



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 21 OF 2016

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS
UNDER ARTICLES 19,20, 21(1),24,25, 27,28,40,47,50, 60,61,62 AND 64 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT (Cap 5A) AND IN THE
MATTER OF FAIR ADMINISTRATION ACTION ACT 2015,**

BETWEEN

BELGO HOLDINGS LIMITED.....APPLICANT

AND

THE NATIONAL LAND COMMISSION1ST RESPONDENT

KIHORO SELF HELP GROUP.....2ND RESPONDENT

JUDGMENT

Introduction

1. This Petition was filed on 22 January 2016. The Petitioner complained that its constitutional rights and fundamental freedoms guaranteed by the Constitution had been violated. The Petitioner sought declaratory orders. The Petitioner also sought damages as well as restraining orders as against the 1st Respondent. The 1st Respondent was to be prohibited from questioning the Petitioner's ownership and proprietary interest in the properties known as Land Reference No. 28586 and 28587 (jointly " the suit property"). The Petitioner also asked for costs of the Petition.

2. The Petition was supported by the affidavits of Akber Esmail, a director of the Petitioner. The affidavits were sworn on the 18th day of January 2016 and the 22nd day of March 2016. Both Respondents opposed the Petition, with the 1st Respondent filing a Replying Affidavit on 11 March 2016

while the 2nd Respondent filed a response on 22 March 2016.

Factual matrix

3. The facts leading to the Petition are largely a common cause. Infra, I shortly summarize the relevant background.

4. The realty from which the suit property was excised was originally part of Crown land. Vide an Indenture of Conveyance dated 15 August 1907, a freehold tenure in the realty was conveyed to one Alfred Terence Mabert. The realty which then measured approximately six hundred and thirty-nine acres was subsequently and variously to be conveyed to private individuals and also subdivided. One of the subsequent owners of the excised portions was Lakeview Development Limited who on 27 July 1995 also conveyed to the Petitioner the suit property for the monetary consideration of kes. 20,000,000/=. Effectively, from 10 August 1995 the Petitioner was reflected as the registered proprietor-in-possession of the suit property. Land Registry documents availed in evidence by the Petitioner reflects this epitome of title to the suit property.

5. The Petitioner's exclusive and quiet possession was to be disturbed albeit briefly between 2004 and 2007 with the entry and trespass unto the suit property by certain persons who also laid claim to the property. Two suits were consequently filed before the High Court. Both sought a determination on the rights of the parties and also an identification of the holder of the proprietary interest. The Petitioner filed High Court Civil case No 266 of 2005 while an Originating Summons, namely, High Court Civil Case No 507 of 2003(O.S) had been filed earlier.

6. The cases were both concerned with the ownership to the suit property. HCCC No 507 of 2003 had been commenced by Raphael Kawai, Joyce Mutio Mutua, James Njuguna Miira and Esther Njeri. They filed suit against Jays Syndicate Limited, Lakeview Development Company Limited, the Petitioner and Joseph S.M Maina. The plaintiffs in this suit sought a declaration that they had acquired ownership of the suit property by way of adverse possession having been in uninterrupted possession of the suit property together with others for a period of more than twelve years running from 1975.

7. On the other hand the individual Defendants in HCCC 266 of 2005, which was filed by the Petitioner, were John Armstrong Njogu, James Njuguna Miira, Franklin Kamathi Kamau, Godfrey Ngatia Njoroge, William Kiplangat Kogo Somoei and Joseph Suleiman Mwangi Maina. The Registrar of Government Lands was impleaded as an institutional seventh defendant to the suit. In HCCC 266 of 2005, the Petitioner sought declaratory orders that it was the legal owner of the suit property to the exclusion of any other person and any purported transfer or conveyance of the suit property in favour of the defendants to the suit was null and void.

8. The two suits were later consolidated, but not before a judgment which the Plaintiffs in HCCC No 507 of 2003 had obtained ex parte was set aside.

