



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC PETITION NO. 17 OF 2018

(FORMERLY CONSTITUTIONAL PETITION NO. 525 OF 2017)

JOAB KAMAU NJOROGE.....PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

CHIEF LANDS REGISTRAR.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

MINISTRY OF LANDS AND

PHYSICAL PLANNING.....4TH RESPONDENT

JUDGEMENT

1. The Petitioner filed this petition on 18/10/2017 claiming that he was the registered owner of land reference number Nairobi Block 82/6365 situated in Tena Estate in Nairobi County (“the Suit Property”) from 1/11/1994 for a term of 99 years. He averred that he acquired the land with vacant possession from its previous registered owner. He claimed that he enjoyed quiet possession of the land until he was sued in Nairobi **Chief Magistrates Court Civil Suit No. 1248 of 2003** in which a declaration was sought that the Suit Property was an open air market. That suit was dismissed on 10/6/2011. The dismissal was upheld by the Court of Appeal.

2. The Petitioner averred that he was astonished to learn that the 1st Respondent had on 17/7/2017 vide Gazette Notice no. 6862 made a determination and revoked the title over the Suit Property in purported exercise of its powers under Section 14 of the National Land Commission Act and Article 68 of the Constitution. He claimed that the 1st Respondent’s decision was illegal, ultra vires, unreasonable and procedurally unfair to the extent that the Petitioner was not afforded a hearing before the determination to revoke his title over the Suit Property was made.

3. The Petitioner claimed that the Respondents’ actions were unconstitutional and amounted to fraudulent deprivation of his property and was therefore unlawful. He claimed that the actions violated Articles 20, 23, 27, 40, 50 (1), 60 and 67 of the Constitution. Further, that the Respondents’ actions violated Sections 24, 25 and 26 of the Land Registration Act by depriving him of his right to ownership of the Suit Property. Further, that they violated Sections 4, 6, 7 and 8 of the Fair Administrative Actions Act by failing to comply with the requirements to issue notice to him, right of review, give reasons and the information that the 1st Respondent relied on in making its determination. He added that the Respondents had usurped the role of the court in determining ownership of the Suit Property by purporting to revoke his title after the court had dismissed the suit questioning his ownership of the Suit Property. In addition, he claimed that the Respondents had changed the title register in violation of Article 40 (3) of the Constitution of Kenya and had wrongfully attempted to defeat his interest in the Suit Property.

4. The Petitioner sought an order of certiorari to remove to the court and quash the decision of the 1st Respondent published in the Kenya Gazette on 17/7/2017 and to expunge the entries entered against the Suit Property after the publication of the determination in the Kenya Gazette. He sought a declaration that the certificate of lease registered in respect of the Suit Property was conclusive evidence of ownership and that he was the absolute and indefeasible proprietor of the Suit Property. He sought a conservatory order to prohibit the Respondents or their agents from interfering with his possession of the Suit Property or issuing a new title to anyone else other than himself. He sought damages and any other relief the court may grant together with the costs of the petition.

5. He swore the affidavit in support of the petition on 18/9/2017 to which he annexed a copy of the certificate of lease dated 9/5/2000, the consent dated 30/3/2000 dated 30/3/2000 for the transfer of the Suit Property from Elizabeth C. Salat to himself. He attached a copy of the judgement in **Nairobi Civil Appeal No. 243 of 2012- J.E. Kamau and Jarred Aruwa (Suing as Officers of Tena Residents Association) v The Developer Mr. Job**. He also produced a copy of the gazette notice dated 17/7/2017 vide which the 1st Respondent directed the Chief

Land Registrar to revoke various titles including the Suit Property which the Gazette Notice indicated was reserved for the Outer-Ring Road Expansion Project.

6. The matter came up in court on several occasions when the Respondents had not filed their responses to the petition and their submissions. The 1st Respondent eventually filed a replying affidavit on 29/7/2020 which was sworn by Brian Ikol. Mr. Ikol deponed that the 1st Respondent received a complaint from the Kenya Urban Roads Authority during the construction of the Outer-Ring Road claiming that the Suit Property which had all along been a road reserve had been encroached on by strangers. The 1st Respondent published notices in the dailies inviting parties with interests in the land to attend a hearing and make submissions on how they acquired the land. He clarified that the suit land was situated at the junction of Outer-Ring Road and Manyanja Road, and that it was situated between the road reserve and power wayleave which were reserved for public purposes. He added that the junction serves as a transportation corridor and truncation.

