REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. PETITION CASE NO. 9 OF 2018

BETWEEN

RUBI DEVELOPERS LIMITED.....PETITIONER

AND

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE LAND REGISTRAR, KISUMU COUNTY.....2ND RESPONDENT

HASHI ENERGY LIMITED.....3RD RESPONDENT

JUDGMENT

Rubi Developers Limited, **(hereinafter referred to as the Petitioner)** has come to court against the National Land Commission, the Land Registrar, Kisumu County and Hashi energy Limited **(hereinafter referred to as the Respondents)** averring that she is the registered proprietor of land parcels nos. KISUMU/KOGONY/6492, 6493, 6494, 6495 and 6496 that it acquired for valuable consideration and it has developed them. That the petitioner's attention has been drawn to gazette notice no. 11710 published by the 1st respondent authorizing the 2nd respondent to cancel titles to the suit parcels and conferring ownership benefit on the 3rd Respondent.

The Petitioner further avers that her titles are properties protected under Article 40 of the Constitution and they are private property which the 1st respondent has got no mandate over. That the 3rd Respondent has never disputed the ownership of the suit properties by the petitioner nor stopped the petitioners from constructing them.

She further avers that the actions of the 1st respondent are threatening to infringe on the constitutional right to ownership and use of their private property that is jealously guarded by Article 40 of the Constitution. That the direction of the 1st respondent to the 2nd respondent aforesaid is unlawful, whimsical and ulta-vires their mandate. That only a court of law can cancel title to private property.

The petitioner avers that the 1st and 2nd respondents'' offices are offices in public trust and they are mandated by Article 2 (2) of the constitution to exercise trust power in a manner authorized under the constitution at all times.

The manner of exercise of that trust power by a state organ is that they must respect and defend the constitution at all times as dictated by Article 3 of the constitution and that they must uphold patriotism, be transparent and accountable and uphold the principle of sustainable development as per the dictates of article 10 of the constitution. That exercise of their authority should be for purposes of serving the people of Kenya and for the well-being of the people of Kenya and their benefit as opposed to self-service as presented by Article 129 of the constitution.

The Petitioner avers that the respondents' actions aforesaid are administrative actions which are now being done unlawfully and unreasonably and the same are done purposely to prejudice the petitioners. That there are no powers bestowed to the Respondents under the constitution or elsewhere that condition them to ignore the constitution and constitutional rights of the petitioner.

The petitioner contends that the 1st respondent breached Article 20 (1) b (4) that gives the court powers to adopt the interpretation that most favours the enforcement of the constitution and promote values of democracy and good governance and Article 23 (1), (3) that gives the court powers to grant an injunction and conservatory orders to protect constitutional values. That the Respondents have violated the petitioner's right to property and fair administrative action.

The petitioner prays for a declaration that the actions of the 1st respondent of directing the 2nd respondent to cancel title nos. KISUMU/KOGONY/6492, 6493, 6494, 6495 and 6496 vide gazette notice no. 11710 is unlawful and the same violates the petitioner's right to property under Article 40 of the constitution and the entitlement of the petitioners at Article 2, 3, 10, 22 (c), 23 (2), and 47 of the constitution and the said gazette notice is null and void. Costs of and incidental to this petition.

In the supporting affidavit, Mr Devaish Prabhudas Chotal reiterates the grounds of the petition and states further that the exercise of the authority of the 1st respondent should be for purposes of serving the people of Kenya and for the wellbeing of the people of Kenya and their benefit as opposed to self-service. That the respondents' actions aforesaid are administrative actions which are now being done unlawfully and unreasonably and the same are done purposely to prejudice the petitioner.

The petitioner did not file any response and did not participate in the proceedings despite being notified.

Mr. George Orwaru Nyangweso the then Land Registrar Kisumu filed a replying affidavit for the 2nd respondent deposing that the dispute was between a private land holder and a public land holder which could only be determined by the court. According to the 2nd Respondent, the 1st respondent was required to refer the dispute to the court for determination as to whether the property was private land or public land.