9. The consolidated suits were heard on merit on three separate days in the months of November and December 2007. The trial court then rendered itself on 11 December 2007 and issued a decree in the following terms:

a. It be and is hereby declared that the Plaintiff has been since 27 July 1995 the lawful proprietor of Land Reference Numbers 3859 and 3860 situated in the City of Nairobi the title thereto being registered at the Government Lands Registry at Nairobi in Volume N7 Folio 351/31 and Volume N61 Folios 15/23 (hereinafter called " the suit property")

b. It be and is hereby re-affirmed and declared that the purported Conveyance of the suit property dated 28th October 2002 (and registered on 3rd December 2002 in Volume N 69 Folio 146/32 and Volume N 61 Folio 15/24) purporting to convey the suit property in favour of the sixth Defendant is illegal and of no legal effect;

c. It be and is hereby declared that HCCC 507 of 2003 (O.S) is a nullity and of no legal effect and is accordingly dismissed;

d. It be and is hereby declared that there was never any legal interest created in the suit property by HCCC 507 of 2003(O.S);

e. It be and is hereby declared that the Conveyance of the suit property dated 16 December 2003 and registered on 19 December 2003 in Volume N.69 Folio 146/34 and Volume N 61 Folio 15/26) allegedly made between Raphael Kavai Maitha, Joyce Mutio Mutua, James Njuguna Miira and Eunice Njeri Kariuki of the one part and the sixth defendant [Joseph Suleiman Mwangi Maina] of the other part is null and void;

f. It be and is hereby declared that the conveyance referred to in paragraph 5 above did not create any interest in favour of the first to the sixth defendants;

g. The first to the sixth defendants as well as the applicants in HCCC No. 507 of 2003(O.S) (or their agents or servants) be and are hereby restrained from trespassing on the suit property or from interfering with the Plaintiff's legal right to quietly possess and use the suit property and the house erected thereon;

h. A mandatory injunction be and is hereby issued directing the first to the sixth defendants and the applicants in HCCC 507 of 2003(O.S) (or their agents or servants) [sic] do vacate the suit property forthwith;

i. The possession of the suit property be and is hereby granted to the Plaintiff;

j. That the first to sixth defendants and the applicants in HCCC 507 of 2003(O.S) jointly and severally do pay to the Plaintiff its cost of this suit [sic] such costs to be taxed and certified by a taxing master of this honourable court.

10. Wary of the continuous attempt by third parties to divest it of its title to the suit property through forged deeds or illegal possession, in 2010 the Petitioner applied to the Registrar of Titles to convert from the registration system applicable to the suit property being the deeds' system under the Government Lands Act (Cap 280)(now repealed) to the Torrens system of registration under the Registration of Titles Act (Cap 281) (also now repealed). The application was approved in July 2010 leading to the conversion in August 2010. The suit property then acquired new land reference and registration numbers under the Registration of Titles Act (Cap 281).

11. The process of conversion entailed a re-survey of the suit property by the Director of Surveys, execution and registration of a formal surrender of the suit property by the Petitioner and a subsequent issuance and registration of new Grants to the Petitioner by the Commissioner of Lands. The processes were dutifully followed given the documents availed to the Court by the parties. The Petitioner was duly issued with the two Grants. The new Land Reference Numbers were Land Reference No 28586 and 28587. The new inland registration numbers were now 124735 and 124736, both effected on 5 August 2010.

12. Everything and everybody was quiet until 17 November 2015 when the 1st Respondent placed a notification in the local daily newspapers of the 1st Respondents intention to review various land Grants. Parties were then invited to a hearing to review the various Grants, including the Grants of the suit property. The Petitioner's advocates however complained to the 1st Respondent that it was abusing its powers and acting unconstitutionally. The Petitioner's advocates drew the 1st Respondent's attention to the history of the suit property, including the related litigation history.

13. The hearing and review had been prompted by the 2nd Respondents. The 2nd Respondents claimed to be owners of the suit property having allegedly occupied the same since the year 1971 until 2005 when

they were allegedly evicted by one Armstrong Njogu. Despite the Petitioner's protestations, the 1st Respondent was determined to proceed with the hearings and review. The 1st Respondent's determination prompted the Petitioner to launch the instant Petition.

