



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI LAW COURTS)
JUDICIAL REVIEW DIVISION
MISCELLANEOUS CIVIL APPLICATION NO. 251 OF 2016

REPUBLIC.....APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

EX-PARTESATYA INVESTMENTS LIMITED

JUDGEMENT

Introduction

1. By a Notice of Motion dated 16th June, 2017, the *ex parte* applicant herein, **Satya Investments Limited**, seeks the following orders:

1. **THAT** an order of Certiorari do issue for purposes of bringing into this Court and quashing the decision by the Respondent made on 12th February, 2016 and communicated in its letter dated 29th February, 2016 for revocation of the Ex-parte Applicant's title over all that property being Land Reference Number 209/12132 (Originally 1870/ix/54) situate at Westlands, Nairobi City County, being the suit property.
2. **THAT** an order of mandamus do issue against the Respondent and its officers commanding them to remove from the titles register of the suit property the caveat registered as Number I.R 62591/7.
3. **THAT** the Respondent be prohibited from interfering with the title of the suit property being Land Reference Number 209/12132 (Original Number 1870/ix/54) or in whatsoever way interfering with the Ex-parte Applicant's possession or use thereof.
4. **THAT** the Court be pleased to issue any further or other order a it may deem fit within the confines of the law.
5. **THAT** costs of these proceedings be borne by the Respondent.

Ex Parte Applicant's Case

2. According to the applicant, it is the registered proprietor of all that piece or parcel of land known as Land Reference Number 209/12132 situate at Westlands, Nairobi in the Republic of Kenya (hereinafter referred to as the suit property) which it bought from one **Stephen Kipkering Sugut** in the year 1994 at which time the property was open space with one, **Joseph Kiarie Mbugua**, claiming user thereof on a licence from the then Nairobi City council. It was averred that the said **Mr. Joseph Kiarie Mbugua** (hereinafter called “the losing party”) lodged legal claims to the suit property leading up to the Court of Appeal which declared, in a judgment delivered on 22nd March, 2013, that the Applicant is the rightful and indefeasible owner of the said land. The attempts by the losing party to proceed to the Supreme Court failed when the Court of Appeal refused him leave opening, among other thing, that the law as to proprietorship of such cases related to the suit property was well settled and the Court of Appeal was the final arbiter.

3. It was averred that vide an order of the High Court of Kenya issued on 25th June, 2013, the losing party, and his agent or any other person residing in the suit property, were ordered evicted so as to render vacant possession to the Applicant. However to circumvent the order of the Court of Appeal, a successor to the losing party filed another case in the High Court being HCCC No.1505 of 2013 seeking to adjudicate over the same issues already decided upon and in tandem with this abuse of process, the losing party, through an amorphous group called Westlands Self Help group, initiated a complaint with the Respondent and the applicant saw an advertisement in the newspapers placed by the Respondent stating that the Grant to the suit property would be reviewed on 25th April, 2014. Accordingly, the applicant presented itself at the hearing before the Respondent on the said 25th April, 2014 but was not allowed to say anything neither was it given the complaint or presented with any documents.

4. It was deposed that the applicant later saw another newspaper advertisement which stated that the Grant to the suit property would be reviewed on 25th November, 2014 and a memorandum was required from interested parties. It presented my documents but again, come the hearing date, neither its Counsel nor itself was given an opportunity to present its case or to interrogate the complaint and the Respondent’s commissioners adjourned the hearing to 9th February, 2015 to await a report from the Nairobi City Council and on which date again, no representative from the County appeared.

5. According to the applicant, it was never notified again until vide an application filed in another suit by the losing party seeking an injunction, when it found out to its consternation, that the Respondent had by its letter dated 29th February 2016 directed the revocation of the title to the suit property.

