which has the reversionary interest and right. It is submitted that the National Land Commission has jurisdiction to review title to land which though private, was public land owing to the fact that it is a leasehold. In this regard reference was made to Section 14 of the National Land Commission Act to support the argument that the 1st Respondent has the said jurisdiction to review titles.

11. It is submitted that although the Constitution protects the right to property, such right and protection does not extend to property that is unlawfully acquired. In this case, the respondents argued that the land in question was intended for use by the Police for purposes of a driving school and there's nothing from the proceedings to clearly show that a surrender instrument was executed, and that at the time of the review, the land was in possession of the Kenya Police Service.

12. It is contended that the Petitioner was accorded a fair hearing process and that there was hence no violation of Articles 47 and 50 of the Constitution.

4th RESPONDENT'S CASE

13. In response to the Petition (and Petitioner's application which is spent), the 4th Respondent filed Grounds of Opposition and submissions on 20th June 2018, a chamber summons application seeking to be struck out of the instant proceedings filed on 16th November 2018, which application was supported by the Affidavit of Jeremiah Nyegenye.

14. The crux of the 4th Respondents case is that it is improperly enjoined in the instant Petition as it has fulfilled its legislative mandate by enacting the National Land Commission Act No. 5 of 2012, which expressly gives effect to Article 68 (c) (v) of the Constitution, contrary to the Petitioner's allegations that the 1st Respondent has not passed the legislation contemplated under the said Article. The 1st Respondent contends that there is no value added by it being a party to these proceedings as no orders sought in the instant Petition can be enforced as against the 4th Respondent. It is also submitted that the Petitioner only alleges that Section 14 of the National Land Commission Act is unconstitutional and seeks a declaration of unconstitutionality to that effect.

ISSUES FOR DETERMINATION

a) Whether this Court has jurisdiction in this matter.

15. **Article 165(1)** of the Constitution vests wide powers in the High Court including the power to *determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and the jurisdiction 'to hear*

any question respecting the interpretation of the Constitution.

Article 23 (1) provides that *the High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.*

Article 165 (6) provides that *“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.”* **Article 165 (7)** provides that *“For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.*

16. In the instant case, the Petitioner alleges violation of his right under the Constitution following the review proceedings undertaken by the 1st Respondent. I find that the question on whether this Court has jurisdiction in this matter therefore stands answered in the affirmative.

b) Jurisdiction of the National Land Commission.

17. The functions of the National Land Commission are provided for under Article 67 (2) (e) of the Constitution which stipulates that; these powers include: *(e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.*

Article **68 (c) (v)** provides that *Parliament shall enact legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality.*

Article **61 (2)** of the constitution classifies land in Kenya as public, community or private. Article **62** of the Constitution defines public land thus:-

“62. (1) Public land is—

(a) land which at the effective date was un-alienated government land as defined by an Act of Parliament in force at the effective date;

(b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;

(c) land transferred to the State by way of sale, reversion or surrender;

(d) land in respect of which no individual or community ownership can be established by any legal process;

(e) land in respect of which no heir can be identified by any legal process;

(f) all minerals and mineral oils as defined by law;

(g) government forests other than forests to which Article 63 (2) (d) (i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;

(h) all roads and thoroughfares provided for by an Act of Parliament;

(i) all rivers, lakes and other water bodies as defined by an Act of Parliament;

(j) the territorial sea, the exclusive economic zone and the sea bed;

(k) the continental shelf;

- (l) all land between the high and low water marks;
- (m) any land not classified as private or community land under this Constitution; and
- (n) any other land declared to be public land by an Act of Parliament—
 - (i) in force at the effective date; or
 - (ii) enacted after the effective date.”

18. **Article 64** of the Constitution defines private land in the following terms:-

“64. Private land consists of—

- (a) registered land held by any person under any freehold tenure;
- (b) land held by any person under leasehold tenure; and
- (c) any other land declared private land under an Act of Parliament.”

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 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.

19. Guided by the provisions of **Articles 67, 68 (c) (v)** of the Constitution and **Section 14** of the Act, I find that that the 1st Respondent has jurisdiction to review all grants or dispositions of *public land*. The critical point however, is that the jurisdiction in this context extends only to public land as outlined above, or land that was previously public but was subsequently converted to private land.

20. In the instant proceedings, it is not disputed that the title exhibited by the Petitioner is a Grant. There is sufficient evidence that the land in question was once public land, which was granted to the petitioner by the then President to the Petitioner. The original parcel which was subsequently sub-divided to give rise to L.R 13760 was initially registered in the name of the Permanent Secretary Treasury. From the documents placed before this Court, Special Condition no. 3 of the original Grant (**I.R 74205 marked as MSM5**) directed that the Police were to use the land for purposes of a driving school. There is evidence that the Petitioner obtained change of user by converting the land from public to private use that is inoffensive light industrial purposes with stores and ancillary offices.(see **special condition no. 5 in Grant no.83003 marked MSM8**).

