



Leting & 2 others (Suing as Executors of the Estate of Joseph Tendenei arap Leting) v National Land Commission; Kenya Railways Staff Retirement Benefits Scheme & another (Interested Parties) (Environment and Land Judicial Review Case 11 of 2018) [2024] KEELC 6604 (KLR) (3 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6604 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 11 OF 2018**

LN MBUGUA, J

OCTOBER 3, 2024

BETWEEN

**CECILIA CHEPKOECH LETING 1ST EXPARTE APPLICANT
MAUREEN CHEPTOO LETING 2ND EXPARTE APPLICANT
ANTONIO KIPROP LETING 3RD EXPARTE APPLICANT
SUING AS EXECUTORS OF THE ESTATE OF JOSEPH TENDENEI ARAP
LETING**

AND

NATIONAL LAND COMMISSION RESPONDENT

AND

**KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME . INTERESTED
PARTY**

KENYA RAILWAYS CORPORATION INTERESTED PARTY

JUDGMENT

The Background

1. The exparte applicants claim to be the executors of the estate of Joseph Tendenei Arap Leting (Deceased). They filed a Chamber Summons Application on 14.3.2016 against the National Land Commission (herein after the commission) seeking leave to institute Judicial Review proceedings against the Commission in the High Court JR Case No. 117 of 2016 for orders inter alia, to stop the Commission from reviewing the Grant in respect of parcel. L.R. 209/6506/1 which was registered in the name of the deceased.



2. On 23.11.2016, Judgment was delivered in favour of the Exparte Applicant. However, vide a Notice of Motion Application dated 13.1.2017, the Trustees Kenya Railways Staff Benefits Scheme (hereinafter the scheme) sought orders to be joined in these proceedings and for the above mentioned judgment to be set aside claiming an interest in the suit property. In a ruling delivered on 19.7.2017, the application was allowed, hence the earlier judgment was set aside and the matter was to start denovo.
3. On 7.2.2018, the court delivered a ruling in which the file was transferred to the Environment and Land Court. By then the matter appears to have been ripe for delivery of the judgment as parties had even filed their respective submissions.
4. I have stumbled upon yet another application filed on 20.8.2018 in which Kenya Railways Corporation also sought to be joined in these proceedings as a 2nd interested party. The fate of that application is unclear, and the said party did not file any other documents in the matter.

Case Management

5. The physical documents which have been filed in this matter are voluminous, and this has taken a toll on the proceedings which are in bad shape. In the circumstances, I hereby give directions for the file to be re-arranged into two volumes, whereby volume (i) will contain only the hand written notes, court orders, rulings and judgments, while all other documents shall be placed in volume (ii).
6. As stated earlier, a judgment had been delivered on 23.11.2016 but was later set aside when the scheme was joined in this matter. And by the time the ruling of 7.2.2018 where the case was transferred to this court was delivered, some parties had apparently filed their submissions in regard to the substantive Notice of Motion. Thus when I took over this matter on 12.10.2022, the court was informed that directions on the filing of final submissions had earlier on been given. Nevertheless, the court listed the matter for hearing so as to ascertain what documents had been filed by the various parties. Eventually, the court gave directions on the delivery of the judgment based on the documents so far filed.

Case for the Exparte Applicants

7. The case of the exparte applicants is contained in the substantive Notice of Motion dated 18.3.2016, the annexed statement of facts and the Verifying Affidavits of Maureen Cheptoo and Hillary Mecheo, all of even dates, as well as the Supplementary Affidavit of Maureen Cheptoo dated 28.6.2026.
8. The exparte applicants seek the following orders in their substantive notice of motion application;
 1. That an order of certiorari do issue to remove into this court and quash the decision by the National Land Commission to issue a Notice and conduct a review and hearing in respect of the property known as Land Reference Number 209/6506/1 belonging to the Estate of Joseph Tendenei Arap Leting (Deceased) which said decision appeared in an advertisement in the Standard Newspaper and the Daily Nation issues of 22nd January, 2016 by the National Land Commission.
 2. That an order of prohibition do issue to forbid the National Land Commission from conducting any hearing or review over the complaint in regard to the property known as Land Reference Number 209/6506/1 whether on the 15th March 2016 or any other date.
 3. That a declaration do issue that the National Land Commission has no jurisdiction to hear or adjudicate and determine any proceedings touching on the property known as Land Reference Number 209/6506/1 either in the manner suggested by the Commission or at all.