7. He averred that the claims that the Suit Property constituted public property were not new and adverted to the case before the Chief Magistrates Court filed by the Tena Residents Association which accused the Petitioner of grabbing the suit land that according to the residents was a public utility plot in use as an open air market. Mr. Ikol clarified that that case was dismissed on a technicality after the Tena Residents Association failed to prosecute it and that the case was never heard on its merit which means the courts have not affirmed the Petitioner's ownership of the Suit Property.

8. He added that an analysis of the title annexed to the Petitioner's supporting affidavit had glaring anomalies such as not being certified as required by the Land Registration Act, the head lessor was the Government of Kenya and the lessee was Elizabeth Salat and not the Petitioner. Further, that there was no explanation on how the Suit Property moved from Elizabeth Salat to the Petitioner and there was no proof that the Petitioner purchased the suit land as he had not exhibited any transfer of land. He added that there was no letter of allotment showing evidence of allocation of the suit land by the Government to either the Petitioner or Elizabeth Salat. He emphasized that the only existing plan showed that the suit land is a road reserve. The 1st Respondent contended that there was no proof of stand premium or evidence of survey of the land as proof of the legality of the process that led to the issuance of the title over the Suit Property. Further, that there was no evidence to show that the Petitioner had been paying land rent or rates for the Suit Property.

9. Mr. Ikol deponed that there were no records in the 1st Respondent's offices or at the Ministry of Lands to support any allocation of the Suit Property and that it was therefore obvious that the title was not procedurally and lawfully obtained.

10. He averred that it was common knowledge that the sale and subdivision of Nairobi Block 82 was undertaken by Continental Developers Limited and that the only government land that remained in Block 82 was public utility portions surrendered as a condition precedent for approval of the subdivision of Block 82. He was emphatic that the Government never allocated any land in Block 82 since the only available public land in Block 82 was what Continental Developers Limited surrendered to the Government, which was not available for allocation. He was emphatic that any purported allocation of the public utility portions surrendered by Continental Developers Limited was unlawful and could not pass a good title to anyone.

11. Mr. Ikol averred that the Petitioner did not deny seeing the hearing notices for the review hearing which the 1st Respondent published in the newspaper. According to him personal service could not be effected on the Petitioner since the official records of the Suit Property indicated that the land had not been allocated to anyone and the Petitioner's details were therefore not known. Mr. Ikol concluded that the Outer-Ring Road had already been constructed on the Suit Property and the Petitioner's recourse was to file a civil suit seeking compensation which in his view would be an academic exercise because the land was never the Petitioner's legally. There were no annexures to the affidavit of Brian Ikol.

12. The 2nd, 3rd and 4th Respondents filed grounds of opposition in which they contended that the Petitioner had not demonstrated how they had violated its Constitutional rights and that he had not cited the provisions of the Constitution which he alleged they had violated. He maintained that the 1st Respondent had jurisdiction to review the grant over the Suit Property pursuant to Section 14 of the National Land Commission Act. The Respondents stated that no objection was raised as to the jurisdiction of the 1st Respondent to review the grant over the Suit Property nor was any objection raised as to the manner in which proceedings were being conducted and that as such the petition was brought in bad faith. They urged the court to dismiss the petition and award them costs.

13. The Petitioner filed a further affidavit which he swore on 17/3/2021. He denied ever seeing any publication in any newspaper concerning the review of the grant touching on the Suit Property or any other land. He maintained that a certificate of title was conclusive evidence of ownership of the land and annexed a copy of the official search done on the Suit Property on 17/7/2017 giving his name as the proprietor of the suit land. The search showed that a restriction was placed against the land by the 1st Respondent on 1/10/2013 and another one by the Chief Land Registrar on 5/9/2017 following a gazette notice. He also annexed a copy of the abstract of the title which shows that Elizabeth Salat was the first registered owner of the land on 14/1/1999 and that a certificate of lease was issued to the Petitioner on 9/5/2000. He annexed a copy of the lease issued to Elizabeth Salat on 14/1/1999. He also attached a copy of the sketch plan for the Suit Property and the cheques for payments made to the Commissioner of Lands on 29/8/2002 to show that he had been paying land rates. He maintained that he did not see any notice relating to the review of the grant over his land and that he was therefore condemned unheard and without due process being followed.

14. The Petitioner and the Attorney General filed submissions. The Petitioner relied on Sections 24 and 26 of the Land Registration Act and urged that he was the absolute and indefeasible owner of the Suit Property. He submitted that the suit filed against him in the Magistrates Court was dismissed for failure to prosecute it within the time given by the High Court and that the Court of Appeal upheld that dismissal. He added that no court had made a determination that he was not the bona fide proprietor of the land.

