



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 273 OF 2015

THE REGISTERED TRUSTEE OF THE
ARYA PRATINIDHI SABHA, EASTERN AFRICA.....PETITIONER

VERSUS

THE NATIONAL LAND COMMISSIONRESPONDENT
PARENTS ASSOCIATION
PARKLANDS ARYA GIRLS' SCHOOL.....INTERESTED PARTY

JUDGMENT

Introduction

1. The Petition was filed on 2 July 2015 brings to the fore the role of the Respondent Commission the National Land Commission (the NLC) in land matters within the Republic of Kenya. The Petitioner main question is whether the NLC can reposes the Petitioner's land in question, being the parcel of land known as Land Reference No. 209/19 (L.R No. 14848) , for a public purpose.

2. The Petitioner seeks declaratory orders effectively to bar the Respondent from taking over the subject property. The Respondent contests the Petition. The Interested Party passively supports the Respondent.

The Parties

3. The Petitioner is a body corporate with perpetual succession registered under the Trustees (Perpetual succession) Act (Cap 164). It has been in existence for over one half of a century. The Petitioner is the registered proprietor of all that parcel of land known as LR. No. 209/19 (“**the subject property**”) where it has developed an educational institution known as Parklands Arya Girls High School (“**the School**”). The Petitioner's areas of interest include charitable relief and educational matters. The Petitioner challenges the Constitutionality of the Respondent's letter dated 3 February 2015 which gave the Petitioner a six-month notice to surrender the subject property.

4. The Respondent is an independent constitutional commission established under Article 67 of the

Constitution as promoted and operationalized by the National Land Commission Act, No 5 of 2012. The Respondent, inter alia, is empowered both by the Constitution and statute to manage and administer public land on behalf of the national as well as county governments.

5. The Interested Party is the association of the parents of the students of the School.

Background facts

6. The Petitioner's stress and distress which led to the instant litigation may, largely (but not entirely) be retrieved from the affidavit of Suresh Sofat sworn in support of the Petition, be stated as follows.

7. In 1958, the subject property was alienated via a Grant No. IR. 14848. It was demised to the Petitioner by the then colonial government to be held by the Petitioner as lessee for a period of 99 years from 1 June 1956. The user of the subject property was stated in Special Condition No. 3 as a school and further limited to the erection of one dwelling house for the accommodation of teachers employed in connection therewith. The school was to operate under the provision of the then Education Ordinance, 1952.

8. Apparently, the Petitioner had been collecting funds to build a school from as early as 1943. The School was already operational by 1956. By 1957, and without any government aid, the Petitioner had completed the building of the school. It was named Arya Samaj Girls' School. Later the name was to be changed to Arya Girls' Senior School and subsequently to its present name. In 1957, the government also agreed that the Education Department would provide recurrent grant-in-aid in respect of all the 1958 fresh students on the same condition with regard to age and ability as applied in the case of other government schools.

9. All appeared to run well and smoothly until the year 2008. The Petitioner vide Petition No. 225 of 2008 moved to court. The Petitioner alleged that the government had interfered both with the management of the school as well as the Petitioner's proprietary rights. The government had on 4 March 2008 then decided to start a boarding in the School and the Petitioner would hear none of that. Petition No. 225 of 2008 was ultimately determined on 4 March 2011 in favour of the Petitioner.

10. Musinga J (as he then was) in Petition No. 225 of 2008 found as a fact that the Petitioner had never consented, but had indeed objected, to any government take-over or involvement in the management of the School. Musinga J, also found and held that as the Education Act came into force in 1968, the school had always been managed and controlled by the Petitioner through Arya Samaj Education Board. Further, Musinga J. held that "*No provision of in the Education Act can be invoked to override the Petitioner's Constitutional right to ownership of property*".

11. Musinga J (as he then) was then granted the following fifteen orders.

1. An order directing the respondent to forthwith stop contravening and/or violating the fundamental rights and freedoms of the petitioner in the performance of functions of his public office purportedly exercised under the provisions of the Education Act, Cap 211 Laws of Kenya.

2. A Declaration that the Petitioner is constitutionally entitled to own, control and manage property of any description and acquire a proprietary interest in and/or right over property of any description in Kenya, including schools and other educational institutions wholly established, built, managed, ran and controlled by it without deprivation.

3. A Declaration that the Petitioner is the legal owner of Land Reference No. 209/19 in Parklands, Nairobi on which Parklands Arya Girls High School, Nairobi is built.

4. A Declaration that Parklands Arya Girls High School, Nairobi is properly vested under the Arya Samaj Education Board and a proper subject of protection of Fundamental Rights and Freedoms enshrined under the Constitutional of Kenya and deserves protection from undue influence and unjustified deprivation by the Respondent or other agents of the state.

