



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELC PETITION NO. 8 OF 2019

MESHACK MOTURI SIRO suing through

JANET SIRO holder of Power of Attorney NO. 2954.....PETITIONER

-VERSUS-

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

THE CHIEF LAND REGISTRAR.....2ND RESPONDENT

THE LAND REGISTRAR-KISII COUNTY.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4THRESPONDENT

JUDGMENT

INTRODUCTION

1. This Judgment is in respect of the Petition dated 4th November, 2019 and filed in court on 12th November 2019 seeking the following orders against the Respondents herein;

- a) A declaration that the decision by the 1st, 2nd and 3rd Respondents and in particular the decision touching on LR NO. KISII MUNICIPALITY/BLOCK I/744 (hereinafter referred to us “the suit property” was irregular, unlawful and void.
- b) A declaration that the revocation of the Petitioners title in respect to the suit property was *ultra-vires* the provisions of section 14 of the National Land Commission Act, sections 7,9, and 10 of the Fair Administrative Actions Act, 2015 and the Land Registration Act, No. 3 of 2012 consequently the same is invalid and unconstitutional.
- c) The Honourable Court be pleased to grant an order of Judicial Review in the nature of Certiorari to quash the insertion of the name of (sic) the Permanent /Principle Secretary to the Treasury as the proprietor of the suit property in lieu of the Petitioner.
- d) The Honourable Court be pleased to grant an order of reinstatement and/or restoration of the Petitioner’s name in the title and in respect to the suit property and thereby confirm the Petitioner as the legitimate proprietor of the same.
- e) The Honourable Court be pleased to grant an order of Judicial Review in the nature of Prohibition prohibiting the Respondents herein either by themselves, agents, servants and/or anyone acting on their instructions from conducting and/or carrying out any proceedings touching on and/or concerning the Review of the lease over and in respect of the suit property and/or making any adverse recommendations thereon and/or in any other manner interfering with the Petitioners developments on the suit property in contravention of the National land Commission Act, 2012
- f) Costs of the Petition be borne by the respondents jointly and/or Severally.
- g) The Honourable Court be pleased to issue any such orders and/writs as it may deem fit and/or expedient.

2. The Petition is anchored on the following grounds that on or about 31st October, 2006, the office of the Chief Commissioner of Lands (now defunct and replaced by the 1st Respondent herein) with the authority of the County Council of Gusii (now defunct), allocated the suit property to the Petitioner herein. Pursuant to and in line with the allocation described herein above, the office the Commissioner of Lands issued to and in favor of the Petitioner a Letter of Allotment, stipulating the terms and conditions of the allotment.

3. Following the Allotment of the suit property to the Petitioner, he proceeded to and indeed paid the Stand Premium and other incidental payments to the office of the Commissioner of Lands, being the precursor of the 1st Respondent, which payments were duly received and acknowledged.

4. Subsequently the Office of the Commissioner of Lands now the 1st Respondent herein generated the lease instrument in favor of the Petitioner which instrument was transmitted to the office of the 3rd Respondent to facilitate further action and necessary registration vide a letter dated 31st October, 2006.

5. The Petitioner contends that upon the transmission of the lease instrument to the office of the 3rd Respondent, the lease instrument was duly executed by and/or on behalf of the lease culminating into the issuance of the Certificate of Lease on 4th December, 2006. By virtue of being the registered proprietor and/or lease holder of the suit property, the Petitioner was/is conferred and/or seized of exclusive rights to own, enter, and occupy the suit property to the exclusion of all and sundry.

6. Notwithstanding the allocation, alienation, transfer and ultimate registration of the suit property in favor of the Petitioner, the 1st, 2nd and 3rd Respondents hereof undertook a process, culminating into the revocation and/or nullification of the Petitioner's title over and in respect of the suit property, albeit without notice to and/or participation of the Petitioner.

7. It is the Petitioner's case that the Respondents either jointly and/or severally were devoid of jurisdiction to revoke the title in respect of the suit property whatsoever or howsoever. The Petitioner avers that the actions and/or omissions by or on behalf the 1st, 2nd and 3rd Respondents herein in particular, the purported revocation of the title over the suit property amounted to a violation and infringement of his constitutional and fundamental rights in the manner set out in the particulars highlighted on the face of the Petition.

8. In the premises the Petitioner herein alleges that he has been denied and or deprived of exclusive and absolute entitlements over the suit property in the manner that violates his constitutional and fundamental rights to ownership of the property and protection under the law and in particular, article 10, 27, 40 (2), 47 and 50 (1) of the constitution.

9. It is the Petitioner's contention that as a result of the irregular actions of the Respondents leading to the revocation of the Petitioner's title to the suit property, the Petitioner has been dispossessed and/or deprived of his right to own, occupy, use and/or benefit from the suit property. It is his further contention that consequent to the actions and/omissions of the 1st, 2nd and 3rd Respondents, the Petitioner is bound to suffer an infringement of his constitutional and fundamental rights thus requiring the protection of this court.

