



Idow Trading Company Limited v National Land Commission & 2 others; County Government of Nairobi & another (Interested Parties) (Environment & Land Petition E035 of 2021) [2022] KEELC 2326 (KLR) (21 June 2022) (Judgment)

Neutral citation: [2022] KEELC 2326 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E035 OF 2021**

**JA MOGENI, J
JUNE 21, 2022**

BETWEEN

IDOW TRADING COMPANY LIMITED PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

COUNTY GOVERNMENT OF NAIROBI INTERESTED PARTY

OSMAN ALI MOHAMED INTERESTED PARTY

JUDGMENT

1. The Petitioner, Idow Trading Company Limited is a limited liability company incorporated in Kenya and proprietor of leasehold interest on the property known as LR No. 36/1/1034 situated at Eastleigh within Nairobi (“the suit property”) filed the Petition dated September 27, 2021 challenging the decision to revoke and nullify its title in respect to the suit property by the 1st Respondent, the National Land Commission (NLC).
2. The Petitioner contended that he had been deprived of the exclusive and absolute entitlement over the suit property and his fundamental rights to ownership and protection of property under *the Constitution* of Kenya and in particular Articles 47 and 50(1) of *the Constitution* of Kenya, 2010 had been violated. The petitioner prayed for the following orders in the petition: -



- a) A declaration that the decision of the 1st respondent delivered on April 28, 2017 and published in the Kenya Gazette Notice published on the July 17, 2017, touching on and/or pertaining to LR No. 36/1/1034, was irregular, illegal, unlawful and void.
- b) A Declaration that the Petitioner's right to fair administrative action under Article 47 of the Constitution has been violated.
- c) A Declaration that the Petitioner's right to a fair hearing under Article 50 (1) of the Constitution has been violated
- d) The Honorable Court be pleased to quash the decision of the 1st Respondent revoking and nullifying the title in respect to the property known as LR No 36/1/1034 situated at Eastleigh within Nairobi County
- e) Costs of the Petition

Brief Background to the Petition;

3. The Petitioner was allocated the suit property by the then Nairobi City Council and a Certificate of Lease issued. The 2nd Interested Party was in possession of the suit property pursuant to a Temporary Occupation Licence issued by the 1st Interested Party at the time the property was being allocated to the petitioner. The Petitioner was not able to occupy the suit property because the 2nd Interested Party declined to give the Petitioner vacant possession leading to the Petitioner filing ELC Case No 63 of 2008.
4. When the matter came up for hearing the Petitioner learnt that through the advocated of the 2nd Interested Party that there was a pending suit ELC No E037 of 2020 in which the 2nd Interested Party was challenging a notice to vacate that had been issued to him pursuant to a decision of the 1st Respondent.
5. The Petitioner came to learn that the 1st Respondent had revoked his title when ELC Case No 63 of 2008 was scheduled for hearing on 16/06/2021 where the advocate for the 2nd Interested Party was challenging the decision of the 1st Respondent in ELC E037 of 2020 for him to vacate the property. The Petitioner avers that he was not served notice by the 1st Respondent and therefore did not get an opportunity to participate in the proceedings that led to the decision to revoke the title to its property thus being denied a right to a fair hearing contrary to Section 47 of the Constitution.
6. On July 17, 2017 the 1st Respondent published a public notice in the Kenya Gazette in which it revoked the decision of April 28, 2017 thus revoking the title of the suit property, vesting it to the National and County Governments.
7. It is the Petitioner's contention that the actions of the 1st Respondent were ultra vires its mandate and constituted a violation and infringement of the Petitioner's constitutional and fundamental rights as relates to the protection of its property rights. The Petitioner submitted it was a bona fide owner of the suit property and in support of his assertion the Petitioner states that it filed ELC Case No 63 of 2008: Idow Trading Company Ltd v Mohammed Jimale & 2 Others but in 2021 he learnt of another suit ELC Case No E037 of 2020 where he got to know about the 1st Respondent's decision.
8. The Petitioner pleads that the action by the 1st Respondent of excluding the Petitioner from the participating in the proceedings denied him the opportunity to present his evidence in breach of provisions of Article 47 and 50 of the Constitution. As a result, the entire process leading to the



revocation and nullification of the property was flawed and was an abuse of the fundamental rights of the Petitioner.