The 3rd Respondent on his part states that the area and or the land parcel nos. KISUMU/KOGONY/6492, 6493, 6494, 6495 and 6496 which the petitioner has described as owned by itself actually is owned and registered in its name of the 3rd respondent as a leasehold title L.R. No. 20295 (the property). The said piece of land was purchased for valuable consideration from the original grantees being Isir Developers Limited who were the first entity to be issued with the leasehold title for the said property L.R. No. 20295 by the Government of Kenya on the 8th of August 2007 as a leasehold title registered as IR No. 6761 IR measuring 2.40 hectares. At the point of purchase from the said original grantee, the property did not have any encumbrance whatsoever. Considering that Kenya Gazette Notice No. LXXVIII- No. 47 dated 19th November 1976, under which KSM/Kogony/2559 was compulsorily acquired has never been revoked or rescinded. To that extent therefore, the property remains Government Land that has merely been leased to the 3rd Respondent. To the extent that the compulsory acquisition by the government of the property as described in paragraph 4 (d) above has not been reversed the property remains public land.

The 3rd Respondent denies that the 1st Respondent ever issued an order conferring ownership of any land on the 3rd Respondent. The 1st Respondent further denies that Article 40 of the constitution can be interpreted in the favour of the petitioner to protect the property that it does not own. He also denies that the property which is the subject matter of the dispute is a private property to which the 1st Respondent lacked jurisdiction to adjudicate.

The 3rd Respondent affirms that the decision and directive given by the 1st Respondent was reasonable, just, procedural, lawful and issued after due consideration of deliberations and submissions by all the interested parties, including the parties to this suit. The 3rd Respondent avers that the 1st respondent acted lawful and within the ambit of its constitutional power and jurisdiction in arriving at its decision.

The 3rd Respondent affirms that in arriving at it decision the 1st respondent complied with the constitution in toto, allowed all parties a chance to be heard before arriving at its decision, made a decision that was consistent with its mandate and the need to protect property that was secured lawfully and that was fair and allowed all parties to present their evidence and testimony.

The 3rd Respondent affirms that the 1st Respondent acted procedurally, lawfully and reasonably with the sole purpose of respecting the law and ensuring that parties before it obtained a just and fair decision. It further affirms that the 1st Respondent decision was

constitutional and in complete compliance to the rule of law.

The 3rd Respondent contends that the 1st Respondent exercised its powers as it is conferred on it under article 68 (c) (v) of the Constitution and Section 14 of the National Land Commission Act, No. 5 of 2012 (NLC Act) and that the 1st Respondent has the power to mandate and power to recommend revocation of title on a matter that falls within its purview.

That any land that is unlawfully acquired can't be beyond the purview or reach of the NLC irrespective of who owns it. An absolute title can't be obtained on a public land. The 1st Respondent has the mandate to hear and determine issues which are related to private land if the property was acquired illegally, irregularly or fraudulently like it was the case in this instant matter where the Petitioner acquired the property illegally, irregularly and fraudulently.

The 3rd Respondent contends further that it has charged the property with ECO Bank for a loan of USD 30,000,000/-. And at the time of recording of the said charge in the year 2015 there were no encumbrances on this property.

The 3rd Respondent believes that this suit is bad in law, having been filed in a court without jurisdiction to hear and determine this matter and shall at the earliest instance apply to have the suit struck out.

The 3rd respondent argues that the 1st Respondent indeed upheld the general application of Article 40 of the constitution by reaching a determination that the Petitioner did not acquire the property lawfully. For this reason, therefore it was not entitled to protection of article 40 of the Constitution when it was not a bonafide purchaser of the property. The petition is incompetent as it is short of the required constitutional thresholds for a constitutional petition.

The 3rd Respondent states that the petition is not merited, it is frivolous vexatious and un deserving of the orders sought as it is based on complete misapprehension of the power and authority of the 1st Respondent under article 68 (c) (v) of the Constitution as read with section 14 of the NLC Act.

I have carefully considered the petition and response and rival submissions and to determine the issues in the petition, this court is guided by the provisions of ***Articles 61, 62, 64 and 67 of the Constitution of Kenya 2010***. ***Article 61*** provides for classification of land thus, all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals and is classified as public, community or private.

Public land is defined in ***Article 62*** as ***interalia*** land which at the effective date was un-alienated government land as defined by an Act of Parliament in force at the effective date or 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 whereas private land consists of registered land held by any person under any freehold tenure or land held by any person under lease hold tenure and any other land declared private land under an Act of Parliament.

