



Case Number:	Petition 54 of 2015
Date Delivered:	19 Dec 2016
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Onguto Joseph Louis Omondi
Citation:	Anthony Otiende Otiende v Public Service Commission & 2 others [2016] eKLR
Advocates:	-
Case Summary:	<p style="text-align: center;"><b><u>Role of the Cabinet Secretary Ministry of Housing, Land and Urban Development and the National Land Commission in Enacting Subsidiary Legislation to the Land Registration Act</u></b></p> <p style="text-align: center;"><b>Anthony Otiende Otiende v Public Service Commission &amp; 2 others [2016] eKLR</b></p> <p style="text-align: center;"><b>Petition 54 of 2015</b></p> <p style="text-align: center;"><b>High Court of Kenya at Nairobi</b></p> <p style="text-align: center;"><b>J.L. Onguto J</b></p> <p style="text-align: center;"><b>December 19, 2016</b></p> <p style="text-align: center;"><b>Reported by Ribia John</b></p> <p><i>Constitutional Law – role of the Cabinet Secretary Ministry of Housing, Land and Urban Development (3rd Respondent) in promulgating regulations and forms for use by both the various land registries and the public in completing land transactions – role of the National Land</i></p>

*Commission in the promulgation of regulations and forms for use by both the various land registries and the public in completing land transactions – whether the regulations and forms promulgated by the 3rd Respondent for use by both the various land registries and the public in completing land transactions in Kenya were unconstitutional, null and void for being promulgated without advice of the National Land Commission (NLC) -Constitution of Kenya, 2010 article 67(2)(c) – National Land Commission Act, section 6(1) – Land Registration Act section 110*

**Land Law**– *process of enacting subsidiary legislation touching on the registration of Land under the Land Registration Act – need for parliamentary approval before enacting subsidiary legislation touching on the use and registration of land - whether the of regulations and forms promulgated by the 3rd Respondent for use by both the various land registries and the public in completing land transactions in Kenya were unconstitutional, null and void for being promulgated without the necessary parliamentary approval – Land Registration Act section 110(2)*

**Statutes** – *Constitutionality of Subsidiary Legislation - the registration forms, forms of title including Leases, Title Deeds, Grants and Certificates of Title or of Lease made and promulgated by Cabinet Secretary, Ministry of Housing, Lands and Urban Development (impugned forms and regulations) - whether the of regulations and forms promulgated by the 3rd Respondent for use by both the various land registries and the public in completing land transactions in Kenya were unconstitutional, null and void for being promulgated without advice of the National Land Commission (NLC) and without the necessary parliamentary approval*

**Constitutional Law** – *Legislative Process – Legislative authority of the Cabinet Secretary Ministry of Cabinet Secretary Ministry of Housing, Land and Urban Development – public participation - whether the of regulations and forms promulgated by the 3rd Respondent for use by both the various land registries and the public in completing land transactions in Kenya were unconstitutional, null and void for being*

*promulgated without public participation - Constitution of Kenya, 2010 articles 10, 174 and 232*

**Civil Practice and Procedure** – *cause of action – where a cause of action is passed by events – whether it was palpable for the Court to determine the manner of appointment of the appointment 2nd Respondent as the Chief Land Registrar when the 2nd Respondent had already been terminated from that position*

### **Brief Facts**

The Land Registration Act (LRA) alongside the National Land Commission Act (NLAA) and the Land Act (Land Act) were enacted in March 2012, all with an assigned commencement date of May 2, 2012. Sections 12 and 13 of the LRA provided for the appointment of the Chief Land Registrar by the 1st Respondent as well as the statutory qualifications for such office. On or about July 2014, the 1st Respondent caused the appointment of the 2nd Respondent as the Chief Land Registrar envisaged under Section 12 of the LRA.

Section 110 of the LRA on the other hand provided for the making of regulations by the 3rd Respondent for purposes of the effective application of the LRA.

Pursuant to the powers donated under Section 110 of the LRA, the 3rd Respondent promulgated regulations and forms (impugned forms) for use by both the various land registries and the public in completing land transactions in Kenya.

Based on those set of facts, the Petitioner raised the instant Petition on two grounds, firstly challenging the promulgation of the impugned forms by the 3<sup>rd</sup> Respondent on grounds that they were promulgated without advice of the National Land Commission (NLC) and without the necessary parliamentary approval. Secondly, he challenged the appointment of the 2nd Respondent as the Chief Land Registrar on grounds that the 2nd Respondent was not duly qualified for that position. He sought to have the

impugned forms declared null and void and to have the appointment of the 2nd Respondent as the Chief Land Registrar to be declared to be inconsistent with the Constitution.

### **Issues**

i. Whether the of regulations and forms promulgated by the 3<sup>rd</sup> Respondent for use by both the various land registries and the public in completing land transactions in Kenya were unconstitutional, null and void for being promulgated without advice of the National Land Commission (NLC) and without the necessary parliamentary approval.

ii. Whether it was palpable for the Court to determine the manner of appointment of the appointment 2nd Respondent as the Chief Land Registrar when the 2nd Respondent had already been terminated from that position

### **Relevant Provisions of the Law**

#### **Constitution of Kenya, 2010**

#### **Article 10**

#### **10. National values and principles of governance**

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
- (c) good governance, integrity, transparency and accountability; and
- (d) sustainable development

#### **Article 174**

##### **74. Objects of devolution**

The objects of the devolution of government are—

- (a) to promote democratic and accountable exercise of power;
- (b) to foster national unity by recognising diversity;
- (c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;
- (d) to recognise the right of communities to manage their own affairs and to further their development;
- (e) to protect and promote the interests and rights of minorities and marginalised communities;
- (f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;
- (g) to ensure equitable sharing of national and local resources throughout Kenya;
- (h) to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and

- (i) to enhance checks and balances and the separation of powers.

**Article 232**

**232. Values and principles of public service**

(1) The values and principles of public service include—

- (a) high standards of professional ethics;
- (b) efficient, effective and economic use of resources;
- (c) responsive, prompt, effective, impartial and equitable provision of services;
- (d) involvement of the people in the process of policy making;
- (e) accountability for administrative acts;
- (f) transparency and provision to the public of timely, accurate information;
- (g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;
- (h) representation of Kenya's diverse communities; and
- (i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—

- (i) men and women;
- (ii) the members of all ethnic groups; and
- (iii) persons with disabilities.

(2) The values and principles of public service apply to public service in—

- (a) all State organs in both levels of government; and
- (b) all State corporations.

(3) Parliament shall enact legislation to give full effect to this Article.

## **Land Registration Act**

### **Section 7(3)**

#### **7. Land Registry**

(3) In establishing the land registry, the Public Service Commission and Cabinet Secretary, shall be guided by the principles of devolution set out in Articles 174 and 175 of the Constitution.

### **Section 12**

#### **12. Appointment of officers**

(1) There shall be appointed by the Public Service Commission, a Chief Land Registrar, and such other officers who shall be public officers as may be considered necessary for the effective discharge of functions under this Act.

(2) Any officer appointed under this Act shall be competitively recruited and vetted by the Public Service Commission.

### **Section 13**

#### **13. Qualifications for appointment of Chief Land Registrar**

(1) A person shall not qualify for appointment as Chief Land Registrar unless such a person—

(a) is a citizen of Kenya;

(b) holds a degree from a university recognized in Kenya;

(c) is an advocate of the High Court of Kenya of not less than ten years standing;

(d) has had at least ten years experience in land administration or management; and

(e) meets the requirements of chapter six of

the Constitution.

