



Attorney General & 2 others v Kagali & 2 others (Environment and Land Appeal E030 of 2021) [2023] KEELC 17495 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17495 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E030 OF 2021**

E ASATI, J

MAY 25, 2023

BETWEEN

**ATTORNEY GENERAL 1ST APPELLANT
KISUMU COUNTY LAND REGISTRAR 2ND APPELLANT
DIRECTOR OF HOUSING MINISTRY OF TRANSPORT INFRASTRUCTURE
HOUSE & DEVELOPMENT 3RD APPELLANT**

AND

**MARY BEATRICE RAGOT KAGALI 1ST RESPONDENT
SAMDAVE NYARIDI KAGALI 2ND RESPONDENT
NATIONAL LAND COMMISSION 3RD RESPONDENT**

*(Being an appeal from the judgement of Honourable W.K. Onkunya
(SPM) delivered in Kisumu CMC ELC NO.385 of 2018 on 7th April, 2021)*

JUDGMENT

Introduction

1. *Vide* the Memorandum of Appeal dated 5th May, 2021, the Hon. Attorney General, the Kisumu County Land Registrar and the Director of Housing – Ministry of Transport, Infrastructure, Housing & Development (the Appellants) lodged the appeal herein against the Judgement delivered in Kisumu CMC ELC NO.385 OF 2018 (herein referred to as the suit) on the 7th April, 2022 by Hon. W.K. Onkunya (SPM). The orders sought are that the appeal be allowed, the judgement of the learned Magistrate be set aside and be substituted with an order dismissing the suit in the lower court, costs of the appeal and of the suit in the court below.



2. The Appellants together with the 3rd Respondent (the National Land Commission) were sued in the suit by the 1st & 2nd Respondents for an order of permanent injunction restraining the Defendants by themselves, their agents, representatives, servants and/or employees from demolishing, alienating or otherwise interfering and/or dealing in any way with the Plaintiffs' (1st & 2nd Respondents herein) parcel of land known as Kisumu Municipality/block 5/590 and costs of the suit. The suit was heard and *vide* its judgement dated 7th of April, 2021, the court found in favour of the Plaintiffs (1st and 2nd Respondents herein) and entered Judgement in their favour as prayed in the plaint.
3. Dissatisfied with the judgement, the Appellants preferred the appeal herein on the grounds shown in the Memorandum of Appeal namely; that learned trial Magistrate erred in law;
 - a. in ignoring the fact that the court lacked jurisdiction to canvass the matter in the light of the fact that the National Land Commission has jurisdiction expressly granted by the Constitution to review, grant and disposition of public land and therefore exercise a quasi-judicial mandate and its process and determination were subject to the supervisory jurisdiction of the High Court through grant of review orders as provided under Article 22 and 23(3) of the Constitution and Section 13(7)(b) of the Environment and Land Court Act No.19 of 2011.
 - b. by ignoring the preliminary objection on jurisdiction that was raised by the 4th Defendant in paragraph 7 of their statement of defence and the submissions of the Appellants with regard to it.
 - c. by arrogating herself supervisory jurisdiction exercise over the National Land Commission by looking into the administrative procedures followed by the National Land Commission.
 - d. by rendering judgement that in effect substitutes and overturns the decision of the National Land Commission and/or runs parallel with it, as the respondent never sought for any orders quashing the said decision and by issuing those orders the court superintended the decision of the National Land Commission in exercise of their constitutional mandate which action is an anathema to article 165 of the Constitution and amounts to an overthrow of the Constitutional order and causes confusion.
 - e. by failing to consider the submissions specifically on jurisdiction, the discrepancies in the letter of allotment particularly that there was no nexus between the part development plan referenced in the letter of allotment and that the one produced and that this irregularity went to the root of the title, thus an innocent purchaser for value cannot obtain a good title where the title is void *ab initio*, having been obtained in violation of the law.
 - f. by intimating that the Respondent were not given fair administrative action while at trial evidence was led by both the Respondents and the 3rd Appellant that they were notified through a newspaper advertisement of a hearing. They both attended the hearing at Tom Mboya College and were accorded a right to be heard and thereafter the reasons for cancellation were issued through a gazette notice.
 - g. by failing to consider the evidence by the 3rd Defendant that the land in question was reserved for government housing.
4. By consent of the parties, the appeal was canvassed by way of written submissions. Written submissions dated 28th February, 2023 were filed on behalf of the Appellant by Sarah Jumma, Senior Litigation Counsel for the Attorney General acting for the appellants. Written submissions dated 23rd March, 2023 were filed by Caroline Khasoa Advocate for the 3rd Respondent and written submissions dated



24th March, 2023 were filed by the firm of Otieno, Yogo, Ojuro & Company Advocates for the 1st and 2nd Respondents.

Issues for determination

5. From the Record of Appeal generally and specifically the grounds of appeal presented and the written submissions made, the following emerge as the issues for determination in this appeal;
 - a. Whether the appeal complies with the provisions of Order 42 of the Civil Procedure Rules 2010.
 - b. Whether or not the trial court had jurisdiction to hear and determine the suit.
 - c. Whether or not the Appellants are entitled to the relief sought herein.
 - d. Who pays the costs of the appeal?

