



Mwangi & 2 others v National Land Commission & another (Environment & Land Petition 64 of 2018) [2023] KEELC 18244 (KLR) (22 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18244 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION 64 OF 2018

OA ANGOTE, J

JUNE 22, 2023

(FORMERLY CONSTITUTIONAL PETITION NO. 294 OF 2018)

IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS AS ENSHRINED UNDER ARTICLES 20, 21, 22, 23, 40, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTIONS ACT 2015

AND

IN THE MATTER OF : NATIONAL LAND COMMISSION ACT NO. 5 OF 2012

AND

IN THE MATTER OF: REVOCATION OF ALLOCATIONS ON LOWER KABETE LAND

BETWEEN

KENNETH MUIRI MWANGI 1ST PETITIONER

SAHARA MOHAMUD MOHAMED 2ND PETITIONER

CHARLES MWANGI MUTERO 3RD PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

JUDGMENT

1. The Petitioners filed the Petition dated 28th August 2018 seeking the following reliefs:



- a. A declaration that the Gazette Notice published on 17th July 2017 violated the Petitioners' fundamental rights and freedoms as enshrined under Articles 40, 47, 48 and 50 of the Constitution of Kenya 2010.
 - b. A Conservatory Order in the nature of a permanent injunction directed towards the 1st Respondent restricting/ Prohibiting the Respondents, their agents, officers and any person acting under them from implementing its decision to revoke titles to land parcel No. L.R. 23928, L.R. 23929 and L.R. No. 23930 being properties of the petitioners.
 - c. A permanent injunction restraining the Respondents, their servants, agents, employees or any other person acting under their directions from interfering with the Petitioners properties known as L.R. No. 23928, L.R. No. 23929 and L.R. No. 23930.
 - d. This Honourable court to issue such further orders and give such directions as it may deem fit to meet the ends of justice and the protection of the Constitution and in the context of the declarations made.
2. The Petitioners' case as stated in the Petition and the Affidavit is that the 1st Petitioner is the registered owner of L.R. No. 23928; the 2nd Petitioner is the registered owner of L.R. No. 23929; and the 3rd Petitioner is the registered owner of L.R. No. 23930 (the suit properties), all located in Lower Kabete, Nairobi.
 3. According to the Petitioners, the 1st Respondent vide a Gazette Notice dated 17th July 2017 intends to revoke their titles and vest the land in the National Funds for the Disabled in Kenya (NFDK) on allegations that the parcels of land had been committed for public purpose under the Children's department; and that the Petitioners stand to suffer substantial irreparable damage should the revocation be implemented.
 4. The Petitioners aver that the 1st Respondent did not at any time notify the Petitioners in accordance with the law of the said revocation or make reasonable attempts to ensure that the notice or knowledge of the 1st Respondent's intentions were brought to the Petitioners' attention and that they became aware of the revocation of their titles through third parties.
 5. It was averred in the Petition that the 1st Respondent did not sufficiently substantiate the basis for revocation of the titles and its actions were arbitrary, illegal and unlawful as they amount to deprivation and restriction of the Petitioners' right to property.
 6. According to the Petitioners, they were allocated the suit properties without notice of any defect or irregularity of title and that they have been in continuous and exclusive possession of the same; that they hold valid title documents issued by the 2nd Respondent and that the Respondents breached their constitutional rights as the 1st Respondent failed to notify them in writing of its decision to revoke their titles.
 7. According to the Petitioners, the Respondents' actions are a breach of their administrative powers and the Petitioners' right to fair administrative action; that the 1st Respondent's decision was arbitrary and made without any legal basis or justification whatsoever and that the Respondents' action of revocation of their titles threatens to infringe on their rights to own and hold property as enshrined under Article 40 of the Constitution.
 8. The 1st Respondent opposed the Petition through Grounds of Opposition dated 17th October 2018. According to the 1st Respondent, the issues raised in this Petition do not meet the constitutional threshold to warrant this court to invoke its constitutional jurisdiction and that the Petitioners have



omitted to frame their case with precision as established in the case of *Anarita Karimi Njeru v The Republic* (1973-1980) KLR 1272.

9. The 1st Respondent averred that the Petitioners have not established any legal right over the properties in question and that the Petitioners' properties do not form part of the parcels of land listed by the 1st Respondent in the special gazette notice of 17th July 2017.
10. The 1st Respondent averred that that Petition does not raise any matter of public interest and has not met the threshold to warrant the grant of conservatory orders as established in the Supreme Court case of *Peter Gatirau Munya v Dickson Mwenda Kithinji & 2 Others* (2014) eKLR.
11. It was averred that Article 40(6) of the *Constitution* provides that the right to property does not extend to property found to be unlawfully acquired and that the Petitioners do not have a cause of action against the 1st Respondent and the Petitioner should be dismissed with costs.

