



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

PETITION NO. 14 OF 2019

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS

UNDER ARTICLES 22, 23, 40, 47 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ILLEGAL AND ARBITRARY DEPRIVATION OF PROPERTY AND

GAZETTMENT OF CANCELLATION OF TITLE NO. THIKA MUNICIPALITY/BLOCK 20/340

BETWEEN

AARON KITURA MATTI, SAMUEL KIBAARA KAUNGA & JOHN NYAGA NJAGI

*(Suing as Chairman, Secretary & Treasurer of Revival & Harvest Ministry International)....***PETITIONER**

VERSUS

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE CHIEF LAND REGISTRAR.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

By a Petition dated 1st November 2019, the Petitioner sought for Judgment against the Respondents jointly and severally for the following orders;

1. A Declaration that by virtue of the grant of lease and Certificate of lease to the Petitioner by and on behalf of the Government of Kenya and the Petitioner thereby holding the same for well over 18 years, a legitimate expectation arose on the part of the Petitioner that it had a valid title in Thika Municipality Block 20/340, and that the Respondents would at all times uphold its property rights in the said property.

2. A Declaration that the actions of the 1st and 2nd Respondents in purporting to carry out investigations and determinations in relations to the Petitioner's land and in relation to Thika Municipality / Block 20/340 and in carrying out the same without any reference to the Petitioner and without affording the Petitioner an opportunity to be heard, amount to unfair administrative action and are contrary to the requirements of due process as enshrined in Articles 47 and 50 of the Constitution of Kenya.

3. A Declaration that in purporting to order the recovery of/ nullification of the Petitioner's land parcel Thika Municipality Block 20/340 without notice or recourse to the Petitioner, the 1st Respondent acted illegally, unconstitutionally, unfairly and irregularly and that the action constitutes an arbitrary deprivation of the Petitioner of its property contrary to Article 40 of the constitution.

4. That an order of Certiorari do issue removing the report of the Thika District Land officer dated 12th September 2018

and in particular reference thereof to Thika Municipality/Block 20/340 to this Honourable Court and quash it.

5. That an order of Certiorari do issue removing Gazette Notice Number 1995 dated 1st March 2019 , Item No. 14 thereof referenced NLC/HLI/537/2018 and in particular reference to Title No. Thika Municipality Block 20/340 therein to this Honourable Court and quash it.

6. An order directing the 2nd Respondent to unconditionally and immediately remove the restriction placed on Thika Municipality Block 20/340 therein to this Honourable Court and quash it.

7. An order directing the 2nd Respondent to unconditionally and immediately remove the restriction placed on Thika Municipality Block 20/340.

8. A Permanent Injunction do issue restraining the 1st and 2nd respondents , their employees, and or agents from revoking , cancelling altering or in any way interfering with the Petitioner's proprietary rights over Thika Municipality / Block 20/340.

9. Costs of the suit.

10. Such other and /or further remedy as this Honourable Court may deem fit and just to grant .

It was averred in the Petition that the Petitioner purchased the suit property from **Ngoingwa Company Limited** in 2001, for a consideration of **Kshs 4, 400,000/=** and was subsequently issued with a lease by the Government of Kenya. That before the purchase, the Petitioner was informed by the seller and ascertained from contemporary records available at the **Commissioner of Lands** Offices at Ardhi House, Nairobi that **Ngoingwa Company Limited** originally owned the land comprising **L.R No. 4914 and L.R 11342**, as private land which was later amalgamated and converted to registration under the **Registered Land Act (Cap 300)** to form **Thika Municipality Block 20**, which block was then subdivided into various parcels for allocation to the membership of the Company . That as part of the subdivision, the Commissioner of lands while approving the subdivision of the mother title had designated the user of **parcel 340**, as reserved for Educational purposes. Further, the Commissioner of Lands had allowed the vesting of the title to this land upon **Ngoingwa Company Limited** or its transferee subject only that the parcel was to maintain the Educational user and that if the user thereof changed, then the title would lapse and the land would automatically revert to the Government. That the Company then decided to sell off the land to meet some of the costs attendant to the subdivision process.

That since the user tallied with the Petitioner's intended use for building a school and as the condition attached to the approval of the subdivision did not adversely affect the Petitioner, the Petitioner purchased the property and the Commissioner of Lands proceeded to issue the Petitioner with a lease and a Certificate of Lease for the same. That the Lease issued to the Petitioner contained special conditions; one of which was that the land and buildings shall always be used for Educational purposes and accommodation for the Headmaster/ Principal. It was contended that since the purchase of the property, the Petitioner has been raising funds for the construction of the school and has engaged the **Kiambu County Government**, for waiver of the rates payable and in any event the Petitioner has paid rates through to 2022 and at no time has the Petitioner been in breach of the lease as would entitle the Commissioner of Lands to recall the title.