Determination

6. This being a first appeal, this court has an obligation to re-analyse and re-assess the evidence adduced in the lower court and I will do this as I discuss and determine the issues for determination.
7. On whether or not the appeal has conformed to the provisions of Order 42 of the Civil Procedure Rules 2010, the 1st and 2nd Respondents submitted that the Record of Appeal filed herein was not proper as it contains no proceedings, decree and/or judgement being appealed from. That this was in contravention of the provisions of Section 65 and 79 of the Civil Procedure Act and O.42 Rule 13(4) of the Civil Procedure Rules. Counsel relied on the decision in the case of Bwana Mohamed Bwana -Vs- Silvano Buko Bunayo & 2 Others (2014)eKLR and submitted that for a competent appeal to lie it must comply with the provisions of Rule 33(1) of the Supreme Court Rules 2012 which provides that an appeal to the court shall be instituted by lodging in the registry within thirty days of the date of filing of the Notice of Appeal; Petition of Appeal, a Record of Appeal and the prescribed fee.
8. That the record of appeal is the complete bundle of documentation including the pleadings, submissions and judgement from the lower court without which the lower court would not be able to determine the appeal before it.

Counsel further relied on the case of Ndegwa Kamau t/a Sideview Garage -Vs- Fredrick Isika Kalumbo (2016)eKLR and Elvis Anyimbo Sichenga -Vs- Orange Democratic Movement and Others (2016)eKLR to support his submissions.

That the saving grace under Article 159(2)(d) of the Constitution of Kenya 2010 is inapplicable in this case and that the appeal should be struck out with costs.

9. I have considered this issue in light of the provisions of Order 42 Rule 13(4) Civil Procedure Rules which provides for the documents that ought to form the Record of Appeal in an appeal to the High Court. These include; the Memorandum of Appeal, the pleadings, the notes of the trial Magistrate made at the hearing, the transcript of any official shorthand, typing notes electronic recording or palantypist notes made at the hearing, all Affidavits, maps and other documents whatsoever put in evidence before the Magistrate, the judgement, orders or decree appealed from and where appropriate the order, if any, giving leave to appeal. Under the proviso to Order 42 Rule 13(4) the Judge may dispense with the production of any document or part of a document which is not relevant other than the Memorandum of Appeal, the pleadings and the judgement, order or decree appealed from and where appropriate the order, if any giving leave to appeal. The documents listed in the provision are the mandatory documents whose exclusion from the record of appeal renders the appeal incompetent.



10. I have carefully perused the Record of Appeal dated 3rd October, 2022 and filed in court on 5th October, 2022. I notice that the Memorandum of Appeal is on pages 1 to 4 of the Record, the pleadings on pages 45 to 135, the proceedings on pages 5 to 30 and the judgement appealed against on pages 31 to 44. I am satisfied that the record of appeal complies with the law.
11. The second issue for determination is whether or not the trial court had jurisdiction to hear and determine the suit. The claim before the trial court as seen from the plaint dated 20th July 2018 was that the 4th Defendant, by a gazette notice No. 6862 dated 17th July 2018 and amended by gazette notice dated 10th November 2018, arbitrarily and without any legal reason or excuse directed the Land Registrar – Kisumu County to cancel the 1st and 2nd Respondents’ title to land parcel number Kisumu Municipality/Block 5/590. That this was in violation of the 1st and 2nd Respondents’ constitutional rights. Hence, they prayed for permanent injunction restraining the actions of the Defendants.
12. The Appellants’ submission was that by article 67(2)(e) of the Constitution of Kenya and Section 15 of the *National Land Commission Act*, the National Land Commission is given powers to conduct investigations, review all grants and dispositions and establish their propriety and legality. That this gives the commission quasi- judicial powers. That the lower court had no business adjudicating the matter once admissions had been made by both parties that a hearing had been conducted by the National Land Commission at Tom Mboya Labour College that culminated into the decision to revoke the title. That such a finding can only be challenged at the High Court. That the Magistrate’s court had no jurisdiction whatsoever to interfere with the decision of the National Land Commission by rendering another decision that in effect overturned and substituted the decision of the National Land Commission thus causing there to be two different decisions from two judicial institutions that are contradictory in nature. Counsel for the Appellant relied on the case of *Tom Dola & 2 Others –vs- Chairman (National Land Commission) & 5 Others* [2008] eKLR where it was held that the processes of the National Land Commission are subject to the supervision by the High Court through Judicial Review orders as provided for under articles 22 and 23(3) of the *Constitution* of Kenya 2010 and Section 13(7)(b) of the *Environment and Land Court Act*. Counsel also relied on the case of *Samuel Kamau Macharia & Another –vs- Kenya Commercial Bank & 2 Others*, Application No.2 of 2011 [2012] eKLR where it was held that a court of law can only exercise jurisdiction as conferred upon it by the Constitution or other written law.
13. Counsel submitted that the procedure available for the 1st and 2nd Respondents was either Judicial Review or appeal under Regulations 30 of the *National Land Commission (Review of grants and dispositions of public land) Regulation*, 2017 which provides that a person aggrieved by the decision of the Commission may, within fourteen days of the Commission’s decision, appeal to the court.
Counsel further relied on the case of *Alma Farm Limited –vs- National Land Commission and 2 Others* [2021]eKLR and *Speaker of the National Assembly –vs- James Njenga Karue*[1992] eKLR to support the submissions.
14. The 1st and 2nd Respondents did not submit directly on the issue of whether or not the trial court had jurisdiction to entertain the claim before it. That the appellants have never to date communicated any decision after their hearings they conducted as required by law despite receiving the documents requested for from the 1st and 2nd Respondents. That the law required the 1st appellant to decide after the hearings and communicate the decision to the 1st and 2nd Respondents to enable them appeal if need be.
15. It was further submitted on behalf of the 1st and 2nd Respondents that the 1st and 2nd Respondents have an indefeasible title under the *Land Registration Act* which is capable of being protected under



