



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW, CONSTITUTIONAL & HUMAN RIGHTS

PETITION NO. 83 OF 2016

BETWEEN

NICHOLAS MWATIKA MULEI.....PETITIONER

AND

NATIONAL LAND COMMISSION.....RESPONDENT

AND

VIRGINIA KATHAMBI MAINGI.....1ST INTERESTED PARTY

CO-OPERATIVE BANK OF KENYA.....2ND INTERESTED PARTY

COMMISSIONER OF LANDS.....3RD INTERESTED PARTY

JUDGMENT

Introduction

1. The core question in this Petition filed on 2 March 2016 revolves around the powers of the National Land Commission (“the NLC”) named as the 2nd Respondent, in relation to those of the superior courts in resolving disputes relating to land. The Petitioner contests a notice summoning the Petitioner and the 1st Interested Party to attend before the NLC and address questions concerning the legality of title and thus ownership of the parcel of land known as Land Reference No. 337/935.

2. The Petition was opposed by the NLC as well as the named Interested Parties save the 2nd Interested Party.

Background

3. The background is uncontroversial and may be stated as follows.

4. Land Reference No. 337/935 (“the suit property”) is a leasehold parcel of land. It measures approximately 0.0636 hectares. In 1996, still unsurveyed, the suit property was apparently allocated to the Petitioner. The Petitioner did not then process the title but caused the suit property to be surveyed. A deed plan No. 243980 was issued on 27 August 2002. The Petitioner was again re-allocated the suit property on 4 February 2010. The Petitioner then caused the title document to be processed by the Ministry of Lands. The Petitioner had surrendered the earlier allotment on 21 December 2009. The Petitioner explained the non-processing of title on the basis of lack of funds to pay for the premium and all related allotment disbursements.

5. On 11 March 2011, the Petitioner was issued with a Grant registered as title number I.R 128765.

6. Enter the 1st Interested Party. The 1st Interested Party claimed to have been allocated the same suit property in 1997. The 1st Interested Party also caused a title document to be prepared having caused another deed plan bearing the same No. 243980 to be issued on 20 August 2002. The 1st Interested Party was issued with a Grant registered as No IR 128910 on 2 March 2011.

7. Fast-forward to 2013. The 1st Interested Party moved the Environment and Land Court at Nairobi in civil case No. 202 of 2013. The 1st Interested Party claimed that the Petitioner had trespassed onto the 1st Interested Party's property, the suit property. The 1st Interested Party sought an injunction. The Petitioner responded with a counter claim also seeking orders to restrain the 1st Interested Party from trespassing onto his land, the suit property. The court was faced with a simple question as to which title between the two was the genuine and valid one to be upheld.

8. As it turned out, both titles had been issued by the land registry and none was a 'fake'. The court, at an interlocutory stage, consequently declined to interfere with the state of affairs.

9. As the hearing and determination before the Environment and Land Court case was still pending between the Petitioner and the 1st Interested Party, the latter prompted the NLC. The NLC was urged to resolve the issue. The 1st Interested Party complained that the suit property which was registered in her name had been allocated and registered in another person's name. The NLC then summoned both the Petitioner and the 1st Interested Party to make representations and assist in the determination as to which 'title' was the legal one. The summons prompted this petition.

The Petitioner's case

10. The Petitioner's case is relatively straight forward. The Petitioner complains that the NLC has violated its mandate and has transgressed the Petitioner's constitutional rights.

11. In particular, the Petitioner points to the fact that the suit property is private land and thus the NLC has no jurisdiction over the same. The Petitioner also adds that the court conferred with jurisdiction; being the Environment and Land Court is already seized with the matter. According to the Petitioner, the matter placed before the NLC was *sub-judice*.

12. The Petitioner then faulted the notices given by the NLC as well as the proceedings before the NLC, which proceedings the Petitioner termed 'a farce'. The Petitioner was clear that the notices issued on 4 August 2014 and 17 November 2015 by the NLC were not only incomplete but also irregular. The Petitioner urged that I set aside all the proceedings before the NLC.

