



**Njoroge v County Government of Nakuru & 3 others (Environment and Land Court Judicial Review Application E007 of 2021) [2022] KEELC 14910 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14910 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND COURT JUDICIAL REVIEW APPLICATION E007 OF 2021  
JM MUTUNGI, J  
NOVEMBER 17, 2022**

**BETWEEN**

**MARTIN MWANGI NJOROGE ..... EXPARTE APPLICANT**

**AND**

**COUNTY GOVERNMENT OF NAKURU ..... 1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY FOR LANDS AND PHYSICAL  
PLANNING ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**HON. ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Ex-parte Applicant pursuant to leave granted on July 22, 2021 filed the Notice of Motion application dated July 26, 2021 on the same date.

By the application, the Applicant prays for the following orders:-

1. The Honourable Court be pleased to issue an order of Prohibition to remove into this Court and prohibit the Respondents from proceeding with the intended verification and authentication of land ownership documents for persons and individuals who directly and indirectly bought land from Agricultural Development Corporation (ADC) in Ndabibi, Maiela Ward, Naivasha Sub-county and Nakuru Municipality Block 19 and subsequent titling as communicated vide the public notices published in Daily Nation Newspaper of July 9, 2021.
2. The Honourable Court be pleased to issue an order by way of a declaration that the Nakuru County Government, the 1<sup>st</sup> Respondent herein does not have the legal mandate to verify and authenticate validity of interest in land and ownership documents and any such verification,



authentication and related processes shall be in violation of the Constitution thus illegal, null and void.

3. The costs of this application be provided for.
2. The application was founded on the statement of facts and the affidavit sworn in support by Martin Mwangi Njoroge on July 21, 2021 and filed in court on the same date together with the Chamber Summons for leave.

### **Grounds and facts relied upon:**

3. The Applicant stated he was a resident of Nakuru County, a law abiding citizen, a human rights defender and a believer in the rule of law and Constitutionalism and instituted these proceedings in pursuit of ensuring the respondents acted in compliance and in conformity of the law. The applicant's complaint was that the 1<sup>st</sup> Respondent, County Government of Nakuru had unilaterally and without any consultation or legal mandate published notices in Daily Nation Newspaper on July 9, 2021 inviting private land owners in Ndabibi, Maiela Ward within Naivasha Sub-county and Nakuru Municipality Block 19 to submit their ownership documents for verification and authentication between the period July 9 to 28, 2021. The applicant contended that the 1<sup>st</sup> respondent lacked the legal mandate to conduct the exercise it sought to embark upon and argued the resultant outcomes would be pursuant to a flawed process and that the 1<sup>st</sup> respondent's acts would be ultra vires and therefore null and void. The applicant averred the 1<sup>st</sup> respondent had no legal mandate to verify and authenticate ownership documents relating to private land and/or to determine interests touching on land and to the extent that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents could in collusion with the 1<sup>st</sup> respondent rely on the outcomes of the unlawful verification and authentication exercise to process titling of parcels of land, such action would be prejudicial and contrary to the law. The applicant contended the Constitutional provisions relating to fair administrative action as provided under Article 47, would be violated as would be the provisions of the Fair Administrative Actions Act, 2015. In the premises, the applicant sought to have the unlawful notices quashed.
4. In support of the application for review, the applicant averred that the 1<sup>st</sup> respondent's action seeking to verify and authenticate ownership documents relating to private land was unfair, arbitrary and ultra-vires as the 1<sup>st</sup> respondent had no legal mandate to do so. The applicant argued the 1<sup>st</sup> respondent's action violated Articles 10, 40 and 47 of the Constitution. The applicant further contended the Court by virtue of Section 7(2) of the Fair Administrative Actions Act, 2015, had power to review an administrative action or decision which was unfair or unreasonable. The applicant contended there was procedural impropriety in the manner the 1<sup>st</sup> respondent purported to carry out its mandate as the affected persons were not afforded the opportunity of being heard before adverse decisions which could affect their interests were made by the 1<sup>st</sup> respondent.

### **1st Respondent's Response**

5. The 1<sup>st</sup> Respondent filed a replying affidavit sworn by Benjamin Njoroge, the County Secretary and Head of Public Service, County Government of Nakuru.
6. The 1<sup>st</sup> respondent deponed that the County Government in matters relating to land administration is mandated to carry out County planning and development which includes:-
  - a. Statistics, (b) land survey and mapping, (c) boundaries and fencing (d) housing.