5. *A Declaration that the compulsory take over by the Respondent through the Honourable Minister for Education of educational of any and/or all institutions built, owned, managed, ran and/or wholly established at the Petitioner's own expense, has, is and is likely to continue infringing the Petitioner's Constitutional rights.*

6. *A Declaration that the compulsory acquisition and taking possession of the Petitioner's [property by the Honourable Minister for Education and which property the Respondent has no interest or right,. Amounts to unlawfully depriving the Petitioner of its property and as such, is unconstitutional, null and void.*

7. *A Declaration that the Respondent's actions lack any lawful and/or reasonable justification, is discriminatory, attributable wholly or mainly to the Petitioner's descriptions by religion or other local connexion and a gross violation of the Petitioner's constitutionally guaranteed fundamental rights and freedom of protection from discrimination enshrined under section 82 of the Constitution.*

8. *A Declaration that the Honourable Minister's action prejudices the rights and freedoms of the Petitioner and offends the due process of law, is against public policy, is unlawful and a contravention of the constitution of the Republic of Kenya.*

9. *A Declaration that the Applicant's right to its freedom to manifest and propagate its religion or belief in worship, teaching, practice and observance, as well as the right to protection of its freedom to establish, maintain and manage places of education at its own expense under sections 78 (1) and (2) of the Constitution respectively, have been, are being and are likely to continue being violated.*

10. *A Declaration that the Applicant is entitled to its constitutional rights and freedom of protection from deprivation of its property as set out under the provisions of section 75 of the Constitution and the compulsory acquisition and take-over of its schools by the Ministry of Education is unlawful, unconstitutional, null and void.*

11. *A Declaration that the compulsory acquisition and take over of Parklands Arya Girls High School, Nairobi by the Ministry of Education is a violation of the Petitioner's freedom of assembly and association and a threat to its interests safeguarded under the provisions of section 80 of the Constitution of Kenya.*

12. *A Declaration that the Petitioner is rightfully entitled to a constitutional redress in pursuance of section 84(1) of the Constitution of Kenya.*

13. *An order barring the Respondent from compulsorily acquiring, de-registering and taking over the ownership and control of the land on which the Petitioner's Parklands Arya Girls High School and other education institutions in Kenya are established.*

14. *An order prohibiting the Respondent and/or its agents from further interfering with the ownership, possession, maintenance, administration, finance, management and day to day running of any or all education institutions and/or schools established at the Petitioner's own expense and/or managed, maintained and controlled by the Petitioner.*

15. *An order prohibiting the Respondent and/or its agents from setting up boarding school facilities at the Petitioner's Parklands Arya Girls High School, Nairobi or any other school wholly established at the Petitioner's own expense."*

12. Then as a parting- shot, Musinga J stated as follows:

"[41]These findings notwithstanding, the Petitioner, the Respondent, the parents/Teachers Association an all other concerned parties should consult and agree about the running of the

school, bearing in mind the best interests of the students who are in the school so that their education is not disrupted in any way”.

13. The parties in Petition No 225 of 2008 were the Petitioner herein and the Attorney General sued on behalf of the Ministry of Education.

14. Save for a lull for nearly four years, no heed was apparently taken of Musinga J’s advice *in obiter*. There appeared to be no consultations. There were also no agreements. The fight raged.

15. On 3 February 2015, the Respondent (“the NLC”) herein perhaps on the prompting of the Ministry of Education fired another Salvo. The NLC wrote thus, in letter copied to the Attorney General and to the Ministry of Education Science and Technology, to the Petitioner:

Dear Sirs,

RE: GRANT NO. I.R 14848- LR 209/19 PARKLANDS ARYA GIRLS HIGH SCHOOL

The National Land Commission is an independent commission established under Article 67 of the Constitution and operationalized by the National Land Commission Act, 2012. The core mandate of the Commission is to manage all public land on behalf of the National and County Governments in accordance with the principles set out in the National Land Policy of 2009

The Commission is in receipt of a complaint from the Ministry of Education, science and Technology regarding the conversion of Parklands Arya Girls High School from a public school to a private school by yourselves. This conversion is without due regard to the fact that parklands Arya Girls High School is classified as a Government School under registration number 9/A/336/84 and that such conversion effectively locks out 95% of the students from free basic education.

The Commission holds the view that such conversion of the school from public to private runs afoul of article 53(1) of the Constitution which guarantees the right of every child to free and compulsory basic education.

Following consultative forums with various stakeholder in the Education sector and as a means of way of ensuring that parklands Arya Girls High School remains a public school, the Government has elected to invoke special condition No.12 under Grant No.14848 for LR. No.209/19 This decision is informed by the need to secure the best interests of children enrolled in the school and is predicated on public interest taking into [sic]the caliber of these children.