The Petitioner's case

14. As may be tracked in the founding affidavits sworn by Akber Esmail, the Petitioner's case is to the effect that the 1st Respondent on the pressing of the 2nd Respondent has acted or is intent on acting unconstitutionally to the detriment of the Petitioner and its rights under Article 40 of the Constitution.

15. The Petitioner complained that the 1st Respondent advertised the intention to conduct the review hearings touching on the suit property without directly notifying the Petitioner.

16. The Petitioner also complained that the 1st Respondent is proceeding to review private land titles without any constitutional backing and minus any complaint as the basis of the review was a complaint by the 2nd Respondent but which complaint had been settled by a court of law. The Petitioner added that in these respects the 1st Respondent having failed to give written reasons why it was undertaking the review of the Grants contrary to ss.4(2) and 4(3) of the Fair Administration Action Act, the 1st Respondent was in violation of Article 47 rights. Finally, the Petitioner contended that since the suit property were private land in terms of Article 64(b) of the Constitution, the 1st Respondent lacked the requisite jurisdiction to review the same and thus its actions were null and void.

The 1st Respondent's case

17. The 1st Respondent was clear that its involvement was prompted by the 2nd Respondent and that having carried out its own investigations deemed it that the Grants to the suit property warranted a review to determine their legality hence the invitation and opportunity extended to all concerned parties to be heard.

18. In the 1st Respondent's view, it was perfectly seized with the jurisdiction to review the Grants of private land in question pursuant to the provisions of Article 67 of the Constitution and s.14 of the National Land Commission Act. The 1st Respondent contended that the idea is to help establish the propriety or legality of such titles or Grants. According to the 1st Respondent, the epitome of title did not matter as even then the Petitioner had to establish that it was a bona fide purchaser for value without notice of any defect on the title. Additionally, it was the 1st Respondent's case that it had the capacity and mandate at the invite of any person to review any Grant or disposition of public land and that a complaint lodged by the 2nd Respondent was no exception.

19. The 1st Respondent also contended that it had not violated any provision of the Constitution and that it has pursuant to s.14(3) of the National Land Commission Act given the Petitioner adequate notice to appear before the 1st Respondent's panel and state its case in relation to the two titles. And, that before the panel the 1st Respondent would follow the due process and procedure.

The 2nd Respondent's case

20. According to the 2nd Respondent, the 1st Respondent was only executing its constitutional and statutory duty to investigate the legality and propriety of dispositions or allotments of public land. It did not matter the designation of the land as 'private', as all land originated from public land.

21. The 2nd Respondent also contended that there was no evidence that the Petitioner's rights had been violated as adequate notice of the review hearings had been given by the 1st Respondent to every person and that no rules of natural justice had been violated.

Arguments

The Petitioner's submissions

22. The Petitioner's case was urged by Mr. James Ochieng Oduol.

23. According to Mr. Ochieng Oduol, the 1st Respondent had no jurisdiction over private land as the Constitution was clear that the 1st Respondent's jurisdiction was limited to public land only. Counsel relied on the case of **R v National Land Commission Ex Parte Krystalline Salt Limited [2015]eKLR** where Korir J held that the mandate of the 1st Respondent to review Grants ceased once it was established that public land had been converted to private land lawfully and regularly. In this regard, counsel also referred to the case of **R v National Land Commission & 4 others Ex P Fulson Company Limited & Another [2015]eKLR**.

24. Counsel added that in any event the Constitution did not envisage a situation where land disposition prior to 2010 was also subjected to investigation by the 1st Respondent. In this regard, counsel referred to the 1963 Constitution which reconfirmed Grants issued and held prior to 12 December 1963.

25. It was also Mr. Ochieng Oduol's submission that the issue of ownership of the suit property had been settled by a court of law and confirmed by way of a decree and such a determination could not be reopened or revisited by the 1st Respondent.