10. The aforementioned grounds were supported by an Affidavit sworn on 4th November, 2020 on behalf the Petitioner by Janet Siro who was a holder of a Power of Attorney authorising her to act for and on his behalf.

11. From the court record, it is evident none of the Respondents has ever entered appearance nor filed any response to the Petition. It is also evident that the Respondents were served and on record are Affidavits of service filed by the Petitioners proving the same.

12. On the 22nd September 2020, when the matter came for directions and after the court confirmed that the Respondents were absent despite being served, the court proceeded to give directions on how the matter was to be heard. The Petitioner successfully moved the court to canvass the matter through written submissions to be filed within fourteen days.

The Petitioner duly filed his written submissions on 19th October, 2020.

ISSUES FOR DETERMINATION.

13. After careful scrutiny of the Petition before me, the supporting affidavit, the evidentiary documents attached to the supporting affidavit and the submissions filed by and on behalf of the Petitioner, I deduce the following as the issues for determination:

- (i) Whether this Honourable Court has jurisdiction to hear and determine this petition and grant the orders sought.
- (ii) Whether the actions of the Respondents in revoking the Petitioner's title to the suit property were *ultra-vires*.
- (iii) Whether the Petitioner's rights were contravened as a result of the revocation of the title.

ANALYSIS AND DETERMINATION

Whether this Honourable Court has jurisdiction to hear and determine this Petition.

14. Before delving into the crux of this Petition, it is imperative to determine whether this court has the requisite jurisdiction to entertain the petition.

15. It is important to note that this Court imports its jurisdiction from Article 162 of the Constitution of Kenya which provides that:

16. Article 162(2) and (3) of the Constitution provides as follows:

“(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a)

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”

17. The Environment and Land Court Act, 2011(ELC Act) provides for the jurisdiction and functions of the Environment and Land Court contemplated by Article 162 (2) (b) of the Constitution.

Section 4(3) of the ELC Act provides that the court shall have and exercise jurisdiction throughout Kenya. Part III of the ELC Act provides for the jurisdiction of the court as follows:

“(1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4)

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c).....

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.

18. This court is not precluded from determining questions touching on breaches of fundamental rights when dealing with matters relating to land and environment. In **Daniel N. Mugendi –Vs- Kenyatta University & 3 Others [2013] eKLR** the Court of Appeal held that:

“In the same token we venture to put forth the position that as we have concluded that the industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights and ancillary and incidental to those matters, the same should go for the Environment and Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with two subjects”.

19. I am in total agreement with the holding in the authority cited above. The Petitioner herein is inviting this court to determine this matter where he has had his title revoked vide a decision of the 1st Respondent. The issue at hand is whether this Honourable court should intervene and render the decision of the Respondent *ultra vires* and thus go ahead to prohibit them from interfering with the petitioner's enjoyment of the suit property. The issue as to whether the Petitioners are entitled to the said orders cannot be determined without first determining the issue of ownership of the subject land. It is now settled law that issues relating to occupation and title to land fall within the ambit and jurisdictional space of the Environment and Land Court by dint of Article 162(2) (b) of the Constitution of Kenya.

20. As was held by the Court of Appeal, in the case of **Daniel N. Mugendi vs Kenyatta University & 3 Others [2013] eKLR** this Court has jurisdiction to determine whether rights and freedoms provided for in the constitution have been threatened or infringed that are incidental and ancillary to land and environment. It is therefore clear that the issue raised by the Petitioner on breach of their fundamental rights can competently be addressed by the Land and Environment Court.

Whether the actions of the Respondents in revoking the Petitioners title to the suit property were *ultra-vires*.

21. The Petitioner contends that the 1st, 2nd and 3rd Respondents without any legal authority, revoked his title to the suit property and caused the same to be registered in the name of the Principle Secretary to hold it in trust for the Ministry of Housing on 17th October, 2010. He also avers that the circumstances that led to the revocation of his title to the suit property and the subsequent registration of the suit property in the name of the Principle Secretary, Treasury are not known. It is his contention that he has not come across or been served with any proceedings conducted by the 1st Respondent for purposes of ascertaining the process therein.

22. In his submissions, learned counsel for the Petitioner argues that Article 67(2)(e) of the Constitution of Kenya, 2010 provides that the National Land Commission (the 1st Respondent herein) can initiate investigations on its own initiative, in present or historical land injustices and recommend appropriate redress. Further he argues that according to section 15 of the National Land Commission Act the 1st Respondents can, where it finds that a title was acquired in unlawful manner, direct the Registrar to revoke the title. He continues to argue that the 1st Respondent can only recommend revocation of the title by the registrar but cannot revoke the same. It is his contention that, it is only upon the recommendation of the 1st respondent that registrar will act and revoke the title.