6. It was the applicant’s case that it was not given a chance to be heard as by law dictated neither was it supplied with the complaint nor other documents upon which the decision was based and this can be established from the Hansard proceedings of 25th April, 2014, 25th November, 2014 and 9th February, 2015. In any case all the allegations about the propriety, legality or otherwise of the Applicant’s title that were presented before the Respondent were already adjudicated by the Court and it could not have been possible for the Respondent to assume jurisdiction, in what was like a Kangaroo process, to pour scorn or decimate the Court’s decision. The applicant therefore believed that the Respondent exceeded its jurisdiction by purporting to review and overturn the judgement of the court of Appeal and directing revocation of the title contrary to section 14(7) of the **National Land Commission Act, 2012** when the Applicant had been declared a Purchase for value without notice.

7. The applicant disclosed that it had carried out a search of the title to the property and found out that the Respondent, pursuant to its impugned decision, placed a caveat barring the Applicant from dealing with the title in breach of the Applicant’s Constitutional rights. To the applicant, clearly from the history of the matter and documents produced in Court, the suit property was an open space with no public toilet as alleged, which, if there was, would have been picked by the Part-Development Plan or the survey records and according to it, if there was such a toilet, it would not have bought the property. This position was confirmed by the Nairobi County Government and its predecessor which stated that the land was owned by the Government of Republic of Kenya which had capacity to allocate it to anybody, a position affirmed by the decision of the Court of Appeal.

8. The applicant therefore believed that if any person was aggrieved by the decision of the Court of Appeal, the only way would be to review it not to start a parallel process to scandalize the Court. In its view, it would bring the Court to mockery, and it touches the very principle of the integrity, authority and independence of the Court, for a subordinate tribunal to purport to interpret and distinguish a judgment of the Court.

9. It was reiterated that the Applicant was a Purchaser for value without any notice, and as noted by the Court of Appeal, the Applicant's title cannot be impeached. In any case, the very provision which gives the Respondent power to review grants expressly prohibits it from revoking titles of third parties who purchased any land for value without notice.

Respondent's Case

10. In response to the application, the Respondent Commission averred that it is an Independent Constitutional Commission established under Article 67(1) of the constitution, Chapter Fifteen of the Constitution and operationalized by the ***National Land Commission Act*** No. 5 of 2012 (hereinafter referred to as "the Act") and that Article 68 (v) of the Constitution of Kenya provides that Parliament shall enact legislation to enable the review of all grants or disposition to public land to establish their propriety or legality. Pursuant to Article 67 (3) and Article 68 (V) Parliament enacted the Act which under Section 14 provides that the Commission will review **ALL** Grants or disposition to public land to establish their legality and propriety.

11. It was deposed that while conducting the stated Review, the Commission is enjoined by the Constitution under Article 27, 40 and Article 40 to accord all affected persons fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and is also required by section 14(3) and section 14(4) of the Act upon receipt of a complaint or on its own volition to make a determination after giving every person a notice of such review and an opportunity to appear before it and to inspect any relevant documents. It was averred that under section 14(5) of the Act, where the Commission finds that a title to land was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title while under section 14 (6) where the Commission finds that the title was irregularly acquired, it shall take appropriate steps to correct the irregularity and may also make consequential orders.

12. To the Commission, the dispositions of public land that the 1st Respondent is mandated and empowered to review include any conveyance, agreement for sale, lease or license made by and on behalf of the Government and includes a certificate of title issued by the Land Registrar and a certificate of lease issued pursuant to the provisions of any Act of Parliament over any public land. To the Commission, the suit land falls within the category of land defined under Article 62(1)(n) of the Constitution and more specifically, the suit land herein is public land set aside for construction of a public toilet. It was asserted that under Article 68(V) of the Constitution, it is the mandate of the Respondent to Review **All grants and dispositions of public land** and it would be an act of discrimination to exempt the suit land from the scrutiny of the commission. According to the Commission, under Article 67(1)(e) of the Constitution, the Respondent is further required to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices and recommend appropriate redress and Review of Grants and disposition is a specific statutory function of the Respondent and only the Respondent can discharge the said mandate at the first instance.