(2) A person shall not be qualified for appointment if that person—

- (a) has been convicted of a felony;
- (b) is an undischarged bankrupt;
- (c) has not met his or her legal obligations in relation to tax;
- (d) has benefited from or facilitated an unlawful and irregular allocation or acquisition of land or other public property; or
- (e) has been removed from office for contravening the provisions of the Constitution.

### **Section 105**

#### **105. Transiting title documents**

(1) On the effective date, the following provisions shall apply in respect of every parcel of land, the title to land which is already registered under the repealed Acts—

(a) if the title to a parcel of land is comprised in a grant or certificate of title registered under the repealed Registered Land Act—

(i) the grant or certificate of title shall be deemed to be a certificate of title or certificate of lease, as the case may be, issued under this Act; and

(ii) the folio of the register of titles kept under the repealed Act shall be deemed to be the register under this Act:

Provided that the Registrar may at any time prepare a register, in the prescribed form, showing all subsisting particulars contained in or endorsed on the folio of the register of titles and substitute such register for such folio and issue to the proprietor a certificate of title or certificate of lease, as the case may be, in the prescribed form;

(b) if the title to the parcel is comprised in a



grant or certificate of title registered under the repealed Registration of Titles Act—

(i) the grant or certificate of title shall be deemed to be a certificate of title or certificate of lease, as the case may be, issued under this Act; and

(ii) the folio of the register of titles kept under section 7 of the repealed Registration of Titles Act shall be deemed to be the register under this Act:

Provided that the Registrar may at any time prepare a register, in the prescribed form, showing all subsisting particulars contained in or endorsed on the folio of the register of titles kept as aforesaid and substitute such register for such folio and issue to the proprietor a certificate of title or certificate of lease, as the case may be, in the prescribed form;

(c) if the title to the parcel is comprised in a register kept under the repealed Government Lands Act or the repealed Land Titles Act, the Registrar shall—

(i) as soon as conveniently possible, cause the title to be examined;

(ii) prepare a register, in the prescribed form, showing all subsisting particulars affecting the parcel which are capable of registration under this Act;

(iii) serve on the proprietor and on the proprietor of any lease or charge, a notice of intention to register; and

(iv) issue to the proprietor, upon request, a certificate of title or certificate of lease in the prescribed form.

(2) In compiling register in the name of the county or national government in trust for the people resident in the county or the people of Kenya, as the case may be, all public land in the area.

(3) Upon the registration of the Commission as proprietor of any land under subsection (2), there

shall also vest in the Commission all rights, powers and liabilities under any grant or lease then subsisting in respect of the land.

## **Section 110**

### **110. Regulations**

(1) The Cabinet Secretary shall make regulations prescribing anything which may be prescribed under this Act generally and for the better carrying into effect the purposes and provisions of this Act and without prejudice to the generality of the foregoing, such regulations may prescribe—

(a) the forms to be used in connection with this Act;

(b) the manner and form of the registries of land, the procedures to be followed by the registries and hours they are to be open for business;

(c) procedures for the transfer of land from one category to another;

(d) particulars and format to be contained in a register or other document required to be kept under this Act; and

(e) any other matter for the better carrying into effect of the provisions of this Act.

(2) In making the regulations, rules or prescribing any matters required under this Act, the Cabinet Secretary shall take into account the advice of the Commission as required under the Constitution and such regulations or rules shall be tabled before Parliament for approval.

## **National Land Commission Act**

### **Section 6(1) and (2)**

#### **6. Registration units**

(1) For the purposes of this Act, the Commission in consultation with national and county governments may, by order in the Gazette, constitute an area or areas of land to be a land registration unit and may at any time vary the limits of any such units.

(2) Every registration unit shall be divided into registration sections, which shall be identified by distinctive names, and may be further divided into blocks, which shall be given distinctive numbers or letters or combinations of numbers and letters.

### **Interpretation and General Provisions Act**

#### **Section 34 (section since repealed)**

#### **34. Rules and regulations to be laid before National Assembly**

(1) All rules and regulations made under an Act shall, unless a contrary intention appears in the Act, be laid before the National Assembly without unreasonable delay, and, if a resolution is passed by the Assembly within twenty days on which it next sits after the rule or regulation is laid before it, that the rule or regulation be annulled, it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the making of any new rule or regulation.

(2) Subsection (1) shall not apply to rules or regulations a draft of which is laid before the National Assembly and is approved by resolution before the making thereof, nor to rules of court.

(3) In this section, "rules" and "regulations" mean respectively those forms of subsidiary legislation which may be cited as rules or regulations, as the case may be.

#### **Held**

1. The dispute as it concerned the 2nd Respondent's appointment no longer raised a live controversy with any practical effect. The conditions imposed for her appointment and

process followed would not be applicable even if reviewed. The 2nd Respondent could not be re-confirmed as the appropriate office holder and neither could the Court issue an order for her removal from office; such orders would be moot. Interest of justice or public interest dictated in the circumstances, that the Court was to not to discuss and determine that aspect of the dispute.

2. Even though the instant Court had the discretion to discuss and determine the dispute when it no longer presented a live or existing controversy, the interest of justice did not dictate that the instant Court proceed to determine it. Mootness in and of itself barred the Court from determining that aspect of the dispute, as the challenge was specific to the 2nd Respondent's appointment and occupation of office as the Chief Land Registrar, which appointment and occupation had both since terminated. The challenge had nothing to do with how the appointment was to be undertaken. The challenge too had nothing to do with the qualifications for the office of the Chief Land Registrar. There was no benefit to the larger public and neither will any legal certainty to be achieved by any determination of the issue as raised by the Petition.

3. Legislating was the function of Parliament. Clear procedure and processes were set out both in the Constitution and Standing Orders. Where Parliament failed to adhere to the manner and form of legislating then such legislation would be rendered invalid and void for being inconsistent with the Constitution and law. *A fortiori*, where statute conferred power upon the executive to legislate then the manner and form provided for the making of such subsidiary legislation was to be complied with. The statutory provisions had to be complied with.

4. Section 110 of the LRA, stipulated that the advice of the NLC was to be taken into account prior to the promulgation of any rules or regulations. The same statutory provision also provided that there had to be parliamentary approval prior to any rule or regulation being promulgated by the 3rd Respondent. Additionally, the Statutory Instruments Act, which was a statute

enacted to promote the better making, enactment, scrutiny and operation of subsidiary legislation by third parties (not parliament) also provided not only for public participation in such enactment but also parliamentary approval. The Statutory Instruments Act came into force in January 2013 and it repealed sections of the Interpretation and General Provisions Act, which also provided that, for subsidiary legislation to come into force, Parliamentary approval was necessary.

5. The 3rd Respondent was under a duty, in the course of law-making to observe and comply with all the relevant statutory provisions relevant to such law-making. The 3rd Respondent was duty bound to comply with the provisions of Section 110(2) of the LRA and the provisions of the Statutory Instruments Act. The 3rd Respondent was duty bound to comply with the constitutional edict of public participation in law making process.

6. Where non-compliance with statutory provisions and requirements was alleged, the question to be answered was not whether there had been 'substantial' or 'exact' compliance; it was, 'was there compliance?'. The decision whether there had been compliance was not pegged to a mere textual reading of the statute, but rather what was the object sought to be achieved by the statutory provision and whether that object had been achieved. It was about the statute's objective and purpose. The test of objective and purpose would countenance any deviation from statutory prescriptions provided the purpose of the statute had been achieved. The purpose of the statute as a whole as well as the specific provision was to be gathered and identified.

