



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC CASE NO. 146 OF 2018

PINNACLE DEVELOPMENTS LTD.....PLAINTIFF

VERSUS

NATIONAL LAND COMMISSION.....1ST DEFENDANT

BEATRICE MBITHE MWANGANGI.....2ND DEFENDANT

CHIEF LAND REGISTRAR.....3RD DEFENDANT

JUDGMENT

INTRODUCTION

1. By a plaint dated 20th July 2018, the Plaintiff herein sought for the following orders;

(a) **Declaration that the Plaintiff is the legal owner of Land Reference 12715/195.**

(b) **Permanent injunction restraining the 1st and 3rd Defendants from alienating the title from the Plaintiff in favour of the 2nd Defendant or at all.**

(c) **Permanent injunction restraining the 2nd Defendant from taking up possession or committing any acts of trespass or disposing of the said title by herself or her agents.**

(d) **Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.**

(e) **Any other relief that this Honourable Court may deem to fit to grant.**

2. The Plaintiff averred that they were a limited liability company duly registered under the Companies Act; that in the years 1997 and 1998, they purchased property known as Nairobi Block Number 12715/195 from one Fredrick Malu and were thereafter issued with a title on 17th December 1998; that Mr. Fredrick Malu had purchased the suit property from Syokimau Farm Limited; that the Plaintiff had acquired vacant possession until 17th July 2017 when the Plaintiff's Managing Director saw an advertisement in Kenya Gazette where the 3rd Defendant was authorized by the 1st Defendant to revoke the title of the suit land in the name of the Plaintiff and transfer it to the 2nd Defendant; that the 2nd Defendant has never alleged fraud claims against the Plaintiff neither has she laid claim on the suit land since 1985 when she alleges that the suit land was allocated to her late husband.

3. On 22nd November 2018, the 1st Defendant filed a preliminary objection to the suit objecting to the jurisdiction of this court. On 6th February 2019 the 2nd Defendant filed a Defence and counterclaim.

4. On 3rd September 2021, the 2nd Defendant withdrew their defence and counter claim and stated that she shall not contest the suit therefore the suit proceeded against the 1st and 3rd Defendants.

5. On 5th November 2018, the 1st Defendant's preliminary objection was dismissed.

6. Therefore the suit proceeded as against the 1st and 3rd Defendants, who had not filed a defence to the suit.

PLAINTIFF'S EVIDENCE

7. At the hearing of the Plaintiff's case, PW1 Mungai Ngaruiya adopted his witness statement as evidence in chief and testified that he was the Plaintiff's Managing Director. That in 2017, he saw a Kenya Gazette Notice dated 17th July 2017 which showed that Title for Land Reference Number 12715/195 held by the Plaintiff was to be revoked. That this was occasioned due to the fact that the 2nd Defendant had made a claim of the suit property before the 1st Defendant, in the absence and without notice to the Plaintiff on allegations that the Plaintiff could not be traced. The Plaintiff's witness further testified that he filed a Judicial Review Application Number 532 of 2017 where the court held that his company's claim ought to be filed in the Environment and Land Court, which culminated in the filing of this suit.

8. It was PW1's testimony that the 1st Defendant raised a preliminary objection on jurisdiction of this court, which was dismissed by this court. He stated that the 1st Defendant never filed a defence while the 2nd Defendant withdrew her defence and counterclaim. He further testified that the Plaintiff acquired the suit land by purchasing from one Fredrick Malu for valuable consideration and has faithfully been paying rates and rents since then. He sought for prayers sought in the plaint. The Plaintiff produced the Title for LR 12715/195 as P-Exb-1, Gazette Notice dated 17th July 2017 as P-Exb-2, Copy of Hansard Report by National Land Commission as P-Exb-3, copy of certificate of incorporation Number 50215 for Pinnacle Development as P-exb-4, copy of transfer from Fredrick Mbeti Malu to Pinnacle Development Ltd as P-Exb-5, rent clearance certificate Number 073901 P-Exb-6, consent to transfer certificate number 106554 P-Exb-7, letter dated 17th August 2013 from Malonza & Co. Advocates as P-Exb-8, copy of certificate of incorporation for Syokimau Farm Ltd P-Exb-9, Kenya Gazette Notice dated 8th August 2013 as P-Exb-10, Kenya Gazette Notice dated 23rd November 1990 P-Exb-11, rates clearance dated 10th September 1998 as P-Exb-12, copy of cheque number 000404 dated 2nd December 1998 of Kshs. 146,000/- as P-Exb-13, letter to the firm of Mungai & Gakuru Advocates dated 2nd December 1998 as P-Exb-14, letter from the firm of Mungai & Gakuru dated 9th December 1998 as P-Exb-15, cheque number 000020 dated 5th November 1998 of Kshs. 100,000/- as P-Exb-16 and Divorce invoices and receipts for land rent and rates as P-Exb-17.