13. It was averred that in the exercise of the said mandate, the Respondent receive a complaint from the Westlands Open Air Market Self Help Group alleging unlawful acquisition of the suit land herein by private persons being land that had been set aside for a public toilet. In strict compliance with the requirements of section 14(3) of the ***National Land Commission Act***, the Respondent herein invited all interested parties to appear for hearings scheduled for various dates and the ex-parte Applicants herein attended the said hearings on 25th April 2014, 25th November 2014, 9th February 2015 and made both oral and written submission on how they acquired the suit land and in response to the complaint before the Commission. This, it was contended has been confirmed by the applicant who very categorically confirmed at paragraphs 10 and 11 of the verifying Affidavit of **Dipak Kumar Anand** as having had notice of the hearings and attended the same and it is clear from the Hansard proceedings on record that

the Interested Party made their oral representations in person and later filed written submissions through their Advocates.

14. It was averred that upon hearing the Parties, the Respondent herein made its determination which was communicated to all the Parties herein vide letter Re: NLC/REVIEWS/VOL.1(21) dated 29th February 2016 in which decision the Respondent found that the suit land was not available for allocation to the either the ex parte Applicant herein nor the Interested Party since the same was vested in the Nairobi City Council to hold in trust for the residents of Nairobi Westlands area for use as the only public toilet in the area and the allocation process adopted was flawed and null and void *ab initio*.

15. According to the Commission, it directed that the grant registered in favour of the ex parte Applicants herein be forthwith revoked and the land be vested in Nairobi City County Government to hold in trust for the residents of Westlands and the Westland business community. It was averred that the Respondent has not reviewed or overturned the judgment of the Court of Appeal in Civil Appeal Number 164 of 2004 for the following reasons;

a. Neither the Respondents herein nor the complainants before the Commission (Westlands open air market Self help group) were Parties to the suits in reference and neither did they participate in the suits in any way.

b. The issues before Court in the suit referred above are different from the issues before the Commission for determination.

c. The question of whether the Suitland was/is land set aside for a public toilet was not before the Court for determination and neither was a pronouncement made by the Court on this issue.

d. The court only answered the issue of who between the Parties before Court was the apparent owner of the land based on available evidence but it did not address questions of the legality or propriety of the grant held by the Applicants herein. Under the new dispensation that determination can only be made by the Respondent herein in the first instance.

e. The Respondent is only performing its Constitutional and statutory functions which requires it to review all grants and disposition to public land.

f. The power to review grants and disposition to all public land if interrogated within its context and historical background within which it was conceived allows the Respondent herein to determine how public land was converted to private land.

16. It was averred that due diligence would have helped establish that the suit land was never available for allocation and there is ample evidence to suggest that the initial allottee **Mr. Sugut** was well aware of this fact and the subsequent purchasers cannot be said to be bona fide purchasers for value without notice as they ought to have discovered the defects in the title if at all any due diligence was done.

17. It was averred that the Respondent herein visited the site and indeed there is still evidence of a toilet although the same has been vandalized. To the Commission, this Court exercises sovereign power on behalf of the people of Kenya and in so doing this court is duty bound to consider public interest and render decisions that do not go against public interest. The said public interest, it was averred, shifts in favour of upholding the right to sanitation for the people of Westlands and militates against granting the orders sought herein. The Court was therefore urged to consider the indignity and embarrassment that the ex parte Applicants have occasioned to the people of Westland where men and women have to relieve themselves on backstreets, allies, corners, bushes and walls all because land set aside for their public toilet has been unlawfully acquired by a private individual. In its view, no prejudice would be suffered by the ex parte Applicants as they have never even occupied the suit land which in any event has never been legally theirs.