7. The Court was to identify the steps, if any, taken to comply with the statutory provisions. The Court would then ponder on whether the subsidiary legislation had achieved the purpose of the statute. Finally, the question as to whether there was any practical prejudice as a result of non-compliance was to be answered prior to the making of any orders.

8. The above approach was dictated by the new constitutional democracy which expected

persons purporting to act under the authority of any law and under the Constitution to be subservient to both the Constitution and to the people of Kenya, whose interest was paramount. It was time for the Court to part ways with the decision in *Republic vs. Wilfred Onyango Nganyi & another* [2008] eKLR where it was held that as it was commonplace and routine for subsidiary legislation to be promulgated without following the laid down statutory procedure (parliament's scrutiny and approval prior to gazette) such ministerial instruments or regulations were not necessarily void.

9. The purpose of the LRA was to revise, consolidate and rationalize the registration of titles of land and to give effect to the principles and objects of devolved Government in land registration and for connected purposes. With a view to achieving its purpose, the LRA repealed the previously applicable substantive and procedural statutes and also provided various officers and bodies with powers and functions. The Chief Land Registrar as well as the Deputy Land Registrars and County Land Registrar were conferred with powers under the LRA; the NLC was not left behind either. There were other officers also conferred with powers including officers responsible for land survey and land valuation. Together all these officials acting with the NLC were to create registration units, establish land registries, maintain land registers, prepare and maintain cadastral or survey maps for every registration unit, prescribe the terms and conditions of sale, amongst other functions and powers.

10. While the functions and powers were isolated to individual officers and bodies, with the aim of rationalizing the registration of title, no individual office or body was expected to operate and act in isolation. Subject to article 67(2)(c) of the Constitution and section 6(1) of the NLC act, the NLC was an independent constitutional commission vested with powers, *inter alia*, to advise the National Government on a comprehensive programme for the registration of title in land throughout Kenya. The NLC did not however act and operate in isolation.

11. The various officers and bodies including the NLC and the Cabinet Secretary responsible for matters relating to land could not in the process of implementing and putting into effect the statutory provisions under the LRA, the Land Act, the NLC Act operate in isolation. The functions of constitutional organs were complementary and no organ could purport to carry on its operations in isolation. That element was a recurring theme throughout the Land Registration Act.

12. For Kenya to rationalise the registration of titles to land, which was one of the aims and purposes of the LRA, the national government through the Cabinet Secretary or officers appointed by the Public Service Commission could not purport to act in isolation. Likewise, for Kenya to achieve a successful comprehensive programme for the registration of title in land throughout Kenya, the NLC could not also purport to act in isolation. Section 6(2) (b) of the NLC Act enjoined the NLC to “hold inquiries for the purposes of performing its functions under the Act”. Such functions included the execution of its constitutional mandate like advising the national government on a comprehensive programme for the registration of title in land. Conversely, in the performance of his functions under the LRA, the Cabinet Secretary was expected to take into consideration the advice of NLC on the comprehensive programme for the registration of title to land in Kenya.

13. A programme for the registration of title to land in Kenya was not to and could not constitute, at the instant stage of revising consolidating and rationalising registration of titles to land, a one stop blue-print. It was a continuous process involving all the players, namely the NLC, the designated offices under both the Land Act and the LRA, the Cabinet Secretary responsible for matters relating to land, the NLC officers and staffers appointed under the National Land Commission Act and the County Government officers/executives responsible for matters relating to land. None was to act in isolation.

14. Section 7(3) of the LRA enjoined the Cabinet Secretary to establish land registries and section 7(5) thereof also to determine the forms to be

applied in the registration process. Under Section 110(2) however, such forms were to be prescribed by the Cabinet Secretary upon taking into account the advice of the NLC and the approval of Parliament. Both the Cabinet Secretary and the NLC had a role to play, even when it came to basic forms.

15. The Cabinet Secretary's contention that the NLC role was simply limited to advising the national government on a comprehensive programme for the registration of title throughout Kenya and that the NLC had no role to play in the process of promulgation or prescribing the impugned forms to be used in the registration process, was not tenable.

16. The promulgation of regulations or forms for purposes of effecting registration was delegated to the 3rd Respondent by Parliament. There was a common law presumption against sub-delegation, expressed in the latin maxim *delegatus delegare non potest* (a delegatee cannot delegate). The maxim, in context, was based on the assumption that where the legislature had delegated powers and functions to a subordinate authority, it intended that authority was to exercise those powers and functions and not someone else.

17. The 3rd Respondents assertion that it was not to delegate powers to promulgate forms to the NLC was not agreeable. Parliament under Section 110 (2) of the LRA expressly conferred powers upon the 3rd Respondent to promulgate forms and other regulations or rules for the better carrying into effect the purposes and provisions of the LRA. Parliament however also expressly enjoined the 3rd Respondent to take into account the advice of the NLC pursuant to the NLC's Constitutional mandate. Additionally, Parliament retained its superintending role of approving any such regulations or rules or forms prior to promulgation by the 3rd Respondent. The principle of *delegatus delegare non potest* would not consequently apply in view of the express statutory provisions of Section 110(2) of the LRA. Taking into account the advice of the NLC, which was not binding, did not mean sub-delegation.

18. For the impugned forms which included



prescribed statutory leases to take effect the 3rd Respondent was expected, nay obligated, to comply with three steps:

- a. the advice of the NLC as required under the statute;
- b. the need of public participation in such subsidiary legislative process; and,
- c. to obtain Parliamentary approval of the prescribed regulations, forms or rules.

19. The purpose of obtaining the advice of the NLC under Section 110(2) of the LRA was to ensure that there was cohesion even as a comprehensive programme for registration of title was being developed. The prescription of statutory registration forms, which included titles, was part of the programme. It was part of the aims and objectives of the post- 2010 land statutes which sought to have a unitary system of land especially when one looked at Section 105 of the LRA as to the transiting of title documents from the repealed (RTA, LTA, RLA) statutes to the LRA. Uniformity and a totally comprehensive registration programme could not be achieved in the absence of the NLC's input.

20. In matters concerning land, emotive as it had been in Kenya and going by history, new processes which led to private ownership needed to be clearly made known to the public and their input ingested or appreciated. The 3rd Respondent was to import in its process of governance the various international and regional covenants which recognised the participation of the people in public affairs. A policy of inclusion rather than exclusion of the public from affairs of government which directly impacted on them was to guide the 3rd Respondent.

21. Section 110(2) of the LRA expressly provided for approval of Parliament to be sought by the Cabinet Secretary prior to the promulgation of the regulations forms or rules. The Statutory Instruments Act also expressly, at Section 11, provided for the laying of any regulations, rules and forms before Parliament for scrutiny and approval. Before the enactment of the Statutory

Instruments Act, the interpretation and General Provisions Act at Section 34 also provided for such subsidiary legislation or forms to be laid before Parliament for approval. The 3rd Respondent had an obligation under statute to lay the impugned forms made under Section 110 of the LRA before Parliament for approval.

22. The more specific purpose of the LRA was carried into effect through the regulations, form and rules. In particular, Sections 7 and 43 which provided for prescribed forms for purposes of effecting registration was to be implemented through the 3rd Respondents action under Section 110 (1) of prescribing the statutory forms. The 3rd Respondent did not seek or obtain the advice of the NLC prior to promulgating the statutory forms. The NLC in its letter to the Petitioner dated February 10, 2015 stated as much. The letter was not contested by the 3rd Respondent and hence it affirmed the fact that the NLC did not participate in the process of the statutory forms being prescribed.

