



**Wandemi Developers Limited v National Land Commission & another;  
Varsityville Residents Association (Interested Party) (Environment & Land  
Petition 29 of 2020) [2022] KEELC 3920 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3920 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION 29 OF 2020**

**OA ANGOTE, J**

**JULY 28, 2022**

**IN THE MATTER OF ARTICLES 22, 23, 40, AND 50 OF THE CONSTITUTION OF  
KENYA AND IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT,  
2012 AND IN THE MATTER OF CONTRAVENTION OF THE FUNDAMENTAL  
RIGHT TO PROPERTY UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA  
AND FUNDAMENTAL RIGHT TO FAIR TRIAL AND OR ADMINISTRATIVE  
ACTION UNDER ARTICLES 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**WANDEMI DEVELOPERS LIMITED ..... PETITIONER**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**VARSITYVILLE RESIDENTS ASSOCIATION ..... INTERESTED PARTY**

**JUDGMENT**

**Background**

1. In the petition dated September 5, 2017, the petitioner herein seeks the following prayers;
  - a. A declaration that the proceedings undertaken by the 1<sup>st</sup> respondent and the decision arrived at and notified vide legal notice No 6865 table 13 item 18 amounts to contravention of the petitioners' fundamental constitutional rights under article 40, 47 and 50 of the [Constitution](#) of the Republic of Kenya, 2010.



- b. A judicial review order of *certiorari* to remove to the high court and quash the decision of the 1<sup>st</sup> respondent contained in legal notice 6865 table 13 item 18.
  - c. A judicial review order of prohibition to prohibit the 2<sup>nd</sup> respondent from revoking the petitioners' title on LR number Ruiru/Ruiru East Block 7/46 or *mandamus* to restore the petitioners' title if the decision of this court after revocation is effected.
  - d. An injunction to restrain the interested parties from entering, encroaching or trespassing or in any other way interfering with the petitioners' quiet possession of the aforementioned suit land.
  - e. Any order as will meet the interests of justice.
  - f. The petitioner be awarded costs herein.
2. It is the petitioner's case as set out in the petition and affidavits that it bought the parcel of land known as Ruiru/Ruiru East Block 7/46 (hereinafter the suit property) for valuable consideration and has been in possession thereof since 2007; that sometime in 2013, activists purporting to act for the interested party attempted to forcibly occupy the suit property and that on being thwarted by the petitioner, the 1<sup>st</sup> interested party filed Nairobi ELC Case No 510 of 2015-Major John Njoroge Wanjagi v Ruiru Academy & 4 others, which suit is pending at the Environment and Land Court at Nairobi.
  3. The petitioner averred in the petition that *vide* an advert in the Daily Newspaper, the 1<sup>st</sup> respondent listed the suit property as one of the parcels with a complaint; that the advertisement provided that the complaint would be heard on November 28, 2016 in Thika town and that through its letter of November 24, 2016, the petitioner informed the 1<sup>st</sup> respondent that the dispute with respect to the property was already pending in court.
  4. According to the petitioner, on January 30, 2017, the 1<sup>st</sup> respondent's panel resolved to have the court dispute resolved first before it could be invited to deal with the complaint and that no further communication or reference was made to the petitioner.
  5. It is the petitioner's case that the above notwithstanding, it was notified *vide* gazette notice 6865 table 13 dated July 17, 2017 that the 1<sup>st</sup> respondent had directed the 2<sup>nd</sup> respondent to revoke its title to the suit property; that the decision aforesaid is in blatant violation of the petitioner's constitutional rights under articles 40, 47, and 50 of the [Constitution](#) in that the petitioner is entitled to own property and the same should not be taken away from it without following due process of law and that the petitioner is entitled to fair hearing in respect to a dispute concerning its property.
  6. It was averred that the decision by the 1<sup>st</sup> respondent was made in the absence of a hearing and/or without affording the petitioner an opportunity to be heard; that the interested party herein who appears to have been the complainant before the 1<sup>st</sup> respondent has taken advantage of the situation and is threatening to enter into the suit property and evict the petitioner's agents and that unless the court intervenes, the petitioner is likely to lose its property.
  7. The 1<sup>st</sup> and 2<sup>nd</sup> respondents did not respond to the petition.
  8. The interested party opposed the petition by way of a reply and cross-petition. The interested party's cross-petition is seeking for the following orders;
    - a. A declaration that the said land Ruiru/Ruiru/East Block/7/46 is community land reserved for a public school.