The 1<sup>st</sup> respondent thus averred that in inviting the members of the public to submit their documents for verification, it was exercising its mandate with a view of mapping out all the public land to facilitate



the issuance by the National Land Commission of allotment letters. The 1<sup>st</sup> respondent further averred that the County Government has the responsibility of preparing the County Physical and Land Use Development Plan. The deponent stated it was the duty of the County Government to control and approve development plans and thus it was essential for the 1<sup>st</sup> respondent to verify the tenure and ownership of the land within the specific areas for planning purposes.

7. The 1<sup>st</sup> respondent further averred that it had mandate to levy rates over properties and hence it was necessary to facilitate planning and issuance of title deeds to owners of rateable land within the County to seek to verify and authenticate the ownership of the parcels of land to be subject to rate payment and for physical and land use planning purposes.
8. The 1<sup>st</sup> respondent contended that all the public land within the County was in terms of Article 62 of the Constitution held and vested in the County Government in trust for the residents of the County and that the National Land Commission administers such land on behalf of the County Government and the residents of the County. The 1<sup>st</sup> respondent averred that the Agricultural Development Corporation (ADC) sold its land to the residents of Ndabibi, Maiela Ward, Naivasha Sub-county which owing to the fact that the land had no titles, the residents who purchased the land had no security of tenure and there were unscrupulous people who were displacing the genuine owners which made it necessary for verification and authentication of the genuine land parcels owners for facilitation of the processing of titles for the genuine land owners.
9. The 1<sup>st</sup> respondent asserted that the land purchased from ADC, and Nakuru Municipality Block 19 did not constitute private land as it was public land that required to be planned and individual titles issued for appropriate and effective land use and management. The County Government in seeking to verify and authenticate ownership of the land parcels within Ndabibi area and Nakuru Municipality, Block 19 was properly exercising its mandate in order to achieve appropriate physical and land use plan for the area in question. The 1<sup>st</sup> respondent consequently denied that it had in any manner acted in violation of the Constitution or any other statutory laws.
10. The 2<sup>nd</sup> and 4<sup>th</sup> respondents filed a statement in reply to the application on October 15, 2021 denying they had any role in the proceedings. They asserted the acts complained of by the applicant only related to the 1<sup>st</sup> respondent and that they had no involvement. They contended the applicant's allegations against the 2<sup>nd</sup> and 4<sup>th</sup> respondents had no merit and that the suit against them was misconceived and constituted abuse of the Court process.
11. The 3<sup>rd</sup> respondent, National Land Commission did not file any response to the application and did not participate in the proceedings.
12. The application was argued by way of written submissions. The ex-parte applicant filed his written submissions on April 5, 2022 while the 1<sup>st</sup> respondent filed their submissions on July 7, 2022. The 2<sup>nd</sup> and 4<sup>th</sup> respondents did not file any submissions though they had sought and were granted time to file their submissions.

### **Submissions of the Ex-parte Applicant**

13. The Ex-parte applicant in his filed submissions reiterated the facts as set out in the statement of facts and affidavit in support of the application.

The thrust of the submissions was that the 1<sup>st</sup> respondent had no legal mandate to verify and/or authenticate ownership of private land and thus the impugned notice to the public inviting them to submit their ownership documents for scrutiny had no basis and was therefore unlawful. The ex-parte applicant submitted that the 1<sup>st</sup> respondent in purporting to carry out the intended verification



and authentication of ownership documents was acting *ultra vires* its jurisdiction and the exercise was unconstitutional. The ex-parte applicant placed reliance on the case of Supreme Court of Kenya and [\*National Land Commission Vs Attorney General & 6 Others\*](#) (2014) eKLR where the Supreme Court rendered an Advisory Opinion on the operations of the National Land Commission and the Ministry of Lands. In the Advisory opinion, the Supreme Court held that while public land within the County vests in the County Government, the management of private land was not vested in the County Government.

14. The ex-parte applicant further submitted that even though the 1<sup>st</sup> respondent averred it had consulted other government agencies notably the National Land Commission before embarking on the purported verification and authentication exercise of land ownership documents, the applicant contended not even the National Land Commission had any mandate to administer and/or manage privately owned land. The applicant in support of this submission relied on the case of [\*Kipsyenyam Farmers Company Vs National Land Commission & Another\*](#) (2019) eKLR where Munyao J. held that the National Land Commission had no mandate to investigate and make decisions in regard to privately owned land. Further, the applicant relied on the case of [\*Karaini Investment Limited Vs National Land Commission & 2 Others\*](#) (2021) eKLR where the Court held thus:-

“The jurisdiction of National Land Commission to review grants of public lands which in any event lapsed on 2/5/2017, did not extend to dealing with interests over private land. That fell within the domain of the Environment and Land Court and the Subordinate Courts .....

