



REPUBLIC OF KENYA



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Mugweru & 4 others (Being the Adminstrators of the Estate of Maaka Mukuhi Mugweru - Deceased) v National Land Commission & 5 others; Estate of Samuel Mugweru Wathirwa Estate of Gichuhi Kimira & another (Interested Parties) (Environment & Land Petition E041 & E042 of 2022 (Consolidated)) [2023] KEELC 20169 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20169 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E041 & E042 OF 2022 (CONSOLIDATED)
AA OMOLLO, J
SEPTEMBER 28, 2023

BETWEEN

LOISE WAIRIMU MUGWERU 1ST PETITIONER
RUTH WANJIRU MUGWERU 2ND PETITIONER
WINNIE WANGU MUGWERU 3RD PETITIONER
BEING THE ADMINSTRATORS OF THE ESTATE OF MAAKA MUKUHI
MUGWERU - DECEASED

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT
CHIEF LAND REGISTRAR 2ND RESPONDENT
DIRECTOR OF SURVEY 3RD RESPONDENT
LOISE WANJIRU GICHUHI 4TH RESPONDENT
HONORABLE ATTORNEY GENERAL 5TH RESPONDENT
GODWIN WACHIRA GICHUHI (SUED AS THE ADMINSTRATORS OF THE
ESTATE OF GICHUHI KIMIRA DECEASED) 6TH RESPONDENT

AS CONSOLIDATED WITH
ENVIRONMENT & LAND PETITION E042 OF 2022

BETWEEN



VIRGINIA WANGUI NGANGA, STEPHEN NJUGUNA NGANGA (SUING IN THEIR CAPACITY AS ADMINISTRATORS OF THE ESTATE OF JOSEPH NGANGAA) 1ST PETITIONER
FRANCIS WAMBUGU MIANO 2ND PETITIONER

AND

THE NATIONAL LAND COMMISSION 1ST RESPONDENT
CHIEF LAND REGISTRAR 2ND RESPONDENT

AND

ESTATE OF SAMUEL MUGWERU WATHIRWA ESTATE OF GICHUHI KIMIRA INTERESTED PARTY
ESTATE OF GICHUHI KIMIRA INTERESTED PARTY

JUDGMENT

A. Background

1. Pursuant to a complaint lodged on the 28th January 2015 by the administrator of the estate of Gichuhi Kimira, the National Land Commission (NLC) rendered a decision on 8th March 2017 on terms that;
 - a. It declared that entries No.6 to 15 in the parallel title to Grant I.R No.24746, (LR No. 13041) deposited in the Land Registry were made fraudulently and are therefore illegal.
 - b. The sub-division arising from these fraudulent transactions are hereby cancelled and the ownership reverted to the Estate of the late Gichuhi Kimira.
 - c. The Records of this sub-division in the correspondence file for grant IR No. 24746, LR No. 13041 should be removed.
 - d. The Director of Surveys, the Chief Registrar and Director of Land Administration (NLC) are directed to implement the decision.
 - e. The commission should process the extension of Lease to Grant I.R No.24746, LR No. 13041 as approved by the County Government in the name o the Administrators of the estate of the late Gichuhi Kimira i.e Loise Wanjiru Gichuhi Kimira and Godwin Wachira Gichuhi as per the Certificate of Confirmation of Grant issued on 28th October 2013.

B. The Petitions

2. Being displeased by the said NLC decision the Petitioners filed separate constitutional petitions which were then consolidated by an order of the court dated 24th November 2022. ELC Petition E041 of 2022 was instituted vide a petition dated 5th October 2022 seeking the following reliefs;
 - a. A declaration does issue to the effect that the 1st Respondent lacked jurisdiction to hear, investigate and determine any complaint and/or claim in respect to LR 13041/1-3 (Originally LR 13041 which is private land and which land has been the subject matter of both the High Court and Court of Appeal decisions.



