



REPUBLIC OF KENYA



Oseko & another v The Chairman – National Land Commission & 4 others (Miscellaneous Application 5 of 2017) [2023] KEELC 21141 (KLR) (31 October 2023) (Judgment)

Neutral citation: [2023] KEELC 21141 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
MISCELLANEOUS APPLICATION 5 OF 2017**

M SILA, J

OCTOBER 31, 2023

BETWEEN

ROENARD OSEKO 1ST APPLICANT

JOEL SIMION NYATUGA 2ND APPLICANT

AND

THE CHAIRMAN – NATIONAL LAND COMMISSION 1ST RESPONDENT

THE NATIONAL LAND COMMISSION 2ND RESPONDENT

THE CHIEF LAND REGISTRAR 3RD RESPONDENT

THE COUNTY LAND REGISTRAR, KISII 4TH RESPONDENT

THE ATTORNEY GENERAL 5TH RESPONDENT

JUDGMENT

1. Through an application dated 30 November 2017 and filed on 1 December 2017, the ex parte applicants sought leave to commence judicial review proceedings for the following orders (slightly paraphrased for brevity):
 - i. Certiorari to quash the proceedings and processes of the 1st and 2nd respondents which culminated into the decision conveyed in the Kenya Gazette Notice Number 6862, Volume CXIX-No.97 published on 17 July 2017 directing the 3rd respondent (Chief Land Registrar) to revoke the titles of the ex parte applicants in respect of LR numbers Kisii Municipality/Block III/602 and 603 and directing that the titles be vested and/or registered in the name of the interested party, Pacifica Mwango (as administratrix of the estate of Simon Kegesa).
 - ii. Certiorari to quash any administrative steps initiated by the respondents to give effect to the impugned determination of the 1st and 2nd respondents.



- iii. Prohibition to prohibit the respondents from dealing with the impugned decision of the 1st and 2nd respondents or implementing the said decision.
2. Leave was duly granted on 30 January 2018 and the ex parte applicants filed the main motion on 27 March 2018 seeking the above orders. The supporting affidavit was sworn by the 2nd ex parte applicant on behalf of himself and the 1st ex parte applicant. It is averred that the 1st ex parte applicant is the registered owner of the land parcel Kisii Municipality/Block III/602 whereas the 2nd ex parte applicant is the registered owner of the land parcel Kisii Municipality/Block III/603 having become so registered on 4 November 1995 under a leasehold interest of 99 years from 1 July 1995. They averred that they inherited the parcels of land from their late father Simon Kegesa. They complained that the 1st and 2nd respondents proceeded to entertain a complaint by the interested party and made a decision nullifying their titles without ever notifying them of the proceedings. They thus assert that they were condemned unheard and that there was a breach of the principles of natural justice. They state that they only came to know of the determination of the 1st and 2nd respondents through a friend who showed them a copy of the Kenya Gazette, Notice No. 6862, published on 17 July 2017. They add that they were never furnished with any details of a complaint.
3. The 1st and 2nd respondents filed a replying affidavit sworn by Brian Ikol, the Deputy Director, Legal Affairs and Enforcement of the National Land Commission (2nd respondent). He deposed that he was a member of the Review of Grants and Dispositions Committee which is a committee that was established by the 2nd respondent to oversee the review of grants and dispositions process and was conversant with the facts of this matter and the committee was thus a quasi-judicial body. He deposed that under Section 14 of the *National Land Commission Act* (NLC Act), the 2nd respondent was mandated to review grants and dispositions of public land. He deposed that they received a complaint from the interested party (Pacifica Mwangi) representing the estate of the late Simon Kegesa, that there were attempts to illegally take ownership of property of the deceased comprised in the land parcel Kisii Municipality/Block III/602. He annexed a copy of what he termed to be the complaint but from what I see, that is a letter dated 5 June 2014, from the Commission itself to various persons. He deposed that the Commission invoked its jurisdiction under Section 14 (1) of the NLC Act and admitted the complaint for review of the legality of the grant as well as other properties included in the complaint. He has deposed that Section 14 (3) of the NLC Act requires notice to be given to every person who appears to have an interest in the grant or disposition under review, and that in full compliance with this provision, all interested parties were notified through newspaper advertisement and advised of the period within which to submit their documents. The affidavit purports to annex the alleged advertisement as “BI-3” but I have seen no such annexure in the affidavit. He continued to depose that all parties who appeared were afforded a chance to be heard and inspect all relevant documents. No proceedings were however annexed. He added that there was further investigation through the land administration department in Kisii County and a ground report prepared which report he annexed. He contends that the ex parte applicants were thus given a fair hearing and the Commission complied with the law. He averred that following a successful review process a well reasoned determination was produced as prescribed by law and that this was communicated vide the impugned Gazette Notice.
4. The 3rd and 4th interested parties (The Chief Land Registrar and the County Land Registrar, Kisii) did not file any affidavit and I have seen no filing of any appearance in respect of the two parties.
5. The interested party filed a replying affidavit which was drawn by herself and sworn on 7 June 2018. It is a rambling affidavit wherein she deposed that she is daughter of Simon Kegesa (the deceased) and the administratrix of his estate. The 2nd applicant is her step-brother. She deposed that her father gave them the land and that he was buried where they reside. She averred that as administratrix she followed