15. He did not dispute the fact that the 1st Respondent was empowered to review grants of public land to establish their legality or propriety but maintained that Article 47 of the Constitution was not complied with when the determination regarding his land was published in the Kenya Gazette on 17/8/2017. He submitted that procedural fairness and natural justice was not observed by the 1st Respondent and relied on the decision in **Onyango v Attorney General (1986–1989) EA 456** which was cited in **Sceneries Limited v National Land Commission**

and others on the issue that if the principle of natural justice was violated it did not matter that that same decision would have been arrived at.

16. He also relied on Section 4 of the Fair Administrative Actions Act on the need to be given notice before any proposed administrative action is taken. He relied on the case of **Robert Mutiso Lelli and Cabin Crew Investment Limited v National Land Commission** which addressed the 1st Respondent's power to revoke titles and Judge Aburili noted that the power to revoke titles was vested in the Registrar and not the 1st Respondent which could only recommend revocation of the title. He submitted that he had satisfied the grounds for award of the reliefs sought pursuant to Article 23 of the Constitution such as conservatory orders or judicial review orders. He urged the court to quash the decision of the 1st Respondent published in the Kenya Gazette of 17/7/2017 and to expunge all the entries derived from the 1st Respondent which were effected by the 2nd Respondent. He urged the court to issue a declaration that he was the bona fide registered proprietor of the Suit Property and to award him damages.

17. The Petitioner contended in this petition that his ownership of the Suit Property was unsuccessfully challenged by the Residents of Tena Estate who claimed that it constituted public land and was reserved for use as an open air market. The dismissal of the suit filed by Tena Residents was upheld by the Court of Appeal in **Nairobi Civil Appeal No. 243 of 2012- J.E. Kamau and Jarred Aruwa (Suing as Officers of Tena Residents Association) v The Developer Mr. Job**. Looking at the judgement of the Court of Appeal, there is no finding or determination that was made by the court on the ownership of the Suit Property and whether or not it was public land. The suit filed before the Magistrates was dismissed for want of prosecution. Despite being given time by the High Court to prosecute their case within 60 days, the Tena Residents failed to comply with the court directions and the suit was dismissed.

18. The right to own property guaranteed under Article 40 of the Constitution excludes property that is found to have been unlawfully acquired. The Petitioner does not dispute that the suit land was public land initially until it was transferred to Elizabeth Salat who he purchased the land from. Indeed, the 1st Respondent challenged the manner of the acquisition of the land and contended that it was not available for allocation to private persons since it had been surrendered for public purposes by Continental Developers Limited.

19. No finding had been made regarding the propriety of the Petitioner's acquisition of the Suit Property until the 1st Respondent purported to review the grant of the Petitioner's title to establish its propriety and recommended the revocation of the title through Gazette Notice Number 6862 of 17/7/2017. The 1st Respondent purported to review the grant pursuant to its mandate granted by Section 14 of the National Land Commission Act. However, the court notes that the power granted by that section to the 1st Respondent to review grants of public land was limited to five years and lapsed on 2/5/2017. The 1st Respondent could not therefore have lawfully exercised this mandate to review grants of public land to establish their propriety after the lapse of the five years unless Parliament extended the period during which it could undertake review of grants over public land to establish their propriety.

20. The Petitioner did not rebut the averments in the affidavit of Brian Ikol that the Suit Property was situated between the road reserve and power wayleave on the Outer-Ring Road and that the junction served as a transportation corridor and truncation. The averment that the Suit Property had already been used up in the construction of Outer-Ring Road was also not controverted by the Petitioner. If that is the case, then it will serve no useful purpose to declare the Petitioner to be the absolute and indefeasible proprietor of the Suit Property. If indeed the Suit Property was used up by the road, then there is no point in prohibiting the 2nd Respondent from interfering with the land records relating to the Suit Property. The right to property is not merely enjoyed by the possession of a title document showing that one is the registered proprietor of the land, that right must go hand in hand with possession or occupation of the land for otherwise the title document will just be that, a document of no value.

21. The court quashes the decision of the 1st Respondent published in the Kenya Gazette of 17/7/2017. The court declines to grant the other reliefs sought in the petition dated 18/9/2017. Each party will bear its own costs.

Delivered virtually at Nairobi this 26th day of April 2021.

K. BOR

JUDGE

In the presence of: -

Mr. Munene Ngati for the Petitioner

Mr. Solomon Mbuthia for the 1st Respondent

Mr. B. Njagi holding brief for Ms. Mwalozi for the 2nd to 4th Respondents

Mr. V. Owuor- Court Assistant