- b. A declaration be hereby issued that the 1st Respondent has no jurisdiction to entertain, hear and/or determine any claim relating to the parcels of land to wit LR 13041/1-3 as the same has been heard and determined by both the High Court and the Court of Appeal which courts are superior to the 1st Respondent.
 - c. An order of certiorari be issued to bring into this court and quash the decision of the 1st Respondent made on 8th March 2018 and the directions given to the 2nd Respondent on 26th October 2018 revoking the sub divisions to wit LR 13041/1-3 (Originally LR 13041) together with the special issue of the Kenya Gazette Notice published on 9th November 2018 to that effect.
 - d. An order of Prohibition be issued directed to the 2nd Respondent prohibiting it, its agents and / or servants from acting on all or any of the recommendations of the 1st Respondent contained in the Gazette Notice issued on 19th November 2018 in relation to LR 13041/1-3 (Originally LR 13041) and/or findings of the 1st Respondent dated 8th March 2018 touching on the parcel of land to wit LR 13041/1-3 (Originally LR 13041).
 - e. A declaration be issued to the effect that the purported investigations conducted by the 1st Respondent with respect to review of the Grant I.R No. 24746 LR 13041 and the determination made on 8th March 2018 and published in the special issue of the Kenya Gazette of 9th November 2018 were irregular, illegal, unlawful, null and void and of no legal effect.
 - f. The costs of this Petition be borne by the Respondents herein above in any event.
3. The second petition, ELC E042 of 2022 dated 6th October 2022 sought for the following orders;
1. A conservatory order to suspend implementation of the direction given by the 1st Respondent to the second respondent namely to cancel the applicant's title or give such title to the 2nd interested party: pending the hearing of this petition.
 2. A declaration that the 1st Respondents determination conveyed vide Gazette No.11714 of 9th November 2018 concerning parcel number 13041 or any parcel of land derived from it upon sub-division was made without jurisdiction was unconstitutional, invalid, null and void.
 3. An order setting aside the said determination and rectifying the title to restore the petitioner names.
 4. Each of the Petitions were supported by respective supporting and supplementary affidavits sworn by Loise Wairimu Mugweru on 5th October 2022 and Virginia Wangui Ng'ang'a on 6th October 2022 and 3rd April 2023 respectively. The Petitioners stated that the Estates of Maaka Mukuhi Mugweru and Joseph Ng'ang'a Njuguna are the owners of LR No. 13041/2 and LR No 13041/1 respectively herein after referred to as "the suit properties" being subdivisions of LR. No.1304 herein after referred to as "the original plot."
 5. The Petitioners gave the history of the ownership of the original plot to wit; that the late Gichuhi Kimira, Simon Mugweru Waithirwa--deceased and Samuel Ngunu Kimotho-deceased had been partners who bought LR No. 13041 together. The plot was registered in the name of Gichuhi Kirima who had declined to transfer to his erstwhile partners their shares. In order to get their shares, Simon and Samuel sued Gichuhi Kimira in Nairobi HCC No.880/77 and 908/77 which cases were consolidated, heard and judgement rendered on 6th October 1989 awarding the land to all the three parties in equal shares.



6. Dissatisfied with the judgment, Gichuhi Kimira appealed vide Civil Appeal No.186 of 1995 which appeal was dismissed on 24th April 1998. A copy of the judgement from the court of appeal was among the annexures to the petitions. That to execute the decree, the high court had appointed Earnest Kamau to sub divide the land and the partition documents were signed by the Deputy Registrar of the High Court resulting in closure of the original title 13041 and issuance of 3 titles in March 2001 in the names of the three parties as follows;
 - a. LR No. 13041/1-Samuel Ngunu Kimotho
 - b. LR No. 13041/2-Simon Mugweru Wathirwa
 - c. LR No. 13041/3-Gichuhi Kimira
7. The Petitioners in E041/22 stated that they are the beneficiaries and administrators of the Estate of Maaka Mukuhi Mugweru (deceased) who was issued with title to one of the suit properties on 16th February 2001. They contended that the title to the suit land was issued pursuant to a decree issued on 6th October 1989 in HCCC No. 880 of 1977 where the court ordered subdivision of LR 13041 into three portions as illustrated above which were consequently registered as such.
8. The Petitioners in E042/22 stated that they are administrators of the Estate of Joseph Ng'ang'a Njuguna (deceased) who together with Francis Wambugu Miano had purchased LR No. 13041/1 from Samuel Ngunu Kimotho (deceased) after the award pursuant to Decree given by the High Court at Nairobi HCC No.880 of 1987(Consolidated with Nairobi HCCC No.908 of 1997).
9. The Petitioners in E041/22 pleaded that the Estate of Guchuhi Kimira filed an affidavit of protest of confirmation of Grant in the Succession case No.250 of 2007 claiming Kshs.1,977,919 being costs in HCC No.880 of 1977 and LR No.1304/2 as a share of the Estate of Gichuhi Kimira which had been determined and judgement delivered on 6th October 1989 as against the said estate, and also the appeal filed on it dismissed on 24th April 1998.The Petitioners stated that the Plaintiffs in HCCC No.880 of 1977, Maaka Mukuhi Mugweru (deceased) being one of them filed an application seeking to enforce the orders of 6th October 1989 and which orders were made on 3rd July 1996 effecting the subdivision of LR No. 13041 into three portions, LR. No. 13041/1, 2 and 3.
10. They added that on 27th January 2014, Julius Gichuki Gichuhi filed an application under Order 24 Rule 3(2) of the [Civil Procedure Rules](#) seeking for an order that the suit against him had abated and sought cost of HCCC No.880 of 1977 which orders were granted and he even filed a bill of Costs which was taxed ex parte at Kshs. 1,977,919. However, the said orders were reviewed and/or set aside by Sergon J. on 4th May 2018. Julius Gichuki Gichuhi challenged the order of setting aside and the appeal is pending.
11. The Petitioners (in E041) further averred that while the above was ongoing, sometimes in November 2018, they discovered that the 1st Respondent had purportedly revoked their title LR No. 13041/2 vide Gazette Notice Special Issue Vol.CXX-No 138. Upon making inquiries, they discovered that a complaint had been lodged by the estate of Gichuhi Kimira to the 1st Respondent on 28th January 2017 (or 2018) and which complaint was heard ex parte and a determination made on 8th March 2018 revoking the titles of the suit properties.
12. The Petitioners averred that at the time of making the determination, the 1st Respondent's mandate to review grants under section 14 of the [NLC Act](#) had expired on 1st May 2017 and as such the Ruling of 8th March 2018 was without jurisdiction. Further they averred that the said complaint was heard ex



parte with the estate of Maaka Mukuhi Mugweru not being informed of the review process and neither participated in the said proceedings before the 1st Respondent.

