



Lamu Estate Agency Limited v Attorney General & 2 others; Nyaga (On her own behalf and on behalf of all residents of Jamii ya Mgini Village) & another (Interested Parties) (Environment & Land Petition 14 of 2015) [2024] KEELC 7376 (KLR) (6 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7376 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION 14 OF 2015
FM NJOROGE, J
NOVEMBER 6, 2024**

BETWEEN

LAMU ESTATE AGENCY LIMITED PETITIONER

AND

HON ATTORNEY GENERAL 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

COUNTY GOVERNMENT OF LAMU 3RD RESPONDENT

AND

MARY IMMACULATE W NYAGA (ON HER OWN BEHALF AND ON BEHALF OF ALL RESIDENTS OF JAMII YA MGINI VILLAGE) INTERESTED PARTY

MOHAMED ALI OMAR INTERESTED PARTY

RULING

1. The 2nd Interested Party moved this court vide a notice of motion application dated 8/5/2024 for orders: -
 1. That the Honourable Court be pleased to order that the determination by the National Land Commission in regard to Parcel No. LR 12852/342 as published in Gazette Notice No. 11714 of 9th November 2018 be and is hereby adopted as the order of the court;
 2. That the Honourable Court be pleased to order as follows:
 - a. That the 345 hectares currently in occupation and use by the Kenya Defence Forces be excised from LR No. 12852/342 and allocated to the Principal Secretary to Treasury



to hold in trust on behalf of the Kenya Defence Forces and the Chief Land Registrar to issue title;

- b. That the family of Mohamed Ali Omar be settled on 208 hectares within Ndununi area and 100 hectares within Migombani area be excised from LR No. 12852/342 and the Chief Land Registrar to issue title to the said family.
 - c. That all occupants in good faith currently in occupation of portion of the suit property LR No. 12852/342 be settled on 203 hectares of land to be excised therefrom and the Chief Land Registrar to issue titles to the individual persons and that all occupants shall be settled in one area.
 - d. That a new grant be issued to Lamu Estate Agency Limited for 6539 hectares after excision of the portions for the Kenya Defence Forces, Mohamed Ali Omar and occupants in good faith above from LR No. 12852/342.
3. That the Honourable Court be pleased to order that the Petitioner do surrender the original title deed for Parcel No. 12852/342 to the Chief Land Registrar within thirty (30) days of the Court's order for implementation of the orders herein.
 4. That costs of this application be provided for.
2. The application was premised on the grounds set forth in the Notice of Motion and the Supporting Affidavit sworn by Mohamed Ali Omar on 4th December 2023, wherein he deposed that his interest in this suit was a portion measuring 208 hectares within LR No. 12852/342 at Ndununi area, and 100 hectares within Migombani area in trust of his family. His claim was that the portion was their ancestral land until sometime in 1964 when they were displaced by bandits then known under the sobriquet "shifta". They later returned to the land and in the year 1998 they applied for title deeds upon approval of the PDP No. LMU 520.VII.296. Before that request was actualized, they learnt that the land was allocated as part of the Petitioner's land. This prompted them to engage the mandate of the 2nd Respondent who published its report regarding the dispute in the Kenya Gazette Notice No. 11714 on 9th November 2018.
 3. The 2nd Interested Party asserted that the published report was a negotiated settlement and was communicated to the Chief Land Registrar vide a letter dated 5th October 2018. He added that the present suit had been dismissed for want of prosecution on 2nd November 2020 and was reinstated for purposes of adopting the settlement as an order of the court; that despite the above, the Petitioner has not taken any steps to have the settlement adopted as an order of the court.
 4. Only the 3rd Respondent opposed the application. It filed a replying affidavit sworn by Patrice Lumumba on 31st May 2024, wherein he stated that the present petition was filed alongside an application for conservatory orders which were granted by Angote J. on 6/10/2015 in the nature of an interlocutory injunction restraining the 2nd and 3rd Respondents from revoking or in any way dealing with the Petitioner's title for LR No. 12852/342. The deponent stated that on 19th September 2016, the conservatory orders were consequently issued to be in place pending the determination of the Petition. That contrary to the conservatory orders in place, the 2nd Respondent vide Gazette Notice No. 6862 of 17th July 2017, published its determination revoking the Petitioner's title.
 5. Less than one month later on 14th August 2017, the 2nd Respondent upheld the Petitioner's title vide Gazette Notice No. 7721, pending this court's decision in Petition No. 10 of 2014, suit which the deponent denied its existence thereof. He added that on 10th November 2017, the 2nd Respondent



published Gazette Notice No. 11043 revoking the Petitioner's title again, and a further Gazette Notice No. 11714 of 9th November 2018, reversing its decision of 17th July 2017 and 10th November 2017.