Pursuant to Special Condition No 12 of the grant, you are HEREBY given a 6 months notice with effect from the date hereof, to surrender all the land under Grant No 14848for public purpose . Compensation for approved buildings, if any, which exist on the land shall be paid subject to discussion and agreement between all the parties including the Ministry of Education, Science and Technology within the stated six months period.

This notice is however subject to and without prejudice to any ongoing Court cases touching on a similar subject.

Yours sincerely,

16. The Petitioner protested. Through its legal counsel the Petitioner insisted that the subject property was private land and the School thereon was a private school funded and built by members of the Arya Samaj Community. The Petitioner insisted that the School could not be taken over by the Ministry of Education and further that the court in Petition No. 225 of 2008 had already ruled as much.

17. When the Respondent appeared not to budge the Petitioner moved this court on 2 July 2015.

Petitioner's case and argument

18. In court, the Petitioner's claim was the same.

19. The Petitioner contended that the NLC has no right or powers to take over private land. The Petitioner further contended that the core mandate of the Respondent was to manage all public land on behalf of the national and county governments in accordance with the principles set out in the National Land policy and that the subject property was private land developed and managed by the Petitioner and its beneficiaries.

20. Additionally, the Petitioner contended that the Respondent could not invoke the provisions of the Education Act to prompt a takeover of the subject property as the court in Petition No. 225 of 2008 had restrained any take-over or acquisition on such basis. The Petitioner contended that as no appeal had been preferred from the decision in Petition No. 225 of 2008, the judgment was binding upon all parties.

21. In his oral arguments before the court, Mr. A.B Shah advocating for the Petitioner, submitted that the NLC had violated Articles 47 of the Constitution as well as the provisions of the Fair Administrative Action Act 2015 when the NLC failed to accord the Petitioner any opportunity to be heard prior to deciding that the subject property be surrendered to the government.

22. The Petitioner's counsel additionally submitted that the NLC had no powers under the Constitution over private land as under Article 67 of the Constitution it could only exercise powers over public land. Additionally, Mr. A.B Shah submitted that the NLC could only investigate present injustices over land or historical injustices and that the present case did not involve any injustice over land.

23. Counsel then submitted that the issue as to whether the Petitioner's subject property could be interfered with by the NLC on the basis of the user as urged the Ministry of Education had been determined by Musunga J in Petition No. 225 of 2008 where the court held that the Ministry of Education could not invoke the provisions of the Basic Education Act to interfere with the Petitioner's proprietary rights. According to Mr. A.B. Shah the judgment was binding on all parties as no appeal had been preferred. It was additionally the contention of counsel that the government was only interested in taking over the Petitioner's property mainly because of the ethnic composition of the School's population.

NLC's case and arguments

24. The NLC's case is contained in the Replying Affidavit of Kaptuiya Chebeiwo sworn and filed on 29th October 2015.

25. The NLC's case is that the subject property was granted to the Petitioner in 1956 to hold for a term of 99 years. The user according to the NLC was specified as a public school and the express intention was that the Petitioner would erect and maintain a public school on the subject property. According to the NLC, it received a complaint from the Ministry of Education Science and Technology of an alleged violation by the Petitioner of the terms of the grant of the subject property. Specifically, condition No. 3 which dictated that the subject property be used as a public school had been contravened by the Petitioner who had converted the school from a public school to a private school. The NLC states that it accordingly exercised its mandate under Articles 66 and 67 of the Constitution and directed the surrender of the subject property. The NLC further contended that it accordingly issued a notice pursuant to condition 12 of the Grant which provided for six months notice to be given to the Grantee (Petitioner) to surrender the subject property where it was required for public purposes.

26. The NLC denied that any of the Petitioner's rights were violated or threatened with violation.

27. Mr. Ondieki argued the NLC's case and submitted that the issue before the court was not *res judicata* and the doctrine of estoppel did not apply as the issue before Musunga J in Petition No. 225 of 2008 had nothing to do with the title to the subject property but rather the management of the school.

28. Mr. Ondieki also submitted that the Petitioner had violated the conditions in the Grant by using the subject property for the purposes of a private school and not public school. It was the contention of the NLC through counsel that the subject property automatically reverted to the government once there was as in this case a breach of special condition No. 4 of the Grant by converting the school to a private one from a public one. Reference was made by counsel to Section 43(1) of the Basic Education Act for purposes of distinguishing “a public” from “a private” school. Counsel insisted that the Petitioner was only a sponsor of the school.

29. The NLC’s Counsel further submitted that the Petitioner had been given a proper notice which was for the covenanted period of six months and further offered compensation and as result it could not be stated that the Petitioner’s rights under Article 40 were violated or on the verge of violation by the Respondent.

