



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO 309 OF 2016

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION

AND

IN THE MATTER OF LAND REGISTRATION NO 1 OF 2012

AND

IN THE MATTER OF FAIR ADMINISTRATION OF ACTIONS ACT 2015

BETWEEN

THE REPUBLIC.....APPLICANT

AND

NATIONAL LAND COMMISSION.....1ST RESPONDENT

SOSPETER K. NGURU.....2ND RESPONDENT

AND

SOSPETER K. NGURUINTERESTED PARTY

EX PARTE: SALIM GULAMHUSSEIN GILANI

JUDGEMENT

Introduction

1. By an undated Notice of Motion filed 3rd August, 2016, the *ex parte* applicant herein, **Salim Gulamhussein Gilani**, seeks the following orders:

1. An order of prohibition directed at the National Lands Commission prohibiting them from conducting hearings, carrying out investigations and or issuing pronouncements or determinations regarding title and or interfering with the applicant's quiet possession of LR

No. Nakuru Municipality Block 17/119.

2. An order of certiorari to remove into this honourable court to quash the decision by National Lands Commission to investigate the complaint filed with the commission with regards to the ex parte applicant's title No. Nakuru Municipality Block 17/119.

4. That costs of this application and the entire proceedings be awarded to the ex parte applicant.

Ex Parte Applicant's Case

2. According to the applicant, he received summons from National Lands Commission, the 1st Respondent herein, on 6th July, 2016 requiring his attendance on 8th July, 2017 relating to a matter before the National Land Commission (hereinafter referred to as "the Commission"). According to the applicant, the summons served upon him, related to a property known as LR. Nakuru Municipality Block 17/119 (hereinafter referred to as "the suit property") of which he is the registered owner as per the copy of certificate of lease exhibited.

3. The applicant deposed that he purchased the suit property from South Knight Ltd on 30th October, 2015 and that his ownership of the suit property is not in dispute. However, the complaint before the Commission is one for alleged eviction. To the applicant, the complaint before the National Land Commission and the contents of summons issued upon him were variance and untenable.

4. The applicant averred that the Commission had usurped the role of the Court by attempting to adjudicate on the claims of eviction and demolition of a house as alleged by the complainant. He disclosed that the complaint before the Commission mentioned his property without making reference to him personally.

5. To the applicant, the leasehold that he enjoys is sacrosanct, inviolable and must be protected by this Court as it is private property not subject to the Commission. Based on legal counsel the applicant contended that the Commission has no jurisdiction to adjudicate on private land matters unless to query how public land was converted to private land which is not the issue in this case. The applicant however contended that his certificate of title is absolute and indefeasible and cannot be challenged since it was obtained procedurally. It was his case that no complaint had been lodged against him and his title to the land has not been challenged by anyone.

6. He therefore sought orders of prohibition and certiorari orders to protect the sanctity of his certificate of lease and reaffirmed the court's jurisdiction.

1st Respondent's Case

7. The application was opposed by the 1st respondent, the Commission. According to the Commission, one **Sospeter K. Nguru**, the 2nd Respondent submitted a complaint to the Commission dated 2nd November 2015 alleging that **Sammy Karinga** and **Daniel Masua Ndonga** accompanied by a mob of around 30 men entered onto Block 17/119 Nakuru Municipality claiming ownership of his land. They forcefully ejected him and destroyed his house and property. He wrote a further letter dated 4th May 2016 giving further details of his complaint.

8. It was averred that section 14(1) the **National Land Commission Act** provides that the Commission, subject to Article 68(c)(v) of the Constitution, shall within five years of commencement of the Act, on its own motion or upon receipt of a complaint by the National or County Government, a community or an individual review all grants and dispositions of public land to establish their legality. Invoking this jurisdiction and thus acting on the above mentioned complaint, the Respondent commenced its own investigations into the status of the suit property known as Block 17/119 Nakuru Municipality.