PLAINTIFF'S SUBMISSIONS

9. The Plaintiff submitted that the Hansard showed that at the 1st Defendant's hearing, the Plaintiff was absent. Counsel submitted that the Hansard at page 80 showed that the person who appeared on behalf of the Plaintiff was one Douglas Okeyo Oluoch who stated that the company did not own land in Syokimau and stated that the company had been registered the previous year (that is 2016). Counsel pointed out that the then Commissioner one Abigael Mukolwe noted that there is a difference between Pinnacle Developments Ltd and Pinnacle Developers Ltd and she noted that the person who appeared before the 1st Defendant represented Pinnacle Developers Ltd and not Pinnacle Developments Ltd. Counsel stated that the Hansard showed that the Plaintiff did not exist and that they could not be found to defend themselves, which reasons were used to have the Plaintiff's title revoked.

10. Counsel argued that it is strange how the 1st Defendant concluded that the Plaintiff is not in existence yet CR12 showed the Plaintiff's directors and the Plaintiff was able to produce a certificate of registration and change of name from Belle Maison Ltd to Pinnacle Developments Ltd in 1993. Counsel clarified that CR12 showed that the directors of the Plaintiff were Mungai Ngaruiya, Elizabeth Ngaruiya, Wilfred Nganga Ngaruiya and did not include Douglas Okeyo Oluoch. Counsel therefore argued that contrary to the findings by the 1st Defendant, the Plaintiff had been in existence for 29 years.

11. Further, counsel submitted that it was not in dispute that the suit property was registered in the Plaintiff's name and the same was lawfully acquired through purchase. Counsel argued that the Plaintiff being the registered proprietor had a superior right as a registered interest ranks higher than the transient rights in the letters of allotment.

12. It was contended for the Plaintiff that the 2nd Defendant withdrew her defence and counterclaim. Further counsel relying on Section 14 (7) of the National Land Commission Act, argued that there ought not be revocation of title of a bona fide purchaser for value without notice of a defect in title. Counsel asserted that the decision by the 1st Defendant was based on the fact that the Plaintiff could not be traced. Counsel relied on the case of **Republic vs National Land Commission Ex parte Holburn Properties Ltd [2016] eKLR** for the proposition that the 1st Defendant's jurisdiction ends at the point of allocation hence once land is registered, the 1st Defendant has no jurisdiction to revoke such title.

13. Counsel contended that the Defendants did not demonstrate that the original allottee and the plaintiff obtained the suit land illegally, and urged the court to find in favour of the Plaintiff and grant the orders sought.

ANALYSIS AND DETERMINATION

14. I have considered the pleadings, the evidence and the submissions on record. In my considered view, the issue that arise for determination is whether the 1st Defendant's direction to the 3rd Defendant to revoke title number LR No. 12715/195 so as to vest the same in the 2nd Defendant was lawful.

15. The law that guide review of grants and dispositions to public land for purposes of ascertaining their propriety and legality is provided for in Article 68(c) (v) of the Constitution as well as Section 14 of the National Land Commission Act.

Article 68(c) (v) of the Constitution provides as follows;

“Parliament shall enact legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality.”