30. Relying on the case of **John Peter Mureithi & 2 Others vs. Attorney General & 4 Others [2006]eKLR** for the proposition that public interest always ought to prevail, the NLC’s counsel submitted that the Petitioner had simply acted as a land grabber who had abused the public trust placed on the Petitioner which was to erect and maintain with the assistance of the government a public school on the subject property. Instead the Petitioner had converted the user and now wanted to cling to the same not only as private property but also a private school

The Interested Party’s case and arguments

31. The Interested Party’s case is contained in the two affidavits filed on behalf of the Interested Party by Abubakar Athman and Mary Apiyo Olute Omondi on 7th January 2016. The Interested Party’s case was presented and urged by Mr. Joe Okwach S.C.

32. The Interested Party’s case is that though the subject property is registered in the name of the Petitioner, the School erected thereon is a public school which is a recipient of government grants for both capital development and maintenance and that the School is also managed by the Interested Party, which factors point to the School being a public and not private school.

33. Like the NLC, the Interested Party relied on the case of **Shree Visa Oshwal Community Nairobi Registered Trustees vs. Attorney General and 3 Others [2014]eKLR** for the proposition that where a school receives teachers from the Teachers Service Commission, monetary support from the government and teachers appointed by the Ministry of Education the pointer was that it was a public school. The Interested Party’s counsel also relied on Section 43 of the Basic Education Act.

34. Mr. Joe Okwach also submitted that under Article 67 of the Constitution, the NLC had powers to conduct on its own initiative or upon prompting through a complaint, incidents of present or historical injustices and make appropriate recommendations. Mr. Okwach added that similar powers also obtained under Section 5 of the National Land Commission Act.

35. Mr. Okwach then submitted that the most appropriate remedy that could be recommended by the NLC by reason of the Petitioner converting land that was originally intended to be used as public land to private land and use, was to have the Petitioner surrender the subject property. Then relying on Section 26 of the Land Act which is to the effect that all terms and conditions in a grant or lease bind the parties thereto, Senior Counsel submitted that the Petitioner had contravened condition 4 of the Grant and consequently the NLC was entitled to invoke condition 12 of the Grant and give the Petitioner six months’ notice to surrender the subject property.

36. Finally, it was also argued by Mr. Okwach that as the NLC was not a party to the concluded litigation in Petition No. 225 of 2008, the findings herein did not bind the NLC.

Petitioner’s Response

37. Mr. A.B. Shah in a brief rejoinder, contended that the Petitioner had not violated condition 4 of the

Grant and consequently it could not be stated that the Grant had automatically been surrendered to the Government. Mr. A.B. Shah insisted that the NLC could only get involved with public, not private land.

38. Finally, Mr. A.B. Shah reiterated that in coming to a decision that the Petitioner had to surrender the subject property without giving the Petitioner's a hearing the NLC was in violation of both the Constitution as well as the Fair Administrative Action, Act, 2015.

Discussion and Determination

Issues

39. The Petition raises two core Constitutional issues.

40. First, what is the extent of the NLC's powers in relation to private property? Secondly, did the NLC violate any of the Petitioner's Constitutionally guaranteed rights or fundamental freedoms. Then there is the issue as to whether or not the school currently being operated on the subject property is a private or public school. On the latter issue, the Petitioner contends that a court of concurrent jurisdiction has already made a final finding and that this court should not reopen the same issue.

The NLC

41. I deem it appropriate to give a brief overview of the NLC.

42. The NLC is one of the thirteen constitutionally recognized independent commissions and independent offices under Chapter Fifteen of the Constitution. More specifically the NLC is established under Article 67 of the Constitution and promoted further by the derivative National Land Commission Act No. 5 of 2012 (" the NLC Act"). The NLC like all other independent commissions enjoys and exercises functional, operational and financial independence. Additionally, in carrying out its functions the NLC is free from any external interferences: see Article 249 (2) (b) of the Constitution. The independence of the NLC notwithstanding, it is a state organ and does not act in isolation from others state organs and offices.

43. The functions and powers of the NLC are catalogued under Article 67 of the Constitution. Article 67(2) is clear that the functions of the NLC are:

“(a) to manage public land on behalf of the National and County Governments;

(b) to recommend a national land policy to the National Government;

(c) to advise the National Government on a comprehensive programme for the registration of title in land throughout Kenya;

(d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;

(e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;

(f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;

(g) to assess tax on land and premiums on immovable property in any area designated by law; and

(h) to monitor and have oversight responsibilities over land use planning throughout the country.

(3) The National Land Commission may perform any other functions prescribed by National

legislation.”

44. The NLC Act, enacted by Parliament pursuant to Article 67(3), duly conferred additional powers to the NLC. Besides reiterating, the mandate under Article 67(2), the NLC Act under Section 5 granted the NLC additional powers and functions. The power of alienation of public land was under the NLC Act conferred upon the NLC. This, in my view, was an extension of the power to administer public land on behalf of both the national and county governments. Likewise, the NLC was also vested with the function of monitoring the registration of all rights and interests in land.