4. That an order of stay of all the impugned proceedings by the National Land Commissioning in respect of the property known as Land Reference Number 209/6506/1 be issued until the hearing and determination of this Application.
5. That the costs of this Application be provided for.
9. It is their case that on that 22nd January, 2016, the National Land Commission advertised a Notice in the Daily Nation and the Standard Newspaper requiring the deceased to appear before the National Land Commission on Wednesday 27th February, 2016 for a public hearing in relation to the Review of the deceased's Grant to the property known as Land Reference Number 209/6506/1. However, the said 27th February, 2016 turned out to be a Saturday and not a Wednesday as stated in the Notice.
10. They contend that the notice did not indicate the nature of the claim, and that the period to respond was too short. They also contend that the Commission had no jurisdiction to review the Grant as the title in question was private property.
11. The exparte applicants have given an account of how the deceased acquired the suit land, starting with a letter of allotment of 14.11.1988 from the Commissioner of lands, and that he (Deceased) was eventually given a title thereof on 13.4.1989.
12. In support of their claim, the exparte applicants availed the following documents; The will of the deceased, the public notice issued by the Commission, the letter of allotment (date not clear), the title deed in the name of deceased and documents from Nairobi City Council.
13. The submissions filed by the exparte applicants in respect of the substantive notice of motion are the ones dated 18.3.2016 and 28.6.2016. They reiterate that the Commission has no jurisdiction to review the title in question as the suit land is private land protected under the doctrine of absolute indefeasibility. To this end, the exparte applicants have relied on the following authorities: Nairobi Permanent Markets Society and Others Versus Salima Enterprises and Others [1995-98] 1 EA 232, Bwambale and Another Versus Matte and Others [2005] 2EA 49 and Moya Drift Farm Limited Versus Theuri [1973] EA 114.
14. The exparte applicants further contend that the commission was in breach of the rules of natural justice as the notice of the complaint was not served upon them and that they were not given an opportunity to respond to the complaint. To this end, reference was made to the provisions of Section 14 of the National Land Commission as well as Article 48 and 68 (c) of *the Constitution*. The Exparte Applicants rely on the cases of: Republic Versus the Director of Medical Services Nairobi High Court Civil Case Number 38 of 2015, *Suchan Investments Limited – Versus – The Ministry of National Heritage and Culture and Others Civil Appel Number 46 of 2012*, *Republic Versus Energy Regulatory Commission – High Court Civil Case Number 355 of 2015* and *Kenya Human Rights Commission – Versus Non-Governmental Organizations Co-ordinations Board – High Court Civil Case Number 495 of 2015*.

Case for the Respondent (The National Land Commission)

15. The Respondent opposed the suit vide the Replying Affidavit of its Deputy Director legal affairs, one Brian Nikol dated 20.6.2016. He contends that pursuant to the provisions of Section 14 of the *National Land Commission Act*, the Respondent has mandate to review all grants and dispositions of public land which entails analysis by the respondent, the process under which public land was converted to private land. And that it is the duty of the respondent to act on each and every claim and determine which complaints warrant a review.



16. For the suit land in question LR. 209/6506/1, the respondent avers that they received a complaint from the 1st interested party who averred that the land was unlawfully acquired by the deceased. Thus the review commenced and the respondent published the notice to that effect on 22.1.2016 indicating that the hearing would be on 27.2.2016. That a representative of the estate of the deceased appeared on 24.2.2016, and he was informed that the proceedings would not be conducted on 27.2.2016 as there was an error as the date was a Saturday.
17. The review however did not take place, thus no rights of natural justice have been breached, but when the review process is undertaken the ex parte applicants will have an opportunity to scrutinize all the documents availed.
18. The submissions of the respondent were filed on 13.11.2017 where they argue that the right to ownership of land is not absolute, as it doesn't extend to land which was acquired unlawfully and that this position is set out at Article 40 of *the Constitution*. It contends that the power to review Grants is set out at Article 68 of *the Constitution* and Section 14 of the *National Land Commission Act*. On this point, the cases of Republic vs. Land Registrar Mombasa & 2 Others Ex parte Bhangra Limited [2012] eKLR and Joseph Mungai Gichuru & Another v. Mathaara Mwangi & 4 Others [2017] eKLR were proffered.
19. The respondent further buttresses its arguments by citing the cases of JR 376 OF 2014 Muktrar Saman Olow –v- National Land Commission, where the Hon. Justice Wendon Korir expressed himself as follows;