- b. A declaration that the transfer of Ruiru/Ruiru/East Block/7/46 to the 3<sup>rd</sup> respondent is null and void.
  - c. An order that the registration of the parcel and the piece of land known as Ruiru/Ruiru/East Block/7/46 in the name of the 3<sup>rd</sup> respondent be cancelled forthwith.
  - d. An order that the parcel or piece of land known Ruiru/Ruiru/East Block/7/46 be registered in the names of trustees if any of Varsity Ville Residents Association for the benefit and use of the residents of Varsity Ville and its neighbors as a primary school.
  - e. An order of permanent injunction restraining the respondents, their servants, agents from entering, remaining, using or alienating the said land or any part thereof or committing any acts of waste or damage on the said land and from obstructing or preventing the cross-petitioner or any other any other residents of Varsity Ville or their servants or agents from entering remaining, using or enjoying the said land for its reserved purpose, namely primary school.
  - f. A permanent injunction restraining the 2<sup>nd</sup> respondent, its servant and or agents at the Ruiru and Thika lands registry to stop all transactions and to cancel all transactions and dealings on the nursery land after the Kenya gazette No Vol CXIX No 97 dated July 17, 2017 which revoked titles issued against the said land.
  - g. An order compelling the 2<sup>nd</sup> respondent to place a caveat on all the parcels of land listed hereinabove and in the gazette No Vol CXIX- No 97 dated July 17, 2017 to prevent any further illegal and irregular dealings on the said parcels of land.
  - h. An order compelling the 1<sup>st</sup> and 2<sup>nd</sup> respondents to notify the public of the nature of all the parcels of land listed hereinabove and in the Kenya gazette No Vol CXIX-No 97 dated July 17, 2017.
  - i. An order of cancellation of the gazette notice dated November 10, 2017 issued by the 1<sup>st</sup> respondent.
  - j. General damages.
  - k. Punitive and exemplary damages.
  - l. An order that compensation for any land acquired from Ruiru/Ruiru/East Block/7/46 or any part thereof or sub-division thereof be paid to the cross petitioner
9. The interested party's case is that Varsity Ville Residents Association is an association duly registered under the *Societies Act* whose objectives include *inter alia* ensuring that the original plan (LR No Ruiru/Ruiru East/Block/1) remains unaltered unless permission is granted for alteration by the association and that the areas designated for church, school and shopping centre were to remain as such.
  10. It was deponed that the interested party stands on property measuring approximately 200 acres, which property was subdivided from a larger piece of land known as LR No 10901/8; that according to the physical development plan, the suit property was delimited for residence, commerce, community use, health center, nursery and primary schools and that the suit property which is 10.7 acres or thereabouts was delimited for a primary school.
  11. The interested party admitted that the suit property is the subject of litigation in ELC civil case No 510 of 2015. According to the interested party, the suit property is community land as defined under



article 63 (2) (a) and (b) of the Constitution and is collectively owned by the residents of Varsity Ville Estate who are members of Varsity Residents Association.