13. The estate of Joseph Nganga Njuguna (petition E042) stated that around October 2016, it had been notified of the complaint lodged and that the same had been listed for hearing on 1st November 2016 which date they attended and submitted their response and copies of documents in opposing the complaint. They plead that the hearing was adjourned and the chairman Dr. Swazuri informed the parties that he would notify them again. It is their assertion that they were not called and were not aware of completion of the hearing.
14. The petitioners contended that the NLC determination was made without hearing them and in total disregard of orders of the High Court of Kenya. They contended that by the Commission failing to hear them, it violated provisions of article 2(4), article 25(c), 19, their right to fair hearing as enshrined in article 47, right to a fair trial that is safeguarded by article 27, 50 and 159 of the *Constitution*. They stated that the Commissioner's order for reinstating a closed title and direction to cancel the sub divisions without calling their registered proprietors was a violation of the applicant's right to private property under article 40 as read with article 64 of the *Constitution*. Further, they assert that the move by the Commission to investigate and determine complaints with respect to the original plot being private land which ceased to exist in the year 2001 and make a determination thereof, violated the provisions of article 67 of the *Constitution* and Section 5(1)(a) of the *National Land Commission Act*.
15. The Petitioners also stated that the Commission's failure to refer to the judgements, decrees and orders of the courts which had been availed was a violation of Judicial authority conferred by among other articles 159 and 165 of the *Constitution* and Section 15 of the *National Land Commission Act* 2012. They stated that the evidence tendered on the complaint had previously been litigated upon in court and was basically alleging fraud and concealing the litigation history and the orders made by the High Court, and the Court of Appeal.
16. The petitioners have sought for orders for judicial review under article 23(f) on the basis that the proceedings of the 1st Respondent and determination thereof have violated clear statutory provisions and are seeking for orders of certiorari and prohibition.

C. The Respondents' Replies

17. The 1st Respondent filed a replying affidavit sworn on 17th December 2018 by Abigael Mbagaya Mukolwe, the vice chairperson of the 1st Respondent and a member of the Review of Grants and Dispositions of Public Land Committee. She deposed that after receiving a complaint from Captain Godwin Wachira Gichuhi son of the deceased Gichuhi Kimira on 28th January 2015, the commission notified all interested parties of its intentions to commence Review of Grants and Dispositions proceedings regarding the suit property. That the Commission invited them to attend the hearings, bring forth any documents that may support their claims of ownership and make submissions on their own behalf and the parties obliged as noted from the excerpts from the typed proceedings for all the hearing dates.
18. The Commission also contended that it rendered the decision on 8th March 2017 and not 8th March 2018 as pleaded by the Petitioners and that the law under the *Fair Administrative Actions Act* under Section 6 empowers the commission to render a decision and give the reasons later. It further stated that it has an obligation to review the grant of the suit property in this matter, private though it may be, to investigate the claims that were raised and determine the legality of the title.
19. The 2nd and 3rd Respondents filed a replying affidavit sworn by Godwin Wachira Gichuhi on 2nd March 2023. He deposed that the Petitioners were and are not the registered owners of the suit properties as