“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.”
20. The respondent contends that it is necessary to interrogate the legality of the title in question to determine if the land was initially public land, hence the orders sought should not be granted.

The Case for the 1st Interested Party

21. The 1st Interested Party opposed the suit vide the Replying Affidavit of its Chief Executive Officer, one Simon Nyakundi filed on 7.8.2017. They contend that the suit land was part of the mother title L.R.No.209/6506 issued by the Government to the East African Railways and Harbours Administration, later succeeded by Kenya Railways Corporation which in turn vested the suit land unto the 1st Interested party vide a legal notice no. 169 of 2006. They therefore contend that the land was acquired unprocedurally by the deceased.
22. The 1st Interested Party further contends that the Respondent had the mandate to review the grant in tandem with the provisions of Section 6 of the *National Land Commission Act*.
23. In support of their case, the 1st Interested Party has availed the following documents for consideration by the court; Provisional Certificate for the Grant I.R. 20533, The title for parcel L.R. 209/6506 Grant I.R.20533, Certificate of Registration of the 1st interested party as a Retirement Benefit Scheme, the legal notice no.169 of 7.9.2006, a letter from Oraro & Co. advocates to Akide & Co. Advocates, a



letter from Akide & Co. Advocates to National Land Commission and an illegible document from National Land Commission.

24. In their submissions filed on 14.11.2017 the scheme argued at length as to why the matter should be handled by the ELC, now a moot issue. They have also rehashed the history of the suit property as set out in their Replying Affidavit.
25. The scheme cited the provisions of Section 14 (4) & (5) of the *Kenya Railways Corporation Act* Cap 397 to argue that public land cannot be alienated by the Kenya Railways without consent by the minister of lands, and in the case at hand, the exparte applicants didn't have such a consent. They still rely on the aforementioned provisions of law to buttress the point that the Respondent had the mandate to review Grants on public land or land which was public land that was converted to private land. To this end, the scheme relies on the cases of; *Republic v National Land Commission Exparte Krystalline Salt Limited* [2015] eKLR and *Compar Investment Ltd v National Land Commission & 3 Others* [2016] eKLR.
26. The scheme further argues that themselves and the Kenya Railways corporation are public entities as was held in the case of *Satrose Ayuma & 11 Others vs. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others, Petition No. 65 of 2010* eKLR.
27. On the question of breach of right to a fair hearing, it was submitted that no hearing took place on 27.7.2016 when it was realized that it was a Saturday, hence an appropriate notice was to be issued again and the exparte applicants were informed appropriately. Thus the exparte applicants apprehensions are premature and on this point, reference was made to the case of *Bernad Muia Tom Kiala vs. Speaker of the County Assembly of Machakos & 4 Others* [2014] eKLR.

Determination

28. The scope of judicial review was elucidated in the Court of Appeal case of *Municipal Council Of Mombasa V Republic And Another* 2002 eKLR that; "Judicial review is concerned with the decision-making process, not with the merits of the decision itself...." Its purpose thereof is to ensure that the individual is given fair treatment by the authority to which he has been subjected - See *Republic -vs- Secretary of State for Education and Science ex parte Avon County Council* (1991) 1 All ER 282, at P. 285.
29. From the arguments presented before this court, and keeping in mind that these are judicial review proceedings, I frame the issues for determination as follows;
 1. Whether there was breach of a right to a fair hearing
 2. Whether the National Land Commission had jurisdiction to deal with the complaint relating to the suit parcel.

Breach of a Right to a Fair Hearing

30. The right to a fair hearing which includes the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair is firmly embedded in our Constitution at Article 50 (1) and Article 47 as well as under Section 4 of the *Fair Administrative Action Act*. The requirement of a "reasonable opportunity to state ones case" is an apparent codification of the common law rule of natural justice known in latin as "audi alteram partem" which literally means hear the other side, and prohibits the condemnation of a person unheard.



31. In Republic v County Director of Education, Nairobi & 4 Others Ex-parte Abdukadir Elmi Robleh [2018] eKLR the court described the above rule as follows;
- “The audi alteram partem rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet”.
32. The grievance of the exparte applicants is that the Commission had put up a notice on 22.1.2016 to review the Grant of the suit land and parties were required to attend the hearing on 27.2.2016. That the notice was too short, the date was a Saturday and that the nature of the complaint was not indicated. It has emerged that no hearing happened on 27.2.2016 as the date indeed turned out to be a Saturday. However, the respondent has explained that the error occurred when information was taken to the Government printers for publication and that this error was explained to the representatives of the deceased on 24.2.2016. The second ground listed in the substantive application is a prayer to prohibit the commission from carrying out any proceedings on 15.3.2016 “or any other date”. What emerges from this evidence is that no hearing took place on 27.2.2016 and that the exparte applicants were resisting any hearing at all.
33. It follows and as rightly submitted by the 1st Interested party that the fears of the exparte applicants are anticipatory hence unfounded in so far as the issue of the notice is concerned. Thus there is nothing which can be construed as amounting to a breach of a fair hearing as at the time this suit was filed.

Jurisdiction

34. On jurisdiction, the arguments proffered by the exparte applicants are that the suit land was private land, hence it did not fall under the mandate of the Commission in terms of review of Grants. On the other hand, the Commission and the scheme contend that the National Land Commission had powers to review Grants relating to public land or land which was public land but was converted to private land.
35. The legal regime governing the mandate of the Commission on the issue at hand is to be found at Article 68 (c) (v) of *the Constitution* as well as Section 14 of the *National Land Commission Act*. For avoidance of doubt, Section 14 provides as follows:

“Review of Grants and Dispositions.

- 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. (Emphasize added).
- 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*.
- 9) The Commission may, where it considers it necessary, petition Parliament to extend the period for undertaking the review”.

36. At this juncture, I pose the question; Which titles acquired in an unlawful manner as mentioned under subsection (5) would the statute be referring to if not the titles birthed by unlawful conversion of public land to private land?. There is no rocket science needed to discern that the Constitutional architectures at Article 68 (c) (v) and Section 14 (5) and (6) of *National Land Commission Act* were designed to “right the wrongs” of yester years, particularly with regard to the post independence land grabbing frenzied phenomenon.

37. In light of the foregoing analysis, I am in agreement with the submissions of the respondent that it had the mandate to review Grants of public land including public land which had been converted to private land. To this end, the cases of JR 376 of 2014 Muktar Saman Olow –vs- National Land Commission and Republic v National Land Commission Ex-parte Holborn Properties Limited [2016] eKLR cited by the respondent are applicable.

38. This being a judicial review matter, it would not be proper for the court to delve into the question as to how the suit land was acquired as that would pre-empt the would be review proceedings. It suffices that the entity known as the scheme had lodged a complaint on the basis that the suit land was public land as at the time of its purported alienation to the deceased.

39. I therefore come to the conclusion that the Commission had the statutory jurisdiction to deal with the matter of review. It is noted that the review did not happen as a stay of the National Land Commission proceedings was granted in this particular matter. There is therefore nothing to prevent the National Land Commission from continuing with the exercise despite the passage of time as the complaint was lodged within time.

Conclusion

40. The court finds that these Judicial review proceedings are unmerited. The suit is hereby dismissed with costs to the Respondent and the 1st Interested Party.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2024
THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA



JUDGE

In the presence of:-

Ongicho for Ex-Parte Applicant

Chege holding brief for Wafula for 1st Interested Party

Masinde for National Land Commission

Macharia for Interested Party

Court assistant: Joan