The NLC's case

13. The main response to the Petition was through Mr. Brian Ikol's Replying Affidavit filed on 26 May 2016.

14. According to the NLC, it was simply executing its constitutional mandate in summoning the Petitioner and the 1st Interested Party to appear before it on the issue of the two titles held by the two protagonists. The NLC also contended that the notices given to the parties were regular and the parties had properly appeared before the NLC with the NLC ultimately finding for the 1st Interested Party.

15. In the NLC's view, the matter which was before the Environment and Land Court was not similar to the complaint before the NLC and hence the decision by the NLC to proceed with the determination.

1st Interested Party's case

16. The 1st Interested Party who was represented by Mr. Odero-Olonde also contested the Petition.

17. According to the 1st Interested Party, the NLC had the mandate to interrogate the two titles and could either, if it found either to have been issued through fraud or mistake. The 1st Interested Party contended that her title was the genuine one having been issued first in time relative to the Petitioner's title.

2nd Interested Party's case

18. The 2nd Interested Party supported the Petition.

19. The 2nd Interested Party has a chargee's interest over the suit property. The 2nd Interested Party insisted that the NLC had knowingly registered the charge in its favour but now sought to condemn the 2nd Interested Party unheard. Additionally, the 2nd Interested Party contended that the 1st Interested Party had already commenced a claim before a competent forum and thus the proceedings before the NLC were absolutely unnecessary.

The hearing

20. I heard the Petitioner's oral testimony under oath on 29 August 2016.

21. The evidentiary hearing was at the request of Mr. Olonde, even though directions had earlier been issued that the hearing of the Petition was to be through the parties' written submissions and the affidavit evidence.

22. The evidence focused on when the Petitioner was allotted the suit property and the Petitioner willfully confirmed that he was first allotted the suit property in 1996 before he attained the age of eighteen. The Petitioner also confirmed that he had guaranteed a third party's

indebtedness with the 2nd Interested Party and created a legal charge in favour of the 2nd Interested Party. The charge was regularly registered at the Lands' registry.

23. The Petitioner was, in my view, clear and unguarded in his testimony. He freely answered the questions. If his evidence was relevant to any issues before me, I would have easily considered and relied on the same. The evidence was of no relevance though as will become clear shortly.

24. The parties' counsel made oral submissions before me in addition to the written submissions. I refer to the respective submissions as may be appropriate as I determine the isolated issues.

Discussion and Determination

25. Various common facts emerged from the pleadings filed by the parties. I may state the same as follows.

26. The Petitioner like the 1st Interested Party holds a Grant (of title) over the suit property. Both Grants were issued by the same issuing authority in 2011. The 1st Interested Party's Grant was the first one to be issued. The Petitioner has created a legal charge over the suit property in favour of the 2nd Interested Party.

27. It is also common cause that the 1st Interested Party filed a claim before the Environment and Land Court impugning the Petitioner's title. The 1st Interested Party sought to have the Petitioner's title cancelled. The Petitioner counter claimed on the same basis; that is to say, that the 1st Interested Party's title was not valid. This was on 7 February 2013.

28. Thirdly, it is also not in controversy that the NLC upon the 1st Interested Party's prompting or complaint summoned the Petitioner to attend before the NLC. The NLC sought to review the two Grants. The summons was clear that the NLC had received a complaint from the 1st Interested Party alleging that the Petitioner had unlawfully acquired title to the suit property which had allegedly been allocated to the 1st Interested Party. The Petitioner and the 1st Interested Party were served both through an advertisement in the local daily print media and also through a formal letter.

29. The hearing by the NLC was subsequently held in early 2016. Whilst, this Petition was pending the NLC made its determination on 23 May 2016 and directed the revocation of the Petitioner's title. Both the Petitioner and the 1st Interested Party were represented before the NLC and both parties made representations.