21. In the circumstances, I am satisfied that the 1st Respondent has jurisdiction to review all grants or dispositions of public land to establish their propriety or legality. In this context, the NLC had the mandate to investigate how the instant title was acquired and how the land in question was converted from public to private use.

c) Whether Section 14 of the National Lands Commission Act is unconstitutional

22. The Petitioner argued that the NLC was not the body contemplated under **Article 68 (c) (v)** of the Constitution of Kenya 2010, hence **Section 14** of the National Land Commission Act is unconstitutional to the extent that it purports to grant powers to the NLC that it cannot constitutionally perform.

As already pointed out earlier in this judgment:

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 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.

23. Article 68 (c) (v) provides that *Parliament shall enact legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality.*

Article 67 (2) (e), lists the powers of the NLC to include: *(e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.*

Article 67(3) further empowers the Commission to perform *any other functions* prescribed by national legislation.

Having regard to the above cited Articles of the Constitution, I am unable to fault the 4th Respondent in the performance of its legislative function in enacting the NLC Act and in particular, **Section 14** of the said Act. Having already found that the 1st Respondent is a body vested with review powers pursuant to **Article 68 (c) (v)** as read together with **Articles 67 (e)** and **67(3)** of the Constitution, I am inclined to disagree with the Petitioner's assertion that Section 14 of the Act is unconstitutional.

d) Whether the Petitioner's Constitutional rights were violated

24. Whereas **Article 40** of the Constitution protects the right to property, this protection/right does not extend to title founded on an unlawful acquisition.

Article 40(6) provides:

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired."

It may indeed be argued that the 1st Respondent, in discharging its functions by investigating the manner in which the title/ grant in question was acquired acted well within the ambit of **Articles 40 (6) 67, and 68 (c) (v)** of the Constitution. It is not for this Court to stand in the way of a quasi-judicial body lawfully discharging its constitutional mandate. See **Milan Kumarn Shah & Others vs City Council of Nairobi & Others Nairobi HCCC No. 1024 of 2005 (unreported) and James Joram Nyagah & Another vs The Honourable Attorney General and Another HC Misc 1732 of 2004(unreported)**

25. Having stated thus, the term lawful in the paragraph immediately above then compels this Court to examine the Petitioner's specific grievances in the instant Petition in respect to **Article 47** and **50** of the Constitution. **Article 47(1)** of the Constitution provides every person with the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. **Article 50(1)** grants every person the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body. **Section 4** of the Fair Administrative Actions Act resonates with **Article 47** of the Constitution and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

26. The Petitioner has argued that he was not accorded fair administrative action by the 1st Respondent. This the Petitioner attributes to the refusal by the NLC to furnish him with the Complaint, failure to carry out proper investigations and to render a decision and reasons subsequent to the hearing, instead of secretly replacing the Petitioner as the proprietor of the subject land. Having perused the documents placed before this Court, it is apparent that notice to the interested parties was issued through print media.

27. The 1st Respondent on its part argues that it issued a public notice in print media and informed all interested parties of the intention to institute review proceedings to ascertain the legality of the title in question. The 1st Respondent asserts that it is a standard operating procedure that it publishes hearing dates in the dailies for matters scheduled for hearing and that it therefore complied with the provisions of **Article 50** of the constitution an section **14 (3)** of the act

Section 14(3) of the Act provides: *"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."*

28. The next issue for interrogation is **whether the notice allegedly given was sufficient and/or adequate**. What is before this Court is the notice issued by the 1st Respondent in print media (**marked as MSM 10**). The said notice cites L.R numbers and names of interested parties, who are subsequently invited through the same notice to make representations before the 1st Respondents. The notice does not outline details of any complaint. At this juncture I am inclined to give meaning to the term adequate notice in the context of the principles of natural justice. In *R.vs. Ontario Racing Commissioners (1969) 8 D.L.R. (3d) 624 at 628 (Ont. H.C.)* Mr. Justice Haines emphasized that a notice that complies with the principles of natural justice means:-

“a written notice setting out the date and subject-matter of the hearing, grounds of the complaint, the basic facts in issue and the potential seriousness of the possible result of such hearing.”

29. Taking a cue from the above decision, I find that the mode of service of notice adopted by the 1st Respondent does not meet the threshold of the principles of natural justice and **Articles 47 and 50** of the Constitution, hence cannot be said to be adequate/sufficient notice.