9. The Petitioner contends that the 1st Respondent's action to revoke and/or nullify his title was a violation of his constitutional rights to protection of his property and that the action was ultra vires the mandate of the National Land Commission and violated Article 47 and 50 of *the Constitution* and the provisions of the *Fair Administrative Action Act*, 2015. The Petitioner sought to be granted the prayers set out in the Petition.

The Petitioner's Case;

PARA 10.

The Petitioner's case is set out in the petition, the supporting affidavit and supplementary affidavit and the annexures thereof, the submission and supplementary submissions filed in court. Broadly, the Petitioner asserts that he was allocated the suit property by the then Nairobi City Council and a Certificate of Lease. The Petitioner contends that at the time the property was allocated to him the 2nd Interested Party was in possession pursuant to a Temporary Occupation Licence which was issued by the 1st Interested Party. This led to the Petitioner filing ELC Case No. 63 of 2008 but when it was scheduled for hearing the Advocate notified the Court there was ELC No E037 of 2020 in which the 2nd Interested Party was challenging a notice to vacate that had been issued pursuant to the decision of the 1st Respondent and therefore the 2nd Interested Party was to have the two cases consolidated.

11. The decision of the 1st Respondent was shared with the Petitioner's Advocate and it came to the Petitioner's attention that the 1st Respondent never served the Petitioner with a hearing notice of the proceeding that were conducted, secondly the 1st Respondent proceeded with the hearing despite being notified of the existence of ELC No 63 of 2008, thirdly the 1st Respondent proceeded with the hearing despite the absence of the Petitioner and lastly the 1st Respondent revoked the Petitioner's title notwithstanding that it had no powers to revoke titles.
12. That the action of excluding the Petitioner from participating in the proceedings by the 1st Respondent denied the Petitioner the opportunity to present its evidence and to challenge any evidence that was presented before the 1st Respondent thus denying the Petitioner a fair hearing.
13. The Petition is opposed and the 2nd and 3rd Respondents who filed grounds of opposition dated 4/01/2021

1st Respondent's Case

14. The 1st respondent did not respond to the petition. Similarly, the 1st respondent did not file written submissions. Affidavits of service filed in the proceedings indicate that the 1st respondent was routinely served with appropriate notices. It is not known why it elected not to file a response to the serious allegations levelled against it in this petition.

2nd and 3rd Respondent's Case

15. The 2nd and 3rd Respondents filed grounds of opposition dated 4/10/2021 through Principal State Counsel Chilaka Lumiti. Counsel indicated in the grounds of opposition that the National Land Commission had powers to review the propriety or legality of land on its own motion or if approached by the community, an individual or by county or national government as per the provisions of Article 68(c) (v) of *the Constitution* and Section 14 of National Land Commission.



16. That the National Land Commission heard the complaint and made a determination directing the 2nd Respondent to implement its decision by revoking the title.
17. That the NLC acted within the law when it mandated the 2nd Respondent to revoke the title. That NLC had been given this mandate from 12/05/2012 to May 12, 2017 and the revocation of the petitioner's land was done on April 28, 2017 within the mandated time before the expiry of five years.
18. That all parties were notified about the complaint and they attended the hearing. Therefore, the Respondents urged the Court to dismiss the Petition with costs.
19. The Counsel submitted that the Petitioner seeks to curtail the mandate of the Respondents by directing it not to do what its mandate entails.
20. The Court directed the parties to file written submissions and in compliance thereof the Petitioners through the Law Firm of Henia Anzala & Associates filed their written submissions dated 4/05/2022. The 1st Respondent did not participate in the proceedings as this Court has not seen any pleadings in the file by the 1st Respondent nor their submissions. The 2nd and 3rd Respondents also did not file submissions. The court has only seen the grounds of opposition.