9. According to the Respondent, the Commission on three diverse dates reached out and invited the Directors of South Knight Company Limited who sold the said property to the ex parte applicant and requested that they appear before the Commission to explain how they acquired the suit property. They however, on all occasions, failed to honour the Commission's invitations.

10. It was disclosed that On the 1st of July 2016 through a letter signed by the Vice Chairperson, the Commission informed the other relevant parties namely; **Daniel Masua Ndonga**, **Sammy Karinga** and **Salim GulamHussein Gilani** (care of Gilani's supermarket), that it had received a complaint from the one **Sospeter K. Nguru** with regards to ownership of Block 17/119 Nakuru Municipality. In the same letter, the Commission also informed all interested parties that it was looking into the complaint. Further, all parties were summoned to attend a hearing scheduled to happen on Friday, 8th July, 2016 at ACK Garden Annex at 10:00 a.m. to give their side of the story regarding how they acquired the property. To the Commission, all the parties were included in the above letter because they all at some point claimed ownership of the dispute land and if the original claim was acquired unlawfully, then all their claims could be tainted.

11. The applicant averred that the applicant is an interested party with regards to the proceedings before the Commission and this is illustrated by the fact that they purchased and are the current registered proprietors of the same. However, whilst still carrying out its investigations into the matter, the Commission received an Order from this Honourable Court dated 19th July 2016 which inter alia prohibited it from carrying out hearings or conducting investigations regarding the above mentioned property and accordingly halted its proceedings.

2nd Respondent's Case

12. According to the 2nd Respondent, upon application to the Commissioner of Lands he was issued plot number Nakuru Municipality Block 17/1119 vide letter of allotment, reference No. 30884/XLIX/135 as shown by the exhibited copy of the letter of allotment and application letters.

13. The 2nd Respondent averred that soon thereafter he erected a residential dwelling house on the plot where he has been living with his family upto 11th October, 2015 when the said house was completely demolished by hired thugs who also looted all his household properties leaving them destitute. When the 2nd Respondent reported the matter to the police and while at the police station a **Mr. Daniel Muchua Ndunga** surfaced and claimed to be the lawful owner by virtue of being a director of South Knight Limited produced a copy of the Title for the subject plot Nakuru Municipality Block 17/119 after which the police advised them to report the matter to National Land Commission offices in Nakuru to have the issue resolved.

14. It was averred by the 2nd Respondent that on or about 14th October, 2015 he visited the Land Commission offices at Nakuru and while there **Mr. Daniel Machua Ndunga** reported that he had purchased the suit parcel from one **Mr. Sammy Karinga Mubea** and produced a copy of the earlier title deed. Further **Mr. Daniel Machura Ndunga** called **Mr. Sammy Karinga Mubea** in the presence of the Land Commission officer Nakuru whereby he promised to come in person together with all requisite documents to explain how he acquired the plot and title but at the appointed time he never turned up. The 2nd Respondent affirmed that up to date **Mr. Sammy Karunga Mubea** has never availed the said documents and from Nakuru the matter was transferred to Nairobi head office of the Lands Commission.

15. The 2nd Respondent was later informed by the Land Commissioner that another person, one **Salim Galam Hussein Gilani** had sued the Land Commission claiming he had purchased the property though the 2nd Respondent asserted that he was the *bona fide* owner of this plot as he followed the proper procedures of acquiring land from the Government and ha not forfeited nor surrendered or transferred his property rights to the said parcel of land to anybody else.

16. The 2nd Respondent therefore was of the view that it is in the interest of justice and fair play that this

honourable court should ensure that his rights should be protected as regards to ownership of land and his private property, lest he is rendered homeless and destitute without any fault of his.

Determinations

17. I have considered the issues raised in this application.

18. According to Article 67(2)(e) of the Constitution one of the functions of the Commission is:

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

19. Article 67(3) also empowers the Commission to perform any other functions prescribed by national legislation. Article 68(c)(v) of the Constitution empowers Parliament to enact legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality. Section 3(b) of the ***National Land Commission Act*** provides that one of the objects of the Act is to provide for the operations, powers, responsibilities and additional functions of the Commission pursuant to Article 67(3) of the Constitution. No doubt therefore that the ***National Land Commission Act*** is the legislation contemplated under Article 67(3) of the Constitution.