The Petitioner took issue with the 1st Respondents failure to furnish him with a complaint, even though it is alleged the 3rd Respondent had lodged a complaint with the 1st Respondent concerning the land in question. The 1st respondent did not state that it furnished the petitioner with the complaint filed against him

Article 50 reads:

“50(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right-...

(3) If this Article requires information to be given to a person, the information shall be given in language that the person understands.

30. My find is that the right to be heard transcends mere notice and extends to the person being given sufficient information to enable them prepare and/ or present their case. Such a person is entitled to be furnished, in good time, with information, including reports and documents in the body's possession that may be prejudicial to his/her case and which would guide that body relied in arriving at its decision. **Section 14(3)** of the Act is clear that such a person, apart from entitlement to notice, has the right **to inspect any relevant document**.

31. Having perused the documents placed before this Court, I am convinced that the Petitioner was neither furnished with the details of the complaint before the 1st Respondent nor granted access to the critical documents before the 1st Respondent. I find that in the circumstances of this case, it would be unfair then to expect or conclude that in the absence of such critical information, the Petitioner was granted a fair hearing as envisaged under **Article 50** of the Constitution. In this respect I agree with the finding of **Mativo, J** in the case of **Sceneries Limited v National Land Commission [2017] eKLR**.

32. In the absence of adequate notice, and access to the complaint as outlined herein, I am inclined to find that the Petitioner was not granted a fair hearing.

e) Does the National Land Commission have jurisdiction to revoke titles to land even where it finds, after an inquiry, that such title was irregularly or illegally acquired"

33. The Petitioner also argued that that the 1st Respondent erred in giving a determination by way of revocation of the grant, as opposed to a recommendation. In this regard the Petitioner annexed a letter (**marked MSM 15**) dated 31st July 2015 by the 1st Respondent addressed to the Chief Registrar of Lands. In the said letter, it is apparent that the 1st Respondent submits their determination showing the Petitioner's grant had been revoked. Although the Petitioner was not satisfied as to the authenticity of the said letter for its lack of a signature, the Petitioner's argument is fortified by Gazette Notice number 2816 issued on 22nd April 2016. The said Gazette Notice lists the 3rd Respondent as registered owner of the land in question. In the circumstances I am persuaded that the 1st Respondent proceeded to revoke the said Grant.

34. It is the Petitioner's contention that the Constitution of Kenya 2010 did not vest the 1st Respondent with power to revoke titles, grants or dispositions of land.

As I have already noted in this judgment, **Article 67 (2) (e)** of the constitution provides that the functions of the National Land Commission include *"to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress."*

Article 68 (c) (v) of the Constitution empowers Parliament to enact legislation to enable the review of all grants or dispositions of public land to establish their propriety. The legislation anticipated in this context is the National Land Commission Act No. 5 of 2012. The Act provides at **Section 14** for the review of grants and dispositions, pursuant to Article 68 (c) (v) of the Constitution. The said section outlines the procedure for the review of grants and disposition of public land to establish their propriety and legality. Where the Commission under Section 15 of the Act finds that the title was acquired in an unlawful manner, the Commission *shall direct the Registrar to revoke the title.*

35. I find that there is no provision empowering the Commission to revoke titles even where it is established that the same were unlawfully or irregularly acquired. The power to revoke title is vested in the Registrar and not the Commission which can only recommend. In this regard I fully associate myself with the sentiments of **Odunga, J** in the case of **Robert Mutiso Lelli and Cabin Crew Investments Ltd v National Land Commission & 3 others [2017] eKLR**

In any case, the provisions of **Article 67 (2)** of the Constitution cited above is clear and overrides the provisions of **section 14 (4)** of the act which provides that *"after hearing the parties in accordance with subsection (3), the Commission shall make a determination."* The Constitution is the Supreme Law of the Land as is indeed espoused under **Article 2 (4)**.

To the extent that the 1st Respondent rendered a determination as opposed to a recommendation, I find that the decision is tainted with illegality.

In conclusion, I find that scales of justice tilt towards a finding in favour of the Petitioner and allow the petition in the following terms:

a) A declaration that the Petitioner's right to fair administrative action under Article 47 of the Constitution as read together with the Fair Administrative Action Act 2015 as well as his right to a fair hearing under Article 50(1) of the Constitution have been violated.

b) The purported revocation and/or replacement of the Petitioner's proprietorship on L.R 209/13760 with the Kenya Police Service are quashed for being illegal, null and void.

c) I make no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 7th day of December 2018

W. A. OKWANY

JUDGE

In the presence of:

Mr Thuita for the petitioner

Mr Angaya for the 4th respondent

Court Assistant – Kombo



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