National Land Commission was only clothed with the mandate to review grants of public land the first time such land was converted to either private or community land. If there was no question as to the propriety or legality of how a title over public land was initially converted to private land and the dispute related to transactions effected over private land, then National Land Commission had no power to enquire into such disputes as that legally fell within the realm of the Environment and Land Court and the Subordinate Courts”.

15. The applicant further asserted that, the 1<sup>st</sup> respondent in seeking to carry out the intended verification, authentication and titling process adopted a flawed process which contravened the Rules of natural justice and the dictates of the Fair Administrative Actions Act, 2015 and Articles 47 of the [\*Constitution\*](#). He argued that the 1<sup>st</sup> respondent was expected and obligated to act within the confines of the law. The applicant submitted it was unfair and unreasonable for the 1<sup>st</sup> respondent to direct private land owners and others to submit ownership documents in regard to unspecified land parcels, yet it was uncertain what purpose the intended verification, authentication and titling exercise was to serve and in what manner the land owners were to be affected. The applicant contended that the residents of the affected areas were not accorded any opportunity to be heard before the 1<sup>st</sup> respondent issued the impugned public notice yet the planned action was bound to have implications that could be prejudicial to their interests. On that account, the applicant submitted the 1<sup>st</sup> respondent’s action was amenable, to Judicial Review. The applicant in support of this submission placed reliance on the case of [\*Mwangi Stephen Muriithi Vs National Land Commission and 3 Others\*](#) (2018) eKLR.
16. In concluding his submissions, the applicant argued that the 1<sup>st</sup> respondent’s action was arbitrary, unfair and contrary to the Rules of natural justice and consequently was void abinitio and ought to be quashed. The applicant was categorical that the 1<sup>st</sup> respondent lacked any legal mandate to seek to verify and/or authenticate ownerships documents of land that was privately owned and urged the Court to



quash the unlawful notice. The applicant in support of his submissions cited the case of *Emfil Limited Vs Registrar of Titles Mombasa and 2 Others* (2014) eKLR where the Court of Appeal held thus:-

“The remedy of Judicial Review of administrative action is intended to check the excesses of power to ensure that the rule of law prevails”.

### **Submissions of the 1st Respondent**

The 1<sup>st</sup> Respondent in its submissions reiterated that the County Government had a role in matters related to the administration of land falling under its jurisdiction. Such roles as per the 1<sup>st</sup> respondent extended to physical planning; maintenance of appropriate statistics; land survey and mapping; and housing. The 1<sup>st</sup> respondent submitted that it was exercising the mandate bestowed on it under the law when it invited members of the public to submit their documents for verification with a view of mapping out the public land and ascertaining persons entitled to be issued with allotment letters by the National Land Commission. Hence, the 1<sup>st</sup> respondent argued the verification and authentication of land ownership within the identified area was for the purpose of facilitating sustainable management and use of the land and ensure the genuine land owners were enabled to obtain titles to their land. The 1<sup>st</sup> respondent in its submissions identified the primary issue for determination by the Court as being, whether based on the facts, disclosed in the Judicial Review application, the 1<sup>st</sup> respondent acted outside its mandate and whether its actions constituted abuse of its power. The 1<sup>st</sup> respondent submitted it did not act outside its mandate and neither did it abuse its powers.

17. The 1<sup>st</sup> respondent contended that under the Fourth Schedule part 2(8) of the *Constitution*, County Governments were entrusted with County planning and development including:-
  - a. Statistics;
  - b. land survey and mapping;
  - c. boundaries and fencing;
  - d. housing; and
  - e. electricity and gas reticulation and energy regulation.