23. There was no evidence that an attempt was made to engage the public and obtain the views of the public. The impugned forms were never placed before Parliament for scrutiny and approval before being gazetted. In all the instances there wasn't even an attempt to comply with the statutory provisions entailing the process of sub-legislating. No step was taken by the 3rd Respondent to comply with the provisions of Section 110(2). That was unlawful, unprocedural and unconstitutional.

24. The instant Court was unable to identify the manner of violation of the rights guaranteed under articles 27 and 40 of the Constitution as alleged by the Petitioners. In promulgating the impugned forms without public participation the 3rd Respondent violated articles 10, 174 and 232 of the Constitution. In promulgating the regulations and forms without the input of the NLC and without Parliament's scrutiny and approval, the 3rd Respondent also acted contrary to Section 110 of the LRA.

25. In so far as the 3rd Respondents duty was a legislative one, *albeit* delegated and in so far as the 3rd Respondent failed to absolutely adhere to

the prescribed process, the 3rd Respondent and the impugned regulations had to be faulted.

26. It was not in controversy that the impugned forms were intended to and had been put to use in carrying out the purposes and provisions of the LRA. The impugned forms were not inconsistent with one of the objectives and purposes the LRA which was also to ensure a proper and effective registration of title to land.

27. In so far as the impugned forms had no input by the NLC, the independent commission mandated to assist the national government in achieving a comprehensive program for the registration of title, the impugned forms had to be deemed to fail to meet the Constitutional threshold or muster. The 3rd Respondent were not to proceed with the registration reforms and programs which, included prescribed statutory forms, without the advice of, or consultation with, or the input of the NLC.

28. The Petitioner had discharged the burden of proof to the required standard. The 3rd Respondent acted *ultra vires* of the powers conferred on the 3rd Respondent by the LRA when it promulgated the regulations and without consulting the NLC and or obtaining Parliament's approval. To that extent the impugned regulations and forms were invalid.

29. An outright declaration of invalidity without more would certainly interrupt the registration processes of various titles. That was a process that was on-going. Such a disruption would also cloud the land registration system with uncertainty. Likewise titles already issued in the application of the impugned regulations and forms would be placed in doubt.

30. The non-compliance especially with regard to non-consultation with the NLC and failure to obtain parliament's approval were grave, given that the people of Kenya under article 67(2) ( c) of the Constitution yearned for and mandated the NLC to advice on the development of a comprehensive land registration programme. It would be appropriate to invalidate the impugned forms but at the same time and in the public interest

suspend such invalidation to avoid throwing the entire system of registration of title into disarray and chaos. That was the measured and proportionate approach that ought to be taken to ensure that there was compliance with the law while at the same time not leaving all the players and stakeholders in limbo or chaos. The Court had such residual powers to suspend any orders or declarations of invalidation

*Petition allowed.*

*Orders:*

*i. Declaration issued that the registration forms as well as forms of title including Leases, Title Deeds, Grants and Certificates of Title or of Lease made and promulgated by the 3rd Respondent without the advice of or input of the National Land Commission and without the necessary public participation and or parliamentary scrutiny and approval were unconstitutional null and void.*

*ii. Considering the immediate consequences of the above declaration on the registration of titles processes that were on-going and already undertaken, the declaration of invalidity was suspended to enable the 3rd Respondent to initiate meaningful engagement with the public, seek and take into account the advice of the National Land Commission, if any, on the impugned regulations and forms pursuant to Section 110(2) of the LRA and seek Parliament's approval pursuant to Sections 110(2) of the LRA and Section 11. of the Statutory Instruments Act.*

*iii. The declaration of invalidity under order (i) above was not to operate retroactively.*

*iv. In default of compliance with order (ii) above by the 3rd Respondent within twelve (12) months, all the regulations and forms promulgated under Section 110 of the LRA, in the absence of the National Land Commission's advice and in the absence of Parliament's approval was to stand null and void for all intents and purposes on the 366th day following the instant order.*

*v. Each party was to bear their own costs.*

Court Division:	Constitutional and Human Rights
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petition Allowed.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
<p>The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.</p>	

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION. NO. 54 OF 2015**

**BETWEEN**

**ANTHONY OTIENDE OTIENDE.....PETITIONER**

**VERSUS**

**PUBLIC SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT**

**SARAH NJUHI MWENDA.....2<sup>ND</sup>RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF**

**HOUSING, LAND & URBAN DEVELOPMENT.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. This judgment relates to the Petition filed on 16<sup>th</sup> February 2015. The Petition raised two core issues. One concerns the promulgation of regulations and forms (“impugned forms”) by the Cabinet Secretary in charge of Housing, Land and Urban Development, who is the 3<sup>rd</sup> Respondent herein. The impugned forms were promulgated for the purpose of effecting the provisions of the Land Registration Act, 2012.

2. The second issue relates to the appointment of the 2<sup>nd</sup> Respondent as the Chief Land Registrar by the 1<sup>st</sup> Respondent. The manner of appointment of the 2<sup>nd</sup> Respondent as well as her qualifications were questioned by Petitioner. The appointment is stated, in sum, to have been unconstitutional, irregular and illegal.

3. Two affidavits were filed in reply to the Petition.

**Brief Background facts**

4. The Land Registration Act No. 3 of 2012 (“**the LRA**”) alongside the National Land Commission Act No. 5 of 2012 (“**the NLAA**”) and the Land Act, No. 6 of 2012 (“**the Land Act**”) were enacted in March 2012, all with an assigned commencement date of 2 May 2012.

5. Under Section 109 of the LRA, five land law statutes were repealed. The five statutes namely the Indian Transfer of Property Act 1882, the Government Lands Act (Cap 280), the Registration of Titles Act (Cap 281), the Land Titles Act (Cap 282) and the Registered Land Act (Cap 300) were until May 2012 the main substantive and procedural statutes governing land transactions in Kenya.

6. Sections 12 and 13 of the LRA provide for the appointment of the Chief Land Registrar by the 1<sup>st</sup> Respondent as well as the statutory qualifications for such office. Section 110 of the LRA on the other hand provides for the making of regulations by the 3<sup>rd</sup> Respondent for purposes of the effective application of the LRA.

7. Pursuant to the powers donated under Section 110 of the LRA, the 3<sup>rd</sup> Respondent promulgated the impugned forms and guiding rules for use by both the various land registries and the public in completing land transactions in Kenya.

8. In or about July 2014, the 1<sup>st</sup> Respondent also caused the appointment of the 2<sup>nd</sup> Respondent as the Chief Land Registrar envisaged under Section 12 of the LRA.

9. The Petition contests both the promulgation of the impugned forms under Section 110 of the LRA as well as the appointment of the 2<sup>nd</sup> Respondent as the Chief Land Registrar of the Republic of Kenya.

### **The Petitioner's Case**

10. The Petitioner's case is contained largely in the Supporting Affidavit sworn by the Petitioner on 13<sup>th</sup> February 2015.

11. It is the Petitioner's contention that the LRA was intended to assist in the consolidation of the various laws dealing with land registration and additionally that pursuant to Article 67 of the Constitution the National Land Commission ("**the NLC**") was to assist in the formulation of a comprehensive programme for the registration of title to land in Kenya.

12. While conceding that the 3<sup>rd</sup> Respondent had a statutory mandate to promulgate prescribed forms for the purposes of disposition of land, the Petitioner however contends that under Section 110(2) of the LRA, such forms could only be promulgated and prescribed by the 3<sup>rd</sup> Respondent upon and after receipt of the NLC's advise which the 3<sup>rd</sup> Respondent never sought or received from the NLC. Additionally, the Petitioner also contends that as the impugned forms were never tabled before Parliament for the necessary approval pursuant to Section 34 of the Interpretation and General Provisions Act (Cap 2), the same are null and void.