- their titles to the same does not exist in the Government records and that the copies of titles produced are forgeries. Mr Wachira added that the Estate of Simon Mugweru Waithirwa and Samuel Ngunu Kimotho were given a notice to show cause by the Chief Land Registrar through Summons dated 25/11/2014 to explain on the issue of Discharge of charge and transfer of the LR 13041(IR 24746). That they did not attend despite being advised by their advocates M/S Mathenge Gitonga & Co. Advocates, through their letter dated 11/12/2014 thus leading to cancellation of the title and the decision has never been challenged.
20. The Respondents stated that the Chief Land Registrar has never issued the title to the alleged subdivisions of the suit properties and in his evidence tendered before the Commission disowned the said sub division and issuance of titles thereto. That the Chief Land Registrar contended that the search over the suit properties produced was a forgery which was first produced as evidence in NRB HCC Milimani Commercial Court Miscellaneous Application No.586 of 2018.
 21. The Respondents also stated that the Petitioners were aware of the delivery of the award by the commission for they were duly invited to the proceedings vide letter dated 1st July 2016 to participate in the public hearing scheduled for Friday 22nd July 2016 and the which letter was acknowledged by their advocates vide a letter date 21st July 2016. That the estates of Maaka Mukuhi Mugweru and Samuel Mugweru Wathirwa were represented by their counsel Mr. Matenge & Mr. Oyalo as indicated in the proceedings of various dates (on 22nd July 2016, 19th August 2016, 16th September 2016, 14th October 2016 and 1st November 2016). Further, that their participation is confirmed by their advocates letters dated 26th November 2018 and other advocates letters dated 19/9/2016, 13/7/2016 and 15/8/2016.
 22. The Respondents averred that that the Commission did not hear any appeal or overturn the decisions of the courts as alleged and that it merely heard the process or manner in which the titles or the Grants touching on LR. No. 13041 had been in the hands of the Petitioners or their predecessors.
 23. The Respondents stated that an order was given by Hon. Justice Waweru on 20/3/2014 which dismissed the Plaintiffs' suit as having abated and all the consequential orders were thus discharged including the preliminary decree. They also stated that during the hearing of HCC No.880 of 1977, in the proceedings of 26th April 2012, Justice G.K Kimondo declared that the 1st Plaintiff (Ngunu Kimotho) suit as having abated against the Defendant, Gichuhi Kimira and recognized the surviving cause of action by the 2nd Plaintiff (Simon Mugweru Waithirwa) against the Defendant which was allowed to continue.
 24. It is also urged by the Respondents that the Petition as filed is not a form of appeal against the decision of NLC referred to the High Court Judgement delivered on 30th September 2022, where the court expressed that the decision by NLC could only be challenged through an appeal or review. They also stated that the Commission had jurisdiction to make a decision as was made on 8th March 2017 on the complaint lodged on the basis that though the Grant LR No. 13041 is a private land, it remains a leasehold property. That the purported extension of lease over LR.13041/2 was unprocedural as no proper grant had been registered in the first place and the said extension could not arise when the mother title/Grant had not been surrendered as statutorily required because it was held by the financier.
 25. The Respondents continued that the orders of Hon. Justice Bosire made on 3rd July 1996 was set aside by the decision of the Court of Appeal in the Judgement delivered on 24th April 1998. That as per the doctrine of lis pendence, the Plaintiffs ought to have awaited the determination of the proceedings in the Court of Appeal. They contended that the Petitioners' predecessors Maaka Mukuhi Mugweru unabatedly forged documents from Transfer, Discharge of charge, Deed of Partition, Sub-division Certificate, Deed Plans and Certificates of Titles and that sometimes in August 2014, the estate of



Gichuhi Kimira collected the Original Discharge of charge and Original Title/Grant from Agricultural Finance Corporation which led to discovery of the said fraudulent transfers prompting them to lodge the complaint with the Commission.

26. The 2nd, 5th and 6th Respondents filed grounds of opposition dated 9th May 2023 and Replying Affidavit deponed by David Nyandoro Nyambaso, Senior Assistant Chief Land Registrar on 16th May 2023 in opposition to the Petition. They contended that the NLC has powers conferred to it by the Constitution of Kenya, the NLC Act and the Land Act to review grants or dispositions of public land to establish their proprietary or legality and that pursuant to these powers it heard the complaint lodged by the 3rd and 4th Respondent and made a determination on 8th March 2017 directing the 2nd Respondent to revoke the sub divisions to wit LR 13041/1, LR 13041/2 and LR 13041/3.
27. They stated that by the time the complaint was lodged in 2015, the leasehold term of the suit property being 31 years and 8 months from 1st May 1971 had expired hence the land had reverted back to the State, making it public land. They further stated that from the excerpts of the proceedings before the Commission, the Petitioners appeared before it or were represented by counsel on various dates between 22nd July 2016 to 1st November 2016.

D. Submissions

28. Parties filed submissions; Petitioners in Petition No. E042 of 2022's dated 17th February 2023, 1st -3rd Petitioners' submissions dated 22nd February 2023, Attorney General's dated 30th May 2023 and 3rd -4th's dated 7th June 2023.
29. The Petitioners submitted that this court has jurisdiction to hear and determine this petition and relied in the case of A.W.G V D.N.K & another [2022] eKLR. They also submitted that the 1st Respondent, the Commission, lacked jurisdiction to review the Grant to wit LR No. 13041 pursuant to the complaint lodged by the 3rd and 4th Respondents because the issues raised were the subject of litigation at the High Court and the Court of Appeal and such flies in the face of Section 7 of the Civil Procedure Act, the commission's mandate to review Grants under Section 14 of the NLC Act had expired and that the parcel of land LR N. 13041/1-3 in subject is private land. In support, they cited the case of Republic v National Land Commission & another Ex parte Salim Gualambusein Gilani [2016] eKLR.
30. The Petitioners submitted that the purported inquiry by the 1st Respondent to review the grant for title LR No. 13041 and the determination thereof was unconstitutional as the entire exercise was carried out in a manner that offends the principles of natural justice and violated the Petitioner's rights guaranteed under Article 2(4), 10, 19, 22, 23, 25, 27, 40,47,50,64,67,73, 159 and 165 of the Constitution. They were not formally notified of the inquiry by the 1st Respondent contrary to section 14(3) of the National Land Commission Act and this violated their right of fair administrative action, fair trial and fair hearing protected by Articles 25(c), 47 and 50 of the Constitution.
31. The Petitioners submitted that a notice of hearing to be deemed to have been sufficient and adequate, it ought to have complied with Sections 4(3) of the Fair Administrative Action Act 2015 and in support cited the decision in Republic v National Land Commission & Tropical Treasure Limited Ex parte Krystaline Salt Limited (2015)eKLR and Republic v National Land Commission & 2 others Ex parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West)[2018]eKLR where court stated that notice served should contain the complainant, complaint together with particulars of the allegations in a manner that allows the accused prepare its defence. That in further breach of the Petitioners' right to a fair administrative action, the commission denied them an opportunity to be heard and relied in the decision by Court of Appeal in the case of Judicial Service