12. It is the interested party's case that sometime on January 30, 2017, the 1<sup>st</sup> respondent conducted a hearing to investigate and review the legality of a number of properties including the suit property herein; that on July 17, 2017, the 1<sup>st</sup> respondent revoked the said titles *vide* Kenya gazette No Vol CXIX No 97 dated July 17, 2017 and that *vide* a gazette notice dated November 10, 2017, the 1<sup>st</sup> respondent unilaterally purported to stay the revocation of title by the earlier gazette notice dated July 17, 2017 relating to Ruiru/Ruiru East Block 7/ 46 pending the hearing and determination of ELC No 510 of 2015.
13. It was averred that the decision to stay the earlier revocation of title was illegal for purporting to stay what had already been done; that contrary to the petitioner's assertions, they were granted a hearing before the aforesaid revocation was done and that the petitioner lodged an objection on account of the pending ELC case.
14. It is the interested party's case that the aforesaid objection was overruled on the grounds that the 1<sup>st</sup> respondent has powers under the Constitution and the National Land Commission Act to investigate, review and revoke any title to public land independent of any case pending in court over the same subject matter and that despite several requests, the 1<sup>st</sup> respondent has refused to avail typed copies of its proceedings with respect to the suit property.

#### **Submissions**

15. The petition was canvassed by way of written submissions. The petitioner through his counsel submitted that the 1<sup>st</sup> respondent violated the petitioner's rights under article 50 as read with section 4(3) of the Fair Administrative Action Act, 2015 because it was never formally served with the complaints against it nor was it heard before a determination was made.
16. Reliance was placed on the case of Republic v National Land Commission and Tropical Treasure Ltd ex-parte Krystalline Salt Limited [2015]eKLR where the court stated that the National Land Commission is required to afford a party an opportunity to be heard before revocation of its title and the Court of Appeal decision of Judicial Service Commission v Mbalu Mutava & Anor [2015]eKLR where the court restated that state organs are obligated to uphold natural justice.
17. Counsel submitted that by carrying out the inquiry in an unconstitutional manner, the 1<sup>st</sup> respondent violated the petitioner's rights to property as guaranteed under article 40 of the Constitution and that the 1<sup>st</sup> respondent's actions in publishing the corrigendum whose effect was to stay the implementation of its decision pending the hearing of the court case was a concession as to the wrong procedure used in making a determination to revoke the petitioner's title.
18. It was submitted that the cross-petition contravenes section 6 of the Civil Procedure Act and that the cross-petition is liable to be struck out on the basis of the doctrine of constitutional avoidance as it has mixed up claims that lie in public law such as judicial review and claims that lie in private law such as cancellation of the title for fraud. Counsel placed reliance on the cases of Communication Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others [2014] eKLR and Hon Gideon Mbuvi alias Sonko v The Attorney General & Anor [2017] eKLR.
19. The interested party's counsel submitted that contrary to the petitioner's assertions, the 1<sup>st</sup> respondent has the power to review and establish the legality of the petitioner's title pursuant to section 14 of the National Land Commission Act No 5 of 2012 and as affirmed by the court in Republic v National Land



*Commission Ex-parte Holborn Properties* [2016] eKLR and *Samuel Kimondo Theuri v Dr Mohammed Swazuri & 2 others* ELC Petition No 28 of 2017 [unreported];

20. It was submitted that the petitioner was given a fair hearing as evinced by the fact that the notices informing parties of the oral hearings were published in the local dailies on October 30, 2016 and on January 18, 2017 and that the hearings were conducted on January 30, 2017 and February 3, 2017 as indicated in the gazette notice dated July 17, 2017. Counsel relied on numerous authorities which I have considered.

### **Analysis and Determination**

21. Having considered the petition, the cross-petition and the replies thereto as well as submissions by the parties, the issues that arise for determination are;
- i. Whether the petition is merited?
  - ii. Whether the cross-petition is competent?
22. In discussing whether the petition is merited, the court will restrict itself to the sole issue for determination under this head, being whether the 1<sup>st</sup> respondent's decision to recommend the revocation of the petitioner's title communicated *vide* gazette notice of July 17, 2017 was done without affording the petitioner an opportunity to be heard thus violating its rights to a fair hearing, fair administrative action and its right to property.
23. The functions of the National Land Commission, the 1<sup>st</sup> respondent herein, are set out under article 67 (2) of the *Constitution* of Kenya and include, *inter alia*, the management of public land on behalf of the national and county governments.
24. The mandate of the National Land Commission in this regard is outlined under section 14(1) of the *National Land Commission Act* which provides as follows:
- (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.
  - (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 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.”