up on the properties left by the deceased and found people having titles to his land. On 20 September 2011, she wrote a letter of complaint to the Permanent Secretary, Ministry of Local Government and a response was received. She deposed that on 6 February 2012, there was a meeting under the leadership of the Assistant Chief. That on 16 August 2013, the NLC wrote to the Kisii District Land Officer to state how the titles were created and the Lands office wrote a letter dated 18 October 2013. She deposed that on 5 June 2014, the NLC wrote to the people with alleged titles to submit them and further that the NLC wrote another letter on 23 July 2014 to the District Lands Registrar complaining of inaction. She added that on 4 May 2015, the NLC wrote to one Wilfred Monyenye Yoge that the issue may be discussed in Parliament; that Wilfred Yoge surrendered all the title deeds to the land parcels No. 601, 602, 603, 604, 605 and 606 to the area Member of Parliament, Richard Momoima Onyonka, and the area MP forwarded the same to her. That she forwarded the same to the NLC who wrote to the Kisii Land Registrar directing them to revoke the title deed vide letter dated 18 January 2016. That on 16 November 2016, the Chairman of the NLC wrote to the Director, Legal and Enforcement stating that those who had taken land were summoned but ignored the summons. That the NLC wrote a letter dated 18 January 2017 to the District Land Registrar to revoke the titles. That on 25 April 2017, the Kisii Land Registrar wrote to the NLC stating that the block numbers are not registered. That on 3 May 2017 the NLC wrote to the Director Legal and Enforcement directing that new fresh letters of allotment be issued. She avers that the Gazette Notice of 17 July 2017 revoked the titles. She adds that the alleged titles were processed on 4 November 1995 when her father was alive since he died on 1 March 2000. She deposes that the official search is suspect as the Land Registrar wrote the letter of 25 April 2017 stating that the land parcels are not registered. She avers that this is a clear case where investigations should be held and for the 2nd ex parte applicant to state where he got his title.

6. On 25 July 2022, the 1st ex parte applicant withdrew his suit meaning that this court need not make any determination in respect of the land parcel Kisii Municipality/Block III/602. This judgment is therefore only in respect of the 2nd ex parte applicant, Joel Simon Nyatuga, and his interest in the land parcel Kisii Municipality/Block III/603.
7. I directed the matter to be canvassed by way of written submissions and I have seen the submissions of Mr. Bigogo, learned counsel for the 2nd ex parte applicant, Ms. Njuguna, learned counsel for the 1st and 2nd respondents and Mr. Ratemo, learned counsel for the interested party.
8. In his submissions, Mr. Bigogo submitted inter alia that the National Land Commission (the Commission) only has jurisdiction to review grants and dispositions over public land but the 2nd ex parte applicant's title is protected as private land under Article 64 (b) of *the Constitution* and the Commission had no mandate to deal with it. He refuted the equation of the Commission's operations to that of a quasi-judicial body. He submitted that the Grant of Letters of Administration issued to the interested party had not been confirmed so as to empower her to distribute any capital assets and the Commission ought not to have proceeded to publish the impugned Gazette Notice without a certificate of confirmation of grant. He added that this grant was revoked on 17 November 2017 and he referred to a document of revocation of grant filed together with the application for leave. He submitted that no newspaper advertisement was ever published as claimed by Mr. Ikol in his replying affidavit. He relied on the case of *Emfil Limited vs The Registrar of Titles Mombasa & Others*, Court of Appeal at Mombasa, Civil Appeal No. 312 of 2012 (2014) Eklr and *Republic vs The Land Registrar, Thika ex parte Maria Wairimu Michael, ELC at Thika*, Judicial Review Application No. 11 of 2019 (2021) Eklr.
9. For the 1st and 2nd respondents, it was urged that the Commission had the requisite mandate. It was argued that where land is registered as private, investigation can be done to establish how public land was converted to private land. Counsel relied on the case of *Joseph Mungai & Another vs Mathaara*



Mwangi & Others, Petition No. 530 of 2016 and Republic vs National Land Commission & Another ex parte Muktar Saman Olow, Miscellaneous Application No. 376 of 2014. She contended that the parties were given a hearing as explained in the affidavit of Mr. Ikol and that there was adherence to the rules of natural justice.