Submissions

12. Counsel for the Petitioners submitted that the Respondents did not accord the Petitioners the right to fair administrative action encapsulated under Article 47 of the *Constitution* in revoking the Petitioners' titles and that under Section 14(8) of the National Land Commission, the 1st Respondent is to be guided by the principles set out under Article 47.
13. Counsel submitted that under Article 10, which binds state organs and state officers to apply the rule of law when interpreting the law or implementing public policy decision, the Respondents ought to have given the Petitioners a chance to be heard before their titles were revoked.
14. The Petitioners' Counsel submission was that under the cardinal rule of natural justice, no person should be condemned unheard and that there is no evidence that the Petitioners were accorded a chance of being heard before their titles were cancelled. Counsel relied on the case of *Judicial Service Commission v Mbalu Mutavu & Another* [2015] eKLR where the Court of Appeal articulated three features of natural justice.
15. Counsel submitted that the 1st Respondent did not furnish any information, documents and/or particulars of the allegations or charges which informed the revocation of the said titles and that there could be no fairness in such circumstances.
16. According to the Petitioners' Counsel, the 1st Respondent was exercising its administrative duty and was bound by Articles 47 and 50 of the *Constitution* as read with the provisions of Section 4 (3) of the Fair Administrative Actions Act which states the measure that an administrator should accord any person to be affected by its decision. The Petitioners' counsel relied on numerous authorities which I have considered.

Analysis and Determination

17. Upon consideration of the Petitioners' suit and the Respondent's rebuttals, the issue for determination before this court is whether the 1st Respondent's decision to recommend the revocation of the Petitioners' title communicated vide gazette notice of July 17, 2017 was done without affording the Petitioners an opportunity to be heard thus violating their rights to a fair hearing, fair administrative action and right to property.
18. Before considering the substantive matter herein, the 1st Respondent has raised a preliminary objection on the basis that the issues raised in the Petition do not meet the constitutional threshold to warrant



this court to invoke its constitutional jurisdiction and that the Petitioners have omitted to frame their case with precision as established in the case of *Anarita Karimi Njeru v the Republic* [1979] eKLR.

19. In the referenced case of *Anarita Karimi Njeru v the Republic* [1979] eKLR, the court stated that it was imperative for constitutional claims to be pleaded with precision:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
20. In the suit before this court, the Petitioners claim is that the 1st Respondent infringed on their rights to fair administrative action under Article 47; the right to property under Article 40; the right to access to justice under Article 48; and the right to fair hearing under Article 50. There is no ambiguity as to the rights which the Petitioners are asserting that have been infringed. The Court is satisfied that the principles set out in the *Anarita Karimi case* (supra) have been met.
21. The functions of the 1st Respondent, the National Land Commission (NLC), are set out under Article 67 (2) of the *Constitution* and include the management of public land on behalf of the national and county governments.
22. The mandate of the NLC is further prescribed under Section 14(1) of the *National Land Commission Act* as follows:
 - (1) Subject to article 68 (c)(v) of the *Constitution*, the commission shall, within five years of the commencement of this act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.
 - (2) Subject to articles 40, 47 and 60 of the *Constitution*, the commission shall make rules for the better carrying out of its functions under subsection (1).
 - (3) In the exercise of the powers under subsection (1), the commission shall give every person who appears to the commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.
 - (4) After hearing the parties in accordance with subsection (3), the commission shall make a determination.
 - (5) Where the commission finds that the title was acquired in an unlawful manner, the commission shall, direct the registrar to revoke the title.
 - (6) Where the commission finds that the title was irregularly acquired, the commission shall take appropriate steps to correct the irregularity and may also make consequential orders.
 - (7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.”
23. In the present case, the jurisdiction of the National Land Commission has not been called into question. What is in issue is whether in its determination, the 1st Respondent infringed the Petitioners’ rights to a fair hearing and a fair administrative action, which threatens to deprive the Petitioners of their rights to property contrary to Article 40 of the *Constitution*.



24. The right to fair administrative action is provided for in Article 47 of the Constitution as follows:

- “(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration.”

25. This right is further secured in the Fair Administrative Actions Act of 2015. Section 2 thereof defines an “administrative action” as including the powers, functions and duties exercised by authorities or quasi-judicial tribunals or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates, and defines an “administrator” as a person who takes an administrative action or who makes an administrative decision.

