



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC JR NO. 22 OF 2017**

**REPUBLIC.....APPLICANT**

**VERSUS**

**NATIONAL LAND COMMISSION.....RESPONDENT**

**AND**

**1. BERNARD KIONGO NJAU**

**2. GODFREY J. MUGO**

**(on behalf of KIMATHI ESTATE WELFARE ASSOCIATION)....INTERESTED PARTIES**

**EX-PARTE APPLICANT: SABINA WANJIRU KUGURU**

**(Suing as the personal representative of the estate of**

**FELIX MWANGI KUGURU, deceased)**

**JUDGMENT**

What is before the court is the ex-parte applicant's Notice of Motion application dated 4<sup>th</sup> August, 2017 seeking the following orders;

1. An order of Certiorari to remove to this Honourable Court and quash the decision of the respondent revoking the title in respect of the property known as L.R No. 209/13403 registered in the name of the ex-parte applicant's deceased husband and the order directing the Chief Land Registrar to implement the revocation.
2. An Order of Certiorari to remove to this Honourable Court and quash the decision of the respondent directing that title in respect of the property known as L.R No. 209/13403 registered in the name of the ex-parte applicant's deceased husband be allocated to the County Government of Nairobi and Kimathi Estate Welfare Association jointly and that the property be utilised for various public purposes.
3. An order of Prohibition prohibiting and restraining the respondent, its officers, servants or agents from revoking or in any other way or manner interfering with the legal title in respect of the property known as L.R No. 209/13403.
4. That the costs of the application be awarded to the ex-parte Applicant.

The application was brought on the grounds set out on the face thereof and on the verifying affidavit of the ex-parte applicant (hereinafter referred to only as "the applicant") and the statutory statement both dated 11<sup>th</sup> July, 2017 that were filed in support of the application for leave. In summary, the applicant's case against the respondent and the interested parties is as follows: The applicant is the personal representative of Felix Mwangi Kuguru, deceased (hereinafter referred to only as "the deceased"). The deceased was at all material times registered as the owner of all that parcel of land known as L.R No. 209/13403 comprised in Grant No. I.R 74977 (hereinafter referred to only as "the suit property"). The applicant had constructed a building on the suit property which was occupied by tenants with whom she had entered into various tenancy agreements and was receiving rent from. The applicant intended to put up an upper floor on the said building and had submitted building plans to the Nairobi City Council which had approved the same. The applicant's application to the National Environmental Authority (NEMA) for a licence for the development was however opposed by the interested parties on the ground that the

development would degrade the environment. The interested parties filed a case against the applicant at the National Environment Tribunal (NET) namely, NET Case No. 84 of 2011 (“the tribunal case”) over the said development. In the proceedings before NET, the applicant learnt that the respondent had on 12<sup>th</sup> April, 2017 made a determination on a complaint by the interested parties in which determination, the respondent purported to revoke among others, the title for the suit property and recommended that the same be allocated to the County Government of Nairobi and Kimathi Estate Welfare Association (the interested parties) to hold in trust for the residents of Kimathi Estate for public use as previously planned. In the same determination, the respondent also directed the Chief Land Registrar to implement the revocation of the title of the suit property. The applicant was unaware of the proceedings before the respondent.

The applicant was neither summoned nor served with a notice to appear before the respondent to answer the complaints that had been raised by the interested parties against her. The decision by the respondent was therefore made without giving the applicant a hearing in breach of her constitutional right to a fair hearing. The decision by the respondent also violated the applicant’s right to property. The applicant contended that the respondent had no jurisdiction to review the grant for the suit property since the suit property was private land acquired for valuable consideration. The applicant also contended that the respondent had no jurisdiction to determine a dispute over land ownership. The said decision by the respondent according to the applicant was ultra vires its powers. The applicant contended that the same was also illegal, unconstitutional, unwarranted and unjustified. Finally, the applicant contended that the decision was arrived at in breach of a public duty and against the rules of natural justice.