26. It was also counsel's submissions that the 1st Respondent had adopted a wrong and unfair procedure and had failed to observe the rules of natural justice in considering a 'bogus' complaint. According to counsel, the 1st Respondent had behaved in an arbitrary, unreasonable, irrational and unfair manner. For the proposition that when looking into land allegedly unlawfully alienated the 1st Respondent was under a duty to follow the due process, Mr. Ochieng Oduol relied on the cases of **Evelyn College v Director of Children's Department [2013]eKLR** and **Kuria Gardens v Registrar of Titles [2011]eKLR**. Counsel also referred to various sections of the Fair Administrative Action Act 2015 which provide and prescribe the fair procedure to be followed.

The 1st Respondent's submissions

27. Ms. Masinde who urged the 1st Respondent's case wholly adopted the submissions filed on behalf of the 1st Respondent.

28. Starting from the premise that the 1st Respondent's actions were prompted by the 2nd Respondent's complaint, counsel submitted that the 1st Respondent was duty bound to review the Grants in exercise of its duties under both the Constitution and the National Land Commission Act (Cap 5A). Counsel referred to both Articles 67 and 68 of the Constitution as well as s.14 of the National Land Commission Act as the relevant provisions of the law which granted the 1st Respondent the powers to review grants and dispositions of public land. Counsel also relied on the case of **R v National Land Commission Ex Parte Krystalline Salt Limited [2015]eKLR** for the proposition that private land unlawfully acquired or irregularly acquired would never be beyond the reach of the 1st Respondent.

29. Ms. Masinde's written submissions were also to the effect that even though the Petitioner claimed to have acquired the suit property through purchase from a previous owner, the 1st Respondent had an obligation to determine whether the Petitioner was truly and indeed a bona fide purchaser for value without notice.

30. On the issue of due process, the 1st Respondent's counsel insisted that the Petitioner had been given adequate and due notice as well as opportunity to appear before the 1st Respondent and produce all its documentation. Counsel was firm that the mere lack of rules of procedure under the National Land

Commission Act was not enough to divest the 1st Respondent of its constitutional mandate to review Grants. For this proposition counsel relied on the case of **Compar Investments Limited v National Land Commission CP No 311 of 2014**.

The 2nd Respondent's submissions

31. The 2nd Respondent's case was presented by Mr. Omakalwala.

32. According to Mr. Omakalwala, the 1st Respondent is enjoined to review only such land that was once public but had been converted to private land. This, according to counsel who placed reliance on the case of **R v National Land Commission Ex p Holborn Properties Limited [2016]eKLR**, stretched to the period before the year 2010. Counsel was also firm that the 1st Respondent had the powers to review grants and disposition of public land and this involved privately held titles. Counsel relied on the case of **R v National Land Commission Ex Parte Krystalline Salt Limited (supra)**.

33. On the issue of due process and fair administrative action, counsel submitted that it all depended on the circumstances of each case and in this regard counsel pointed to the decision of the Court of Appeal in **Judicial Service Commission v Mbalu Mutava & Another [2015]eKLR**. Counsel stated that the principle applied whether it was a notice being given or the information to be included in the notice.

Issues

34. Having heard counsel and also having reviewed the pleadings filed herein, the core issue is whether the 1st Respondent has jurisdiction to review the Grants currently held by the Petitioner over the suit property. If so, there is the corollary issue as to whether the Petitioner's right to fair administrative action has been violated.

Discussion and determination

Jurisdictional issue

35. According to the Petitioner, the 1st Respondent's decision at the 2nd Respondent's prompting to review the Grants to the suit property is unconstitutional, illegal, ultra vires and contravenes statute because it seeks the exercise by the 1st Respondent of functions and powers outside its constitutional and statutory mandate. The Petitioner points out that the land in question is private land and thus the Respondents should not interfere. The Petitioner also points out that the Grants were obtained in the first decade of the 20th century and that the review mandate of the 1st Respondent did not spread that far. Almost as an alternate argument, the Petitioner contends that the intended review is *res judicata* as a court of competent jurisdiction had already settled the issue of the petitioner's ownership.