The 1<sup>st</sup> respondent further submitted that the enabling legislation being the *County Government Act 2012* under Sections 103, 105 and 106 clearly gave it the mandate to carry out the exercise of undertaking verification and authenticating the ownership documents of the members of the public in the affected areas for the purposes of carrying out its mandate as envisioned under the above mentioned provisions of the law. The 1<sup>st</sup> respondent argued that an order of prohibition cannot be granted to prohibit a body from doing that which it was authorized by law to do. In support of this submission, the 1<sup>st</sup> respondent relied on the case of *Nyando Power Techniques Ltd Vs Nairobi City Council and Another* (2016) e KLR and the case of *Republic Vs Kenya Maritime Authority and 2 Others* (2021) KeHC 309 (KLR). In the latter case Mativo, J. (as he then was) considered circumstances under which a Court would intervene where a decision is impugned and/or challenged. The Judge observed as follows at paragraph 35 of his judgment:-

35. The proper approach for this Court in reviewing the impugned decision is to establish factually, whether an irregularity occurred. Then, the irregularity must be legally evaluated to determine whether it amounts to a ground for the Court to intervene. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding



that a ground for the Court to intervene has been established. The role of the Court in cases of this nature was well articulated in *International Trade Administration Commission Vs SCAW South Africa (Pty) Ltd 2012 (4) SA 618 (CC)* as follows:-

“(95) Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, Courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a Court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric”.

18. The 1<sup>st</sup> respondent maintained in its submissions that the exercise of verification and authentication that it intended to undertake was consistent with its mandate as per the Constitution, the County Governments Act 2012, and the National Land Commission Act 2012. It was the 1<sup>st</sup> respondent’s position that in order to effectively carry out its mandate under the County Governments Act, 2012 and the other Acts, it was necessary to verify the land owners’ identity, public land, and the physical infrastructure for appropriate development planning. The 1<sup>st</sup> respondent thus submitted the application lacked merit and should be dismissed with costs.
19. Having reviewed the pleadings and the evidence, and having considered the submissions made on behalf of the ex-parte applicant and the 1<sup>st</sup> respondent, the issues that emerge for determination are as follows:-
  - i. Whether the 1<sup>st</sup> Respondent’s intended verification and authentication of ownership documents for titling purposes violated the Constitution, the Fair Administrative Actions Act or any other law?
  - ii. Whether the Ex-parte applicant is entitled to an order of prohibition?
  - iii. Who bears the costs of the suit?
20. The Applicant’s case is premised on the 1<sup>st</sup> Respondent’s lack of mandate to undertake the exercise of verification and authentication of ownership documents of the residents of the areas notified in the public notification. The 1<sup>st</sup> respondent for its part was emphatic that it had the mandate to undertake the exercise that it intended to do. The 1<sup>st</sup> respondent cited the functions and powers vested in the County Governments by the Constitution under the Fourth Schedule of the Constitution. Under Article 2(8) of the Fourth Schedule, the functions and powers of the County Government include County planning and development, including:-
  - a. Statistics;
  - b. land survey and mapping;
  - c. boundaries and fencing;
  - d. housing; and



- e. electricity and gas reticulation and energy regulation.
21. The 1<sup>st</sup> Respondent further asserted that its mandate was additionally amplified under the County Governments Act, 2012 more particularly under Sections 103, 105, 106 and 110 of the Act. The objectives of County planning under Sections 103 of the County Government Act include to:
- a. Ensure harmony between National, County and Sub-county spatial planning requirements;
  - b. facilitate the development of a well-balanced system of settlements and ensure productive use of scarce land, water and other resources for economic, social, ecological and other functions across a County;
  - c. maintain a viable system of green and open spaces for a functioning eco-system;
  - d. -----;
  - e. protect the historical and cultural heritage, artefacts and sites within the County and
  - f. make reservations for public security and other critical national infrastructure and other critical National infrastructure and other utilities and services.
22. Under Section 104(2) of the County Government Act, the Counties in developing their County plans are required, to integrate economic, physical, social environmental and spatial planning. Sections 105 of the County Government Act provide as follows:-
105. Planning in the County
- (1) A County planning unit shall be responsible for –
- a. Coordinating integrated development planning within the County;
  - b. ensuring integrated planning within the County;
  - c. ensuring linkages between County plans and the National planning framework;
  - d. ensuring meaningful engagement of citizens in the planning process;
  - e. ensuring the collection, collation, storage and updating of data and information suitable for the planning process; and
  - (f) ensuring the establishment of a GIS based database system.
- (2) The designated planning authority in the County shall appropriately organize for the effective implementation of the planning function with the County.
- Section 106(2) of the Act provides:-
- (2) County plans shall be based on the functions of the County Governments as specified in the Fourth Schedule to the Constitution and on relevant National policies.
23. A County spatial plan developed pursuant to Section 110 of the Act among other matters under Section 110(c) (i) and (iii) is required to indicate desired patterns of land use within the County and