That the Petitioner has enjoyed quiet possession since 2001, until it discovered that the 1st Respondent had issued a Gazette Notice **Number 1995 dated 1st March 2019**, in which the National Land Commission under item 14 thereof reference **NLC /HLI /537 /2018** which purports to nullify the Petitioner's title claiming that the title should revert to the National and County Government. That the said Gazette Notice was issued without any recourse to the Petitioner notwithstanding that the suit property being a parcel affected by the gazettelement is registered in the Petitioner's name. That the Petitioner has visited the 1st and 2nd Respondent's offices as well as the Land Registrar office in Thika with view to obtaining information but the said offices have been opaque in providing information to the Petitioner to enable it take relevant action. That the Petitioner's investigations reveal that the mother parcels namely **L.R 4914 & L.R No. 11342**, which gave rise to **Thika Municipality Block 20**, were private land belonging to **Ngoingwa Company limited**. Further that the Commissioner of Land gave his consent to subdivision and user of titles for the public user plot . That at no time did **parcel No. 340** comprise public land that would be subject to the Respondents recovery proceedings and neither would the same be subject to the 1st Respondent's Historical Injustices Committee under which the purported recovery was made.

Further that the Petitioner's investigations revealed that an officer of the 2nd Respondent purportedly issued a report dated **12th September 2018**, touching on parcels within **Thika Municipality Block 20**, and which purportedly recommended that the suit property amongst other plots be surrendered to the National and County Governments on the pretext that the same constitutes public land. That the Lands Officer in his report erroneously and mischievously listed the suit property as a playground whereas a subsequent search done by the Petitioner reveals the true user of the land as for Educational purposes. Further that the Petitioner was at no point informed or contacted for information by the **Thika District Lands Officer**, during his purported investigations or ultimate preparation of the report despite the fact that it is a matter of public record that the Petitioner is the registered owner of the suit property.

That the report dated **12th September 2018**, is full of factual errors on the face of it. Further that an entity known as **Mangú Block 19 Residents CBO** appears to have presented a complaint upon which the 1st Respondent purported to have conducted a hearing after which it issued its report dated **7th February 2019**, adopting the report by the Thika District Lands officer and purporting to recover the suit property recommending its surrender to the National and County Governments. That the Petitioner's officials were neither given a chance to be heard nor were they notified of the hearing notwithstanding the fact that the Petitioner is the registered owner of the suit property. That the purported complaint was never properly lodged with the secretariat at the historical injustices committee of the **National Land Commission**, but was merely inserted in their records. The Petitioner has realized that a restriction was placed by the 2nd Respondent on the suit property on the grounds that the same is a public utility. Further that the purported hearings conducted and the report issued thereof by the 1st Respondent and the report by the Thika District Lands Officer are clear violations of the Petitioner's right

to be heard and are contrary to the principles of natural justice and reek of mischief.

It was further contended that the 1st Respondent's Historical Land injustice Committee had no mandate to purport to conduct hearings over the suit property as **Block 20** was originally owned by **Ngoingwa Company** as private land. That the Petitioner was issued with a lease and Certificate of Lease and has held the title for over **18 years**, thereby creating a legitimate expectation that the Respondents had issued a valid title and they would uphold the Petitioner's right. The Petitioner particularized unconstitutionality and illegality as; the 1st and 2nd Respondents' actions complained of were carried out without any reference to the Petitioner and therefore without affording the Petitioner an opportunity to be heard, contrary to the requirements of due process as enshrined in **Article 50 of the Constitution**, that the gazettment and revocation of the suit property by the 1st Respondent amounts to arbitrary deprivation of property contrary to **Article 40 (2) of the Constitution**, the action of the Respondents complained of are a gross violation of the Petitioner's constitutional guarantee of title and are unprocedural, unreasonable and amount to unfair administrative action contrary to **Article 47 (1) of the Constitution**, the actions are repugnant to the principles of natural justice.

The Petition is supported by the Affidavit of **Aaron Kiura Matti** the Chairman of the Petitioner. He averred that at the time of purchase of the suit property, the title was registered in the names of its officials **Aaron Kiura Matti, Gabriel Matumo Njagi and Paul Muriangi Ragwa** to hold in trust for the Petitioner. That the ultimate conditions for subdivision approval given by the then Commissioner of Lands did not include the requirement to surrender public utility plots to the Government, except the plot for Police use and the affected parcels remained private land registered to the Petitioner with the only restriction being that the public user was to be maintained. That the Petitioner is aggrieved by virtue of being the registered owner. He further averred that unless conservatory orders are issued by the Court, the Respondents may proceed to arbitrarily deprive the Petitioner of its property for the benefit of vested interest without having afforded the Petitioner a hearing.

The Petition is opposed and the 2nd and 3rd Respondents filed grounds of opposition dated **16th January 2020**, on the grounds that;

- 1. That the Petition is misconceived, frivolous, vexatious and an open abuse of the Court process.*
- 2. That the Commissioner of Lands Vide letter of allotment dated 23rd November 2000 Ref 37789/11 (annexure AKM6) gave approval of subdivision f L.R No. 11342 and gave consent for allocation of Thika municipality / Block 20/340 to Ngoingwa Company Limited on condition that the same would be used for educational purposes (Primary School).*
- 3. That the suit property having been surrendered by Ngoingwa Company limited for public utility and the 1st Respondent could therefore deal with it as it had mandate to deal with claims of historical injustices.*
- 4. That the suit property having been surrendered by Ngoingwa company Limited for public use ceased to be private property and the use for which it was reserved could not be altered unless with authority of the Commissioner of Lands who authorized the subdivision of the scheme.*
- 5. That the Petitioners / Applicants irregularly fraudulently and or illegally obtained the certificate of lease issued on 17th January, 2001 for Thika Municipality/Block 20/340 as a result of misrepresentation that they would establish an education facility on the suit property.*
- 6. That the Petitioner failed to honour the conditions of lease, specifically Condition No. 3 (annexure AKM 3 of the lease registered on 17th January 2001 by not constructing an Educational facility and accommodation for principal/ Headmaster thereafter constructing a church.*
- 7. That the protection offered under Article 40 of the Constitution does not extend to property that has been illegally acquired.*
- 8. That where land has been allocated or title issued without due observance of procedure or through fraud, the title therefrom would be null and void.*
- 9. That granting of the order sought by the Petitioners would in essence be perpetuating an illegality.*
- 10. That the Public interest herein superseded private interest of the petitioners.*

The Respondents urged the Court to dismiss the Petition with costs.

The Court directed the parties to file written submissions and in compliance thereof the Petitioners through the **Law Firm of Wanyaga & Njaramba Advocates** filed their written submissions dated **12th March 2020**. The 1st Respondent did not participate in the proceedings as this Court has not seen any pleadings in this file by the 1st Respondent nor their submissions. The 2nd and 3rd Respondents filed their written submissions through **Mwihaki Ndundu**, Litigation Counsel on behalf of the Attorney General.

The Court has carefully read and considered the Petition, the grounds of opposition and the written submissions. The issues for determination are as follows:-

- 1. Whether the 1st Respondent had Jurisdiction to deal with the property*

2. *Whether the Applicant was accorded fair Administrative action.*

3. *Whether the 1st Respondent's decision to revoke the Petitioner's title contravened the rules of natural Justice and the Petitioners right to be heard as well as his legitimate Expectation*

4. *Whether the Petition is merited.*

1. Whether the 1st Respondent had jurisdiction to deal with the suit property

It is the Petitioner's contention that the suit property is private land and has never been public land and therefore the 1st Respondent did not have jurisdiction to deal with the matter. However, the 2nd and 3rd Respondent's submitted that the relationship between the Petitioner and the government is governed by lease and since the title is leasehold with a specific term, it is owned by the Government.

The Court has considered the provisions of Section 14(1) of the National Land Commission Act that grants the 1st Respondent powers to review all grants or disposition of public land to establish their propriety or legality. Further Section 14 of the National Land Commission Act gives the 1st Respondent powers to deal with review of public land, but not privately owned freehold titles. It is not in doubt that the suit land is a leasehold which this Court finds and holds is within the purview of the Land Commission as the same was public land before it was allotted. See the case of Republic ...Vs... National Land Commission & Another Exparte Muktar Saman Olow [2015] eKLR where the Court held 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.”

It is not in doubt that the suit property initially belonged to the government and the process through which the National Land Commission investigates how the same was converted to public land is well within its purview and mandate. It is important to stress that while land may be private land, the process through which it was converted to private land falls within the purview of the National Land Commission, and the only time the National Land Commission cannot have jurisdiction over the same is where a private person sold the property to a private person. In this instant if the Commission was to probe how the suit property was transferred from Ngoingwa Company Limited to the Petitioner then the same would be ultra vires.

The Court therefore finds and holds that the 1st Respondent had jurisdiction to deal with the matter.

2. Whether the Petitioner was accorded fair administrative action.

It is the Petitioner's contention that they were not afforded an opportunity to be heard before the 1st Respondent recommended that their title over the suit property be cancelled. The Petitioner's further contended that they learnt of the cancellation through the Gazette Notice. The 1st Respondent did not participate in the proceedings. The 2nd and 3rd Respondents though filed grounds of opposition did not controvert the assertions by the Petitioners that they were not given an opportunity to be heard. The Court has further seen the proceedings by the 1st Respondent that led to the revocation of the Petitioner's title to the suit property. It is thus clear that there is no indication that the Petitioners who are the registered owner of the suit property as per the documents produced in Court participated in the said proceedings and were even invited to participate in the said proceedings.