36. The 1st Respondent is established and mandated by Articles 67 and 68 of the Constitution as well as s.14 of the National Land Commission Act to among others review all grants and disposition of public land to establish their propriety or legality. The review was to be scheduled and conducted within 5 years of the commencement of the Act. The 1st Respondent is also mandated to manage public land on behalf of both the national and county governments.

37. I would start by pointing out that arguments that the 1st Respondent may not concern itself with private land are not well founded both in law and logic. A review of the relevant law would quickly reveal this as I will shortly show.

38. In the case of **R v National Land Commission Ex Parte Krystalline Salt Limited(supra)**, which was copiously referred to by all counsel in this matter, Korir J, stated as follows:

“It therefore follows that once a person is lawfully granted a leasehold tenure over public land,

the land becomes private land and the same can only be converted to public land by (i) compulsory acquisition.Once it is established that public land was converted to private land lawfully and regularly, the mandate of the Respondent (NLC) ends there” (Emphasis)

39. It is clear that Korir J was making the point that the 1st Respondent’s jurisdiction does not extend to where it is shown or has been shown that the Grant in question was lawfully and regularly acquired. This makes sense.

40. All land deemed public land may be converted to private land and vice-versa. In the case of the former, the conversion is ordinarily through a process of alienation. This was also the routine under the now repealed Government Lands Act (Cap 280). The procedural red-carpet was and is still detailed and involves a process of a Physical Development Plan as well as a Part Development Plan being prepared by physical planners to justify the alienation. There is then all the necessary survey works and physical planning works being undertaken. Rent, where applicable, and rates assessment is also ran through. Where the process is undertaken to the book and the Grant finally approved issued and registered the 1st Respondent should have no role.

41. Ordinarily, the confirmation as to whether the process was regular ought to take the more in-house form. The 1st Respondent as the custodian of the registration and alienation records ought to be able to confirm whether the conversion through alienation was regular and lawful. It sincerely needs no invite by any other person and neither does it need to conduct a public inquiry.

42. Where however, the 1st Respondent holds the view that the alienation may not have been regular and or lawful, the 1st Respondent is then enjoined to invite all the affected parties and give them a hearing having notified them of the basis of the hearing.

43. I do not view it that the 1st Respondent was simply to conduct a wholesale review of all Grants in private hands. Nay, a basis has to be laid down and this may be done by the 1st Respondent itself or through prompting by a third party leading the 1st Respondent to some internal interrogation.

44. Conversely, I also do not view it that the mere fact that land is ranked and classified as private is enough to divest the 1st Respondent of jurisdiction to review a Grant. It would defeat the constitutional and statutory mandate of the 1st Respondent to not only manage and administer public land but also conduct a review of grants and disposition thereof. Un-alienated 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 would have some power, albeit limited, to have an appraisal of any Grant hence the power to review Grants.

45. In the case of **The Registered Trustee of the Arya Pratinidhi Sabha, Eastern Africa v The National Land Commission & Another [2016]eKLR**, the court while drawing from the Supreme Court of Kenya decision **In the Matter of the National Land Commission, Advisory Reference No. 2 of 2014 [2015]eKLR** and appreciating that the 1st Respondent executed an oversight role stated that the role and mandate of the 1st Respondent had “*to be construed as narrowly as possible and not extended unreasonably to avoid role-conflicts*” with other State organs.

46. The court in **The Registered Trustee of the Arya Pratinidhi Sabha, Eastern Africa v The National Land Commission & Another (supra)** then proceeded to identify no less than six instances when the 1st Respondent could intervene in so far as private land was concerned. The instances were identified as; where the private land had been irregularly and unlawfully acquired, matters concerning administration of private land, matters concerning land use and planning, compulsory acquisition of private land, issues touching on present or historical land injustices and instances of review of grants to establish their propriety or legality under s.14 of the National Land Commission Act.