20. Section 14 of the ***National Land Commission Act***, on the other hand provides that:

(1) Subject to Article 68(c)(v) of the Constitution, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.

(3) In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.

(4) After hearing the parties in accordance with subsection (3), the Commission shall make a determination.

(5) Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.

(6) Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.

(7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.

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

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

21. It is therefore clear that the Commission is empowered, on its own motion or upon a complaint by the national or a county government, a community or an individual to review all grants or dispositions of public land to establish their propriety or legality, of course subject to Article 68(c)(v) of the Constitution which restricts its powers of review of all grants or dispositions to public land.

22. In this case the applicants contend that the complaint before the Commission was not about the

disposition of land but about unlawful eviction of the 2nd Respondent. According to the Commission the 2nd Respondent submitted a complaint to the Commission dated 2nd November 2015 alleging that **Sammy Karinga and Daniel Masua Ndonga** accompanied by a mob of around 30 men entered onto Block 17/119 Nakuru Municipality claiming ownership of his land. They forcefully ejected him and destroyed his house and property.

23. It is therefore clear that the complaint which was lodged with the 1st Respondent by the 2nd Respondent was not about disposition of land but was about unlawful eviction of the 2nd Respondent from the suit property.

24. It is trite that a judicial or quasi-judicial tribunal, such as the Commission herein has no inherent powers. In **Choitram vs. Mystery Model Hair Salon [1972] EA 525, Madan, J** (as he then was) was of the view that powers must be expressly conferred; they cannot be a matter of implication. Similarly, in **Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734**, it was held that Rent Restriction Board is the creation of statute and neither the Board nor its chairman has any inherent powers but only those expressly conferred on them.

25. It was in appreciation of the foregoing position that the Court in **Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981** held that in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication since a Tribunal being a creature of statute has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration. See **Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Choitram vs. Mystery Model Hair Salon (supra); Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461.**

26. It is therefore clear that a Tribunal's power must be conferred by the Statute establishing it which statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly. As has been held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.

27. Therefore where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies. Whereas, if Parliament gives great powers to them, the courts must allow them to it, the Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence their actions; and they must not misdirect themselves in fact or law. Most importantly they must operate within the law and exercise only those powers which are donated to them by the law or the legal instrument creating them. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

28. Where a Tribunal has no jurisdiction, the law is that it must down its tools immediately upon realizing

that there is want of jurisdiction on its part. It cannot proceed with the matter in the hope that it may unearth certain facts which may clothe it with jurisdiction. See **Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Limited [1989] KLR 1** and **Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367.**

29. It is clear that the Commission is empowered, on its own motion or upon a complaint by the national or a county government, a community or an individual to review all grants or dispositions of public land to establish their propriety or legality, of course subject to Article 68(c)(v) of the Constitution which restricts its powers of review of all grants or dispositions to public land. In my view, land which for example was registered as a result of land adjudication system cannot be the subject of review by the Commission.

30. Article 62(1) of the Constitution defines public land as:

(a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;

(b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;

(c) land transferred to the State by way of sale, reversion or surrender;

(d) land in respect of which no individual or community ownership can be established by any legal process;

(e) land in respect of which no heir can be identified by any legal process;

(f) all minerals and mineral oils as defined by law;

(g) government forests other than forests to which Article 63 (2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;

(h) all roads and thoroughfares provided for by an Act of Parliament;

(i) all rivers, lakes and other water bodies as defined by an Act of Parliament;

(j) the territorial sea, the exclusive economic zone and the sea bed;

(k) the continental shelf;

(l) all land between the high and low water marks;

(m) any land not classified as private or community land under this Constitution; and

(n) any other land declared to be public land by an Act of Parliament—

(i) in force at the effective date; or

(ii) enacted after the effective date.