10. For the interested party, it was submitted that the Commission was well within its legal authority to assess the conversion process from public to private land. Counsel relied on the case of Republic vs National Land Commission ex parte Anil Ratilal Tailor; Pacifica Mwangi & Another (interested parties) (2019) Eklr. On whether parties were given a fair hearing, he submitted that all interested parties were notified through a newspaper advertisement and after all interested parties who appeared before the Commission were given a hearing. He closed his submissions by urging that the ex parte applicant has failed to meet the requisite threshold for grant of judicial review orders.
11. The suit herein emanates from the manner in which the NLC proceeded to purport to exercise its powers to review grants over public land pursuant to the mandate provided in Section 14 of the National Land Commission Act, Act No. 5 of 2012. That Section provides as follows :-

14. Review of grants and dispositions

- (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.
- (8) In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the Constitution.



(9) The Commission may, where it considers it necessary, petition Parliament to extend the period for undertaking the review specified in subsection (1).

12. From the above, particularly at subsection (3), it will be observed that the Commission was expected to give every person who has an interest in the grant or disposition concerned, notice of such review, and also such person was to be given an opportunity to appear before the Commission for purposes of being heard. Under subsection (4), the Commission was to make a determination after hearing the parties.
13. In this instance, part of the complaint of the 2nd ex parte applicant is that he was never notified of the proceedings and processes which culminated in the determination conveyed in the impugned Gazette Notice No. 6862. He avers that prior to the Gazette Notice, he was never invited to any hearing and he only came to learn of the purported cancellation of his title after a friend brought to his notice the impugned Gazette Notice. In essence, the 2nd ex parte applicant contends that he was never given the benefit of a hearing before the decision was made contrary to the rules of natural justice and contrary to the express provisions of the NLC Act.
14. In response to this assertion that the ex parte applicants were never informed, Mr. Ikol, in his replying affidavit, deposed inter alia that they received a complaint from the interested party, which complaint they admitted, and that the Commission then proceeded to notify all parties interested in the land through a newspaper advertisement. I have gone through the affidavit of Mr. Ikol and also the affidavit of the interested party and nowhere is the purported newspaper advertisement annexed. If ever there was a newspaper advertisement as alleged, there would have nothing easier than to annex it but as I have said, no such newspaper advertisement was annexed. The only conclusion that this court can reach is that there was no such newspaper advertisement as alleged.
15. There is also no evidence of any other notice issued to the 2nd ex parte applicant informing him of the complaint and also advising him that the complaint will be heard on a particular day and place. Again, I have gone through the affidavit of both Mr. Ikol and the interested party, and nowhere is there any deposition of when and where the complaint of the interested party was heard. There are no minutes attached of any such session. In absence of these, the only reasonable conclusion that this court can reach is that there was actually never a hearing that was conducted.
16. Apart from the foregoing, I have seen the purported decision of the Commission annexed to the affidavit of Mr. Ikol. It bears the date 10 July 2017. However, it appears as if the Commission had already written to the Land Registrar, Kisii, on 2 May 2017, informing the Land Registrar that it has held hearings on “various dates” (which dates are not provided) and that the Commission has made determinations in respect of the properties. Now, it doesn’t add up, because if the Commission had already heard the matter and made determinations by 2 May 2017, how come Mr. Ikol has annexed a purported determination made on 10 July 2017, which comes before the letter of 2 May 2017? It is clear to me that the purported determination of 10 July 2017 was nothing but a sham merely aimed at lending credence to an otherwise completely flawed process.
17. All the foregoing aside, if the Commission is relying on a determination made on 10 July 2017, such determination is ultra vires because pursuant to Section 14 (1) of the NLC, Act, review of grants was to be done within 5 years of the commencement of the Act. The NLC Act commenced on 2 May 2012. It means the power to review grants expired on 2 May 2017. The Commission could therefore not purport to make a review of grants on 10 July 2017 which is beyond the 5 year period. It has



not been shown to me that the 5 year period was ever extended and it would therefore mean that the determination of 17 May 2017 is null and void.

18. For the above reasons, it is clear that this suit is merited and I allow it. I proceed to quash the Gazette Notice No. 6862, Volume CXIX – No. 97, of 17 July 2017, in respect of the land parcel Kisii Municipality/Block III/603. I also proceed to quash and set aside any administrative steps taken in order to give effect to the impugned Gazette Notice in so far as it affects the land parcel Kisii Municipality/Block III/603. I also issue a writ of prohibition, prohibiting the respondents or any other person from implementing the impugned Gazette Notice in so far as it relates to the land parcel Kisii Municipality/Block III/603.
19. I have only made orders in respect of the land parcel Kisii Municipality/Block III/603 since the 1st ex parte applicant withdrew from the suit. His interest was in the land parcel Kisii Municipality/Block III/602. I have therefore not made any orders in respect of this land parcel Kisii Municipality/Block III/602.
20. On costs of this suit, I award costs to the 2nd ex parte applicant as against the 2nd respondent,
21. the National Land Commission. I make no order as to costs for or against the other parties in this suit.
22. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 31 DAY OF OCTOBER 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