30. The issues before me do not however concern the merits of either the Petitioner's as well as the 1st Interested Party's claim of entitlement to the suit land. I should indeed not be concerned with such issues. I have no such jurisdiction. I must and can only be concerned with issues touching on the constitutionality of the NLC's actions as well as claims of violation of the Petitioner's constitutional rights by either the 1st Interested Party or the NLC.

31. In this regard, it is easier to isolate the issues as follows. Firstly, whether the NLC had jurisdiction to adjudicate the dispute between the Petitioner and the 1st Interested Party. Secondly, whether the Petitioner's rights have been violated as alleged. Thirdly, what reliefs may be available, if any, to the Petitioner.

The NLC's jurisdiction

32. Both the Petitioner's counsel and the Respondent's counsel as well as the 1st Interested Party's counsel submitted on the issue of jurisdiction.

33. The Petitioner submitted that the NLC lacked the jurisdiction not only because the suit property was private (not public) land but also the dispute was already *pendente lite* before the Environment and Land Court. The NLC's counsel on the other hand insisted that the NLC was well within the Constitution when it proceeded with the inquiry and handed down a decision. Counsel also submitted that the fact that the dispute was already pending before the Environment and Land Court could not be an impediment as the NLC was simply supplementing the court.

34. Who is right?

35. The issue of the NLC's jurisdiction has severally been visited by parties before this court. The central argument has been that the jurisdiction of the NLC, both under the Constitution and the National Land Commission Act, is limited to public land. In **R v National Land Commission Ex P Krystalline Salt Limited [2015]eKLR** and **R v National Land Commission & 4 others Ex P Futson Company Limited [2015]eKLR** the view advanced by the court was that the mandate of the National Land Commission ceased once it was established that public land had been converted to private land. **Ex parte Krystalline Salt Limited (supra)** however also made it clear that private land unlawfully acquired would never be beyond the reach of the NLC.

36. In **R v National Land Commission Ex parte Holborn Properties Ltd [2016] e KLR**, the view advanced by the court was that the NLC was enjoined to review any such land that was once public but had been converted to private to ascertain whether it was legally and regularly acquired.

37. In my view, Articles 67 and 68 of the Constitution as read together with s.14 of the National Land Commission Act (Cap 5A) clearly

empower the NLC to review grants and dispositions of public land. It was not the intention of Kenyans as we adopted the Constitution or the intention of Parliament as it promulgated the National Land Commission Act (Cap 5A) that the mandate of the NLC be limited to public land. The NLC was to review “grants and disposition”, effectively meaning land already alienated and which would not, on the face of it, be available as public land. The NLC mandate was all about reviewing public land converted to private land to ascertain whether it was regularly and lawfully acquired.

38. As was stated in the case of **Belgo Holdings Ltd v National Land Commission & Another [2017]eKLR**

“[44]...Unalienated land remains public land. It has no Grant to be reviewed. Clearly, the intention of both the Kenyan people and the legislature when they promulgated the Constitution and the National Land Commission Act respectively was that the 1st Respondent [NLC] would have some power, albeit limited, to have an appraisal of any Grant hence the power to review Grants”“.

39. The NLC’s jurisdiction over private land is however not a carte-blanche. Caution must be exercised and where it is common cause, as in this case, that the land in question is private land but it is alleged that the NLC is acting ultra vires, the court must closely interrogate whether the NLC has crossed the line. Thus while it cannot be simply stated that the land is private land thus jurisdiction is absent in so far as the NLC is concerned, it also cannot be simply stated that the mere fact that the land was previously public land grants the NLC jurisdiction over all disputes touching on the title or grant to such land: see the **Registered Trustees of the Arya Pratinidhi Sabha, E.A v National Land Commission & Another [2016]eKLR**.