25. In the present case, the jurisdiction of the National Land Commission as demonstrated hereinabove has not been called into question. What is in issue is whether in making a determination to have the petitioner's title revoked, the 1<sup>st</sup> respondent infringed the petitioner's rights to a fair hearing and a fair administrative action culminating in the deprivation of property contrary to article 40 of the Constitution.
26. It is a cardinal principle of law that no person should be condemned without being given an opportunity to be heard. This is enshrined in article 50(1) of the Constitution which provides as follows:
- “Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”
27. Tied to this principle is the guarantee to a fair administrative action as set out in article 47 of the Constitution which is further buttressed by the Fair Administrative Action Act, 2015 which provides that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, that person is entitled to prior and adequate notice of the nature and reasons for the administrative action, an opportunity to be heard and to make representation and reasons for the decision.
28. As expressed by the Court of Appeal in the case of Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR:
- “In exercise of its powers under the Constitution or under legislation, public officers, state officers, state organs and independent bodies or tribunals may make decisions which may be characterized as judicial, quasi-judicial or administrative depending on the empowering provision of the Constitution or the law. The landmark decision of the House of Lords in *Ridge v Baldwin* [1964] AC 40 clarified the law, that the rules of natural justice, in particular right to fair hearing, (*audi alteram partem* rule) applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties. In that case, Lord Hodson at page 132 identified three features of natural justice as:
- a. i. the right to be heard by an unbiased tribunal.
  - b. ii. the right to have notice of charges of misconduct.
  - c. iii. the right to be heard in answer to those charges.”
29. A determination of whether or not a party was afforded a fair hearing is a matter of fact. This was expressed by the Court of Appeal in Tom Dola & 2 others v Chairman, National Land Commission & 5 others [2020] eKLR thus;
- “But as this court stated in *Judicial Service Commission v Mbalu Mutava & Another* [2015] eKLR, whether a person has been afforded a fair hearing or the right to natural justice, depends on the circumstances of each case.”
30. In the present case, it is undisputed that the 1<sup>st</sup> respondent placed an advert in the Daily Newspaper wherein the suit property was listed as one of the parcels of land subject to investigation. In response to that advert, the petitioner, through its advocates, wrote a letter of November 24, 2016 informing the 1<sup>st</sup> respondent that the dispute with respect to the property was already pending in court. When



the 1<sup>st</sup> respondent convened its hearing, the petitioner appeared through its advocate and highlighted the same.

31. According to the petitioner, on January 30, 2017, its director together with counsel attended the hearing at Thika where it was brought to the 1<sup>st</sup> respondent's chairman's attention that there was a pending suit. It is the petitioner's disposition that the chairman declined to hear the complaints pending determination or withdrawal of the civil suit and that there was thereafter no communication from the 1<sup>st</sup> respondent up until the impugned gazette notice was issued.
32. On the other hand, the interested party, while conceding that the petitioner participated in the hearing of January 30, 2017 and duly informed the 1<sup>st</sup> respondent that there was a pending civil case, asserts that this objection was overruled by the 1<sup>st</sup> respondent who in any event has jurisdiction to review grants notwithstanding the pendency of a suit.
33. Unfortunately, the 1<sup>st</sup> respondent did not deem it fit to participate in these proceedings and failed to adduce the proceedings of the impugned hearing. The petitioner and the interested party assert that they were never provided with the proceedings despite requesting for the same. The court is therefore left in limbo as to the exact outcome of the proceedings of January 30, 2017.
34. The above notwithstanding, the petitioner having asserted that they were not afforded a fair hearing having not received any further communication after the meeting of January 30, 2017 which resolved to halt proceedings pending the outcome of the case, the 1<sup>st</sup> respondent was obligated to prove that the hearings were indeed conducted or provide evidence with respect to its decision, if any, on the objection that was raised by the petitioner on January 30, 2017.
35. The 1<sup>st</sup> respondent having failed to avail to this court the proceedings in respect to the hearing it purportedly conducted in respect of the suit property, the interested party cannot without more purport to step into the shoes of the 1<sup>st</sup> respondent and assert on its behalf that it conducted a fair hearing.
36. Further, schedule 4, section 19 of the NLC Act mandates the 1<sup>st</sup> respondent to keep minutes of its proceedings and decisions, and the same not having been presented to this court, the court finds that the petitioner has proven on a balance of probabilities that it was not afforded a fair hearing.
37. While considering the interested party's account, the court takes note of the undisputed fact of the existence and pendency of ELC 51 of 2015 dealing with the suit property. The court in Robert Mutiso Lelli and Cabin Crew Investments Ltd v National Land Commission & 3 others [2017] eKLR while considering the jurisdiction of the 1<sup>st</sup> respondent to review grants vis a vis a pending suit stated as follows:

“I reiterate that the National Land Commission must not usurp the powers of a court of competent jurisdiction in as much as it has the power to inquire into how a title or disposition in public land was acquired. In this case, what the National Land Commission did, in my humble view, was in effect to remove the pith of litigation from a court of competent jurisdiction and leave only a shell. The Court of Appeal principle in Dr Alfred Mutua v Ethic and Anti-Corruption Commission & Others Civil Application Nairobi No 31 of 2016 citing the Nigerian Court of Appeal decision in Olusi & another v Abanobi & others suit No CA/B/309/2008 stated:

“It is an affront to the rule of law to render nugatory an order of court whether real or anticipatory. Furthermore...parties who have submitted themselves to the equitable jurisdiction of courts must act within the dictates of equity.”



In other words, parties who have submitted themselves to the court's jurisdiction to adjudicate on a matter which they are disputing over ought not to create a situation whereby the decision to be made by the court would be of no use.

It is for that reason that I also agree with the Nigerian Court of Appeal decision in *United Cement Company of Nigeria v Dangote Industries Ltd & Minister of Solid Mineral Development /CA/A/165/2005* that the court ought to ensure that

“appropriate orders are made to prevent acts which will destroy the subject matter of the proceedings or foist upon the court a situation of complete helplessness or render nugatory any judgment or order.”

38. The court is persuaded by the above rationale. It is not disputed that the suit property is the subject of litigation in ELC 510 of 2015 which suit was filed in the year 2015, before the 1<sup>st</sup> respondent's investigation on the proprietary of the suit property. That being the case, it is the finding of this court that the 1<sup>st</sup> respondent did not have jurisdiction to entertain the dispute relating to the suit property.
39. The perusal of the cross-petition reveals that the prayers sought therein are identical to those in the plaint in ELC 510 of 2015. Without belaboring the point, it is apparent the cross-petitioner is inviting this court to make determinations similar to those pending in ELC 510 of 2015. The court must decline this invitation. The issues raised in the cross petition are sub judice. The same should be ventilated in ELC 510 of 2015.
40. In the circumstances, the court finds and makes a determination that the petitioner's constitutional rights under articles 40, 47 and 50 of the *Constitution* were contravened. The court accordingly allows the petition dated September 5, 2017 and makes the following final orders;
  - a. A declaration be and is hereby issued that the petitioner's right to fair administrative action under article 47 of the *Constitution* as read together with the *Fair Administrative Action Act* 2015 as well as its right to a fair hearing under article 50 (1) of the *Constitution* have been violated.
  - b. An order of *certiorari* be and is hereby issued to remove to the High Court and quash the decision of the 1st respondent contained in legal notice 6865 table 13 item 18.
  - c. An order of prohibition be and is hereby issued to prohibit the 2nd respondent from revoking the petitioner's title on land known as number Ruiru/Ruiru East Block 7/46 or *mandamus* to restore the petitioner's title if the revocation of the plaintiff's title had already been effected.
  - d. The cross petition is dismissed with costs.
  - e. The 1st respondent and the interested party to pay the costs of the petition.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28TH DAY OF JULY, 2022.**

**O. A. Angote**

**Judge**

**In the presence of;**

Mr. Mbigi for Petitioner

No appearance for Respondent

Mr. Wawire for Interested Party