47. The court then concluded as follows..

“[58] The instances where the NLC’s mandate will cross paths with private land are therefore very limited but no doubt exist. It is consequently important that where a party alleges that the NLC is acting ultra vires due to the fact that the land in question is no longer public land, the court must interrogate closely the circumstances leading to the NLC’s actions and identify if it falls within any of the instances identified above or within any statutory mandate of the NLC under the NLC Act.”

48. Thus where the jurisdiction of the 1st Respondent is challenged on the basis that the land in question is private land, the issue is to be visited with circumspection.

49. *In casu*, the Petitioner complains that it is the registered proprietor of the suit property. The Petitioner adds that its insulated by the Constitution and further that a court of law long determined that it is the registered proprietor and was entitled to the suit premises to the exclusion of any other party including the 2nd Respondent.

50. The Petitioner states that the issues, if any, now being raised by the 2nd Respondent were settled in HCCC No 507 of 2003 as consolidated with HCCC No.266 of 2005. The Petitioner states that it has drawn the 1st Respondent’s attention to this fact but the Respondents are adamant that the Grants to the suit property must be reviewed. The Petitioner insists that the Respondents cannot revisit the Petitioner’s entitlement to the suit property. In response the Respondents state that they were never a party to the two earlier cases lodged before this court and that s.14 of the National Land Commission Act mandates the intended review.

51. Essentially, the Petitioner is raising a plea of *res judicata*. In this regard, I must hasten to state that the *res judicata* plea whensoever raised must never be viewed from the narrower angle only but also from the wider Henderson principle. In **Henderson v Henderson [1843] 3 Hare 100**, the court held that the principle of *res judicata* applies to all issues the court could have been invited to determine and even when not expressly determined such issues were deemed to have been determined. This was in keeping with the policy and principle of finality to litigation.

52. I have little doubt in my mind that it was not the intention of the Kenyan people and the Kenyan Parliament, in promulgating the Constitution and granting power to the 1st Respondent to review Grants, that the 1st Respondent should review judgments and decisions of courts of law. By the same vein as well, I have little doubt that it was also not the intention of the people of Kenya and Parliament that whenever an issue involving any parcel of land had passed through the courts, the 1st Respondent’s jurisdiction over such land was crippled. Each case, in my view, has to be looked at in its own unique circumstances.

53. Where therefore a question arises whether the 1st Respondent should revisit a decision made by the court involving private land, the court’s role in such a case will be to establish whether the decision was a final judgment *in rem* (affecting the status of property) or simply a judgment *in personam* or *inter partes* (affecting status of individual litigants). If it be the former then it would serve little sense having the 1st Respondent ravage through the decision or judgment and questioning it. If however the decision is *in personam*, then the 1st Respondent would have all the rights to review the Grant in question.

54. According to **Halsbury’s Laws of England, Vol. 15 (4th Ed)**, the meaning of a judgment *in rem* is defined in paragraph 351 as:

“Judgment of the court of competent jurisdiction determining the status of ... a thing, or the disposition of a thing as distinct from particular interest in it of a party to the litigation”.

Further in paragraph 366, the most important distinction between judgments *in rem* and judgments *in personam* or *inter partes* is given as:

“ judgments inter partes are only binding between the parties thereto and those who are privy to them. The judgment in rem of a court of competent jurisdiction is as regards...property situate within the jurisdiction of the court pronouncing the judgment, conclusive against all the world in whatever it settles as to the status of the property, or as to the right or title to the property, as to whatever disposition it makes of the property itself”.

55. The above principles may not be subject to any contest.

56. I only need add that party to an action need not state or plead that his action is *in rem* or *personam*. The nature of the proceedings, the evidence led and the reliefs sought and granted will determine that course.

57. The 1st Respondent's powers are subject to review by the court and once a court of law has made a decision *in rem*, it may not be overturned by the 1st Respondent. The court will most definitely stand by and reinstate its own decision if an attempt is made by the 1st Respondent to upset the same. It may result into an unnecessary conflict between State organs. Such a conflict is easily avoided where the 1st Respondent does not seek to open an *in rem* decision.

