



**Awadh v National Land Commission & 2 others (Environment & Land Petition  
55 of 2019) [2022] KEELC 12790 (KLR) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12790 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION 55 OF 2019  
LN MBUGUA, J  
SEPTEMBER 30, 2022**

**BETWEEN**

**ZULEKHA MOHAMED AGIL AWADH ..... PETITIONER**

**AND**

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

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

**COUNTY GOVERNMENT OF NAIROBI ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. *Vide* a petition dated October 28, 2019 the petitioner filed this suit claiming that he is the registered proprietor of land parcel known as LR 209/21371 Grant IR 192858/1 Deed Plan No 389838 measuring 1.000 hectares situated at Dafur Dupoto settlement scheme, Embakasi Nairobi county, having a leasehold interest for a term of 99 years with effect from July 1, 1997. He contends that sometime in August 2019 when his advocates were perusing a past issue of the Kenya Gazette for February 15, 2019 researching an unrelated legal point, they came across Gazette Notice No 1549 titled “inquiries /investigations on public land in respect of the following grants and orders” issued under article 68(c)(v) and section 6 of the [National Land Commission Act](#) by which the 1st respondent had purportedly directed the 2nd respondent to revoke the petitioners title to the suit land and vest the same to the Nairobi County Government.
2. The petitioner contends that the aforementioned gazette notice was not published “ pursuant to section 14 of the [National Land Commission Act](#) which governs review of grants and dispositions of public land and limits the 1st respondents exercise of such power to within five (5) years from the commencement of the Act i.e from May 2, 2012.”
3. The petitioner also contends that he was not formerly notified of the inquiries conducted by the 1st respondent, thus the actions of the respondents amounts to violation of his rights to property as set



out under article 40 of the Constitution and the right to fair administrative action under article 47 of the Constitution. Further the petitioner claims he stands to suffer irreparable damage due to the illegal and unconstitutional acts of the respondents.

4. The petitioner therefore seeks the following orders;
  - a. “An order of certiorari do issue to bring into this honourable court for the purposes of being quashed, Gazette Notice No 1549 of February 15, 2019 to the extent it purports to revoke the petitioner’s title to all that parcel of land comprised in land reference number LR 209/21371 Grant number IR 192858/1 situate in the city of Nairobi.
  - b. A permanent injunction order does issue restraining the respondents by themselves, agents or assigns or any other government department or agency from alienating the Petitioner’s parcel of land comprised in land reference number LR 209/21371 Grant Number IR 192858/1 situate in the city of Nairobi or in any manner interfering with the petitioner’s possession of the said property by forcible entry or otherwise in any manner whatsoever or proceeding in any manner whatsoever with cancelling or revoking the petitioner’s grant aforesaid or maintaining any entries in the grant adverse to the petitioner’s sanctity of title.
  - c. An order of prohibition do issue to prohibit the Respondents by themselves, servants, agents or whomsoever from alienating the petitioner’s title to all that parcel of land comprised in land reference number LR 209/21371 grant number IR 192858/1 situate in the city of Nairobi or in any manner interfering with the petitioner’s title and possession of the said property.
  - d. An order of prohibition do issue to prohibit the respondents by themselves, servants, agents or whomsoever from in any manner issuing any title and/or license in respect to the petitioner’s land comprised in land reference number LR 209/21371 grant number IR 192858/1 situate in the city of Nairobi or registering any encumbrance thereon.
  - e. An order or *mandamus* does issue to compel the respondents by themselves, servants, agents to delete any entries on the petitioner’s certificate of title in land reference number LR 209/21371 Grant Number IR 192858/1 situate in the city of Nairobi made as a consequence to or in furtherance of the Gazette Notice No 1549 of February 15, 2019.
  - f. A declaration that the respondents purported revocation of the petitioner’s title to all that parcel land comprised in title land reference LR 209/21371 grant number IR 192858/1 situate in the city of Nairobi is unconstitutional, null and void.
  - g. A declaration that the certificate of title to the petitioner in respect to all those parcels of land comprised in title numbers land reference LR 209/21371 grant number IR 192858/1 situate in the city of Nairobi is conclusive evidence of ownership and that the petitioner is the absolute and indefeasible owner of the suit property.
  - h. General damages and exemplary damages for the violations of the petitioners rights under article 40 and 47 of the Constitution
  - i. Costs of and incidental to this suit.
  - j. Interest on the awarded damages and costs”.
5. The suit was opposed by the 2nd respondent vide their grounds of opposition dated July 5, 2021. The said grounds are set out as follows:



1. “That the 1st respondent is mandated under article 68 of the Constitution as well as section 6(b) and section 14(1) of the National Land Commission Act No 5 of 2012 to review all grants or dispositions of public land to establish their propriety or legality.
  2. That the decision to revoke the title to the suit property LR 209/21371 grant IR 192858/1 was done pursuant to the constitutional mandate bestowed on the 1st respondent.
  3. That the right to own property provided for under article 40 of the Constitution is not absolute and the title may be revoked if it is found to have been acquired illegally or through fraudulent means.
  4. That the Chief Land Registrar was not involved in the process leading to the revocation of the petitioner’s title if any.
  5. That the petition is frivolous and vexatious”.
6. The 3rd respondents were represented in court from the early stages of the suit as is evident from the proceedings of October 8, 2020. However, they never filed any response to the petition or submissions in this matter.
  7. As for the 1st respondents they made an appearance in court on July 7, 2021 when the hearing date was given on October 6, 2021. Again on October 6, 2021, the National Land Commission was represented when the court gave directions that all the respondents were to file and serve their pleadings by November 3, 2021. The court also gave a hearing date on February 8, 2022. Come the date of February 8, 2022 and the 1st respondent was absent. On the subsequent date given by the court which was June 22, 2022, the counsel appearing for 1st respondent simply informed the court that he didn’t know anything about the matter. In essence, the 3rd respondent though aware of these proceedings opted to be missing in action!
  8. The suit was heard by way of written submissions of which only the petitioner and the 2nd respondent filed submissions. In their submissions dated June 16, 2022, the petitioners have reiterated the averments set out in their petition. They have added that under section 24 of the Land Registration Act, their title is prove of absolute ownership of that land, and such a title can only be challenged in line with the provision of section 26 of the aforementioned statute. That in the instant matter, the respondents have not demonstrated to this court that there was any fraud, illegality, misrepresentation, or corrupt schemes in the manner in which the property was acquired.
  9. The petitioners contend that the transfer of their title was effected on December 22, 2017, and thus the land was private land when the petitioner acquired the same. The petitioner therefore claims that he is a *bona fide* purchaser without notice of defect of title if any.
  10. In support of his case, the applicant cited the case of Mwangi Stephen Muriithi v National Land Commission & 3 others [2018] eKLR where it was held that: “The right to be heard transcends mere notice and extends to the person being given sufficient information to enable them prepare and /or present their case. Such a person is entitled to be furnished, in good time, with information, including reports and documents in the body’s possession that may be prejudicial to his/her case and which would guide that body relied in arriving at its decision”.
  11. The case of Republic v National Land Commission & 2 others Ex parte Biren Amrital Shah [2019] eKLR, was also cited where the petitioners were seeking similar orders as in the present petition and the learned judge in allowing the application for orders to quash the decision of the 1st respondent stated thus; “The court notes that the respondent’s decision is dated October 9, 2017, by which time the period within which the respondent was empowered to review grants of public land had lapsed.



- The respondent therefore lacked the legal mandate to review grants of public land at the time it made its decision.”
12. Further, the petitioner made reference to the case of *Republic v National Land Commission Ex parte Holborn Properties Ltd* 2016 eKLR as cited in *Samuel D Omwenga Angwenyi v National Land Commission & 2 others* [2019] eKLR where it was held that: “ The recommendation to the registrar by the respondent to revoke title which it finds was illegally issued is only in respect to the initial allottee. However, where the initial allottee of public land has transferred land to a bona fide purchaser for value without notice of defect in the title, the registrar does not have the jurisdiction to revoke such a title (see section 14 (7) of the *National Land Commission Act*).”
  13. The 2nd respondents submissions are dated July 5, 2021 where they have raised the following issues for determination.
    - i. Whether the revocation of the petitioner’s grant was done in accordance to the law?
    - ii. Whether the 2nd respondent is culpable?
    - iii. Whether the petitioner is entitled to the orders sought?
  14. On the first issue, it was submitted that the National Land Commission has a constitutional and statutory mandate to review all grants and disposition of public land as set out in the *Constitution of Kenya 2010* and the *National Land Commission Act*. That it is the responsibility of the 1st respondent to determine the legality of a grant to public land, and this is done by examination of all processes and procedures preceding including the issuance of titles, thus in essence interrogating the indivisible nature of title.
  15. The 2nd respondent contends that a person who acquires title by way of fraud or illegality, such a title cannot be protected. On this points reference has been made to the cases of *Republic v National Land Commission & another Ex parte Cecilia Chepkoech Leting & 2 others* [2018] eKLR where Odunga J referred to the decision of Korir, J in JR 376 of 2014 – *Muktar Saman Olow v National Land Commission* where it was stated 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.”
  16. The case of *Chemey Investment Limited v Attorney General & 2 others* [2018] eKLR was also cited where the Court of Appeal held that title to property that is obtained fraudulently or illegally in violation of the provisions of the statute is not sacrosanct and does not enjoy protection of the law under the repealed Act.
  17. Another case cited is that of *Evelyn College of Design Ltd v Director of Children’s Department & another* [2013] eKLR, where Majanja J pronounced himself that; “article 40 which protects the right to property must be read to exclude property found to have been unlawfully acquired under article 40(6). This requirement is an extension of the fact that the *Constitution* protects higher values which are to be found in preamble to the *Constitution* and article 10. Values such as human rights and social justice cannot countenance a situation where the *Constitution* is used to rubberstamp what is in effect unlawful”
  18. The case of *Funzi Island Development Ltd & Others v County Council of Kwale*, Mombasa Civil Appeal No 252 of 2005 was also cited where the court held that: “... a registered proprietor acquires an absolute



and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives it seal of approval to an illegal or irregularly obtained title.” Other cases referred to are; *Munyu Maina v Hiram Gathiba Maina*, Civil Appeal No 233 of 2009 and *Denis Noel Mukhulo & Another v Elizabeth Murungari Njoroge & Another*, CA No 298 of 2013.

19. On whether the 2nd respondent is culpable, it was argued that the 2nd respondent merely implemented the decision of the 1st respondent. The 2nd respondent was sued in their capacity as keeper of the records of which it is their statutory mandate to register transactions and keep such records. In that regard, the 2nd respondent did not breach petitioners rights as alleged.
20. On the 3rd issue, it was submitted that granting the orders sought would amount to assisting the petitioner to perpetuate an illegality, as the petitioner has failed to demonstrate how public property was allocated to him without due process. In that regard, the 2nd respondent has made reference to the case of *Republic v Kenya Power and Lighting Company & another* [2013] eKLR.
21. In conclusion, the 2nd respondent urges the court to dismiss the suit with costs.

### **Determination**

22. The issue falling for determination is whether the prayers sought in the petition are merited. From the outset, I wish to point out that the decision of the National Land Commission which culminated in the legal notice No 1549 of February 15, 2019 has not been availed by any of the parties herein!. However, the legal notice has a headline “ inquiries/investigation on public land in respect to the following grants”. It is further indicated that the inquiries and the investigations were carried out under section 6 of the *National Land Commission Act* and the recommendations given were for the revocation, regularization, and upholding of the titles where applicable. For the title in question LR No 209/21371, the recommendation given was for the revocation of that title.
23. The 1st respondent was established under article 67 of the *Constitution* of Kenya which also spelt out some of its functions. Article 68 of the *Constitution* directed parliament to enact legislation providing for among others the review of all grants or dispositions of public land to establish their propriety or legality.
24. The *National Land Commission Act 2012* was enacted pursuant to the provisions of articles 67(3) and 68 of the *Constitution*. Pursuant to article 68(c) (v) of the *Constitution*, the 1st respondent was given powers under the Act to review grants and dispositions of public land.
25. In these proceedings, the petitioner contends that the 1st respondent purported to review his title to the suit properties pursuant to a complaint that was lodged by the 3rd respondent sometimes in 2018. That in a report dated January 2019 whose findings and recommendations were published in the Special Issue of the Kenya Gazette of February 15, 2019, the 1st respondent directed the 2nd respondent to revoke the petitioners title to the suit properties and gave liberty to the 3rd respondent to demolish the structures if any that the petitioner had put up on the suit properties.
26. Under section 14 of the *National Land Commission Act*, the 1st respondent had powers (in exercise of its review powers) to direct the 2nd respondent to revoke any title that upon review was found to have been acquired unlawfully. The 1st respondent was also given power to regularize any title found to have been acquired irregularly and to make consequential orders. What this means is that the 1st respondent could only direct the revocation of a title to land in exercise of its powers of review under section 14 of the aforementioned Act.”