The Interested Parties' case

21. The 1st Interested Party filed a Replying Affidavit dated 31/03/2022 sworn by Counsel Abwao Eric Odhiambo filed on behalf of the 1st Interested Party County Government of Nairobi and submissions dated 9/05/2022. The 2nd Interested Party filed a Replying Affidavit dated 9/05/2022 and submissions dated 9/05/2022.
22. The 1st Interested Party's case is that they are a stranger to the instant suit and that the decision to revoke its title was gazette on July 17, 2017 and the Petitioners refused and or failed to utilize the 14 days provided to appeal the decision contrary to Regulation 30 of the National Land Commission. (Reviews of Grants and Dispositions of Public Land) Regulations. It was the 1st Interested Party's contention that on matters of review of grants and disposition of land, this court enjoyed appellate jurisdiction on matters of law only.
23. The 1st Interested Party contended that since there are two cases in court ELC Case No 63 of 2008 and ELC E037 of 2020 and therefore the current suit violates the doctrine of Constitutional avoidance since the Petitioner is before the court with competent jurisdiction who can grant the orders sought. The 1st Respondent relied on the following cases *Communication Commission of Kenya and 5 others v Royal Medical Services and 5 others* [2014] eKLR, *COD & another v Nairobi City Water & Sewerage Company* Petition 419 of 2015 [2015] eKLR, [*Geofry Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others*](#) [2015] eKLR. The 1st Interested Party termed the Petition as an abuse of the court process by the Petitioner who clothed it in the Bill of Rights Language and sought orders without exhausting the mechanisms provided for under the statute in violation of the principle of Constitutional exhaustion.
24. The 2nd Interested Party submitted that they have been in occupation of the suit property since 1997 having been granted a temporary occupation license from the City Council of Nairobi. He contends that on 14/09/2020 the 2nd Interested Party was served with a 21-day notice to vacate the suit property and on the same day he was served with the notice of revocation of title of LR No 36/1/1034 by the 1st Respondent.
25. The 2nd Interested Party relied on the following cases in his submissions *Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another* [2018]



eKLR; *Samwel Mayenda Openda v National Land Commission & another v National Land Commission & another* [2019] eKLR.

26. The 2nd Interested Party in his Replying Affidavit and Submissions, supported the Petitioner and urged the court to grant prayers a and d of the petitioner since the 1st Respondent violated the rules of natural justice and Article 50 of *the Constitution* by denying the right to be heard.

Analysis and Determination

27. The Court has carefully read and considered the Petition, the affidavit evidence presented in support of the petition; the grounds of opposition filed in the proceedings; and the written submissions presented by the parties. I have also considered the relevant constitutional and statutory frameworks. Similarly, I have considered the relevant jurisprudence on the key issues in the petition. Parties did not present a common statement of issues for determination by the court. Secondly, the National Land Commission, the party whose decision is the cause of action in this petition, neither filed a response to the petition nor submitted on it. Against the above background, the following, in my view, I find that there are four issues for determination are as follows: -

- 1) Whether the 1st Respondent had Jurisdiction to deal with the property
- 2) Whether the Petitioner was accorded fair Administrative action.
- 3) Whether the 1st Respondent's decision to revoke the Petitioner's title contravened the rules of natural Justice and the Petitioner's right to be heard as well as his legitimate Expectation
4. Whether the petitioner demonstrated a case of violation of his rights by the 1st respondent to warrant the quashing of the impugned Gazette Notice in so far as it relates to the suit property.

Whether the 1st Respondent had jurisdiction to deal with the suit property

28. The provisions of Section 14(1) of the *National Land Commission Act* that grants the 1st Respondent powers to review all grants or disposition of public land to establish their propriety or legality. Further Section 14 of the *National Land Commission Act* gives the 1st Respondent powers to deal with review of public land, but not privately owned titles. It is not in doubt that the suit land is a leasehold which this Court finds and holds is within the purview of the mandate of the National Land Commission to deal as the same was public land before it was allotted. See the case of *Republic v National Land Commission & another Ex parte Muktar Saman Olow* [2015] eKLR where the Court held that;

“Under Section 14 of the *National Land Commission Act*, 2012 the Respondent is given jurisdiction to enforce Article 68(c)(v) of *the Constitution* and review all grants or dispositions of public land to establish their propriety or legality. In my view, the Respondent can only fulfil this mandate by probing the process under which public land was converted to private land. It would defeat the purpose of *the Constitution* to imagine that unlawfully and irregularly acquired land once registered as private property is no longer within the reach of the Respondent.”

29. It is not in doubt that the suit property initially belonged to the government and the process through which the National Land Commission investigates how the same was converted to public land is well within its purview and mandate. It is important to stress that while land may be private land, the process through which it was converted to private land falls within the purview of the National Land



Commission, and the only time the National Land Commission cannot have jurisdiction over the same is where a private person sold the property to a private person.