58. From the facts outlined and a perusal of the judicial pronouncements in HCCC No 507 of 2003 as consolidated with HCCC No.266 of 2005, the court rendered itself on the status of the suit property. The judgment was not on or upon any personal rights to the suit property or personal liabilities ordinarily not associated with the property. Rather it was a determination on the status of the suit property. It bound the parties. It also bound the world.

59. More critically, the evidence availed to the court then, included a detailed investigatory report conducted by the criminal investigations department of the State. The report had been prepared at the instance of the court. The report detailed the history of the two parcels. The report detailed the process of acquisition by the Petitioner. The report suggested that there had been irregularities in the manner the Petitioner had acquired the two parcels of land but the Court thought and found otherwise and rendered a judicial determination confirming the Petitioner as the true owner. The court had before it all the relevant facts, details and an independent investigator even as the verdict was returned. The court determined not only the legality but also the propriety of the Petitioner's title to the suit property.

60. It causes no harm when the 1st Respondent receives complaints from the public concerning private parcels of land. The 1st Respondent is then under a duty to look into the complaint to determine whether *prima facie* it is a complaint worth being pursued. This is a constitutional duty that the 1st Respondent should not abdicate. However where it is drawn to the 1st Respondent's attention that the court has already exercised an *in rem* jurisdiction over that same parcel of land, my view is that , the 1st Respondent must move no further. It cannot purport to review that which a competent court has returned a judicial verdict on. It would equate second guessing the court: see **Republic v National Land Commission Ex p Holborn Properties Ltd [2016] eKLR .**

61. I would find, as I now do, that the 1st Respondent's notice of intention to review the Grants of the suit property and summons to the Petitioner are misconceived and an exercise that exceeds the mandate and powers of the 1st Respondent. It should not do that which the court has done. Any attempt to do so would amount to superintending the court. This would be unconstitutional.

62. I find for the Petitioner. The 1st Respondent lacks the necessary remit. I need not therefore consider the Petitioner's complaints as to violation of fair trial rights

63. The 1st Respondent in the circumstances of this case does not have the remit to review the grants in question. It has no power to determine the 2nd Respondent's grievances over the suit property. It has to be prohibited from proceeding any further. I also find that the 1st Respondent's approach to the Petitioner's reaction to the summons was wanting and disappointing. I will award costs of the Petition to the

Petitioner.

64. The Petitioner has sought damages. I have however not found any basis for the same and neither was there any attempt to lay a basis and establish any loss and suffering. I would decline the prayer for damages.

Disposal

65. I have found for the Petitioner and now make the following orders in disposal:

a. There shall forthwith issue a declaration that the Grants for Land Reference Numbers 28587 (Orig No. 3859) and 28586 (Orig No 3860) registered in favour of the Petitioner are private land not subject to review by the 1st Respondent in terms of Article 64(a) of the Constitution in view of the determination and judgment of this court in HCCC No 507 of 2003 as consolidated with HCCC No 266 of 2005.

b. There shall forthwith issue an order of prohibition , prohibiting the 1st Respondent , its servants, officers and agents in any manner whatsoever from holding any proceedings or hearings for review or touching on and concerning the Grants in favour of the Petitioner over Land Reference Numbers 28587 (Orig. No. 3859) and 28586 (Orig. No. 3860).

c. There shall forthwith issue an order of injunction restraining the 1st Respondent , its servants, officers and agents or any person whosoever acting on behalf of the 1st Respondent from interfering in any manner whatsoever with the Petitioner's proprietorship or possession of Land Reference Numbers 28587 (Orig. No. 3859) and 28586 (Orig. No. 3860).

d. The 1st Respondent shall pay the costs of the Petition to the Petitioner to be taxed, if not agreed upon.

66. I must state that I rue the delay in rendering this judgment. I could do no better than render it today due to circumstances beyond my control. I indeed apologize to the parties who have had to bear the anxiety as they waited as well as counsel.

Dated, signed and delivered at Nairobi this 14th day of November, 2017.

J.L.ONGUTO

JUDGE