The constitutional mandate of the National Land Commission is inscribed in ***Article 67(2)*** of the constitution of Kenya 2010Thus: -

(2) **The functions of the National Land Commission are—**

(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.

The functions and powers of the National Land Commission are set out in ***Section 5 of the National land Commission Act*** that as follows thus :-

(1) Pursuant to Article 67(2) of the Constitution, the functions of the Commission shall be—

(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.

(2) In addition to the functions set out in subsection (1), the Commission shall, in accordance with Article 67(3) of the Constitution—

(a) on behalf of, and with the consent of the national and county governments, alienate public land;

(b) monitor the registration of all rights and interests in land;

(c) ensure that public land under the management of the designated state agencies is sustainably managed for the intended purposes;

(d) may develop and maintain an effective land information system for the management of public land;

The above provisions of law do not grant the National Land Commission the power to determine a dispute between two individuals on land tenure and as to who was the owner of the suit property as the dispute could only be determined by the Environment and land court and therefore the 1st respondent engaged in an illegality as it did not have the jurisdiction to entertain the dispute. Moreover, the 1st respondent breached the constitution of Kenya 2010 by directing the cancellation of the petitioner's title when it did not have the powers to do so as the land was no longer public land vested in the Government because the land was classified as private land either leased, or held under freehold tenure. It is important to restate that all land belongs all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals and is classified as public, community or private. The 1st Respondent could only arbitrate on a dispute in respect of public land.

The Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012]**

eKLR, underlined the importance of courts and tribunals to operate within their jurisdictional fields as follows:

"**A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission* (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.''**

This court finds that the same principle is applicable to the jurisdiction of all state corporations, government agencies and commissions. None of them has unlimited mandates and they can only do that which they were established to do. The 1st Respondent's jurisdiction is not limitless. It can only do that which the Constitution and the law allow it to do and nothing more.

The 1st respondents decision was further a violation of Article 47 of the Constitution of Kenya as the decision was not lawfull for lack of jurisdiction and further the 1st respondent gave the 3rd respondent reliefs that were not prayed for as the 3rd respondent had alleged that only titles number 6494, 6495, and 6496 had encroached on his leasehold land title number 20295 however the 1st respondent went further to advise that Kisumu /kogony/6492,6493,6494,6495 and 6496 which had not encroached on the 3rd respondents leasehold title to be cancelled.

The process of arriving at the decision of the 1st respondent was not fair due to the fact that the 1st respondent did not consider calling the Director of Surveys and the Chief Land Registrar who are the custodians of the Maps and Registers in respect of the disputed parcels of land. A commission like the Respondent is expected to operate within its constitutional and statutory mandate and cooperate with other state organs, public agencies and commissions. The aim is to ensure smooth operations that will deliver maximum benefits for the people of Kenya in whose interest the Constitution was promulgated.

In the locus classicus case of **Anisminic Ltd v Foreign Compensation Commission [1969] 2 A.C. 147 (HL)** Lord Reid stated that:

"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly. I understand that some confusion has been caused by my having said in *Reg.* v. *Governor of Brixton Prison, Ex parte Armah* [1968] A.C. 192, 234 that if a tribunal has jurisdiction to go right it has jurisdiction to go wrong. So it has, if one uses "jurisdiction" in the narrow original sense. If it is entitled to enter on the inquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law.''

It is the petitioner's position that the 1st respondents decision is void, in law, a nullity. This argument was buttressed by the statement in **Macfoy v United Africa Co. Ltd [1961] 3 All E.R. 1169** where it was stated that:

"If an act is *void*, then it is in law a *nullity*. It is not only bad, but incurably bad. There is no need for an order of the court to

set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

The upshot of the above is a finding that the National Land Commission acted without jurisdiction and further did not call the relevant authorities to assist it in decision making.

The petition succeeds and I do grant a declaration that the actions of the 1st respondent of directing the 2nd respondent to cancel title nos. KISUMU/KOGONY/6492, 6493, 6494, 6495 and 6496 vide gazette notice no. 11710 is unlawful and the same violates the petitioner's right to property under Article 40 of the constitution and the entitlement of the petitioners at Article 2, 3, 10, 22 (c), 23 (2), and 47 of the constitution and the said gazette notice is null and void. Costs of the petition to the petitioner to be paid by the 1st respondent.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 17th DAY OF DECEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE