



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**APPLICATION NO. 15 OF 2018**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**NATIONAL LAND COMMISSION.....RESPONDENT**

**-AND-**

**KATANA KARISA SARO.....1<sup>ST</sup> INTERESTED PARTY**

**BRIAN ONYANGO OTIENO.....2<sup>ND</sup> INTERESTED PARTY**

**-AND-**

**JOHN KAMANDE MWANIKI.....EX PARTE APPLICANT**

**JUDGEMENT**

1. On 17<sup>th</sup> July, 2017, the National Land Commission (hereinafter “NLC”), the Respondent herein, gazetted an award purporting to review the title to L.R No. Chembe/Kibabamshe/302 (hereinafter “the Suit Property”) and directing that the title be regularized to the registered owner of the land and the Chief Registrar to revoke the title. It was contended that the award was procedurally *ultra vires* the powers of NLC because the NLC denied the *ex parte* Applicant (hereinafter “the Applicant”) the right to be heard by failing to give proper notice of the complaint against his title to the suit property. It was further contended that the NLC denied the Applicant a reasonable opportunity to present his defence to the substance of the complaint and lastly, that the NLC denied the Applicant an opportunity to be heard on the contents and effect of the records alleged in the decision to be at the Ministry of Lands and Physical Planning.

2. It was also his deposition that the purported award was substantively *ultra vires* the powers of NLC because the dispute between the Applicant and the 1<sup>st</sup> Interested Party did not relate to a grant of title within the meaning of Section 14 of the National Land Commission Act that is, the dispute was between private persons which pursuant to **Article 162(2)(b) of the Constitution and Section 13(2) of the Environment & Land Court Act** should be heard and determined by the Environment and Land Court. Consequently, NLC did not have powers to receive, investigate or make the award gazetted on 17<sup>th</sup> July, 2017. In his view, the award was so unreasonable and NLC failed to take into account relevant factors. Indeed, he averred that the award therein was null and void *ab-initio* and therefore unenforceable.

3. Aggrieved by the said award, the Applicant moved this court vide a Notice of Motion application dated 18<sup>th</sup> January, 2018 seeking for **ORDERS:**

1) *Certiorari to bring to the High Court and quash the proceedings leading to and the award gazetted on 17<sup>th</sup> July, 2017 by the National Land Commission for being made contrary to the rules of natural justice and ultra vires the powers of the National Land Commission.*

2) *A prohibition to prohibit the NLC and any interested party from lodging, registering or in other way enforcing the award gazetted on 17<sup>th</sup> July, 2017.*

3) *Declaration that the proceedings leading to the award, the purported findings, reports, recommendations gazetted on 17<sup>th</sup> July, 2017 are null and void from being made contrary to the rules of natural justice as against the ex parte Applicant and ultra vires of*

the power of the NLC.

4) Costs.

4. The application is founded on the grounds set out on the face therein, the Statutory Statement dated 16<sup>th</sup> January, 2018 and the Verifying Affidavit of **John Kamande Mwaniki** sworn on even date.

**Responses**

5. The Respondent did not put any response in respect to the application.

6. The 1<sup>st</sup> Interested Party opposed the motion through the Replying Affidavit of **Katana Karisa Saro** sworn on 3<sup>rd</sup> April, 2021. He averred that sometime in the year 2017, NLC placed adverts in numerous print and electronic media inviting interested members of the public to hearings to be conducted in Malindi interrogating the veracity of allotments in the troubled Chembe Kibabamshe Settlement Scheme. He attended the hearing in person in respect to the suit property together with the Applicant who was duly represented by counsel and one Valentine Seenoi who also laid a claim. Subsequently on 17<sup>th</sup> July, 2017, the NLC published its determination in the **Kenya Gazette Notice Number 6862** and he was declared the rightful owner of the subject property.

7. He contended that pursuant **Rule 29 of the National Land Commission (Historical Injustices Rules) of 2016**, any party that felt aggrieved with NLC's determination was at liberty to pursue an appeal within a specified period of time and neither the Applicant nor the said Valentine Seenoi have ever filed and or served any appeal on him. Consequently, he sold the subject property to the 2<sup>nd</sup> Interested Party vide an agreement of sale dated 9<sup>th</sup> March, 2020 and upon receiving full purchase price effected the Transfer to the 2<sup>nd</sup> Interested Party who has in turn sub-divided the subject property into smaller lots and sold a good number to third parties. Accordingly, he averred that the subject property is therefore no longer in existence.

8. It is averred that judicial review proceedings must not act as a substitute for an appellate procedure and determining the instant application is tantamount to leading this Honourable Court to sit on appeal. He therefore urged that the application be dismissed with costs.

9. The 2<sup>nd</sup> Interested Party also opposed the motion through the Replying Affidavit of **Brian Onyango Otieno** sworn on 3<sup>rd</sup> April, 2021. He contended that he is an innocent purchaser for value of the property in question. He contended that the Applicant and his then counsel fully participated at the hearing that led to the determination in favour of the 1<sup>st</sup> Interested Party. It was further his contention that subsequent to his registration as proprietor, he subdivided the subject property and offered some lots for sale to the general public.

10. He contended that he was not aware of the Applicant's claim to the subject property at the time of the purchase and the instant application is only designed to circumvent the express provision of the **National Land Commission (Historical Land Injustices) Rules of 2016** since the said determination has never been appealed against. It was further his contention that determining the instant application is to have this court interrogate the decision of the NLC which ought to be by way of appeal and not judicial review proceedings. He therefore urged that the application be dismissed with costs.

**Parties Submissions**

11. The Applicant filed written submissions dated 29<sup>th</sup> July, 2021 in support of the motion. On the issue of jurisdiction, counsel submitted that **Article 23 as read with Article 165 of the Constitution** grant this court jurisdiction and in any event the proceedings herein are challenging the purported power and procedure adopted by NLC in arriving at the award. To that end, counsel cited the cases of **Municipal Council of Mombasa v Republic & Umoja Consultants Limited (2002) eKLR**, **Mwangi Stephen Muriithi v National Land Commission & 3 Others (2018) eKLR** and **Rahab Wanjiru Njuguna v Inspector General of Police & Another (2013) eKLR** for the proposition that courts would only be concerned with the process leading to the making of a decision and courts have jurisdiction to review proceedings undertaken by the National Land Commission. Further, that the availability of other remedies is no bar to the granting of judicial review reliefs.

12. On whether NLC had power to make the award gazetted on 17<sup>th</sup> July, 2017, counsel submitted that the NLC does not have jurisdiction to review dispositions of private land. To buttress his argument, counsel cited the case of **William Abok v National Land Commission & 3 Others; Redeemed Gospel Church (Interested Party) (2019) eKLR** and **Sceneries Limited v National Land Commission (2017) eKLR** for the proposition that NLC had no mandate to investigate, question or make recommendations on title to land under Article 67 of the Constitution and further, NLC can only "recommend appropriate redress" but cannot purport to make a "determination" which is a final decision.

13. On whether the Applicant was heard before his title was revoked, counsel submitted that NLC failed to take into account his evidence prior to making the impugned decision and the procedure adopted by NLC violated the principles of natural justice and Articles 47 and 50 of the Constitution.

14. On whether the judicial review orders are available to the Applicant, counsel cited the case of **Rahab Wanjiru Njuguna (supra)** and submitted that the Applicant has established that NLC denied him an opportunity to be heard and acted *ultra vires* by purporting to make the award of 17<sup>th</sup> July, 2017. Accordingly, counsel urged that the application be allowed.

15. The 1<sup>st</sup> Interested Party also filed written submissions dated 22<sup>nd</sup> October, 2021. Counsel submitted that the NLC acted within powers bestowed on it by **Article 67(2) of the Constitution as read with Section 5 of the National Land Commission Act** and by law, NLC is tasked with interrogating, investigating and confirming the veracity of alienation of all Government Land from independence to date and the

Applicant's contention that NLC lacked jurisdiction is therefore misplaced.

16. Counsel also submitted that pursuant to **Rule 29 of the National Land Commission (Historical Land Injustices) Rules, 2016** the decision of NLC was to have been appealed against within 28 days should a party have been aggrieved by the same and the Applicant filed the instant suit seven (7) months after the said decision. Furthermore, counsel argued that the Applicant has not adduced any evidence that the transactions referred to in his affidavit were ever seen to completion. It was also submitted that the Applicant's allegation that NLC breached his right to be heard is defeated by the Applicant's own written participation in NLC's inquiry.

17. Indeed, counsel submitted that NLC's determination has been effected and both the declaration and the order of prohibition sought by the Applicant cannot issue and have since been overtaken by events. Fundamentally, he argued that the suit property is no longer in existence the same having been sub-divided, issued new numbers and sold off to third parties by the current owner, the 2<sup>nd</sup> Interested Party herein. Accordingly, counsel argued that the Applicant's remedy, respectfully lies in an action for indemnity and not rectification of the register as sought under the application herein pursuant to Section 81 of the Land Registration Act. He therefore urged that the application be dismissed with costs.

18. The 2<sup>nd</sup> Interested Party also filed written submissions dated 30<sup>th</sup> August, 2021 and 18<sup>th</sup> October, 2021 opposing the motion. Counsel submitted that the 2<sup>nd</sup> Interested Party herein is an innocent purchaser for value, having purchased the suit property from the 1<sup>st</sup> Interested Party who was the duly registered owner at the time of the purchase. To that end, counsel cited the case of **Katende v Haridar & Company Limited (2008) 2 E.A. 173** where the Court of Appeal in Uganda described who a *bona fide* purchaser is.

19. Counsel further submitted that contrary to the view taken by the Applicant that NLC had no jurisdiction to interrogate what the Applicant terms "private property", the suit property was government land alienated to the 1<sup>st</sup> Interested party under the Chembe Kibabamshe Settlement Scheme and both the Constitution and statute grant NLC powers to interrogate all alienation of government land irrespective of current status. Accordingly, NLC's recommendation was duly effected and the Applicant's title revoked by the Chief Land Registrar.

20. Counsel submitted that while the Applicant claims to have been aggrieved by the said decision, he failed to follow the laid down mechanism for redress provided under Rule 29 of the National Land Commission (Historical Land Injustices) Rules 2016 and filed the instant suit seven (7) months later. To that end, counsel relied on the Court of Appeal decision in **Speaker of the National Assembly v Karume (1992) eKLR**. Meanwhile, counsel submitted that with absolutely no knowledge of the Applicant's purported interest or claim, purchased the suit property from the 1<sup>st</sup> Interested Party for a valuable consideration and has since sub-divided the property into several portions, the majority of which have been sold to third parties.

21. Indeed, counsel argued that pursuant to **Section 80 of the Land Registration Act No. 3 of 2012**, the fact of possession is a shield against rectification acting in favour of the 2<sup>nd</sup> Interested Party and the orders sought, if granted, shall act to rectify the register against the 2<sup>nd</sup> Interested Party's interest. It was further submitted that the underlying issues raised in the instant application relate to ownership of land and judicial review proceedings is not a forum where such disputes can be adjudicated upon and determined. To buttress his argument, counsel cited the case of **Sanghani Investment Limited v Officer in Charge Nairobi Remand and Allocation Prison Nairobi (2007) eKLR**. Accordingly, it was urged that the application be dismissed.

### **Analysis and Determination**

22. I have considered the application herein, the responses thereto and the parties' submissions and the issues for determination is whether this court has jurisdiction to entertain the application herein in view of Rule 29 of the National Land Commission (Historical land injustices) Rules 2016, and if in the affirmative, whether the orders sought are merited.

23. The Applicant is aggrieved by the decision of NLC gazetted on 17<sup>th</sup> July, 2017 revoking his title. This challenge comes after the applicant participated in proceedings before the respondent ably represented by counsel. A decision was reached and duly gazetted as per the law governing the 1<sup>st</sup> Respondent's operations. **Rule 29** of the National Land Commission (Historical Land Injustices) Rules, 2016 provides that a party aggrieved by a decision of the NLC ought to appeal against the decision in 28 days. The applicant did not pursue this very clearly provided procedure but instead instituted these judicial review proceedings. His application is thus contrary to the law and it is an invite to this court to assume a jurisdiction that it does not have.

24. In addressing this issue, the Court of Appeal in **Almer Farm Limited v National Land Commission & 2 others [2021] eKLR** held as follows:

*"We have at the beginning of this ruling summarized the facts that were before the ELC at Kitale. The Judge found, rightly, we think, that the applicant had submitted to the jurisdiction of the 1st respondent. Proceedings were conducted and a decision reached which was duly gazette pursuant to the laws creating the 1st respondent. The applicant, if dissatisfied with the said decision was required to follow the procedure laid out in the said law if it desired to file an appeal. There is considerable authority for the statement that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed – **Speaker of the National Assembly v James Njenga Karume [1992] eKLR**.*

*The applicant who was aggrieved was required to file an appeal within the timeline prescribed in law. It did not do so but instead, contrary to procedure, it applied for judicial review. That was not the procedure prescribed by the National Land Commission (Investigation of Historical Injustices) Regulations."*

25. In view of the above, the 1<sup>st</sup> issue on jurisdiction answers in the negative. The applicant is not properly before the court. Without jurisdiction, the court is handicapped in dealing with any other issues in the matter. It must down its tools. The upshot is that the Notice of

Motion application dated 18<sup>th</sup> January, 2018 is not merited and is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2022**

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**A. K. NDUNG'U**

**JUDGE**