13. It is the Petitioner's contention that as the forms are not recognizable under Section 43 of the LRA due to the lack of NLC's input and want of approval by Parliament, the Petitioner's as well as members of the public's right to own property under Article 40 of the Constitution is threatened. Additionally, the Petitioner contends that the land policy principles under Article 60 have been violated by the 3<sup>rd</sup> Respondent.

14. With regard to the appointment of the 2<sup>nd</sup> Respondent as the Chief Land Registrar, the Petitioner contends that the appointment was not only shrouded in mystery and irregularities but also contrary to the Constitution and statute. The Petitioner states that even though the 2<sup>nd</sup> Respondent applied for the post of the Chief Land Registrar, she was never originally shortlisted only for the 2<sup>nd</sup> Respondent to end up being shortlisted again alongside two other candidates. According to the Petitioner, the 2<sup>nd</sup> Respondent was not qualified for the post. Further, the Petitioner also stated that the 2<sup>nd</sup> Respondent had failed to meet the integrity threshold to be appointed to the office of the Chief Land Registrar.

15. In appointing the 2<sup>nd</sup> Respondent as the Chief Land Registrar, the Petitioner contended, the 1<sup>st</sup> Respondent had violated Article 232(2) of the Constitution which extols fair competition and merit as the basis of appointment to public office. Further, the Petitioner contended that the 1<sup>st</sup> Respondent had also

failed to observe the provisions of Article 10(2) as to equality, social justice and accountability as the 1<sup>st</sup> Respondent in appointing the 2<sup>nd</sup> Respondent had failed to take into account gender, progressive implementation of appointment of persons with disabilities and access to employment for the youth. Finally, the Petitioner also contended that the 2<sup>nd</sup> Respondent's appointment as the Chief Land Registrar was contrary to Article 27(3) which guarantees equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

16. The Petitioner sought three substantive prayers, viz:

*a) A declaration that the forms promulgated by the 3<sup>rd</sup> Respondent without taking into account the advice of the National Land Commission and without the necessary parliamentary approval are null and void.*

*b) A declaration that the 2<sup>nd</sup> Respondent is not a fit and proper person with due regard to her suitability, qualifications and hence her appointment as the Chief Land Registrar is inconsistent with the Constitution and statute and hence invalid.*

*c) An order of review and setting aside the approval and appointment of the 2<sup>nd</sup> Respondent.*

### **The Respondents' case**

17. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents filed Replying Affidavits to the Petition. The affidavits were sworn by Ms. Alice Otwala the Secretary to the 1<sup>st</sup> Respondent on 22 February 2016 and Hon. Charity Kaluki Ngilu on 3 March 2015.

18. The 1<sup>st</sup> Respondent denied that the recruitment process and ultimate appointment of the 2<sup>nd</sup> Respondent was contrary to both the Constitution and the statute.

19. According to the 1<sup>st</sup> Respondent the vacancy for the post of Chief Land Registrar was advertised twice with the first advertisement of February 2014 being non-responsive. The second advertisement of June 2014 attracted seven (7) applicants, of which one was male and one was a person living with disability. The 1<sup>st</sup> Respondent further contended that the process was transparent as the names of the successful applicants were published on the 1<sup>st</sup> Respondent's website before the short listing and interviews were undertaken. The 2<sup>nd</sup> Respondent was then appointed on merit from the three shortlisted candidates one of whom was a person living with disability. The 1<sup>st</sup> Respondent insisted that it strictly took into account the qualifications outlined in Section 13 of the LRA.

20. Hon. Charity Kaluki Ngilu who swore the 3<sup>rd</sup> Respondent's Replying Affidavit was at the material time the Cabinet Secretary in charge of Land, Housing and Urban Development.

21. The 3<sup>rd</sup> Respondent insisted that the NLC had no role to play in the day to day or "issue by issue", participation in land registration process, in the 3<sup>rd</sup> Respondents view, the NLC could only be involved in a comprehensive land registration process.

### **Discussion and Determination**

22. I must first point out that the litigation herein was staggered on 29<sup>th</sup> July 2015 when the court (Mumbi J) ordered a stay of proceedings pending the determination by the **Supreme Court of Advisory Opinion No. 2 of 2014- In the Matter of the National Land Commission.**

23. It was not until May 2016 when the proceedings in this Petition actively resumed, with directions as



to the filing of written submissions. While the Petitioner filed his submissions on 18<sup>th</sup> May 2016, the Respondents did not.

24. The issues raised by the Petition as already pointed out were two fold. The Petitioner questioned the propriety of the 2<sup>nd</sup> Respondents appointment as the Chief Land Registrar by the 1<sup>st</sup> Respondent. The Petitioner also questioned the propriety of the impugned forms, in the absence of approval by Parliament, for purposes of effecting land registration under the LRA.

***Propriety of the 2<sup>nd</sup> Respondent's appointment as the Chief Land Registrar***

25. My first chore with regard to this issue is whether the question as to the 2<sup>nd</sup> Respondent's propriety is now moot as there is apparently no live controversy as concerns the 2<sup>nd</sup> Respondent's appointment as the Chief Land Registrar.

26. The Petitioner made no submissions with regard to this issue and simply left it to the court's determination.

27. The 2<sup>nd</sup> Respondent, it is not in dispute, is no longer in office. The Petitioner says the 2<sup>nd</sup> Respondent was removed from office on account of alleged corruption and abuse of office. The 2<sup>nd</sup> Respondent indeed currently faces charges related to abuse of office.

28. I have no doubt that the dispute as concerns the 2<sup>nd</sup> Respondent's appointment no longer raises a live controversy with any practical effect. The conditions imposed for her appointment and process followed would certainly not be applicable even if reviewed. The 2<sup>nd</sup> Respondent may not be re-confirmed as the appropriate office holder and neither may the court issue an order for her removal from office. It would be moot. I do not also deem it that the interest of justice or public interest would dictate, in the circumstances, that I discuss and determine this aspect of the dispute.

29. Even though I have the discretion to discuss and determine the dispute when it no longer presents a live or existing controversy, the interest of justice does not dictate that I proceed and determine it. Mootness in and of itself bars me from determining that aspect of the dispute, as the challenge was specific to the 2<sup>nd</sup> Respondent's appointment and occupation of office as the Chief Land Registrar, which appointment and occupation have both since terminated. The challenge had nothing to do with how the appointment should be undertaken. The challenge too had nothing to do with the qualifications for the office of the Chief Land Registrar. There will be no benefit to the larger public and neither will any legal certainty be achieved by any determination of the issue as raised by the Petition.

***Referral of LRA Registration forms to the NLC for advice and to Parliament for approval before promulgation***

30. On this issue, the Petitioner's arguments were straightforward.

31. While conceding that the 3<sup>rd</sup> Respondent had powers under Section 110 of the LRA to make regulations which may prescribe forms to be used in connection with the LRA as well as any other matter for the better carrying application of the LRA, the Petitioner was categorical that such regulations as promulgated by the 3<sup>rd</sup> Respondent had to take into account the NLC's advice as well as meet with Parliament's approval as provided under Section 110(2) of the LRA. According to the Petitioner, the 3<sup>rd</sup> Respondent disregarded this statutory requirement and did not therefore seek NLC's advice or Parliament's approval before promulgating the regulations and statutory forms.

32. Additionally, the Petitioner contended that the 3<sup>rd</sup> Respondent had also failed or neglected to invite public participation prior to promulgating the impugned forms.