31. Private land on the other hand is defined by Article 64 as consisting of:

(a) registered land held by any person under any freehold tenure;

(b) land held by any person under leasehold tenure; and

(c) any other land declared private land under an Act of Parliament.

32. It is therefore clear that any land classified as private land cannot, unless an Act of Parliament defines it so, be public land. The only land which though falls under the general definition of private land but may be deemed as public land would be Government land according to an Act of Parliament which was unalienated at the effective date. In other words Government land which was at the effective date alienated and which is private land as defined under Article 64 of the Constitution cannot for the purposes of Article 62(1) be public land. According to Article 64, it is the holding or tenure as opposed to the process of alienation that defines what constitutes private land save for what would otherwise be private land but was Government land before the effective date.

33. As I have said above, the jurisdiction of the Commission is, as far as relevant to these proceedings, not defined by the process of acquisition of the land but the status of the land at the time of the investigation and at the effective date. Apart from the Constitution it has not been pointed out to me that there is another definition of public land that would bring private land as defined under the Constitution within the ambit of public land in order for the Commission to have jurisdiction to review its disposition in order to establish the propriety or legality thereof.

34. Whereas it is correct that under Article 40(6) of the Constitution, land which is found to have been unlawfully acquired is not protected under Article 40, it is my view that there must be a finding that the land was unlawfully acquired. In other words the due process must be adhered to in the process of making a determination whether or not the particular property was unlawfully acquired.

35. Section 14 of the **National Land Commission Act**, in my view contemplates three determinations. The Commission may find that the land was neither unlawfully nor irregularly acquired in which event no further action is necessary. It can also find that the title was acquired in an unlawful manner, in which event it would proceed to direct the Registrar to revoke the title. It may also find that the title was irregularly acquired, in which case it would take appropriate steps to correct the irregularity and may also make consequential orders. In other words where the title was irregularly acquired, the Commission may direct inter alia that the acquisition of the title be regularized.

36. It is however my view and I so find that though land which was unlawfully acquired does not confer a good title and is not protected under Article 40 of the Constitution, where the land in question has acquired the status of private land pursuant to Article 62 as read with Article 64 of the Constitution, it is only the Environment and Land Court that has the jurisdiction to investigate and determine the legality of such title.

37. In this case however the complaint was not in respect of disposition of land but wrongful eviction therefrom and the Commission clearly had no jurisdiction to investigate the same. Such a dispute could only be properly investigated by the Environment and Land Court established under Article 162(2) of the Constitution as read with the **Environment and Land Court Act**. To permit the Commission to investigate all disputes pertaining to land would amount to clothing the Commission with jurisdiction it does not have.

38. Having considered this application, it is my view that the Respondent Commission has no powers to proceed in the manner it intends to proceed. The scope of the judicial review remedy of Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR** in which the said Court held *inter alia* as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can

only prevent the making of a contemplated decision...*Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land.* It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...” [Emphasis added].

39. In the circumstances of this case, this Court is entitled to prohibit the Respondent from proceedings in excess of its jurisdiction.

Order

40. In the premises the Notice of Motion dated 3rd August, 2016 succeeds and I grant the following orders:

1) An order of prohibition directed at the National Lands Commission prohibiting them from conducting hearings, carrying out investigations and or issuing pronouncements or determinations regarding title and or interfering with the applicant’s quiet possession of LR No. Nakuru Municipality Block 17/119 based on the 2nd Respondent’s complaint in the manner in which the said complaint was lodged.

2) An order of certiorari removing into this Court for the purposes of being quashed the decision by National Lands Commission to investigate the complaint filed by the 2nd Respondent with the Commission with regards to the ex parte applicant’s title No. Nakuru Municipality Block 17/119 which decision is hereby quashed.

3) As the substratum of the claim remains unresolved, there will be no order as to costs.

41. It is so ordered.

Dated at Nairobi this 13th day of December, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Miriu for Mr Kariuki for the Applicant

Mr Sospeter K. Nguru the interested party

CA Mwangi