16. Section 14 of the National Land Commission Act No. 5 of 2012 provides as follows;

- 1. “Subject to Article 68 (c) (v) of the Constitution, the Commission shall, within five years of commencement of this Act, on its own motion or upon a complaint by the national or county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.**
- 2. Subject to Articles 40, 47 and 60 of the Constitution, the Commission shall make rules for the better carrying out of its functions under Subsection (1).**
- 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 commissioner 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 bonafide 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).**

17. It is therefore clear from Section 14 of the National Land Commission Act that the commission had powers within 5 years of the commencement of the Act, to review grants or dispositions of public land to ascertain their propriety or legality, and while exercising those powers it must act in a manner that respects the protection of the right to property under Article 40, the right to the fair administrative action under Article 47 and to be guided by the principles of land policy under Article 60 of the Constitution.

18. Section 14 of the National Land Commission emphasizes the notion of fairness as responsibility placed on the commission by underscoring the importance of Article 47 of the Constitution as repetitively mentioned in subsections 2 and 8 of Section 14.

19. In the instant suit, the Plaintiff has contended that they were not informed of the hearing and therefore their right to be heard was curtailed. They stated that the person who was given audience was one Douglas Okeyo Oluoch, who was not one of the directors of the Plaintiff as demonstrated by the CR12 produced by the Plaintiff as an exhibit in this matter. By failing to confirm the identity of the Plaintiff and giving audience to a representative of Pinnacle Developers Ltd instead of a representative of Pinnacle Developments Limited as demonstrated in the Hansard report, the commission failed to act diligently to ensure that the Plaintiff was accorded a fair administrative action.

20. Article 47 of the Constitution of Kenya provides as follows;

- 1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**
- 2. If a right or a fundamental freedom of a person has been or is likely to be adversely affected, by administrative action, the person has the right to be given written reasons for the action.**
- 3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall.....**
 - (a) Provide for the review of administrative action by a court or if appropriate, an independent and impartial tribunal, and**
 - (b) Promote efficient administration.**

21. It is therefore clear that the commission being a quasi-judicial body, must exercise its power of review of grants by ensuring that both the procedure and the decision against any person who has an interest in the land in issue are fair.

22. In the case of *Judicial Service Commission vs Mbalu Mutava & Another [2015] eKLR*, the Court of Appeal held as follows;

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a

constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the bill of rights. The right to fair administrative action is a reflection of some of the national values in Article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires form which administrative law under the common law was developed.”

23. The right to be heard is a cornerstone of the rule of law. This principle of natural justice is intertwined with the right to a fair administrative justice. In the case of *Pashito Holdings Ltd & Another vs Paul Nderitu Ndungu & Others*, the Court of Appeal stated as follows;

“An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of natural justice. The decision must be declared to be no decision.....the rules of natural justice are minimum standards of fair decision-making imposed by the common law on persons or bodies who are under duty to ‘act judicially’.”

24. In the instant case, the Plaintiff was not given opportunity to be heard before the decision by the 1st Defendant to direct the 3rd Defendant to revoke his title was arrived at. As the Commission was aware that its decision would affect the Constitutional rights of the Plaintiff, it was bound by the Constitution and statutes to ensure that the Plaintiff was availed a right to be heard and that both the procedure and the decision were fair. The 1st Defendant having failed to accord the Plaintiff the right to be heard and a fair administrative action, its decision is a nullity and of no legal effect. I therefore find and hold that the 1st Defendant’s direction of the 3rd Defendant to revoke title 12715/195 and vest the same in the 2nd Defendant was unlawful and of no legal effect.

25. Consequently, it is my finding that the Plaintiff has proved their case on a balance of probability. The Plaintiff’s claim is allowed, and I make the following orders;

(a) A declaration be and is hereby made that the Plaintiff is the legal owner of Land Reference 12715/195.

(b) A permanent injunction be and is hereby issued restraining the 1st and 3rd Defendants from alienating the title from the Plaintiff in favour of the 2nd Defendant or at all.

(c) A permanent injunction be and is hereby granted restraining the 2nd Defendant from taking up possession or committing any acts of trespass or disposing of the said title by herself or her agents.

(d) Costs shall be borne by the Defendants.

26. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 23RD DAY OF FEBRUARY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Ms Bakari holding brief for Ms Ngaruiya for the Plaintiff

No appearance for the Defendants

Ms Josephine Misigo – Court Assistant