Therefore, the Court finds and holds that the Petitioners were condemned unheard which is against the cardinal rule of natural justice. See Halbury Law of England, 5th Edition 2010 Vol.61 at para 639, which states:-

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alterman partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court.”

Fair administrative action is described in Article 47 of the Constitution as follows:

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

Article 47 of the Constitution requires just fair administrative action should be lawful reasonable and procedurally fair. This Court finds that it is clear that the Petitioner were never given an opportunity to ventilate their issues and therefore their rights to fair Administrative Action were breached thereby making the actions by the 1st Respondent unconstitutional as the Petitioner was not issued with a Notice before its title was revoked.

3. Whether the 1st Respondent's decision to revoke the Petitioner's title contravened the rules of natural Justice and the Petitioners

right to be heard.

In the case of Sceneries Limited v National Land Commission (2017) eKLR, the Court held that;

“the right to a fair hearing under Article 50(1) of the Constitution encompasses several aspects. these includes, the individual being informed of the case against her/him, the individual being given an opportunity to present/her/his side of the story or challenge the case against her/him and the individual having the benefit of a public hearing before a court or other independent and impartial body.”

This Court finds that on **28th September 2018**, when the hearing was conducted, the Petitioner was not present and drastic orders were issued against them. The Petitioner was thus not accorded a fair hearing as provided by **Article 50** of the **Constitution**. By failing to afford the Petitioner a fair hearing as provided by the Constitution, the Court finds that the same was in contravention of the rules of Natural Justice and therefore the decision to revoke the Petitioner’s title over the property contravened the rules of Natural Justice.

4. Whether the Petition is merited

The Petitioners have sought for various declarations and orders in their Petition. The Court has already held above that the **1st Respondent** acted illegally and against the rules of Natural Justice in failing to give the Petitioner an opportunity to be heard before revoking the Title Deed. Therefore, it follows that its actions are unconstitutional and cannot be left to stand. See the case of Msagha vs. Chief Justice & 7 Others Nairobi HCMCA no. 1062 of 2004 (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006] 2 KLR 553 where the Court held that:

“The Court observes firstly that the rules of natural justice “audi alteram partem” hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialisation of the globe during the hey-days of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision...It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.

Therefore, the orders sought by the Petitioner seeking to quash the decision by the **1st Respondent** are merited.

Further it is clear that the Petitioners were granted the Lease by the government of Kenya with certain conditions including a condition that the suit property would be used for Educational purposes. From the Lease document produced in evidence, there is no indication that the suit property ever reverted to the government as the Lease provided for instances in which the property would revert to the Government. No evidence has been produced to prove that any of the conditions thereof has been breached despite the allegations made by the **2nd** and **3rd** Respondents. Further, from the subdivision scheme produced by the Petitioner, it clear that the lease to the suit property was issued to Ngoingwa Company Limited with a caveat that it uses the same for Educational purposes which Company subsequently sold the same to the Petitioner. As the Lease was issued by the Government, the Court finds that a legitimate expectation arose on the part of the Petitioner that it had a valid title deed and there is no evidence to suggest otherwise. It is clear that the land was never public land as it was leased to Ngoingwa Company Limited.

The Petitioners have also sought for an order to quash the report by the Thika District Lands officer dated **12th September 2018**. The Court notes that in his report, the said Lands officer noted that the suit property had been set aside as a play ground. From the lease and the Subdivision scheme dated **23rd November 2000**, it is not in doubt that the suit property was for educational purposes. The Lands office was represented in Court and it would only have been fair for it to produce the basis of such averments. Given that none was produced, the Court finds that the same being non factual then the said report is ripe for quashing.

The Petitioner is the registered owner of the suit property and is entitled to all the rights and privileges over the suit property.

Having now carefully read and considered the instant Petition, the Affidavits in Support, the Grounds of Opposition and the written submissions by the parties and the annexures thereto, the Court finds and holds that the Petition herein dated **1st November 2019** is merited and the same is allowed entirely in terms of prayers no. 1, 2, 3, 4, 5, 6, 7 and 8 with costs to the Petitioner.

It is so ordered

Dated, signed and Delivered at Thika this 4th Day of March 2021

L. GACHERU

JUDGE

4/3/2021

Lucy - Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by the Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Wamai for the Petitioner

M/s Masinde for the 1st Respondent

M/s Ndundu for the 2nd and 3rd Respondents

L. GACHERU

JUDGE

4/3/2021