The application was opposed by the respondent and the interested parties. The respondent filed a replying affidavit sworn by Brian Ikol on 20<sup>th</sup> June, 2019. The respondent averred that it received a complaint from the interested parties that several parcels of land within Kimathi Estate that were reserved for public purposes among them the suit property had been allocated to private individuals. In exercise of its mandate under section 14(1) of the National Land Commission Act, 2012, the respondent admitted the complaint for review of the legality of the grants in respect of among others, the suit property. The respondent thereafter sent out a public notice through daily newspapers with nationwide circulation inviting all persons who were interested in the properties whose grants were the subject of review to come for hearing at the respondent’s office to establish the legality of the said grants. Despite that notice, the applicant did not participate in the review proceedings and as such did not place any material or evidence before the respondent regarding the title she held in respect of the suit property. The respondent contended that by giving the applicant the said notice, the respondent complied with Article 50 of the Constitution and Section 14(3) of the National Land Commission Act, 2012. The respondent after reviewing the legality of the said grants over among others the suit property, made a determination the subject of the applicant’s application. The respondent contended that the application was made in bad faith and was an abuse of the process of the court.

The interested parties opposed the application through a replying affidavit sworn by the 1<sup>st</sup> interested party, Bernard K. Njau on 17<sup>th</sup> November, 2017. The interested parties averred that the applicant’s application was based on dishonesty, greed and concealment of material facts as concerns the genesis of the dispute between the applicant and the interested parties. The interested parties averred that the suit property was located in Bahati Estate and that it was opposite an open space plot known as L.R No. 209/7383/R within Kimathi Estate (“the open space”). The interested parties admitted that the applicant had constructed a structure on the suit property which she had referred to as “ground floor.” The interested parties averred that the applicant obtained approval to construct “a first floor” on top of the said “ground floor” that she had put up on the suit property which is in Bahati Estate. The interested parties averred that instead of constructing the said “first floor” on top of her “ground floor” situated in Bahati Estate, the applicant commenced construction of a new building on a public open space known as L.R No. 209/7383/R in Kimathi Estate (“the open space”) aforesaid. The interested parties annexed photographs to their affidavit showing the applicants “ground floor” in Bahati Estate and the new structure that she started constructing on the open space in Kimathi Estate. The interested parties averred that this is what prompted the filing of the tribunal case. The interested parties averred that NET visited the suit property and confirmed that the construction by the applicant was in Kimathi Estate and that it was being carried out on top of a sewer line situated in the said open space. The interested parties averred that the survey that gave rise to the suit property fraudulently extended the boundary of the suit property which is situated in Bahati Estate to include an open space in Kimathi Estate. The interested parties averred that annexation of the said public open space in Kimathi Estate to the suit property in Bahati Estate amounted to public land grabbing. The interested parties averred that the respondent acted within the law in revoking the title of the suit property. The interested parties averred that the revocation of the applicant’s title should stand since the applicant did not want to restrict her activities to the portion of the suit property in Bahati Estate where her “ground floor” is situated.

The applicant’s application was heard by way of written submissions. The interested parties filed their submissions on 24<sup>th</sup> October, 2018 and supplementary submissions on 11<sup>th</sup> June, 2019. I have not seen on record the submissions by the applicant and the respondent. I have considered the applicant’s application together with the affidavit and statutory statement filed in support thereof. I have also considered the replying affidavits filed by the respondent and the interested parties in opposition to the application. Finally, I have considered the submissions by the interested parties. My view on the matter is as follows. In OJSC Power Machines Limited, Trans Century Limited, and Civicon Limited (Consortium) v Public Procurement Administrative Review Board Kenya & 2 others [2017] eKLR, the Court of Appeal stated as follows:

**“The law on the jurisdiction of the High Court to entertain judicial review proceedings are encapsulated in several decisions, some of which were cited before us while the learned Judge applied others in his judgment. The law, from these decisions is to the following effect;**

**That the purpose of judicial review is to ensure that a party receives fair treatment in the hands of public bodies; that it is the purpose of judicial review to ensure that the public body, after according fair treatment to a party, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court in a judicial review proceeding. Put another way, judicial review is concerned with the decision making process, not with the merits of the decision itself. In that regard, the court will concern itself with such issues as to whether the public body in making the decision being challenged had the jurisdiction, whether the persons affected by the decision were heard before the decision was made and whether in making the decision, the public body took into account irrelevant matters or did not take into account relevant matters”.**

The applicant has sought an order of certiorari and prohibition. Certiorari, mandamus and prohibition are public law remedies which are available to persons whose legally recognised interests have been infringed by public bodies or officers exercising statutory powers. In