40. The circumstances in the instance case are rather clear.

41. The suit property is private land. Two Grants were issued by the then issuing authority to the 1st Interested Party and to the Petitioner on separate dates in 2011. The Petitioner lays claim to land and insists he is the owner. The 1st Interested Party does the same. The latter moved to court seeking to be so declared the owner and asking that the Petitioner’s Grant be cancelled. The Petitioner countered and also sought reliefs to effectively declare him the owner. Then, the 1st Interested Party prompted the NLC who quickly summoned the Petitioner.

42. When the Petitioner appeared before the NLC the Petitioner raised an objection specifically that the matter sought to be determined was already before the Environment and Land Court. The NLC would however hear none of the objection and ruled that the issues before the Environment and Land Court were not the same as those before the NLC. So stated the NLC in its summary decision of 23 May 2016.

“The commission established that the Environment and Land Court was supposed to determine the ownership of the land, while the commission was called upon to investigate the legality of titles held by the two parties. It is on this basis that the commission decided to continue with the review of the title despite the fact that there was a case in court”.

43. The NLC in my view adopted a rather narrow view of the jurisdiction of the Environment and Land Court as well as of the dispute that was raging between the two parties.

44. The jurisdiction of the Environment and Land Court is founded under Article 162(2) & (3) of the Constitution as read with s.13 of the Environment and Land Act No. 19 of 2011. In addition and of relevance are also the provisions of s.101 of the Land Registration Act No. 3 of 2012 and s.150 of the Land Act No. 6 of 2012. On issues touching on private land and title to such land these latter two provisions of statute law cannot be ignored as they donate exclusive jurisdiction to the Environment and Land Court.

45. For the purposes of the instant Petition, s.101 of the Land Registration Act is more relevant. This section confers jurisdiction on the Environment and Land Court to deal with matters arising under the registration statute. The Land Registration Act deals with and applies to the registration of interest in all public and private land: see s.4 of the Act. By its s.26, the Land Registration Act provides that:

“26(1) The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) Where the certificate of title has been acquired illegally unprocedurally or through corrupt scheme.

(2)...”

46. Quite evidently, the Environment and Land Court may entertain a challenge to a title as well as a Grant or disposition of land on the basis that it was obtained unprocedurally or illegally or through a corrupt scheme.

47. In my view, it cannot be as was submitted by the NLC that the Environment and Land Court adjudicates disputes touching on ownership while the NLC’s mandate is to visit disputes touching on illegally acquired titles. There is no doubt a thin-line. A dispute as to ownership will no doubt invite an interrogation of the title or titles. Ownership disputes cannot be deemed to exclude issues of illegality especially where the same is fetched on a title.

48. I have reviewed the claim that was lodged by the 1st Interested Party in Civil Case No. 202 of 2013 before the Environment and Land

Court. It concerned ownership but the underlying factor to the dispute was the legality or otherwise of title held by the Petitioner. Conversely, the Petitioner's counterclaim also challenged the 1st Interested Party's title. It was certainly for the court to determine the dispute. The 1st Interested Party settled for a forum and the court properly seized with the jurisdiction set to resolve the matter. The fact that the court declined to issue interlocutory orders did not divest it of jurisdiction. If anything, it was the proper approach to adopt. Such disputes, where there is prima facie evidence of title by both parties, are best dealt with in the final trial proceedings rather than at an interlocutory stage.

49. I would in the circumstances fault the 1st Interested Party for forum shopping. I would also fault the NLC for proceeding to adjudicate the 1st Interested Party's complaint when it was clear and the NLC was made aware that a forum with jurisdiction was already seized with the matter. The NLC, in my judgment ought to have exercised some reticence and allowed the dispute to be finalized by the Environment and Land Court. This is what harmony and cooperation between state organs is all about. This too is why consistently the courts have allowed disputes already pending before the NLC to proceed where a party attempts to also file a dispute before the court. The NLC should have taken note of the fact that the pendency of the dispute before the court meant much more. It did mean that ultimately the jurisdiction of the Environment and Land Court could be invoked to undo all that the NLC purported to do.