- Commission v Mbalu Mutava & another* [2015] eKLR which set out the obligation of state organs in complying with rules of natural justice while exercising judicial, quasi-judicial or administrative functions. They also submitted that their right to a fair trial was violated and cited the case of *Gladys Boss Shollei v Judicial Service Commission & another* [2018] eKLR among others.
32. The Petitioners submitted that owing to the unconstitutional manner in which the commission carried out the inquiry, their right to property guaranteed under Article 40 of the *Constitution* was violated as it sought to arbitrarily deprive them their property without due process and in support cited the case of *Republic v Registrar of Titles & Another Ex parte David Gachira & another* [2014]eKLR and Court of Appeal decision in *Musk Deer Limited v Benjamin K.Kipkurui & another* Mombasa CA No.54 of 2017.They also submitted that owing to the history of litigation up to the Court of Appeal involving the original plot any inquiry conducted by the commission was outside its constitutional mandate as section 15(3) of the *NLC Act* sets out the criteria of what constitute a historical land claim capable of being admitted ,registered and processed by the commission to wit; (b) the claim has not or is not capable of being addressed through the ordinary court system.
33. They also submitted that the suit being a constitutional petition is not affected by the doctrine of laches and there is no limit within which a party can seek redress over a constitutional violation in a court of law. Further, the previous Constitutional Petition No.421 of 2018 was dismissed for want of jurisdiction and that Section 7 of the *Civil Procedure Act* does not apply to constitutional Petitions of a similar nature herein. In support they cited the case of *Chief Land Registrar & 4 others v Nathan Tirop Koeh & 4 others* 2018 (eKLR) and *Safepak Limited v Henry Wambega & 11 others* [2019] eKLR which emphasized on jurisprudence that there is no time limit for filing a constitutional petition therefore they are entitled to the orders sought.
34. The Attorney General submitted that the estate of Maaka Mukuhi Mugweru and the family of Simon Mugweru Wathirwa was well represented during the proceedings before the 1st Respondent and in fact advocate Mr. Oyalo who appeared for the family of Simon Mugweru Wathirwa confirmed to the Commission on 19th August 2016 that he had filed documents on the case, therefore it is misleading to the court for the petitioners to allege that they were not aware of the complaint and did not participate in the proceedings before the 1st Respondent.
35. They also submitted that going by the evidence of the 1st Respondent, the impugned Determination was made on 8th March 2017 by which date the mandate of the 1st Respondent to review Grants and Dispositions had not lapsed, thus it was well within its mandate to review the Grant in respect of LR 13041 and give a Determination on 8th March 2017.
36. The Attorney General submitted that the parcel of land in subject was public land at the time the 1st Respondent reviewed its grant because by the time the complaint was lodged in 2015, the leasehold term of LR 13041 had expired and the land reverted back to being public land. That, the Grant in respect of LR 13041 I.R 24746 was duly issued on 1st May 1971 and the term of the grant was 31 years and 8 months from 1st May 1971 therefore the said term expired on 1st January 2003.
37. Further, they submitted that vide letter dated 17th February 2015 by Deputy Registrar confirming that there was no trace of discharge of charge signed in the reference of the case shows that there was no discharge of the charge undertaken paving way for registration of the consequent entries of the suit property and the same was also confirmed by the Agricultural Finance Corporation vide their letter dated 11th July 2014.
38. Also, the with regard Entry No. 11- Subdivision Certificate by the Town Clerk Nairobi City Council approving the sub division of LR 13041 into 3 sub plots, the same was disowned by the then Nairobi



City Council thus entries number 10 -15 on the register were registered irregularly, unprocedurally and/or illegally hence void ab initio.