30. The Court therefore finds and holds that the 1st Respondent had jurisdiction to deal with the matter. See also the Supreme Court of Kenya decision 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.
31. There should be however 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*. In the instant case there was neither a trigger from the County nor the National Government. The complainants were a community organization. In all situations however, 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.

Whether the Petitioner was accorded fair administrative action.

32. It is the Petitioner's contention that it was never invited to the hearing where the decision by the 1st Respondent to revoke his title was made. It contends that it only received a copy of the decision once the 2nd Interested Party filed an application to consolidate ELC No 63 OF 2018 with ELC No E037 of 2020. The 2nd and 3rd Respondents in their Grounds of Opposition contend that all parties who had an interest in the suit property were notified of the complaint and were given an opportunity to make their submissions. I have had the opportunity to peruse the proceedings dated 28/04/2017 and noted that the Petitioner was not at the meeting and this was brought to the attention of the NLC by Ms. Atusimire Hudah representing the 2nd Interested Party.
33. There is no indication that the Commission took any steps to remedy this situation and therefore the Petitioner who is the registered owner of the suit property as per the documents produced in court was not invited to the said meeting and was not given an opportunity to participate in the proceedings leading to the decision to revoke its title to its property denying it the right to fair hearing contrary to Article 47 of *the Constitution*. This violates the rules of natural justice - Audi Alteram partem, this means that the decision of the 1st Respondent of April 28, 2017 by the 1st Respondent to revoke the Petitioner's title and vest it in the County Government of Nairobi, 1st Interested Party herein, should only have been done after the 1st Respondent had accorded the Petitioner an occasion to be heard before any such decision is made. Therefore, the Court finds and holds that the Petitioners were condemned unheard which is against the cardinal rule of natural justice. See *Halbury Law of England, 5th Edition 2010 Vol.61* at para 639, which states: -

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alterman partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court.”



34. Fair administrative action is described in Article 47 of *the Constitution* as follows:

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

Article 47 of *the Constitution* requires just fair administrative action should be lawful reasonable and procedurally fair. This Court finds that it is clear that the Petitioner were never given an opportunity to ventilate their issues and therefore their rights to fair Administrative Action were breached thereby making the actions by the 1st Respondent unconstitutional as the Petitioner was not issued with a Notice before its title was revoked.

Whether the 1st Respondent’s decision to revoke the Petitioner’s title contravened the rules of natural Justice and the Petitioners right to be heard.

35. The cause of action disclosed from the pleadings and evidence presented in this petition is the 1st respondent’s decision dated 28/04/2017 was published in the Kenya Gazette dated July 17, 2017. The tenor and import of the decision was that it determined and directed a revocation of the petitioner’s title relating to land parcel number LR No 36/1/1034 situated at Eastleigh within Nairobi County. The key gravamen of the petitioner is that the said decision was reached against it without the 1st Respondent inviting to the hearing where the complaint was raised and without being accorded a chance to be heard, among other allegations.
36. Despite being served with suit papers and notices, the National Land Commission elected not to respond to the allegations made against it in the petition. Consequently, the allegations of procedural impropriety made against the 1st Respondent remain uncontroverted. Similarly, the evidence of procedural impropriety presented against the 1st Respondent remain uncontroverted. In the absence of any response or controverting evidence by the 1st Respondent on how it carried out the grant review hearing leading to the impugned decision, the court will accept the evidence presented by the petitioner, to the effect that the petitioner was not accorded an opportunity to interrogate and challenge the allegations made against its title.
37. The right to be heard before a decision affecting one’s constitutional right is underpinned by various Articles of *the Constitution*, among them Articles 47 and 50. Similarly, the Fair Administrative Actions Act contains an elaborate framework that is mandatory whenever a decision affecting one’s constitutional rights is contemplated.
38. I have perused the documents placed before this Court, and it is apparent that 1st Respondent never served the Petitioner with a hearing notice as is required under Article 50 of *the Constitution* and section 14 (3) of the Act
39. Section 14(3) of the Act provides: “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.”
40. Due to this failure to serve the Petitioner with a hearing notice the Petitioner pleads that the 1st Respondent infringed on its right for fair hearing. Part of the documents that the Petitioner has presented before the court is the report of the proceedings conducted by the 1st Respondent documenting it’s the decision reached on various parcels of land including the Petitioner’s suit property and subsequent revocation of the Petitioner’s title. At this juncture I am inclined to give meaning to the term adequate notice in the context of the principles of natural justice. In *R v Ontario Racing*



Commissioners [1969] 8 DLR (3d) 624 at 628 (Ont HC) Mr. Justice Haines emphasized that a notice that complies with the principles of natural justice means: -

“a written notice setting out the date and subject-matter of the hearing, grounds of the complaint, the basic facts in issue and the potential seriousness of the possible result of such hearing.”

