



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC PETITION NO. 11 OF 2016

ESTHER MOGAKAPLAINTIFF

VERSUS

THE NATIONAL LAND COMMISSION.....1ST DEFENDANT

THE HON. ATTORNEY GENERAL2ND DEFENDANT

JUDGMENT

INTRODUCTION

1.The Petitioner instituted this suit by way of Petition dated 30th March claiming that the Municipal Council of Kisii (now defunct) had on 16th day of March 2016, published an advertisement in one of the Daily Newspapers claiming that the Petitioner's parcels of land known as L.R NO. KISII MUNICIPALITY/BLOCK III/358 and 359 were on a riparian reserve thus violating the Petitioner's rights over the said parcels of land. The Petition is supported by the affidavit of Esther Kemuma Mogaka, the Petitioner herein in which she explains how she acquired the Suit Property and she has annexed various documents in support of her claim. The Petitioner thus prays for the following reliefs:

- a) A declaration be issued to the effect that the Petitioner is entitled to protection under the Constitution.
- b) A declaration that the publication and/or newspaper advertisement carried on the 16th day of March 2016 in the Star Newspaper touching on and concerning the illegality and/or irregularity in the allocation of L.R Nos KISII MUNICIPALITY/BLOCK III/358 and 359 was/is premature, illegal and unconstitutional.
- c) A declaration that the intended review of the Grant and/or Certificates of Lease over and in respect of L.R Nos KISII MUNICIPALITY/BLOCK III/345, 358 and 359 are *ultra vires* and unconstitutional and amounts to witch-hunting, contrary to and in contravention of articles 67 and 68 (c) of the Constitution, 2010.
- d) The Honourable Court be pleased to grant an order of Judicial Review in the nature of Certiorari to quash the publication and/or newspaper advertisement carried on the 16th March 2016 in the Star Newspaper, touching and/or concerning (sic) the impropriety in respect of L.R Nos KISII MUNICIPALITY/BLOCK III/345, 358 and 359.
- e) In the alternative and without prejudice to the foregoing, the Honourable Court be pleased to grant an order to remove and/or delete the title over and in respect of the newspaper advertisement carried on the 16th March 2016 in the Star Newspaper and the 1st Respondent be barred from further publishing any advertisement touching and/or concerning (sic) the suit property.
- f) A permanent injunction restraining and/or prohibiting the 1st Respondent herein either by herself, agents, servants and/or anyone acting on her instructions from conducting and/or carrying out any proceedings touching and/or concerning the review of the lease over and in respect of L.R Nos KISII MUNICIPALITY/BLOCK III/345, 358 and 359 and making any adverse recommendations thereon and/or in any other manner interfering with the Petitioner's developments on the suit property, save for carrying out and/or conducting necessary supervision and/or inspection on the developments thereon, subject to the provisions of the Constitution ,2010 and the obtaining law.
- g) Costs of the Petition be borne by the Respondents jointly and severally.
- h) The Honourable Court be pleased to issue such orders and/or writs as the court may deem fit and/or expedient.

2. Despite being served with the Petition, the Respondents did not file any response and the matter therefore proceeded ex-parte. The court directed that the Petition be disposed of by way of written submissions and the Petitioner filed her submissions dated 5th August 2020.

ISSUES FOR DETERMINATION

3. Having considered the pleadings, exhibits and written submissions, the following issues fall for determination:

1. Whether the allocation of the suit properties to the Petitioner was lawful.
2. Whether the 1st Respondent had sufficient grounds to review the grants in respect of the suit properties.
3. Whether the said review of the suit properties is *res judicata*.
4. Whether the Petitioner is entitled to the reliefs sought

ANALYSIS AND DETERMINATION

4. With regard to the first issue, it is not in dispute that the Petitioner was allocated two un-surveyed plots by the Commissioner of Lands, which plots were later registered in the Petitioner's name as L.R Numbers KISII MUNICIPALITY/BLOCK III/ 358 and 359. According to the affidavit evidence on record which is uncontroverted, the Petitioner made the necessary payments before the suit properties were registered in her name. Under the Government Lands Act (now repealed) the Commissioner of Lands had the power to allocate un-alienated government land to individuals or institutions in accordance with the procedure laid down in the said Act. In the absence of any evidence to the contrary it is my finding that the procedure laid down in the Government Lands Act was followed and the allotment of the suit properties to the Petitioner was proper and lawful.

5. Turning to the second issue, the powers of the National Land Commission as pertains to review of grants and dispositions in public land are laid out in Section 14 of the National Land Commission Act as follows:

Section 14

- (1) Subject to Article 68(c) (v) of the Constitution the Commission shall within 5 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 individual review all grants or dispositions of public land to establish their propriety or legality.
- (2) Subject to Article 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 exercise of the power under section (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 document.
- (4) After hearing the parties in accordance with sub-section (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 exercise of its power under this section, the Commission shall be guided by the principles set out in Article 47 of the Constitution.
- (9) The Commission may where it considers it necessary petition Parliament to extend the period for undertaking the review specified in subsection (1).