39. The 3rd and 4th Respondents submitted that the 1st Respondent had jurisdiction to deal with the complaint raised by the 4th Respondent as the Grant LR No. 13041 was a leasehold that expired in year 2003 reverting back to the state therefore had the mandate to look on whether the law and procedure was followed in effecting the decree and the registration of instruments on the entries made on the parallel title and how the Grant of certificate of Titles to LR No. 13041/1-3 were acquired. Further, that any transfer or dealing of the suit property was subject to payment of the loan with the Agricultural Finance Corporation and in effecting the decree the petitioners the same was done illegally an unprocedurally.
40. The Respondents submitted that the Petitioners were summoned to appear before the Commission vide a letter dated 1st July 2016, for a hearing at NLC proceeding scheduled on a Friday, 22nd July 2016 and the same were received and acknowledged by the Petitioners' vide their Advocates letter dated 21st July 2016. Also, it is a standard operating procedure by the Commission to publish hearing dates in the dailies for matters scheduled for hearing and therefore it complied with the provisions of Article 50 of the Constitution and Section 14(3) of the Act.
41. They also submitted that the petitioners have not demonstrated in any way that the Commission acted ultravires in conducting the proceedings at National Land Commission hence the orders of certiorari and prohibition and mandamus should not be granted. In support they cited the case of *Republic v National Land Commission -Exparte Ephraim Muriuki Wilson & others* 2018(eKLR).
42. The 3rd and 4th Respondents submitted that the award made by the National Land Commission is not tainted with illegality nor abuse of the court process and did not determine issues which had been pronounced by the High Court as the cases therein had been declared abated and the commission merely within the ambit of Articles 40(6),67 and 68(c)(v) of the Constitution probed the legality in processing the registration of a Discharge of charge purportedly issued by the Agricultural Finance Corporation and a Transfer both entered in the register to title IR No.24746(LR No. 13041) on the 5.10.1993 and the subsequent sub-division of LR No. 13041 and the resultant.

Analysis

43. I have read and considered the pleadings, the documents annexed in support of each sides' case as well as the submissions rendered. I frame the following questions for determination:
 - i. Whether the Petitions are properly before this court and if yes,
 - ii. Whether the 1st Respondent had jurisdiction to deal with the complaint the subject matter of this dispute
 - iii. Whether the previous suits had abated
 - iv. Whether or not the rights of the Petitioners were violated
 - v. What orders ought to be granted in the circumstances
44. The 3rd Respondent and the Interested Parties pleaded that the Petitioners ought to have moved the court either by way of appeal or review in challenging the decision rendered by the 1st Respondent. As already outlined above, the 4th Respondent said he moved the 1st Respondent under the provisions of article 67 of the Constitution and the National Land Commission Act. I have read the provisions of sections 5, 14 of the NLC Act and find the Act is silent in so far as appeals against its decisions/



awards. I draw an inference that such decisions can be challenged by way of review. Article 23(3) of the *Constitution* states that in any proceedings brought under article 22, a court may grant a relief including;

- a. declaration of rights
- b.
- c.
- d.
- e.
- f. An order of judicial review

45. Thus article 23(3) gives this court powers to make orders of judicial review in a constitutional petition. Consequently, I am satisfied that the petitions are properly before this court.

46. In answering the second question, I consider the provisions of section 14(1) of the *NLC Act* which provides thus-;

“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”

47. The end words bring out the powers of the 1st Respondent to review all grants or dispositions of public land to establish their legality or propriety. The 3rd and 4th Respondents argued that the jurisdiction was conferred on the 1st Respondent because the leasehold interest on the suit property had expired. I pick two issues to contrast this assertion, first that the complaint filed by the 4th Respondent pertained private interests with no expression of protecting the public interests. Secondly, the question of reversion of the land to the government did not arise. At paragraph 4 of the award, the 1st Respondent stated thus;

“The commission should process the extension of Lease to Grant I.R No.24746, LR No. 13041 as approved by the County Government in the name o the Administrators of the estate of the late Gichuhi Kimira i.e Loise Wanjiru Gichuhi Kimira and Godwin Wachira Gichuhi as per the Certificate of Confirmation of Grant issued on 28th October 2013”

48. The fact that the suit property was private land and the dispute between private not public parties automatically ousted the jurisdiction of the 1st Respondent to entertain the complaint lodged by the 4th Respondent.

49. The Petitioners also challenged the decision of the 1st Respondent on the basis that it abused judicial authority as the issues in dispute had already been litigated. In contradicting this allegations, the 4th Respondent and the Interested party argued that the cases before the High Court had abated hence there was nothing pending to stop the 1st Respondent from hearing their complaint.

50. Both parties acknowledge the existence of HCCC No 880 of 1987 as consolidated with HCCC No 908 of 1977 and the subsequent appeal to the Court of Appeal vide civil appeal number 186 of 1995. The copies of judgement and orders made in the said suits were produced and in particular, the judgement of the Court of Appeal in CA No. 186 of 1995. The fact that the decision in number 880



of 1987 as consolidated with number 908 of 1977 was challenged on appeal means that the case before the High Court was heard and fully determined. In the heading in Civil appeal number 186 of 1995, it is recorded thus;

“ appeal from the judgement and decree of the High Court of Kenya at Nairobi (Hon Justice Akiwumi) delivered on 6th October 1989).