45. It is important to point out that both the Land Act No. 6 of 2012 and the Land Registration Act No. 3 of 2012 also confer additional powers and functions to the NLC.

46. The powers and functions of the NLC however all revolve around the administration and management of public land. Besides, there is also the function of monitoring registration of all rights and interest in land and also determining and maintaining land registers.

47. With regard to administration and management of public land, the Supreme Court of Kenya in **In the Matter of the National Land Commission, Advisory Reference No. 2 of 2014 [2015]eKLR** held that the functions of the NLC do not extend to include registration and issuance of land titles. The Supreme Court however also made it clear that the NLC like other constitutional commissions also had a watch dog role which could not be understated or undermined but with the rider that as an oversight institution, its mandate whether constitutional or statutory had to be construed as narrowly as possible and not extended unreasonably to avoid role- conflicts: see the concurring opinion of Ndungu SCJ.

48. There is no doubt that the NLC’s mandate is mainly over “public” land as specified and defined under Article 62(1) of the Constitution. More specifically the NLC administers on behalf of the national and county government land which as at August 2010 was unalienated government land or is land lawfully held used or occupied by any State organ or is land transferred to the state by way of sale reversion or surrender or is land not owned by an individual or a community or no heir to the same can be identified. Additionally, the NLC has the power to administer government forests, roads, rivers, lakes, territorial sea, the continental shelf and any land not classified as private or community land under the Constitution. The Constitution did not however extend the NLC’s mandate to any land declared to be public land by an Act of Parliament: see Article 62(1)(12) and 62(2) of the Constitution.

49. Clearly, the Constitution did not envisage a situation where the NLC also superintended and administered private land the same way it had a mandate over public land. I would however not state that the NLC must have absolutely nothing to do with private land. Quite the contrary, in certain circumstances, it has. In **Republic vs. The National Land Commission Ex Parte Krystalline Salt Ltd [2015] eKLR**, Korir J, inter alia, held 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)

50. As I understand Korir J’s holding in **Ex Parte Krystalline Salt Ltd (supra)**, the NLC will have powers over private land where it has been acquired unlawfully or irregularly. A person may not acquire public land irregularly or unlawfully or through corrupt practices and then state that the NLC has no right to even question such acquisition because the land has converted to private land. It would defeat the purpose of the Constitution and the NLC Act which was to ensure that the NLC administered and managed public land. In my view proper administration and management can only be achieved through custody, limited as it may be.

51. Secondly, the NLC has the explicit role of administering land. The Land Registration Act has defined the term “land administration” to include the process of determining, recording, updating and dissemination information about ownership value and use of land. The NLC may have no powers under

both the Constitution and statute to register title documents but it has a mandate in respect of various processes leading to the registration of title to land. The NLC has, for example, the responsibility to issue licences, leases and grants in respect of public land. It has the mandate therefore to question a grant as to whether it had been regularly or unlawfully obtained and converted/ registered as a private land.

52. Thirdly, the Constitution at Article 67(2)(h) expressly grants power to the NLC

“to monitor and have oversight responsibilities over land use planning throughout the country.”

53. The NLC’s role in these respects is not limited to public land. Private land is included.

54. Article 67(2) (h) must however be read alongside Article 66 of the Constitution. The latter Article clearly stipulates that the State has the duty and power to regulate “the use of any land or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health or land use planning”. In this regard therefore, the appropriate conception would be that the NLC’s role under Article 67(2) (h) is limited only to “land use planning” and not user of land (private or public) generally.

55. A fourth instant where the NLC is expressly conferred with powers touching on and concerning private land is the process of compulsory acquisition. Indeed, the NLC has a deep and extensive role to play in this elaborate and methodical process sanctioned under Article 40(3) of the Constitution. A detailed summary of the process of compulsory acquisition under Part VIII of the Land Act, No. 6 of 2012 may be found in the case of **Patrick Musimba –v- The National Land Commission & 4 Others [2016] eKLR ,[85]-[96]**. The process starts with the NLC being prompted by the national or county government requiring the private land for a public purpose or in public interest. And, the process, ends with the NLC taking possession of the land once payment, to the owner, is made in compensation.

56. A fifth main instant when the NLC will “interfere” with private land is when it “seeks to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress” as per Article 67(2) (e) of the Constitution.

57. A sixth and perhaps final main instant when the NLC has to deal with private land is found under Section 14 of the NLC Act. The NLC under section 14 of the NLC Act is enjoined to review all grants or dispositions of public land to establish their propriety or legality. Literally all private land trace their origins to public land. The NLC thus has up till 1st May 2017 to review grants and disposition of public land and this no doubt includes and involves private land.