27. It is quite clear that the 1st respondent had no mandate to recommend the revocation of petitioner's title under the provisions of section 6 of the said Act.
28. It is also noted that the title of the applicant was apparently issued on December 22, 2017 and bears the name of the applicant. If that be the case, the 1st respondent ought to have demonstrated the efforts they had made to notify the petitioner that they were to conduct inquiries relating to his title. However, the 1st respondent has chosen to remain mute.
29. In the case of *Republic v National Land Commission & 2 others Ex Parte Archdiocese of Nairobi Kenya Registered Trustees (St Joseph Mukasa Catholic Church Kabawa West)* [2018] eKLR, the court stated that;
- “What the Constitution requires in my view is the notification of the intention to take an action against a person likely to be adversely affected thereby and the reasons for the intended action. The said reasons, it is my view must depend on the peculiar circumstances of each case and it is those peculiar circumstances which ought to be considered which consideration must under article 47 of the Constitution entail an opportunity to the applicant to be heard on the circumstances alleged to constitute satisfactory reasons for the taking of the adverse action”.
30. This court is not seized of the complaint made to and the substantive decision made by National Land Commission, thus the court does not desire to dwell on issues which are in the realm of speculation, particularly the issue as to whether the decision was made within the given statutory mandate.
31. This court is in agreement with the submissions of the 2<sup>nd</sup> respondent that under the Constitution, the right to own property does not extend to any property which is found to have been unlawfully acquired as set out under article 40 (6) of the Constitution. However, the sanctity of the title must be challenged through the laid down constitutional and statutory legal frameworks.
32. In the instant case, this court has pronounced itself that the National Land Commission had no such mandate to challenge the title of the petitioner under section 6 of the National Land Commission Act. In that regard, this court cannot make a declaration regarding the propriety of the title of the petitioner. When the title is challenged through a lawful process then that would be the opportune time to give such declaratory orders.
33. As at now I find that the appropriate order to give is prayers a, c, e and f in the petition to the effect that;
- i. An order of *Certiorari* is hereby issued to bring into this honourable court for the purposes of being quashed, gazette notice No 1549 of February 15, 2019 to the extent it purports to revoke the petitioner's title to all that parcel of land comprised in land reference number LR 209/21371 grant number IR 192858/1 situate in the city of Nairobi.
  - ii. An order of prohibition do issue to prohibit the respondents by themselves, servants, agents or whomsoever from alienating the petitioner's title to all that parcel of land comprised in Land Reference Number LR 209/21371 Grant Number IR 192858/1 situate in the City of Nairobi or in any manner interfering with the petitioner's title and possession of the said property..
  - iii. An order of *mandamus* does issue to compel the respondents by themselves, servants, agents to delete any entries on the petitioner's certificate of title in Land Reference Number LR 209/21371 Grant Number IR 192858/1 situate in the City of Nairobi made as a consequence to or in furtherance of the Gazette Notice No 1549 of February 15, 2019.



- iv. A declaration that the respondents purported revocation of the petitioner's title to all that parcel land comprised in title Land Reference LR 209/21371 Grant Number IR 192858/1 situate in the City of Nairobi is unconstitutional, null and void.
- v. Each party to bear their own costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2022 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

M/s Wambui for the Petitioner

M/s Masinde holding brief for Mbutia for 1st Respondent

Fatma for the 2nd Respondent

Court assistant: Joan