33. Consequently, the Petitioner asserted that the Petitioner and other members of the public were being compelled to use forms not recognized by the LRA. This, it was submitted, threatened the enjoyment of the right to own property under Article 40(1) of the Constitution and also violated the land policy principles enshrined under Article 60 of the Constitution.

34. The 3<sup>rd</sup> Respondent, in response, contended that advice from the NLC was not necessary as the NLC was only mandated by the Constitution under Article 67(2) to advise the national government on a comprehensive land registration programme. The 3<sup>rd</sup> Respondent however made no mention of whether the impugned forms were tabled before Parliament for approval.

35. The starting point is definitely the acceptance and recognition that the Parliament has delegated partially its law-making role to the 3<sup>rd</sup> Respondent vide Section 110(1) of the LRA. The Section deals with delegated legislation and provides as follows:

**110(1) The Cabinet Secretary shall make regulations prescribing anything which may be prescribed under this Act generally and for the better carrying into effect the purposes and provisions of this Act and without prejudice to the generality of the foregoing such regulations may prescribe**

**a)the forms to be used in connection with this Act.**

**b)the manner and form of the registries of land, the procedures to be followed by the registries and hours they are to be open for business.**

**c)procedures for the transfer of land from one category to another.**

**d)particulars and format to be contained in a register or other document required to be kept under this Act; and**

**e)any other matter for the better carrying into effect of the provisions of this Act.**

**(2). In making the regulations, rules or prescribing any matters required under this Act, the Cabinet Secretary shall take into account the advice of the Commission as required under the Constitution and such regulations or rules shall be tabled before Parliament for approval.**

36. The now repealed Section 34 of the Interpretation and General Provisions Act (Cap 2), in so far as it is relevant, provided as follows:

**34(1) All rules and regulations made under an act shall, unless a contrary intention appears in the Act, be laid before the National Assembly without unreasonable delay, and , if a resolution is passed by the Assembly within twenty one days on which it next sits after the rule or regulation is laid before it that the rule or regulation be annulled, it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the making of any new rule or regulation.**

37. The above section was repealed by Section 27 of the Statutory Instruments Act ,No 23 of 2012 which came into force on 25 January 2013. The Statutory Instruments Act provides in its long title that it

is an Act of Parliament to provide for the making, scrutiny, publication and operation of statutory instruments and for matters connected therewith. A statutory instrument is defined under Section 2 of the Statutory Instruments Act to mean

***Any rule, order, regulation, direction, form, tariff of costs of fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued”.***

38. Section 11 of the Statutory Instruments Act provides as follows:

***11(1) Every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before Parliament.***

***(2) An explanatory memorandum in the manner prescribed in the Schedule shall be attached to any statutory instrument laid or tabled under subsection (1).***

***(3) The responsible Clerk shall register or cause to be registered every statutory instrument transmitted to the respective House for tabling or laying under this Part.***

***(4) If a copy of a statutory instrument that is required to be laid before Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void.***

39. There should be no doubt that Section 110 of the LRA was enacted pursuant to Article 94(5) of the Constitution which stipulates that:

***(5) No persons or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.***

40. In the case of **Trusted Society of Human Rights Alliance vs. Cabinet Secretary Devolution and Planning & 4 Others [2016]eKLR**, the court with regard to delegated legislation stated as follows

***[78] For various reasons, delegated legislation is an inevitable feature of modern government. Pressure of Parliamentary time and technicality of subject matter of legislation are the most common and known reasons: see Executive Council of the Western Cape Legislature vs. President of the Republic of South Africa [1995] 4 SA 877 .***

***[79] In Executive Council of the Western Cape Legislature vs. President of the Republic of South Africa (supra) it was also stated that the fact that it is very rare for Acts of Parliament to contain all provision which are essential for its implementation has also always led to or prompted delegated legislation. Of the competence of Parliament to delegate its legislative powers the court in Executive Council of the Western Cape Legislature vs. President of the Republic of South Africa (supra) per Mahomed DP stated that delegation could not be determined in the abstract but depended***

***“inter alia on the constitutional instrument in question, the powers of the legislature in terms of that instrument, the nature and ambit of the purported delegation, the subject matter to which it***

relates, the degree of delegation, the control and supervision retained or exercisable by the delegator over the delegate, the circumstances prevailing at the time when the delegation is made and when it is expected to be exercised, the identity of the delegate and practical necessities generally”

**[80] In the context of implementation of statute, it is not uncommon to delegate to the executive the power to not only legislate various implementation provisions but also the commencement date as there may exist various practical reasons why a new Act should not come into effect as soon as the Presidential assent is given and the Bill is gazetted. Parliament, it must be stated, is also not expected to deal with all matters concerning implementation.**

**[81]The texture of our Constitution contains nothing which expressly prohibits delegation of legislation to other bodies. Indeed, Article 94(5) of the Constitution allows provisions having the force of law to be made by persons other than Parliament where the Constitution or legislation expressly allows. Delegated legislation and powers are also themselves subject to judicial review especially where the delegatee has attempted to obtain from Parliament greater powers to legislate than should have been given.(emphasis)**

41. Legislating is the function of Parliament. Clear procedure and processes are set out both in the Constitution and Standing orders. Where Parliament fails to adhere to the manner and form of legislating then such legislation will be rendered invalid and void for being inconsistent with the Constitution and law: see Articles 2(4) and 165 (3)(d)(ii) of the Constitution. See also **Kenya County Bus Owners Association –v- Cabinet Secretary for Transport and Infrastructure & 5 Others [2014] eKLR.**

42. *A fortiori*, where statute confers power upon the executive to legislate then the manner and form provided for the making of such subsidiary legislation is to be complied with. The statutory provisions must be complied with.

43. The relevant statutory provision, in this case section 110 of the LRA, stipulates that the advice of the NLC ought to be taken into account prior to the promulgation of any rules or regulations. The same statutory provision also provides that there has to be parliamentary approval prior to any rule or regulation being promulgated by the 3<sup>rd</sup> Respondent.

44. Additionally, the Statutory Instruments Act No. 23 of 2013 which is a statute enacted to promote the better making, enactment, scrutiny and operation of subsidiary legislation by third parties (not parliament) also provides not only for public participation in such enactment but also parliamentary approval. This Act came into force in January 2013. It repealed sections of the Interpretation and General Provisions Act (Cap 2), which also provided that, for subsidiary legislation to come into force, Parliamentary approval was necessary.

45. It is clear in the instant case that the 3<sup>rd</sup> Respondent was under a duty, in the course of law-making to observe and comply with all the relevant statutory provisions relevant to such law-making. In this respect, the 3<sup>rd</sup> Respondent was duty bound to comply with the provisions of Section 110(2) of the LRA and the provisions of the Statutory Instruments Act, No. 23 of 2013.

46. Additionally, the 3<sup>rd</sup> Respondent was duty bound to comply with the constitutional edict of public participation in law making process: see the cases of **Doctors for Life International vs. Speaker of the National Assembly & Others [2006] ZACC 11** and **Nairobi Metropolitan PSV’s Sacco Ltd & 25 others vs. County of Nairobi Government & 3 Others [2014]eKLR.**

*Dealing with non-compliance*

47. Where non-compliance with statutory provisions and requirements is alleged, the question to be answered is not whether there has been 'substantial' or 'exact' compliance. It is : was there compliance" The decision whether there has been compliance is not pegged to a mere textual reading of the statute, in my view, but rather what is the object sought to be achieved by the statutory provision and whether that object has been achieved. It is about the statute's objective and purpose and this test, in my view, will countenance any deviation from statutory prescriptions provided the purpose of the statute has been achieved. In that regard therefore, the purpose of the statute as a whole as well as the specific provision is to be gathered and identified.