18. The Commission accordingly, was of the view that the instant application has no merit and is an abuse

of the court process and the same should be dismissed summarily

Interested Party's Case

19. According to the interested party herein, the Estate of the late **Joseph Kiarie Mbugua**, the Estate filed ELC Civil Suit Number 1505 of 2013 against Satya Investment Limited; the Chief Land Registrar and the Nairobi City County. To the interested party, the documents filed in the said suit establish the Estate's claim to the above plot and as this case is already in court, it did not expect the court to sit in judgment over the claim. According to the estate the documents annexed hereto to confirm that the land was previously owned by the City Council of Nairobi and the process by which it was registered in the name of Satya remains opaque and unsubstantiated. The interested party contended that the Court of Appeal did not make a determination that the ex parte applicant properly acquired the suit land. In its view, the **Estate of J. K. Mbugua** is the rightful owner of the plot which is now owned by Satya Investments Limited.

Determination

20. I have considered the issues raised herein.

21. In this case the applicant contends that the issue of ownership of the suit land had been determined by the Court of Appeal in its favour and therefore the Respondent had no jurisdiction to entertain the matter. It is further contended by the applicant that it was never afforded a hearing before the Commission before the impugned decision was made.

22. On its part the Respondent contends that it is the entity that is mandated by the law to determine the propriety of the acquisition of public land. In fact what I gather from the position taken by the Respondent is that it does not matter what the Courts have held. As long as the Respondent has not made a determination on the matter it has the power to reopen a decision which was made by the Court and deal with the merits of the same afresh.

23. With due respect this position smacks of arrogance and impunity not expected of a Constitutional Commission which is an inferior Tribunal to the Superior Courts. The Respondent ought to know that in carrying out its duties whether statutory or constitutional, it is subject to the supervisory jurisdiction of the Superior Court. For it to arrogate to itself the powers to in effect reopen and question decisions already made by the Superior Court is with due respect a manifestation of lack of appreciation of the values and principles of governance in Article 10 of the Constitution one of which is the rule of law. As was appreciated by **Emukule, J Muslims for Human Rights (MUHURI) & Another vs. Inspector-General of Police & 5 Others [2015] eKLR:**

“The principles of constitutionalism and the rule of law lie at the root of our system of government. It is a fundamental postulate of our constitutional architecture. The expression the rule of law conveys a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority. At its very basic level, the rule of law vouchsafes to the citizens and residents of Kenya, a stable, predictable and ordered society in which to conduct its affairs. Like our National Anthem says it is our shield and defender for individuals from arbitrary state action.

24. It is a pity that a Constitutional Commission can treat the Courts with such remarkable arrogance and ignorance of the basic tenets of the Constitution.

25. With respect to the position adopted by the interested party, it is clear that the interested party is also claiming the same parcel of land and has in fact instituted judicial proceedings to that end. Though the interested party opposes the application, it is clear that its claim cannot stand unless the Respondent's decision is set aside.

26. In my view, this is a matter which ought to be heard and determined on merits. In order to do this it is

only prudent that the decision of the Respondent which was based on the irrational grounds that the Respondent is not bound by the decisions of the Superior Courts be set aside so as to pave way for the determination of the dispute on its merits.

Order

27. In the premises an order of Certiorari is hereby issued bringing into this Court and quashing the decision by the Respondent made on 12th February, 2016 and communicated in its letter dated 29th February, 2016 for revocation of the Ex-parte Applicant's title over all that property being Land Reference Number 209/12132 (Originally 1870/ix/54) situate at Westlands, Nairobi City County, being the suit property, which decision is hereby quashed.

28. As the merits of the dispute remains unresolved it is only reasonable that the subject of the dispute be preserved. Accordingly in the exercise of this Court's discretion I decline to issue the other orders sought in the Motion.

29. Each party will bear own costs of these proceedings.

30. It is so ordered.

Dated at Nairobi this 29th day of June, 2017.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Ndago for Mr Nyawara for the applicant

Mr Mbuthia for the Respondent and holding brief for Mr Oigara for the interested party

CA Mwangi