Halsbury's Laws of England, 4<sup>th</sup> Edition at paragraph 46, the authors have stated as follows:

**“the courts have inherent jurisdiction to review the exercise by public bodies or officers of statutory powers impinging on legally recognized interests. Powers must not be exceeded or abused”.**

In the book, H.W.R Wade & C.F. Forsyth, Administrative Law, 10<sup>th</sup> Edition the authors have stated as follows at page 509 on the remedies of Certiorari and Prohibition:

**“the quashing order and prohibiting order are complementary remedies, based upon common principles...A quashing order issues to quash a decision which is ultra vires. A prohibiting order issues to forbid some act or decision which will be ultra vires. A quashing order looks to the past, a prohibiting order to the future.”**

In Kenya National Examination council v Republic, Exparte Geoffrey Gathenji Njoroge & 9 others [1997]eKLR, the court set out the scope and efficacy of the remedies of certiorari, mandamus and prohibition. In that case the court described the remedies of prohibition and certiorari as follows:

**“..... prohibition is an order from the High Court directed to an inferior tribunal or body which prohibits that tribunal or body to continue proceedings in excess of its jurisdiction or in contravention of the laws of the land.....Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons....”**

I am in agreement with the respondent and the interested parties that the respondent had power to review grants or dispositions of public land to establish their propriety or legality and that where it found that any title to such land was acquired in unlawful manner, it had power to direct the Chief Land Registrar to revoke the title. Those powers were contained in section 14 of the National Land Commission Act, 2012 which provides as follows:

**“14. (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.**

**(8) In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the Constitution.”**

The applicant has contended that although the respondent had power to review grants and dispositions of land, the power was limited to public land. On whether the respondent had jurisdiction to review grants and dispositions in respect of private land, my view is that so long as the land in issue was public land before it was alienated for private use, it was within the purview of the respondent's review jurisdiction. It is common ground that once public land is alienated to a private entity or person, it becomes private land. See, section 9(2) of the Land Act, 2012.

I am of the view that the powers that were conferred upon the respondent by section 14 of the National Land Commission Act, 2012(“the Act”) were intended to enable it examine the propriety and legality of alienation of public land for private use. It follows therefore that the respondent could only review titles for public land that had already been alienated and as such converted to private land. On this issue, I am in agreement with the observation that was made by W.Korir J. in Republic v National Land Commission & another, Exparte Muktar Saman Olow[2015] eKLR in which he stated that:

**“47. 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.”**

It is common ground that the suit property was owned by the Government before the same was allocated to Skyblue Holding Limited which sold the same to the deceased on 18<sup>th</sup> March, 1997. The suit property was therefore public land. According to the evidence placed before the court, the respondent received a complaint from the interested parties that a portion of the suit property had been reserved for public use as an open space in Kimathi Estate and that the same had been illegally allocated to the applicant. It is my finding that it was within the respondent's power to investigate how the portion of the suit property that was reserved for public use was allocated to the deceased/applicant and to make a determination on the propriety of that allocation.

On whether the respondent observed the rules of natural justice before making the impugned decision, the following is my view. Sections 14(3) and (8) of the National Land Commission Act, 2012 provides as follows:

**14(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.**

**14(8) In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the Constitution.**

Article 47 (1) and (2) of the Constitution provides that:

**47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

I am satisfied from the replying affidavit of the respondent that the applicant was accorded a fair hearing and fair administrative action by the respondent. Section 14 of the National Land Commission Act, 2012 reproduced above enjoins the respondent to give every person who appears to have an interest in a grant or disposition under review, a notice of such review and an opportunity to appear before the respondent and to inspect any relevant documents. The respondent averred in its replying affidavit that the applicant was given a notice of the review of the grant of the suit property through newspaper advertisement. The applicant did not dispute this fact. I am satisfied that the applicant was accorded reasonable opportunity to appear before the respondent and to respond to the complaints that were levelled against her by the interested parties in respect of the suit property.