48. Secondly, the court is to identify the steps, if any, taken to comply with the statutory provisions.

49. Thirdly, the court will then ponder on whether the subsidiary legislation has achieved the purpose of the statute.

50. Finally, the question as to whether there is any practical prejudice as a result of non-compliance is to be answered prior to the making of any orders.

51. The above approach is dictated by the new constitutional democracy which expects persons purporting to act under the authority of any law and under the Constitution to be subservient to both the Constitution and to the people of Kenya, whose interest ought to be paramount. I consequently have little hesitation in parting ways with the decision of Ojwang J (as he then was) in **Republic vs. Wilfred Onyango Nganyi & another [2008]eKLR** where it was held that as it is commonplace and routine for subsidiary legislation to be promulgated without following the laid down statutory procedure (parliament's scrutiny and approval prior to gazette) such ministerial instruments or regulations are not necessarily void.

52. In the instant case, it is not in doubt that the purpose of the LRA was to "*revise, consolidate and rationalize the registration of titles of land [and] to give effect to the principles and objects of devolved Government in land registration and for connected purposes*".

53. With a view to achieving its purpose of revising, consolidating rationalizing the registration of title to land, the LRA repealed the previously applicable substantive and procedural statutes and also provided various officers and bodies with powers and functions. The Chief Land Registrar as well as the Deputy Land Registrars and County Land Registrar were conferred with powers under the LRA. The NLC was not left behind either. And there were other officers also conferred with powers including officers responsible for land survey and land valuation. Together all these officials acting with the NLC are to create registration units, establish land registries, maintain land registers, prepare and maintain cadastral or survey maps for every registration unit, prescribe the terms and conditions of sale , amongst other functions and powers.

54. It is relatively clear that while the functions and powers were isolated to individual officers and bodies, with the aim of rationalizing the registration of title, no individual office or body is expected to operate and act in isolation. The NLC is an independent constitutional commission vested with powers, inter alia, to advise the National Government on a comprehensive programme for the registration of title in land throughout Kenya: see Article 67(2) (c) of the Constitution and Section 6(1) of the National Land Commission Act No. 5 of 2012. The NLC does not however act and operate in isolation, as independent a commission as it is.

55. Thus is in **Re the National Land Commission [2015]eKLR**, the Supreme Court whilst rendering itself in an advisory opinion sought by the NLC appreciated the fact that the various officers and bodies including the NLC and the Cabinet Secretary responsible for matters relating to land cannot in the process of implementing and putting into effect the statutory provisions under the LRA, the Land Act, the National Land Commission Act operate in isolation. So held the Supreme Court:

***[253]...the relationship between the NLC and the National and County Government is one of mutual cooperation, coordination and consultation. The functions of these constitutional organs are complementary and no organ may purport to carry on its operations in isolation. This element is a recurring theme throughout the [Land Registration] Act".*** (emphasis)

56. For the country to rationalize the registration of titles to land, which is one of the aims and purposes of the LRA, the national government through the Cabinet Secretary or officers appointed by the Public Service Commission cannot purport to act in isolation. Likewise, for the country to achieve a successful comprehensive programme for the registration of title in land throughout Kenya, the NLC cannot also purport to act in isolation. It is little wonder that Section 6(2) (b) of the NLC Act enjoins the NLC to "hold inquiries for the purposes of performing its functions under the Act". Such functions include the execution of its constitutional mandate like advising the national government on a comprehensive programme for the registration of title in land. Conversely, in the performance of his functions under the LRA, the Cabinet Secretary is expected to take into consideration the advice of NLC on the comprehensive programme for the registration of title to land in Kenya. This point was once again made clear by the Supreme Court in **Re the National Land Commission [supra]** when the court stated as follows.

***" [265] The Cabinet Secretary, while undertaking these functions, is to take into consideration the advice of the NLC, on the comprehensive programme for the registration of title to land in Kenya, in accordance with the Constitution".***

57. In my view, a programme for the registration of title to land in Kenya should not and cannot constitute, at this stage of revising consolidating and rationalizing registration of titles to land, a one stop blue-print. It is a continuous process involving all the players, namely the NLC, the designated offices under both the Land Act and the LRA, the Cabinet Secretary responsible for matters relating to land, the NLC officers and staffers appointed under the National Land Commission Act and the County Government officers/executives responsible for matters relating to land. None ought to act in isolation.

58. It is thus with little wonder that Section 7(3) of the LRA enjoins the Cabinet Secretary to establish land registries and also to determine the forms to be applied in the registration process (Section 7(5). Under Section 110(2) however such forms are to be prescribed by the Cabinet Secretary upon taking into account the advice of the NLC and the approval of Parliament. Both the Cabinet Secretary and the NLC have a role to play, even when it comes to basic forms.

59. It consequently follows that, in the instant case, the Cabinet Secretary's contention that the NLC role is simply limited to advising the national government on a comprehensive programme for the registration of title throughout Kenya and that the NLC has no role to play in the process of promulgation or prescribing the impugned forms to be used in the registration process, is not tenable.

60. It is true that the promulgation of regulations or forms for purposes of effecting registration was delegated to the 3<sup>rd</sup> Respondent by Parliament. It is also true that there is a common law presumption against sub-delegation, expressed in the latin maxim *delegatus delegare non potest* (a delegatee cannot delegate). This maxim, in context, is no doubt based on the assumption that where the legislature has

delegated powers and functions to a subordinate authority, it intends that authority to exercise those powers and functions and not someone else. I understood the 3<sup>rd</sup> Respondent to argue; that it should not delegate powers to promulgate forms to the NLC.

61. I do not agree.

62. Parliament under Section 110 (2) of the LRA expressly conferred powers upon the 3<sup>rd</sup> Respondent to promulgate forms and other regulations or rules for the better carrying into effect the purposes and provisions of the LRA. Parliament however also expressly enjoined the 3<sup>rd</sup> Respondent to take into account the advice of the NLC pursuant to the NLC's Constitutional mandate. Additionally, Parliament retained its superintending role of approving any such regulations or rules or forms prior to promulgation by the 3<sup>rd</sup> Respondent. In my view the principle of *delegatus delegare non potest* would not consequently apply in view of the express statutory provisions of Section 110(2) of the LRA. Taking into account the advice of the NLC, which may not even be binding, does not mean sub-delegation.

63. For the impugned forms which included prescribed statutory leases to take effect the 3<sup>rd</sup> Respondent was expected, nay obligated, to comply with three steps. Firstly, the advice of the NLC as required under the statute. Secondly, the need of public participation in such subsidiary legislative process and, thirdly, obtain Parliamentary approval of the prescribed regulations, forms or rules.

64. The purpose, in my view, of obtaining the advice of the NLC under Section 110(2) of the LRA is to ensure that there is cohesion even as a comprehensive programme for registration of title is being developed. I have little doubt that the prescription of statutory registration forms, which include titles, is part of the programme. It is part of the aims and objectives of the post- 2010 land statutes which sought to have a unitary system of land especially when one looks at Section 105 of the LRA as to the transiting of title documents from the repealed (RTA, LTA, RLA) statutes to the LRA. Uniformity and a totally comprehensive registration programme may not be achieved in the absence of the NLC's input.