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 identity if it falls within any of the instances identified above or within any statutory mandate of the NLC under the NLC Act.

59. It certainly must not be lost to the court that even as the NLC’s mandate is limited to the constitutional and statutory provisions, the rather deplorable status of alienation of public land, registration of interest in and title to land, user of land and the general administration and management of public land, is what led to the setting up of the NLC as an independent constitutional organ. The NLC was set up to assist in addressing the existing mischief. Yet again it was not the only organ. Other organs, including the ELC, were also specifically created to deal with the ever troubling land issues in Kenya.

60. In the instant case, the NLC has sought to reclaim pursuant to conditions in the Grant of title, the subject property. In its letter of 3rd February 2015 the NLC relayed to the Petitioner the NLC’s decision to repossess the subject property on behalf of the national government through the Ministry of Education Science and Technology. The NLC claimed that the Petitioner had converted the user of the subject property from a public to private school. The complaint in this regard was lodged by the Ministry of Education Science and Technology. The NLC in its letter stated that it had consulted various stakeholders

in the education sector. Additionally the NLC stated that it had invoked on behalf of the grantor (the government of Kenya) Special Condition No. 12 of the Grant or title to the subject property.

61. Special Condition No. 12 reads as follows

“Notwithstanding anything to the contrary contained herein or implied by the said Crown Lands Ordinance, the Grantee shall on receipt of six months notice in writing in that behalf surrender all or any part of the land required for public purposes without payment of any compensation save in respect of such of the approved buildings as may have to be evacuated or demolished”.

62. The starting point would be the obvious concession that the subject property is private land. It was alienated in favour of the Petitioner on 7 March 1958. The delineated user was “*a school and one house for the accommodation of teachers employed in connection*” with the school. That is not in controversy.

63. I may indeed also state it is apparent that the NLC is not contesting the fact that the subject property has been put to the discerned and defined user: a school. What the NLC contends, apparently upon the prompting of the Ministry of Education, Science and Technology, is that the subject property is not being used as a public school, but rather a private school. It is for this reason that the NLC have invoked special condition No. 12 to effect the user to the public. I may also add and I view it so, that the NLC have invoked Special condition No. 12 of the Grant conscious of the fact that the issue as to whether the school is a private one or a public one has been the subject of litigation before this court in Petition No. 225 of 2008 (Musinga J). The last paragraph in the NLC’s letter of 3 February 2015 is telling. The paragraphs reads:

“This Notice is subject to and without prejudice to any ongoing litigation on the same”.

64. There is however no on-going litigation. It was long closed and the court held that :

“[37]. It is unconstitutional for the Respondent [Attorney General sued on behalf of the Minister for Education] to purport to apply any provision of the Education Act to interfere with the Petitioner’s proprietary rights over the suit property as well as their right of worship”.

And further that

“[38]...No provision in the Education Act can be invoked to override the Petitioners’ Constitutional right to ownership of property”.

65. Effectively, the court held that the simple distinction between “private school” and “public school” could not be used to expropriate the Petitioner’s subject property. It is the Education Act (and now the Basic Education Act) which makes that distinction and the court already held that the provisions in the statute could not be used to divest the Petitioner of the subject property. Certainly the NLC must be held to have been aware of such holding and indeed bound by it given the fact that the NLC in the instant process was not acting of its own accord but at the behest of the Ministry of Education Science and Technology. The Ministry of Education Science and Technology was, through its predecessor the Ministry of Education, a party to the proceedings in Petition No. 225 of 2008.

66. It thus, in my view, does not fall for me to make a determination as to whether the school is a private or public school as, in view of the decision of Musinga J (as he then was) in Petition No. 225 of 2008 and which decision I wholly agree with, the deprivation or expropriation of the subject property cannot be dependent upon a distinction of the user of the property under the Education Act. In any event, if the NLC was completely convinced that there had been a conversion of the user, the NLC would have invoked special condition No. 4 of the Grant which reads as follows:

“4. If the school erected on the land shall cease to function as such under the provisions of the Education Ordinance 1952 then the term hereby created shall ipso facto also be determined and the land shall be deemed automatically to have reverted to Her Majesty as from the date of such

cessation without the necessity of any formal surrender thereof”.

67. The NLC did not invoke special condition No. 4. Rather it sought a surrender of the subject property pursuant to Special Condition No. 12, that the subject property is required for public purpose- yet another indication that the NLC was mutely conceding that the subject property was being put to use as a private property and a private school.

68. The question thus that falls to be answered is whether the NLC had the mandated and properly exercised its mandate.

69. There should be no doubt that where a private property is required for a public purpose or in the public interest, then the NLC has the mandate to trigger the process of acquisition on behalf of the national or county government once prompted by the cabinet secretary or county executive respectively: see **Section 107 of the Land Act**. There is a process, a due process, to be observed. The process must be observed and carried out in accordance with the Constitution and any Act of Parliament which provides for prompt compensation in full and any challenge in a court of law.