51. The Court of Appeal set ought the orders issued by Akiwumi J which numbered 10 (page 116-117 of the petitioners bundle in E042 of 2022). Order number 1 and 2 stated that, “it is hereby declared that the Plaintiffs are beneficiaries as to one third of the farm (LR. 13041) and the income derived from the farm. That the farm (LR. 13041) be transferred by the defendant into the names of the plaintiffs and the defendant as tenants in common in equal shares subject to the loan of the Agricultural Finance Corporation charged upon the farm.”
52. At page 27 (page 143 of the bundle) the learned judges of the Court of Appeal had this to say, It is apparent that the learned judge considered the conflict very fully and we do not find any fault with what he found. In our view, there is cogent evidence to show that the farm was purchased by the three partners together. We come to the same conclusion that the learned judge did, which is, that the farm was purchased by all the three partners together. At page 30 (now page 146 of the bundle) the learned judges of appeal in the last paragraph stated thus; we have earlier set out the orders that were given in the high court. The first of those orders, namely, a declaration that the plaintiffs are beneficiaries as to one third each of the farm and the income derived therefrom, follows naturally as a result of the findings by the learned Judge. We see no error there.”
53. From the 10 orders that were made in the judgement by the High Court, it is only order number three (3) that was amended to vary the date of the dissolution of the partnership which the judge ordered as wound up within 90 days from the date of judgement (6th October 1989) to read 20th day of April 1977. The Court of appeal directed that the accounts to be taken go back to a period of 22 years in the hope that what is now left of the suit, in that aspect, would be allowed to fade away. That save for the minor amendment we have ordered in respect of the 3rd order, this appeal be is hereby dismissed with costs to the Respondents.
54. It is my considered opinion that the dispute in relation to the suit land was wholly determined both by the high court and the Court of Appeal in so far as they determined the interests of the parties to one third each each. The ownership of LR. 13041 having been fully determined by Courts of competent jurisdiction, there was nothing to abate. The matter was closed and could not be re-opened as a fresh complaint before the 1st Respondent by a party who derived his claim from Gichuhi Kimira-deceased who was a defendant in the former suit.
55. If the estate of Gichuhi Kimira-deceased was unhappy in the manner the decree emanating from the court in so far as subdivision of LR. 13041 was undertaken, the 1st Respondent was in my view not the proper forum to challenge the said execution. The Respondents submitted that if the Petitioners were effecting a decree, the same ought to have been effected in strict observance of the law as provided for under Order 21 (repealed) of the Civil Procedure Rules. They wondered why inspite of holding a decree, they forged inter alia, discharge of charge, signature of the Deputy Registrar of the Court and a subdivision certificate.
56. There has been no claim brought against the Petitioners levelling the particulars of fraud submitted on before the Court whose decree was being executed. This court cannot infer fraud just by looking at documents annexed by parties and if they wanted to pursue this line, they ought to have lodged a cross-petition or filed a suit against the parties they deem participated in the fraud. In any event, the



- Petitioners produced a ruling in a criminal case no 1767 of 2005 where Samuel Ngunu Kimotho was acquitted of the charges of uttering false documents on 18th April 2008.
57. Although the 4th Respondent made reference to the holding in the case of *Yalwala v Indimuli* (1989) eKLR and *National Bank of Kenya v Wilson Ndolo Ayah* (2009) eKLR which emphasized that public policy requires that citizens obey the law of the land and that courts enforce the law and avoid perpetration of acts of illegality, they have not demonstrated how the partitioning of the original land into three as decreed by the court was contrary to public policy. The taking of accounts was an order on its own and the court proceeded to appoint a proper person to carry out the accounts.
58. The Petitioners in E042 said they purchased LR 13041/1 from Samuel Ngunu Kimotho-deceased and paid the entire purchase price. Samuel Ngunu Kimotho-deceased was one of the plaintiffs who got a third portion in the original number LR. 13041. The 2nd Interested party (estate of Gichuhi Kimira) argued that the said Samuel Nguno ought to have been joined in this petition. It is my considered opinion and I so hold that once Samuel disposed his interest in the property, there was no need to bring him (or his estate) to this proceeding. Any dispute that may arise between his estate and the Petitioners as regards the interest in LR. 13041/1 would be determined in so far as the transfer was done and not the legality of the subdivision.
59. The 4th question posed by the Court is whether or not the Petitioners rights were violated, in particular the rights under articles 47 and 50 of the *Constitution*. The Petitioners in E041 stated that they were not made aware of the complaint and did not participate in the proceedings. The Petitioners in E042 stated that they were aware, attended the first hearing listed on 1st November 2016 where they presented their documents but the hearing was adjourned. That they waited to be notified only to later learn the matter proceeded ex parte and a determination reached. In a rejoinder, the 3rd and 4th Respondents and the 2nd Interested party stated that the Petitioners participated in the proceedings.
60. Under paragraph 13 of the Replying affidavit of Godwin Wachira Gichuhi sworn on behalf of the 2nd Interested party, he deposed Margaret Wandia Ngunu who is the predecessor to the Petitioners in E042/2022 were summoned to appear before the Chief Land Registrar vide a summon dated 25.11.2014 (annexed as GWG 2a &b) to explain the issue of the discharge of charge and transfer of LR. 13041. That the Petitioners or their predecessors did not appear before the Chief Land Registrar, leading to the cancellation of the said fraudulently acquired title LR. 13041. Mr Wachira does not depose how this summon was served and if the said Margaret Wandia Ngunu was the legal administrator of the estate of Samuel Ngunu Kimotho. Secondly, if the Chief Land Registrar ordered for cancellation of the transfer transacted by Samuel Ngunu Kimotho-deceased, what was left to be presented to the 1st Respondent as a complaint?
61. The Attorney General referred to the contents of the replying affidavit of the Vice Chairperson of the 1st Respondent made in HC Petition no 421 of 2018 (annex GW-9) with the excerpts of this affidavit extensively quoted by the A.G in their submissions. The said replying affidavit made reference to representations by a Mr Oyalo for the beneficiaries of the estate of Samuel Mugweru Wathirwa on the dates in between July- November 2016. According to submissions by the A.G, the full hearing took place on 1st November 2016, while for the Petitioners, the matter was adjourned on this date and they went away waiting to be served with a fresh hearing date.
62. The estate of Mugweru now represented by the Petitioners in number E041 of 2022 in my view participated in the hearing before the commission on 1st November 2016 by way of presenting the documents to oppose the complaint lodged against them. They were duly accorded a right to legal representation and I find no basis to fault the 1st Respondent for violating their rights under article 47