- to provide strategic guidance in respect of the location and nature of development within the County. Further, under Section 110 (2)(d), the spatial development framework, for the County - “shall indicate where public and private land development and infrastructure investment should take place”.
24. In the instant matter, the public notice complained of by the applicant was issued by the 1<sup>st</sup> respondent and carried in the Daily Nation Newspaper of July 9, 2021. It was purportedly issued pursuant to the provisions of the *County Governments Act* and the Physical and Land Use Planning Act. There were two sets of Notices. One Notice related to ex- ADC land sold to residents of Ndabibi, Naivasha Sub-county and the other Notice related to land within Nakuru Municipality Block 19. Persons owning land in the affected areas were requested to submit their documents of ownerships for verification and authentication. In the case of the land within Ndabibi, the County stated the exercise was aimed at ensuring the land was planned, surveyed and titled. In the case of the Nakuru Municipality land, the County stated it was intended to facilitate sustainable management and use of land.
25. I have considered the Constitutional provisions under Articles 185 and 186 of the *Constitution* and the Fourth Schedule Part 2(8) of the *Constitution* together with Sections 103, 104, 105, 106 and 110 of the *County Governments Act* outlined herein above, and I am satisfied that indeed the 1<sup>st</sup> respondent acted within its legal mandate in issuing the public notice that has provoked these proceedings. It is in my view not possible for a County Government to validate physical plans and prepare credible rating rolls of the properties within its jurisdiction without authenticating ownership of the parcels of land within their jurisdiction. The County Government under the *County Governments Act* have the obligations and responsibility of preparing development plans that make provision for public spaces, social amenities and appropriate infrastructure. Land such as the ADC land that was purchased at Ndabibi, Naivasha Sub-County needed to be planned at the sub-division stage to ensure the necessary public spaces and social amenities were factored in. As part of their mandate, the County Governments are entitled to carry out land survey and mapping and generally to ensure there is planned settlement that facilitates optimal use of the available land.
26. The 1<sup>st</sup> respondent in my view did not, in issuing the public notification of their intention to carry out verification and authentication of ownerships documents held by the interested parties, usurp the role and/or mandate of the National Land Commission and/or indeed the National Government. If for nothing else, the 1<sup>st</sup> respondent was entitled to take stock of all public spaces, which by law are vested in the County though administered by the National Land Commission. Additionally, the 1<sup>st</sup> respondent was entitled to validate ownership of land parcels that would ordinarily be rateable and further was entitled to collate accurate data to facilitate the County spatial planning that the County was obligated to undertake. It is thus my determination that the 1<sup>st</sup> respondent did not act ultra vires its mandate/ jurisdiction when it issued the impugned notice. In consequence, the 1<sup>st</sup> respondent did not violate any Constitutional provisions or the Fair Administrative Actions Act as contended by the applicant.
27. Having come to the conclusion that the 1<sup>st</sup> respondent acted well within its mandate when it issued the impugned public notification, it follows that the 1<sup>st</sup> respondent cannot be prohibited from doing what in law it has authority to do. The 1<sup>st</sup> respondent acted within its jurisdiction and did not contravene any legal provision. The Court of Appeal in the case of *Director of Public Prosecution Vs Martin Maina & Others* (2017) eKLR observed as follows:-

“Judicial Review is concerned with decision making process and not with the merits of the decision itself. Judicial Review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to Judicial Review. A decision can be upset through certiorari on a matter of law if on the face of it; it is made without jurisdiction, or in



consequence of an error of law. Prohibition restrains abuse or excess of power". (Emphasis added)

28. In the instant matter, the applicant has not demonstrated the 1<sup>st</sup> respondent had acted in abuse and/or excess of power to warrant the Court to issue an order of prohibition. The Court holds that the applicant is not entitled to an order of prohibition. In the final result, I find and hold that the application lacks merit and the same is hereby ordered dismissed.
29. On the question of costs, the Court considers that the suit was one that raised public interest concerns and as the Court is not desirous of stifling public interest litigation, I am of the view that this would be an appropriate case for each party to be ordered to bear their own costs. It is so ordered.

**Judgment Dated, Signed and Delivered Virtually through Video link this 17th day of November, 2022.**

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**HON. J. M. MUTUNGI**  
**ELC JUDGE**