70. It is clear that the NLC, by its own admission, moved to expropriate the subject property at the request of the Cabinet Secretary Ministry of Education Science and Technology. The property was required for a public purpose so stated the NLC. The NLC also acknowledged that it would effect or arrange for compensation once the same was discussed and agreed upon by all the parties, presumably including the Petitioner and the Ministry of Education, Science and Technology.

71. The NLC had the mandate to trigger the process of acquisition. The question then is whether they followed the proper process.

72. The NLC in the instant case having been prompted by the Ministry of Education, Science and Technology invoked special Condition No. 12 of the Grant and gave the requisite 6 months notice under the condition. The NLC also made it clear that the subject property was required by the national government for a public purpose and further that such acquisition would be subject to compensation.

73. In light of the current constitutional and statutory dispensation with regard to acquisition of property, the Petitioner contended that the NLC had acted unconstitutionally through its letter of 3 February 2015. The NLC’s response was that it acted pursuant to the provisions of Special Condition No. 12 which was binding upon both the grantor (Government of Kenya) and the Grantee (Petitioner).

74. In the case of **Shree Visa Oshwal Community Nairobi Registered Trustees vs. Attorney General & 3 Others [2014]eKLR** similar circumstances obtained. There was an allegation that the petitioners had converted a public school to a private one. The Commissioner of Lands invoked a similar condition in the grant to cause the petitioners to surrender the property. The petitioners was also given a six months notice and promised compensation once agreed. The petitioners challenged the constitutionality of the Notice as well as of the special Condition No. 12. The court held that the Commissioner of Lands had not acted unconstitutionally and further that Special Condition No. 12 was binding upon the grantee of land.

75. The same facts obtain in the instant case, apart from the parties who are different.

76. The decision in **Shree Visa Oshwal Community Nairobi Registered Trustees –v- Attorney General & 3 Others (Supra)** is however not binding upon me. It is of persuasive value. I am entitled to review the facts of the instant case independently and may if I deem it appropriate depart from the decision of the court in **Shree Visa Oshwal Community Nairobi Registered Trustees –v- Attorney General & 3 Others (Supra)** I must however turn first to a discussion of the first Constitutional issue which relates to Article 40 of the Constitution.

77. Article 40 of the Constitution reads, in so far as it is relevant, as follows:

(3) The State shall not deprive a person of property of any description, or of any interest in, or

right over, property of any description, unless the deprivation-

a) results from an acquisition of land or an interest in land or a conversion of an interest in law or title to land, in accordance with Chapter five; or

b) is for public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that

i. Requires prompt payment in full, of just compensation to the compensation to the person; and

ii. Allows any person who has our interest in, or right over that property a right of access to a court of law(emphasis).

78. Deprivation of private property by the state is ordinarily a creature of the Constitution and of statute: see **Patrick Musimba –v- National Land Commission & 4 Others (Supra)**. It must also only take place when either it's for a public purpose as the public interest so dictates : see **Priest vs. Secretary of State [1982] 81 LGR 193**. The process is a bitter pill for the private owner hence the need that the prescribed process is adhered to by the state and compensation is also made promptly. Hence too, the Constitutional requirement that it is undertaken in accordance with the Constitution and of statute, not otherwise and additionally that the affected private property owner not denied his right of access to a court of law. As was stated in **Patrick Musimba –v- The National Land Commission and 4 Others (Supra)**, the statutory framework of acquisition of land by the State is found under Part VIII of the Land Act and

“[84]With a view to ensuring that there was a real, rather than a fanciful or remote connection between the compulsory acquisition and the State’s developmental needs, Part VIII was drafted in detail. History in the practice of compulsory acquisition prompted such detail. Not only was the State to keep its right to compulsorily acquire but the citizen too was to be protected from wanton and unnecessary deprivation of his private property”

79. Does special Condition No. 12 of the grant meet the constitutional muster?

80. One of the core constitutional principles in the process of acquisition of private property by the State is compensation. The obligation to pay compensation while must be just is a condition of expropriation. It is however not a pre-requisite for the operation of the process and just compensation will be deemed to have been made even after the appropriation has taken place.

81. Special Condition No. 12 provides for compensation but limits the same to only approved buildings. In my view that may not amount to just compensation under the Article 40 of Constitution. Just compensation is all about the principle of equivalence. The compensation ought to be equivalent to the compulsory sacrifice. There ought not to be any differentiation as between developed and underdeveloped land. Land once privately owned ought not to be expropriated by the state unless compensation is offered and paid. In so far as Special Condition No 12 seeks therefore to limit compensation to developed portion of the land, in my view, it is inconsistent with Article 40(3) of the Constitution.