26. Section 4 (3) and (4) of the Act provide as follows:

- “(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—
 - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
 - (b) an opportunity to be heard and to make representations in that regard;
 - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - (d) a statement of reasons pursuant to section 6;
 - (e) notice of the right to legal representation, where applicable;
 - (f) notice of the right to cross-examine or where applicable; or
 - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to—
 - (a) attend proceedings, in person or in the company of an expert of his choice;
 - (b) be heard;



- (c) cross-examine persons who give adverse evidence against him; and
- (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”

27. The Petitioners have asserted that their right to a fair hearing has been infringed. This right is secured under Article 50(1) of the Constitution:

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

28. This right was extensively discussed by the Supreme Court in Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others [2014] eKLR, where the court held as follows:

“Article 50(1) refers to the right to a fair hearing for all persons, while article 50(2) accords all accused persons the right to a fair trial. Article 25(c) lists the right to a fair trial as a non-derogable fundamental right and freedom that may not be limited. Often the terms ‘fair hearing’ and ‘fair trial’ are used interchangeably, sometimes to define the same concept, and other times to connote a minor difference. Although the right to a fair trial is encompassed in the right to a fair hearing in our Constitution, a literal construction of these two provisions may be misconstrued in some quarters to mean that Article 50(1) deals with the right to fair hearing in any disputes including those of a civil, criminal or quasi criminal nature whereas Article 50(2) is limited to accused persons thereby arguing that the protection of such right only relates to criminal matters. This is not an acceptable interpretation or construction within the parameters of articles 19 and 20 of the Bill of Rights, which calls for an expansive and inclusive construction to give a right its full effect.”

29. The right to a fair hearing and fair administrative action constitute what is commonly referred to as natural justice. The Court of Appeal summarized the rule as follows in the Judicial Service Commission v Hon. Mr. Justice Mbalu Mutava & Another Civil Appeal No. 52 of 2014 where the court relied on the decision of the House of Lords in Ridge v Baldwin:

“... The landmark decision of the House of Lords in Ridge v. Baldwin [1964] AC 40 clarified the law, that the rules of natural justice, in particular right to fair hearing, (audi alteram partem rule) applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties. In that case, Lord Hodson at page 132 identified three features of natural justice as:

1. the right to be heard by an unbiased tribunal.
2. the right to have notice of charges of misconduct
3. the right to be heard in answer to those charges.

On his part, Lord Reid when dealing with class of cases of dismissal from office “where there must be something against a man to warrant his dismissal” said at page 66: “There, I find an unbroken line of authority to the effect that an officer cannot be dismissed without first telling him what is alleged against him and hearing his defence or explanation.”[20] The right to fair hearing as a rule of natural justice, a part of the common law, has in



modern times been variously described as “fair play in action”, justice of the common law”; “common fairness” “fairness of procedure” or simply as “duty to act fairly.” As an example, in *Wiseman v Borneman* [1969] 3 All ER 275 in determining, inter alia, the question whether the principles of natural justice (right to fair hearing) had been followed Lord Morris of *Borth-y-Gest* denominated the issue as to one of whether the tribunal had “acted unfairly”. So did Lord Denning MR in *Selvarajan v Race Relations Board* [1976] 1 All ER 12 when dealing with the procedure of bodies required to make investigation where he said at page 19: “In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigations and the consequence which it may have on the person affected by it.”

30. This court is guided by the above decisions and laws. In this matter, the Petitioners aver that they are the registered landowners of the suit properties. They have adduced copies of their titles as proof of ownership.
31. Section 26 of the [Land Registration Act](#) provides that a certificate of title is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner of the land, and that such title can only be challenged on grounds of fraud or misrepresentation to which the proprietor is a party or the acquisition was through an illegal and corrupt scheme.
32. Considering that the Respondents did not adduce any evidence to show that the Petitioners acquired their titles fraudulently or by misrepresentation, or that the acquisition was illegal, this court is persuaded that the Petitioners have established that they are the prima facie legal owners of the suit land.
33. The 1st Respondent has argued that the Petitioners’ properties are not subject to the impugned gazette notice. Indeed, L.R. Nos. 23928, 23929 and 23930 are not listed as affected properties in the gazette notice. However, the Petitioners’ names and the names of their businesses are contained therein, namely, Garissa Auto Tune, Muiro Mwangi and Sahara M. Mohamed. It would appear that the gazette notice intended to divest the Petitioners of the suit properties but fell short by erroneously referring to different properties.
34. To the extent that the Petitioners’ parcels of land have not been named in the impugned gazette notice, it will be presumptive for the court to make a determination that their right to property, or the right to a fair administrative action or fair hearing has been infringed.
35. Consequently, this court strikes out the Petition with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 22ND DAY OF JUNE, 2023.

O. A. ANGOTE

JUDGE

IN THE PRESENCE OF;

Ms Mbithe for Petitioners

Mr. Allan Kamau for 2nd Respondent

Court Assistant - Tracy