65. Secondly, I also have little doubt that the concept of public participation in the legislative process is now part of our constitutional dictates and safeguards: See Articles 10 and 174 of the Constitution as well as the Supreme Court decisions in **Communications Commissions of Kenya & 5 Others vs. Royal Media Services & 5 Others [2014]eKLR [ 379 & 381]** and **Speaker of Senate & Another vs. Attorney General & 4 Others [2013]eKLR [136]**. In matters concerning land, emotive as it has been in Kenya and going by history, new processes which lead to private ownership need be clearly made known to the public and their input ingested or appreciated. In these respects the 3<sup>rd</sup> Respondent ought to import in its process of governance the various international and regional covenants which recognize the participation of the people in public affairs. A policy of inclusion rather than exclusion of the public, from affairs of government which directly impact on them, ought to guide the 3<sup>rd</sup> Respondent.

66. Thirdly, and finally, Section 110(2) of the LRA expressly provides for approval of Parliament to be sought by the Cabinet Secretary prior to the promulgation of the regulations forms or rules. The Statutory Instruments Act No. 23 of 2013 also expressly, at Section 11, provides for the laying of any regulations, rules and forms before Parliament for scrutiny and approval. Before the enactment of the Statutory Instruments Act, the Interpretation and General Provisions Act ( Cap 2) at Section 34 also provided for such subsidiary legislation or forms to be laid before Parliament for approval. There is consequently no doubt that the 3<sup>rd</sup> Respondent had an obligation under statute (or more correctly two statutes) to lay the impugned forms made under Section 110 of the LRA before Parliament for approval.

67. I have already identified the general purpose of the LRA which was effectively to revise consolidated and rationalize the registration of titles to land in a more comprehensive and simplified manner. The

more specific purpose of the LRA was carried into effect through the regulations, form and rules. In particular, Sections 7 and 43 which provide for prescribed forms for purposes of effecting registration was to be implemented through the 3<sup>rd</sup> Respondents action under Section 110 (1) of prescribing the statutory forms.

68. There is no contest that the 3<sup>rd</sup> Respondent did not seek or obtain the advice of the NLC prior to promulgating the statutory forms. The NLC in its letter to the Petitioner dated 10<sup>th</sup> February 2015 states as much. This letter was not contested by the 3<sup>rd</sup> Respondent and hence affirming the fact that the NLC did not participate in the process of the statutory forms being prescribed.

69. Secondly, it is also not contested that the public was not involved in the process. There is certainly no evidence before me that an attempt was made to engage the public and obtain the views of the public.

70. Finally, it is not in controversy that the impugned forms were ever placed before Parliament for scrutiny and approval before being gazetted.

71. In all the instances there was not even an attempt to comply with the statutory provisions entailing the process of sub-legislating. No step was taken by the 3<sup>rd</sup> Respondent to comply with the provisions of Section 110(2). In my view that was unlawful, unprocedural and unconstitutional.

72. It is not easy to ascertain whether there has been or there is any practical prejudice due to the non-compliance. The impugned forms have been put to use for nearly three years now. They may have defects and in land matters the defects may only become apparent years later. For now, the defects, if any, are not patent.

73. The Petitioner alleged that the use of the forms have infringed on both Articles 27 (as to equal treatment) and Article 40 (as to right to own property). The Petitioner also contended that the continued user of the impugned forms violates the law as the forms are not recognized under Section 43 of the LRA. I have however been unable to identify the manner of violation of the rights guaranteed under Articles 27 and 40 of the Constitution. No doubt, in promulgating the impugned forms without public participation the 3<sup>rd</sup> Respondent violated Articles 10, 174 and 232 of the Constitution. In promulgating the regulations and forms without the input of the NLC and without Parliament's scrutiny and approval, the 3<sup>rd</sup> Respondent also acted contrary to Section 110 of the LRA.

74. In so far as the 3<sup>rd</sup> Respondents duty was a legislative one, albeit delegated and in so far as the 3<sup>rd</sup> Respondent failed to absolutely adhere to the prescribed process, the 3<sup>rd</sup> Respondent and the impugned regulations must be faulted.

#### **Is the Petitioner entitled to the reliefs sought"**

75. It is not in controversy that the impugned forms were intended to and have been put to use in carrying out the purposes and provisions of the LRA. The impugned forms are certainly not inconsistent with one of the objectives and purposes the LRA which is also to ensure a proper and effective registrations of title to land.

76. In so far as the impugned forms have no input by the NLC, the independent commission mandated to assist the national government in achieving a comprehensive program for the registration of title, the impugned forms must be deemed to fail to meet the Constitutional threshold or muster. The 3<sup>rd</sup> Respondent should not and must not proceed with the registration reforms and programs which, include



prescribed statutory forms, without the advice of or consultation with or the input of the NLC.

77. The Petitioner alleged non-compliance on the part of the 3<sup>rd</sup> Respondent. The Petitioner has discharged the burden of proof to the required standard. I find that the 3<sup>rd</sup> Respondent acted ultra vires the powers conferred on the 3<sup>rd</sup> Respondent by the LRA when it promulgated the regulations and without consulting the NLC and or obtaining Parliament's approval. To that extent the impugned regulations and forms are invalid.

78. I am however conscious of the fact that an outright declaration of invalidity without more would certainly interrupt the registration processes of various titles. That is a process that is certainly and currently on-going. Such a disruption would also cloud the land registration system with uncertainty. Likewise titles already issued in the application of the impugned regulations and forms would be placed in doubt.

79. In my view, the non-compliance especially with regard to non consultation with the NLC and failure to obtain parliament's approval were grave, given that the people of Kenya under Article 67(2) (c) of the Constitution yearned for and mandated the NLC to advice on the development of a comprehensive land registration programme. It would be appropriate to invalidate the impugned forms but at the same time and in the public interest suspend such invalidation to avoid throwing the entire system of registration of title into disarray and chaos. That is the measured and proportionate approach that ought to be taken, as I shortly will, to ensure that there is compliance with the law while at the same time not leaving all the players and stakeholders in limbo or chaos.

80. I am satisfied that the court has such residual powers to suspend any orders or declarations of invalidation.

#### **Final orders**

81. I have faulted the 3<sup>rd</sup> Respondent. I have also appreciated the effect of an outright order of invalidity, it would disrupt the process of registration of title uncontrollably.

82. The Petition succeeds.

83. I would consequently make the following orders.

*a) A declaration is hereby issued that the registration forms as well as forms of title including Leases, Title Deeds, Grants and Certificates of Title or of Lease made and promulgated by the 3<sup>rd</sup> Respondent without the advise of or input of the National Land Commission and without the necessary public participation and or parliamentary scrutiny and approval are unconstitutional null and void.*

*b) However considering the immediate consequences of the above declaration on the registration of titles processes currently ongoing and already undertaken, the declaration of invalidity is hereby suspended to enable the 3<sup>rd</sup> Respondent to initiate meaningful engagement with the public, seek and take into account the advice of the National Land Commission, if any, on the impugned regulations and forms pursuant to Section 110(2) of the LRA and seek Parliament's approval pursuant to Sections 110(2) of the LRA and Section 11. of the Statutory Instruments Act No. 23 of 2013.*

*c) Additionally, the declaration of invalidity under (a) above is not to operate retroactively.*

*d) In default of compliance with (b) above by the 3<sup>rd</sup> Respondent within twelve (12) months, all the*

*regulations and forms promulgated under Section 110 of the LRA, in the absence of the National Land Commission's advice and in the absence of Parliament's approval shall stand null and void for all intents and purposes on the 366<sup>th</sup> day following this order.*

84. As to costs, I direct and order each party to bear its own costs of the Petition.

**Dated, signed and delivered at Nairobi this 19<sup>th</sup> day of December, 2016.**

**J.L.ONGUTO**

**JUDGE**



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