6. It is clear from the above provisions of the law that the 1st Respondent has the power to review any grant or disposition in public land. The question that I must determine is whether in the instant suit the Commission erred in advertising the Petitioners properties with a view to reviewing the grants. The impugned advertisement by the 1st Defendant states as follows:

“Having received complaints in accordance with section 14 of the National Land Commission Act, the Commission will conduct public hearings for the affected plots as listed below. This is to invite all interested parties to appear before the Commission on the date and venue indicated below:

The Commission invites all interested parties to submit five (5) copies of their written representations and documents at the National Land

Commission's Secretary/CEO's office 12th Floor Room 1205 Ardhi House by Friday 1st April 2016. Complainants are encouraged to submit their representations before the said date.

All interested parties will be required to submit original plot allocation documents during the hearing for verification"

7. In her submissions the Petitioner contends that the claim that the suit properties are on riparian land was settled in KISII ELC Case NO. 166 of 2011 and the same is therefore *res judicata*. It is her contention that in the circumstances, the issue pertaining to the propriety, validity and/or legality of the titles over the suit properties cannot be addressed by the 1st Respondent as to do so would amount to subjecting the Petitioner to double jeopardy and it would be an abuse of the doctrine of finality.

8. The Petitioner has cited the case of **Independent, Electoral and Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR** for the proposition that litigation must come to an end. It was the Petitioner's contention that any decision that was made against the Municipal Council of Kisii which concerns the validity of suit properties cannot be the subject of further quasi-judicial proceedings at the instance of the 1st Respondent.

9. Having perused the advertisement by the 1st Respondent, I do not see any reference to riparian land as the advertisement merely invites the owners of the land parcels mentioned in the said advertisement to appear before the 1st Defendant on a particular date with their title documents. The said advertisement was issued by the 1st Respondent in accordance with its mandate to review grants and dispositions in land as provided by section 14 (3) of the National Land Commission Act. If the Petitioner's titles were obtained lawfully, she has nothing to fear as the 1st Respondent is likely to affirm her title to the suit properties.

10. The Petitioner has alluded to the suit she filed against the Municipal Council of Kisii. Although the pleadings in the said suit were not attached to her Supporting Affidavit, she did attach the Decree which was extracted after the suit was compromised and the same is couched in the following terms:

"DECREE

UPON READING the consent letter dated 10th day of September 2012 and signed by the advocates for the Plaintiff, Defendants and the Interested parties respectively, IT IS HEREBY ORDERED THAT:

a) The instant matter be and is hereby settled as hereunder:

i. The ground location in respect of L.R NO. KISII MUNICIPALITY/BLOCK III/358, 359 and 593 respectively have since been ascertained, confirmed and /or planted.

ii. The interested parties herein (Samwel Kenani Omwando and Abel Moranga Ongwacho) have no further dispute concerning the ground location/position over and in respect of L.R NO. KISII MUNICIPALITY/BLOCK III/358 and 359 belonging to and registered in the name of the Plaintiff, Esther Kemuma Mogaka)

iii. The Plaintiff be and is hereby at liberty to develop L.R NO. KISII MUNICIPALITY/BLOCK III/358 and 359 upon obtaining the requisite approvals from the 2nd Defendant (Municipal Council of Kisii) herein and other relevant authorities.

iv. Upon compliance with limb (iii) herein, the Defendants be and are hereby restrained from interfering with the Plaintiff's occupation, possession and/or activities over and in respect of L.R NO. KISII MUNICIPALITY/BLOCK III/358 and 359 belonging to and registered in the name of the Plaintiff.

v. However, the Defendants be and are hereby at liberty to challenge the root of the interested parties' title as they deem fit and expedient.

vi. Each party to bear their own costs of the suit....."

11. There is no dispute that the above decree which was issued by this court is still in force. The said decree bars the defendants from interfering with the suit properties. However the respondents in the instant suit were not parties to the said suit and therefore the principle of *res judicata* does not arise.

12. As mentioned earlier, the 1st Respondent by placing the advert in the Star Newspaper was merely exercising its powers under section 14 of the National Land Commission Act. I am not satisfied that the Petitioner has demonstrated how her constitutional rights have been violated or threatened by a mere invitation to appear before the 1st Respondent. On the contrary if the 1st Respondent had taken any action without the said advertisement, the petitioner would have been entitled to complaint that due process was not followed in accordance with Article 47 of the Constitution.

13. In my view the suit herein is premature and does not meet the threshold for a constitutional petition as the Petitioner has not demonstrated the manner in which her constitutional rights have been violated in accordance with the principle laid down in the case of **Anarita Karimi Njeru v Republic 1979 Eklr** where the court held that:

"We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the

Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

14. Accordingly, the Petitioner’s suit fails and the same is dismissed. Each party shall bear its own costs.

Dated, signed and delivered at Kisii this 10th day of February 2021.

J.M ONYANGO

JUDGE