41. Taking a cue from the above decision, I find that the mode of service of notice adopted by the 1st Respondent through a gazette notice does not meet the threshold of the principles of natural justice and Articles 47 and 50 of *the Constitution*, hence cannot be said to be adequate/ sufficient notice.

42. The Court in the case of *Sceneries Limited v National Land Commission* [2017] eKLR, the Court held that;

“the right to a fair hearing under Article 50(1) of *the Constitution* encompasses several aspects. these includes, the individual being informed of the case against her/him, the individual being given an opportunity to present/her/his side of the story or challenge the case against her/him and the individual having the benefit of a public hearing before a court or other independent and impartial body.”

43. In the instant suit this Court finds that on April 28, 2017, when the hearing was conducted, the Petitioner was not present and drastic orders were issued against it. The Petitioner was thus not accorded a fair hearing as provided by Article 50 of *the Constitution*. By failing to afford the Petitioner a fair hearing as provided by *the Constitution*, the Court finds that the same was in contravention of the rules of Natural Justice and therefore the decision to revoke the Petitioner’s title over the property contravened the rules of Natural Justice.

Whether the Petitioner demonstrated a case of violation of his rights by the 1st respondent to warrant the quashing of the impugned Gazette Notice in so far as it relates to the suit property

44. The 1st Interested Party in its Replying Affidavit has referred to the doctrine of constitutional exhaustion also referred to as doctrine of constitutional avoidance, which deals with instances where a Constitutional Court will decline to deal with a matter because there exists another remedy provided in law which the aggrieved party is yet to utilize. It notable that the 1st Respondent never even served the petitioner with the revocation and or cancellation of title order. The Petitioner only got to learn about it in a separate court matter.

45. The Petitioner has sought for various declarations and orders in their Petition. The Court has already held above that the 1st Respondent acted illegally and against the rules of Natural Justice in failing to give the Petitioner an opportunity to be heard before revoking the Title Deed. Therefore, it follows that its actions are unconstitutional and cannot be left to stand. See the case of *Msagha v Chief Justice & 7 others Nairobi HCMCA No 1062 of 2004* (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006] 2 KLR 553 where the Court held that:

“The Court observes firstly that the rules of natural justice “audi alteram partem” hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonisation of the globe during the hey-days we of the British Empire. 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 justice. The decision must be declared to be no decision...It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.

46. Therefore, the orders sought by the Petitioner seeking to quash the decision by the 1st Respondent are merited. Further it is clear that the Petitioner was granted the Lease by the City Council of Nairobi. From the Lease document produced in evidence, there is no indication that the suit property ever reverted to the government as the Lease provided for instances in which the property would revert to the Government. No evidence has been produced to prove that any of the conditions thereof has been breached. Further, from the subdivision scheme produced by the Petitioner, it clear that the lease to the suit property was issued to Idow Trading Company Limited with a caveat that it uses the same for Commercial purposes. As the Lease was issued by the Government, the Court finds that a legitimate expectation arose on the part of the Petitioner that it had a valid title deed and there is no evidence to suggest otherwise. It is clear that the land was never public land as it was leased to Idow Trading Company Limited. The Petitioner is therefore the registered owner of the suit property and is entitled to all the rights and privileges over the suit property.

Having now carefully read and considered the instant Petition, the Affidavits in Support, the Grounds of Opposition and the written submissions by the parties and the annexures thereto, the Court finds and holds that the Petition herein dated 27/09/2021 is merited and the same is allowed entirely in terms of prayers no. a, b, c, d and e with costs to the Petitioner.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI, THIS 21ST DAY OF JUNE 2022

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MOGENI

JUDGE

In the Presence of:

.....Petitioner

.....1st Respondent

.....2nd Respondent

.....3rd Respondent

.....1st Interested Party

.....2nd Interested Party