article 40 of the Constitution. That under section 26 of the Land Registration Act certificate of title is conclusive evidence of proprietorship. That no evidence was presented to court to show that the Respondent's certificate was unlawful.

16. It was submitted further that the state which has issued a title cannot assert a right inconsistent with the title without following due process. That although the relevant documents were forwarded towards acquisition of LR. No. Kisumu Municipality/Block 5/590 the appellants have never communicated any written decision after the hearings as required in law.
17. The 3rd Respondent in the appeal (the National Land Commission) submitted on this issue that the learned trial Magistrate erred in assuming supervisory jurisdiction over the National Land Commission which jurisdiction is expressly given to the High Court under article 165(6) of the Constitution of Kenya 2010. That both the Constitution and Statute give the Commission powers to review grants and dispositions. Counsel referred to the provisions of Section 14 of the National Land Commission Act and submitted that the Commission acted as a quasi-judicial body, conducted a hearing to review the grant over the suit land and *vide* gazette Notice No.6862 dated 17th July, 2017 and Gazette Notice No.11043 dated 11th November 2017 gave a determination revoking title to the suit property.
18. I have carefully considered the evidence placed before the trial court as to whether there had been proceedings before National Land Commission under section 14 of the National Land Commission Act. There is no doubt from the evidence that there were hearings before the National Land Commission on the legality and propriety of the 1st and 2nd Respondents' title to the suit land. It is clear from the evidence that the parties testified before the National Land Commission sitting at Tom Mboya Labour College. The 1st Respondent who testified in the lower court as PW1 stated in her evidence that "we were called at Tom Mboya Labour college in 2017 to protect our properties." On re-examination she had stated that "I received a letter and went to the Commission at Tom Mboya College" DW1 also alluded to the hearings which were conducted by the Commission at Tom Mboya Labour College at Kisumu. Kenya Gazette No.6862 of 17th July 2017 containing the decision of the National Land Commission was produced as exhibit. It showed that the decision by the Commission was to revoke the title to the suit land for reasons of illegal allocation on public utility land reserved for government housing.
19. Pursuant to the provisions of Section 14 of the National Land Commission Act and Regulation 30 of the National Land Commission (Review of grants and dispositions in public land) Regulations 2017, the only recourse for the 1st and 2nd Respondents was to file an appeal against the decision or seek for Judicial Review orders.
20. In spite of having this evidence on record the trial court proceeded to hear and determine the case. The court faulted the Commission for not following the proper procedure in revoking the 1st and 2nd Respondent's title. It held

"From the evidence on record, there is no prove that the five mandatory procedures were followed before the plaintiff's title was revoked. Contrary to article 47 (1) of the Constitution which guarantees every person fair administrative action."

In view of the provisions of article 67(2) of the constitution of Kenya 2010, section 14 of the National Land Commission Act and the Regulations thereto, the trial court had no jurisdiction to do this. As to whether the decision by the Commission to revoke the titles had been communicated to the parties, I find that publication of the decision in the Kenya gazette was sufficient communication to the parties. The 1st and 2nd Respondents had knowledge of the existence of the Kenya gazette as the



proceedings show that it was PW1, the 1st Respondent herein who produced the gazette No. 6862 and the supplementary gazette thereto as her exhibit P. 2 during trial.

21. Having determined that the trial court lacked jurisdiction, I find that the appeal has merit and that the appellants are entitled to the orders sought. I allow the appeal and make the following orders:
- i. the judgement in Kisumu CMC ELC NO.385 of 2018 delivered on 7th April, 2021 is hereby set aside and substituted with judgement dismissing the suit with costs to the appellants.
 - ii. Costs of the appeal are awarded to the appellants.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 25TH DAY OF MAY, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Juma for the Appellants.

Okaka for the 1st and 2nd Respondents.

Juma holding brief for Khasoa for the 3rd Respondent.