I do not believe the applicant that she was not aware of the proceedings before the respondent. The evidence placed before the court by the interested parties shows that the applicant lied and concealed material facts to the court. I am of the view that the court was misled into granting the leave that was granted herein and for the same to operate as a stay. The applicant had stated in her verifying affidavit that she had already developed the suit property and that the same was rented out to tenants from whom she was receiving rent. The applicant also talked of having obtained approval to put up "a first floor" on top of the "ground floor" which tenants had occupied under various tenancy agreements and from which she would "be deprived of the rental income I currently collect from the tenants..." The photographs taken on the suit property on 24<sup>th</sup> August, 2017 after the filing of this suit annexed to the interested parties' replying affidavit show that the so called "ground floor" that the applicant claimed to have put up on the suit property is an incomplete structure and that the purported "first floor" that she wanted to put on top of the "ground floor" was a separate structure. There is no evidence of occupation of any of the structures. The court feels that it was cheated while granting leave to bring these proceedings and for the grant of leave to operate as a stay. Since I am satisfied that the leave that was granted herein on 20<sup>th</sup> July, 2017 was obtained by the applicant through misrepresentation and concealment of material facts, that is a sufficient ground to strike out the application before me that was filed pursuant to that leave even if I had found that the application had merit.

I am also not convinced that the deceased was a bona fide purchaser of the suit property for value without notice. From the evidence on record, the deceased purchased the suit property on the strength of a letter of allotment. The suit property had not been surveyed and had no title. The deceased took the risk of purchasing a property without a title and cannot claim innocence when after the property was surveyed, its boundaries extended to a public open space.

The applicant's application should fail both on merit as I have demonstrated above and also on account of misrepresentation and concealment of material facts. However, I have noted from the evidence placed before the court by the interested parties that their complaint before the respondent concerned the open space in Kimathi estate that was annexed and included in the suit property. The complaint was not over the entire parcel of land comprised in the suit property. The interested parties had no problem with the portion of the suit property outside the said open space. In the circumstances, the respondent acted unreasonably or irrationally in revoking the title for the entire parcel of land comprised in the suit property while only a portion thereof was in dispute as having been reserved for public use as an open space. I am of the view that it would be unjust in the circumstances to uphold the decision of the respondent in its entirety. Due to the foregoing, I will review the decision of the respondent in relation to the portion of the suit property that does not fall within the open space in Kimathi Estate that was reserved for public use. I am of the view that the applicant should retain the portion of the suit property falling within Bahati Estate which was not in dispute. In conclusion, I hereby make the following orders;

1. The decision by the respondent made on 12<sup>th</sup> April, 2017 revoking the title of the entire parcel of land comprised in L.R No. 209/13403 is quashed in respect of the portion of the said parcel of land that does not extend to or cover the open space in Kimathi Estate which was formerly known as L.R No. 209/7383/R (as per F/R 96/71).

2. The decision by the respondent made on 12<sup>th</sup> April, 2017 shall only attach to the portion of L.R No. 209/13403 that extends to or covers the open space in Kimathi Estate which was formerly known as L.R No. 209/7383/R (as per F/R 96/71).

3. The decision by the respondent made on 12<sup>th</sup> April, 2017 directing that the entire parcel of land comprised in L.R No. 209/13403 be allocated to the County Government of Nairobi and Kimathi Estate Welfare Association jointly for use for public purposes is quashed in respect of the portion of the said parcel of land that does not extend to or cover the open space in Kimathi Estate which was formerly known as L.R No. 209/7383/R (as per F/R 96/71).

4. Only the portion of L.R No. 209/13403 which falls within the open space in Kimathi Estate formerly known as L.R No. 209/7383/R (as per F/R 96/71) shall be allocated to the County Government of Nairobi and Kimathi Estate Welfare Association to hold in trust for public use.

5. The applicant shall carry out a survey at her own cost within 60 days from the date hereof through a surveyor employed in the public service on L.R. No. 209/13403 and shall excise from the said property the portion thereof which falls within the open space in Kimathi Estate formerly known as LR. No. 7383/R (as per F/R 96/71) which shall be allocated to the County Government of Nairobi and Kimathi Estate Welfare Association to hold as aforesaid.

6. The applicant shall retain the remainder of L.R. No. 209/13403 after the said survey and excision.

7. Either party shall be at liberty to apply limited only to the issues that may arise in relation to the survey and subdivision of L.R No. 209/13403.

8. Each party shall bear its own costs.

**Dated and Delivered at Nairobi this 11<sup>th</sup> day of February 2021**

**S. OKONG'O**

**JUDGE**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

N/A for the Applicant

N/A for the Respondent

N/A for the Interested Parties

Ms. C.Nyokabi - Court Assistant