23. The Petitioner supported his argument by referring this court to the case of **Mwangi Stephen Muriithi vs the National Land Commission and 3 others (2018) eKLR** where the court held that;

“I find that there is no provision empowering the Commission to revoke titles even where it is established that the same were unlawfully or irregularly acquired. The power to revoke title is vested in the Registrar and not the Commission which can only recommend.....In any case, the provisions of Article 67 (2) of the Constitution cited above is clear and overrides the provisions of section 14 (4) of the Act which provides that “after hearing the parties in accordance with subsection (3), the Commission shall make a determination.” The Constitution is the Supreme Law of the Land as is indeed espoused under Article 2 (4). To the extent that the 1st Respondent rendered a determination as opposed to a recommendation, I find that the decision is tainted with illegality.....

24. Learned counsel concludes his line of argument by submitting that the Respondents had no jurisdiction to revoke the title unless laid down procedures were followed in line with article 47 of the constitution.

25. Since the Respondents, especially the 1st Respondent did not enter appearance or present its side of story regarding the above averments by the Petitioner, I am inclined to agree with the Petitioner that the actions of the Respondents to revoke his title were *ultra-vires* and thus void.

Whether the Petitioner's rights were contravened as a result of the revocation of the title.

26. The Petitioner has endeavored to explain how he acquired title to the suit property which title has now without any explanation been revoked by the respondent. He has annexed various supporting documents. He contends that such revocation has led to a violation of his constitutional rights to fair administrative action under article 47, his right to property under article 40 and his right to fair hearing under article 50 of the Constitution.

27. The Petitioner avers that he only got to know that his title had been revoked when he visited the Land Registry to conduct a search only to discover that the suit property had on 17th May, 2010 been registered in the name of the Permanent Secretary, Treasury. It is his contention that he should have been given an explanation as to why his title had been revoked and registered in the name of the Permanent Secretary, Treasury. He also averred that it was a necessity that he be given notice to vacate the suit property before such revocation or any action that would follow if at all the Respondents reached the conclusion that his title was invalid. He thus contends that the actions of the Respondent have denied him an opportunity to enjoy his property.

28. I have made a finding earlier in this judgment that this court is not precluded from determining questions touching on breaches of fundamental rights when dealing with matters relating to land and environment and I will therefore not shy away from making a determination on this issue.

29. Article 47 of The Constitution of Kenya provides for a fair administrative action thus every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. 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. This article is complemented by article 50 of the Constitution which provides for Fair hearing thus 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.

30. Under Section 6 of the National Land Commission Act, the National Land Commission, the 1st Respondent herein does not have any power to decide, determine or declare that the ownership and/or occupation of a specific parcel of land is illegal or unlawful nor any powers to arbitrarily restrict a registered proprietor from using or otherwise developing his land.

Section 14(1) of the National Land Commission Act stipulates as follows:

“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 the National or County Government, a community or an individual, review all grants and dispositions of public land to establish their propriety or legality.”

31. The other relevant sub-sections of **Section 14** of the National Land Commission Act are the following:

“(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.”

32. In **Robert Mutiso Lelli Vs the National Land Commission & 3 Others NBI JR Nos. 298 and 363 of 2014**, the Court held that the National Land Commission had no jurisdiction to revoke a title even if it was established upon review that the title was unlawfully obtained. It was held that the power of revocation rested with the Registrar.

33. From the above provisions of the National Land Commission Act and the case law I have cited, it is clear that the National Land Commission has no powers to revoke titles where it finds that a person has unlawfully acquired title to a property. All it can do is to forward its decision to the Chief Land Registrar for execution.

34. It was expected that the Chairman of the National Land Commission would file a Replying Affidavit in response to the allegations made by the Petitioner. Failure to do so means that the allegations of the Petitioner that he was not afforded fair administrative action or a fair hearing by the Respondent before revoking his title are not controverted.

35. In conclusion therefore, I find that the Petitioner has proved his case on a balance of probabilities and I allow the Petition in the following terms:

a) A declaration is hereby issued that the Petitioner’s right to fair administrative action under Article 47 of the Constitution as read together with the Fair Administrative Action Act 2015 as well as his right to a fair hearing under Article 50(1) of the Constitution have been violated by the Respondents.

b) The purported revocation of the Petitioner’s proprietorship of land parcel LR NO. KISII MUNICIPALITY/BLOCK I/744 by the Respondents is hereby quashed for being illegal, null and void.

c) An order is hereby issued to the 2nd Respondent to reinstate the Petitioner’s name in the title and in respect to land parcel LR NO. KISII MUNICIPALITY/BLOCK I/744.

d) An order is hereby issued prohibiting the Respondents herein either by themselves, agents, servants and/or anyone acting on their instructions from conducting and/or carrying out any proceedings touching on the lease over and in respect of the land parcel LR NO. KISII MUNICIPALITY/BLOCK I/744 or making any adverse recommendations thereon or in any other manner interfering with the Petitioner’s developments on the suit property

e) The Petitioner shall have the costs of this Petition.

DATED, SIGNED AND DELIVERED AT KISII THIS 17TH DAY OF MARCH 2021.

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J.M ONYANGO

JUDGE