50. I return the verdict that the Environment and Land Court has jurisdiction to interrogate the legality of title where such challenge is placed before it and such challenge may come through by way of a dispute involving ownership. I also return the verdict that the NLC has jurisdiction to review titles to private land and interrogate their legality. Where however a party has commenced proceedings before the Environment and Land Court challenging title, it would amount to abuse of process as well as resources for the same party to complain to and prompt the NLC about the same dispute and for the NLC to proceed with such dispute.

51. The matter was sub judice and based on policy reasons a matter pending in court may not be adjudicated upon by the another court of competent jurisdiction or any other body with jurisdiction unless the court seized with the matter itself deems it appropriate that the dispute be referred to the alternative forum.

Violation of Articles 47 and 50 of the Constitution

52. I move now to the second core issue.

53. The Petitioner alleged that his rights under the Constitution had been violated. The Petitioner pointed to Articles 47 (as to fair administrative action) and Article 50 (as to fair trial).

54. I have no doubt that in the execution of its constitutional mandate the NLC is duty bound to observe and follow the due process: see **Evelyn College of Design v Director of Children's Department [2013]eKLR** and also **Kuria Gardens v Registrar of Titles [2011]eKLR**. The NLC must not only observe the rules of natural justice but also the provisions of the Fair Administrative Action Act 2015 as to due process and fair procedure. The circumstances of each case however dictate the due process and the fair procedure to be adopted: see **Judicial Service Commission v Mbalu Mutava & Another [2012] eKLR**. Circumstances count for the simple reason that the right to fair administrative action is not absolute.

55. I have already found that the NLC lacked the procedural jurisdiction to determine the dispute and I ideally need not determine the issue of fair administrative action. Suffice however to point out that, in my view, in the circumstances of this case the evidence has revealed that the Petitioner's rights to fair administrative action were not violated. The NLC notified the Petitioner. The Petitioner attended by Counsel, before the NLC. The Petitioner's counsel made representations, the opportunity to do so having been availed. This sufficed.

56. I have read the transcript of the proceedings before the NLC. The NLC appeared overbearing but not to warrant the proceedings being voided had I not found that it had no jurisdiction to entertain the complaint.

Conclusion and disposal

57. The Petitioner has done enough to satisfy me that the NLC should not have acted in so far as the 1st Interested Party's case was still before the Environment and Land Court pending determination. The Petitioner has however in any event not satisfied me that there was any transgression on the part of the NLC in so far as the Petitioner's right to fair administrative action was concerned.

58. Before making my final orders in disposal, I do rue the delay in rendering this judgment. The anxiety occasioned to both counsel and the parties is regretted. The reasons for the delay were beyond my reach.

59. I now make therefore the following final orders.

a) A declaration is hereby issued that in so far as the ELC. No. 202 of 2013 was and is still pending determination the NLC could not and should not entertain adjudicate or arbitrate any complaint which is the subject matter of LR. No. 337/935.

b) A declaration is hereby issued that all the proceedings before the NLC in respect of LR. No. 337/935 which purported to investigate the Petitioner's and the 1st Interested Party's title to the said LR. No. 337/935 on the basis of a complaint by the 1st Interested Party are null and void ab initio.

c) An order of certiorari shall issue forthwith removing into this court for purposes of being quashed and is hereby quashed all the proceedings by and before the NLC which purported to investigate and review the Petitioner's and the 1st Interested Party's titles to LR. No. 337/935. For the avoidance of doubts proceedings include all notices issued by the NLC to the Petitioner and or

the 1st Interested Party or any other person all concerning or touching on L R No 337/935.

d) An order of certiorari shall issue forthwith removing into this court for purposes of being quashed and is hereby quashed the entire findings and decision of the NLC rendered on 23 May 2016 concerning and touching LR. No. 337/935.

e) Each party is to bear its own costs of the Petition.

Dated, signed and delivered at Nairobi this 30th day of January, 2018.

J.L.ONGUTO

JUDGE