6. Mr. Lumumba further deposed that the allegation that the 2nd Respondent's decision was arrived at by consent of the parties herein was misleading and false, since the 3rd Respondent was neither consulted nor participated in any such negotiations. He added that he is aware of attempts by the Petitioner and the 2nd Respondent to have the matter settled by consent; however, he took exception to the exclusion of the 3rd Respondent in such attempts.
7. The application was canvassed by way of written submissions. Both the 2nd Interested Party and the 3rd Respondent filed their respective submissions which I have keenly considered. The main issue for determination is whether the decision of the 2nd Respondent published in Gazette Notice No. 11714 On 9th November 2018 should be adopted as the order of this court.

Analysis and Determination

8. It is undisputed that there is a Gazette Notice No. 11714 of 9th November 2018 published by the 2nd Respondent and that it forms the basis of the present application. The contents of the said gazette notice are equally not in contention. The 3rd Respondent's grievance is that the 2nd Respondent acted on the dispute despite there being a consent order restraining the same in court proceedings herein. No doubt, the consent order which is said to be dated 19th September 2016 granted the petitioner prayer no. 4 of its application dated 5th October 2015 and which was framed as follows:

That this Honourable Court be pleased to issue a conservatory order in the nature of an injunction restraining the 2nd and 3rd Respondents, their agents, officers or any persons acting under their instructions from revoking the Petitioner's title deed for all that land parcel known as L.R No. 12852/342 Lamu Estate Ranch pending the hearing and final determination of this petition."

9. Subsequently, on 13th March 2018, parties indicated intention to compromise the petition but never seemed to arrive at a consent until sometime on 2nd November 2020 when the petition was dismissed for want of prosecution. The Petition was however reinstated on 25th July 2022, with room for negotiations granted.
10. Section 14(1) of the *National Land Commission Act* grants the 2nd Respondent powers to review all grants or disposition of public land to establish their propriety or legality. This provision is founded on Articles 67 and 68 of *the Constitution*. However, it must not be lost that there was an injunction restraining revocation of the title in dispute pending the hearing and determination of the Petition. It is evident that when the 2nd Respondent made its decision on 9th November 2018, the injunction orders were still in place. There is also a complaint by the 3rd respondent, in which I find considerable merit, that it was not consulted in the consent relied on by the applicant. Guided by the reasoning of Odunga J in *Republic v National Land Commission, Harcharan Singh & 2 others Ex parte Taraban Company Limited & another* [2017] eKLR, I hold the view that the actions of the 2nd Respondent were not proper for being conducted contrary to the orders of this court.
11. In the said case, Odunga J expressed: -
 47. It is not in doubt that the matter before the Commission is the manner of acquisition of interest by the ex parte applicant/interested party in the suit property. To my mind, that is an issue that the ELC may if the pleadings are properly placed before it squarely deal with. One shudders to think of a scenario where the Commission finds that the interest in the suit



property was not properly acquired by the ex parte applicant/interested party and proceeds to direct the Registrar to cancel the ex parte applicant's leasehold interest while the ELC declines to issue the orders sought by the 2nd interested party.

48. In my view that is scenario which must be avoided at all costs. It is my view that where a matter may be adjudicated before two fora, one with limited jurisdiction such as the Commission herein and another with a much wider jurisdiction such as the ELC, prudence dictates that the Commission ought to give way to the High Court in order to avoid conflicting decisions being arrived at between an inferior Tribunal such as the Commission and a Superior Court such as the ELC.
 49. Therefore while I decline to quash the proceedings before the Commission, the Commission ought to be prohibited from making a determination regarding the propriety or otherwise of the acquisition of interest by the ex parte applicant and the Interested Party in the suit property until the proceedings before the ELC are terminated one way or the other."
12. In the given circumstances I am unable to adopt the 2nd Respondent's decision as prayed. The outcome is that the application dated 8/5/2024 is hereby dismissed with costs.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 6TH DAY OF NOVEMBER, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