82. Secondly, the rather detailed provisions of the law prescribed pursuant to a derivative direction under Article 40(3) (b) of the Constitution would in my view appear to dictate that it was never the intention of the Constitution’s draftsmen that expropriation of private property by the State be conducted in a summary manner. The transformative nature of the Constitution dictates that the historical modus of operation by the State in acquiring private property became a thing of the past .

83. Special Condition No. 12 in my view provides a very short-cut manner of expropriation of private property, the very short-cut process the Constitution sought to avoid when it provided that the acquisition be in accordance with the Constitution and Act of Parliament. The phrase, “*In accordance with the Constitution*” would also immediately in the circumstances of Special Condition No. 12 invite the provisions of Article 47 given that the NLC in making a decision to acquire the subject property were executing an administrative action.

84. Finally, the elaborate process of expropriation of private property under the Land Act (Part VIII) appears in direct conflict with special Condition No. 12. Even though the same statute provides under Section 26 that covenants and conditions under a Grant bind all grantees and licencees and lessees and all persons claiming under them, the elaborate and detailed process under Part VIII appears to be in perfect tandem with the Constitution, while Special Condition No. 12 is not.

85. I return the verdict that Special Condition No. 12 of the Grant is inconsistent with express provisions of the Statute as well as of the Constitution. The NLC ought not apply the same whilst acquiring private property instead, it would be appropriate for the NLC to invoke the specific provisions of the Land Act to ensure that the expropriation of private property is constitutional.

86. I state so with the full knowledge that the NLC was and is still duty bound under Section 14 of the NLC Act to review grants and dispositions of title to land. The NLC must ensure in the process of such review that any conditions in Grant which are in conflict with the Constitution or the new land laws are duly amended and or revised.

87. The Petitioner also alleged that its rights under Article 47 of the Constitution as well as under the Fair Administrative Action Act 2015 (FAAA) had been violated. This allegation only arose during the oral submissions made before me.

88. While I have no doubt that in writing the decisive letter of 3 February 2015 the NLC made an administrative Action which was subject to both Article 47 and the FAAA, I have to state that the Amended Petition was not drafted with the requisite reasonable precision as was stated and held in the cases of **Anarita Karimi Njeru vs. Republic [1978] KLR 154** and **Mumo Matemu vs. Trusted Society of Human Rights & 5 Others [2013]eKLR**. I will consequently not interrogate this aspect of an allegation of violation of a constitutional right.

89. Likewise, in view of my findings that Special Condition No. 12 does not meet the Constitutional muster and any action on the basis of the said condition is thus unconstitutional, I see no need to visit the question as to whether there the issues now raised by the NLC had been determined by the court in Petition No 225 of 2008.

Conclusion and Summary of findings

90. The mandate of the NLC appears expansive as stated both under the Constitution as well as the Statute. A closer reading of both the and the Constitution and the Land Statutes (the Land Act, the Land Registration Act and the National Land Commission Act) would definitely reveal that the NLC's mandate though directly set on public land also traverses private land in specified instances.

91. In the instant case, I find that the NLC had the mandate to expropriate the Petitioners property upon the prompting of the Ministry of Education Science and Technology. I additionally find and hold that such appropriation could only be undertaken pursuant to the clear constitutional and statutory provisions and process.

92. In the circumstances of this case, I find that Special Condition 12 of the Grant dated 7 March 1958 is inconsistent with the Constitution's Article 40(3) as well as the Land Act (Part VIII) in so far, as the Special Condition seeks to provide an alternate mode of compulsory land acquisition contrary to the provisions of the Constitution and of the derivative Part VIII of the Land Act. Additionally, in so far as the NLC sought to invoke Special Condition No. 12 to expropriate the Petitioners property, I find and hold the same to be unconstitutional.

93. The NLC may, and I so hold, however proceed under Part VIII of the Land Act. Any other mode of expropriation would otherwise not be in compliance with Article 40 of the Constitution.

Disposal

94. In final disposal, I find that the Petition has merit and the Petitioner has proven its case. The court has the ability under Article 23 to fashion appropriate remedies and I make the following final orders.

a) A declaration is hereby issued that the NLC's action in purporting to compulsorily acquire the Petitioner's property namely Land Reference No. 209/19 without following the due process under Part VIII of the Land Act No. 6 of 2012 is unconstitutional and ultra vires the Land Act.

b) An order of certiorari is hereby issued for the purposes of removing into this Court the decision by the NLC of 3 February 2015 as contained in the NLC's letter of 3 February 2015 and quashing in its entirety the decision and the contents of the letter dated 3 February 2015.

c) There shall however be no order as to costs.

Dated, signed and delivered at Nairobi this 20th day of December, 2016.

J. L. ONGUTO

JUDGE