and 50 of the Constitution. Since they were duly represented by an advocate, they had the liberty to write to the 1st Respondent through their advocate to make the necessary enquiries.

63. There is no mention of participation in any form by the estate of Samuel Ngunu Kimotho or his successor in title on the dates mentioned in the affidavit of the 1st Respondent's vice chairperson and the only conclusion that this court can arrive at is that they were never served. Thus they were never accorded an opportunity to present their case, hence condemning them unheard.

64. The 3rd and 4th Respondents submitted that by virtue of the participation of the Petitioners in petition number E041 of 2016, they could not now contest the jurisdiction of the 1st Respondent to deal with the complaint. In the case of Peter Gichuki King'ara v. Independent Electoral and Boundaries Commission & 2 others (2013) eKLR: where the Court of Appeal expressed:-

“It is our considered view that passage or lapse of time does not and cannot confer jurisdiction; jurisdiction is a continuum, jurisdiction cannot lack today and by passage or lapse of time exist tomorrow. Jurisdiction is either present ab initio or absent forever.”

65. It is trite law that where there is no jurisdiction, even participation of the parties cannot confer it. The 1st Respondent derives its jurisdiction from the Constitution and the NLC Act and not from those who appear before it. In the case of Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR the Court of Appeal stated thus:-

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the same.

66. In summary, I conclude that the two petitions are merited for the reasons that the 1st Respondent lacked jurisdiction to entertain the complaint and the orders they made were null and void. Secondly, the constitutional rights of the petitioners under article 40, 47 and 23 were violated hence the Petitions as filed are merited and are allowed on the following terms;

- a. A declaration be and is hereby issued to the effect that the 1st Respondent lacked jurisdiction to hear, investigate and determine any complaint and/or claim in respect to LR 13041/1-3 (Originally LR 13041 which is private land and which land has been the subject matter of both the High Court and Court of Appeal decisions.
- b. An order of certiorari is issued to bring into this court and quash the decision of the 1st Respondent made on 8th March 2017 or 2018 and the directions given to the 2nd Respondent on 26th October 2018 revoking the sub divisions to wit LR 13041/1-3 (Originally LR 13041) together with the special issue of the Kenya Gazette Notice published on 9th November 2018 to that effect.



- c. An order of Prohibition be and is hereby issued directed to the 2nd Respondent prohibiting it, its agents and /or servants from acting on all or any of the recommendations of the 1st Respondent contained in the Gazette Notice issued on 19th November 2018 in relation to LR 13041/1-3 (Originally LR 13041) and/or findings of the 1st Respondent dated 8th March 2017 or 2018 touching on the parcel of land to wit LR 13041/1-3 (Originally LR 13041).
- d. A declaration is issued to the effect that the purported investigations conducted by the 1st Respondent with respect to review of the Grant I.R No. 24746, LR 13041 and the determination made on 8th March 2017 or 2018 and published in the special issue of the Kenya Gazette of 9th November 2018 were irregular, illegal, unlawful, null and void and of no legal effect.
- e. An order setting aside the said determination and rectifying the register of titles to restore the Petitioners' names.
- f. Costs awarded to the Petitioners (both in Pet no E041 and E042 of 2022)

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2023

A. OMOLLO

JUDGE

In the presence of :

Mr Njuguna for Petitioners in No E041 of 2022

Miss Karita for the 3rd Petitioner (Martin Mugweru)

Ms Nyawira for 2nd, 5th and 6th Respondents

Mr Mahinda for 3rd & 4th Respondents in E041 and 2nd I. party in E042

