



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELC PETITION NO. 6 OF 2019**

**IN THE MATTER CONCERNING ARTICLES 1, 3, 22, 23, 40, 47, 50, 64, 67 AND 162(2) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT OF 2015**

**AND**

**IN THE MATTER OF SECTION 14 OF THE NATIONAL LAND COMMISSION ACT OF 2012**

**AND**

**IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT OF 2011**

**BETWEEN**

**KARAINI INVESTMENT LIMITED.....PETITIONER**

**AND**

**THE NATIONAL LAND COMMISSION.....RESPONDENT**

**AND**

**THE ESTATE OF NJERU MUNGE.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF LANDS REGISTRAR.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

1. The dispute in this petition relates to ownership of the land known as land reference number 36/I/14 situated in Eastleigh within Nairobi County (“the Suit Property”). The land was initially registered in the name of Njeru Munge until 15/12/1978 when it was transferred to various persons including Njeru Munge vide an instrument registered at the lands office. The Suit Property was transferred to the Petitioner on 15/4/1986. Njeru Munge died on 14/10/1978.

2. On 10/6/2016 the family of the late Njeru Munge wrote to the National Land Commission (NLC) through the firm of Wainaina and Karimi Advocates seeking its intervention in getting the title over the Suit Property revoked on the complaint that the title the Petitioner held was fraudulently obtained because the Suit Property was transferred after Njeru Munge had died and that he could not have signed the transfer at the time it was purportedly signed since he was dead by then. The family of the late Njeru Munge maintained that the Suit Property belonged to him and should form part of his estate. The Petitioner on the other hand argued that the late Njeru Munge held the Suit Property in trust for several other persons who after the incorporation of the Petitioner resolved that the land be transferred to the Petitioner. It was admitted that the late Njeru Munge held shares in the Petitioner and that over the years the Petitioner paid dividends to the family of the late Njeru Munge.

3. When the family of the late Njeru Munge sought the intervention of NLC in having the transfers of the Suit Property which were effected on 15/12/1978 and 15/4/1978 revoked on the basis that they were fraudulently obtained, NLC invited the Petitioner to present documents in support of its claim over the Suit Property. The Petitioner contended that the matter was scheduled to come up before NLC on diverse dates between 8/7/2016 and 14/6/2017 and that its advocate applied and was granted an adjournment on 8/7/2016 to enable it file its response. It added that on 9/9/2016 when they went before NLC for the hearing the 1<sup>st</sup> Interested Party applied for an adjournment to take instructions. According to the Petitioner the matter did not proceed as scheduled on 28/10/2016 and 9/12/2016.

4. The Petitioner claimed that it raised an objection regarding NLC's jurisdiction when the matter came up before NLC on 26/1/2017 and that the ruling on its preliminary objection was not delivered on 6/4/2017. Further, that NLC delivered its ruling and dismissed its objection on 21/4/2017 and reserved 14/6/2017 for hearing of the complaint. The Petitioner claimed that it was stunned to learn from NLC's letter of 18/12/2018 that NLC had determined the dispute on 28/4/2017 after allegedly hearing the dispute on 8/7/2016. The Petitioner received NLC's letter dated 28/4/2017 on 8/1/2019.
5. The Petitioner argued that it was not heard before NLC arrived at its determination and that the issues of ownership and transfer of the Suit Property were not adjudicated upon by NLC. The Petitioner pointed out various anomalies in NLC's determination of the complaint. These included that NLC referred to affidavits which were filed after it had purportedly heard the dispute; the statement that NLC's decision was arrived at after listening to all submissions from all parties concerned yet the Petitioner had not participated in any hearing; and that the decision dated 28/4/2017 made reference to the judgement delivered in the judicial review matter when in actual fact that judgement was delivered on 26/7/2018.
6. The Petitioner contended in the petition dated 31/1/2019 that NLC had infringed or violated its rights under Articles 40, 47 and 50(1) of the Constitution and sought a declaration that NLC's conduct while presiding over the 1<sup>st</sup> Interested Party's complaint regarding the Suit Property violated its rights. Further, that NLC's directive to the 2<sup>nd</sup> Respondent vide the letter dated 18/12/2018 was arbitrary and offended the rules of natural justice and was therefore void. It sought an order to restrain the Interested Parties from trespassing onto the Suit Property or interfering with the Petitioner's use of the Suit Property. Finally, it sought any consequential order the court may make relating to a fresh hearing and determination of the dispute before the Environment and Land Court.
7. Brian Ikol, NLC's Deputy Director in charge of Legal Affairs and Enforcement swore NLC's affidavit in opposition to the petition. He confirmed that NLC received a complaint from the 1<sup>st</sup> Interested Party dated 10/6/2016 requesting it to look into the transfer of the Suit Property which it contended was done fraudulently. He stated that NLC invoked its jurisdiction pursuant to Section 14 of the National Land Commission Act and admitted the complaint for review. He confirmed at paragraph 9 of the affidavit that the Respondent sought an adjournment when the matter came up on 8/7/2016 and that when parties appeared before NLC on 29/7/2016 the 1<sup>st</sup> Interested Party sought leave to respond to the averments in the Petitioner's affidavit. He confirmed that the Petitioner sought an adjournment on 28/10/2016 to enable it obtain instructions.
8. Mr. Ikol maintained that the Petitioner participated in the proceedings before NLC and that it was given an opportunity to be heard. He averred that NLC delivered its ruling on 20/4/2017 in which it found that it had jurisdiction to undertake review of grants and dispositions in relation to the Suit Property. He added that it was enough that parties filed documents before NLC and that they did not need to submit orally before NLC while explaining that NLC acted as a quasi-judicial tribunal and did not carry out its proceedings in the manner that the court does.
9. Richard Muthee Njeru, an administrator and beneficiary of the estate of the late Njeru Munge, the 1<sup>st</sup> Interested Party, swore the affidavit on 6/3/2019 in response to the petition. He confirmed that the complaint he lodged before NLC came up before NLC on numerous occasions. He learned from his advocates that NLC regarded all proceedings before it as hearings. He averred that in arriving at its decision, NLC examined the documents presented before it including the records held at the Ministry of Lands and Physical Planning.
10. Mr. Njeru produced copies of the complaint dated 10/6/2016, certificate of death for Njeru Munge showing that he died on 14/10/1978, the conveyance dated 21/12/1970 vide which the Suit Property was transferred to the late Njeru Munge, conveyance dated 30/11/1978 which transferred the Suit Property from Njeru Munge and NLC's determination dated 28/4/2017. He also annexed a copy of the Further Affidavit which he filed before NLC on 27/10/2016.
11. Mwangi Kibicho swore the Further Affidavit on 10/3/2020 and annexed a copy of the ruling dated 26/7/2018 which Mativo J. delivered in **High Court Judicial Review Case No. 172 of 2017- Republic v National Land Commission and the Estate of Njeru Munge, Ex parte Karaini Investments Limited**. NLC cited this decision in its decision of 28/4/2017.
12. Parties filed submissions which the court has considered. The Petitioner submitted that the manner in which NLC conducted its proceedings including the fact that its decision reached the Petitioner almost two years after it was made demonstrated that NLC carried out a flawed process. The Petitioner submitted at this juncture it was seeking conservatory orders for suspension of NLC's letter dated 18/12/2018 and determination dated 28/4/2017 as well as the barring of NLC and the Interested Parties from dealing with the Suit Property.
13. The Petitioner relied on Articles 22 and 23 of the Constitution as well as Articles 40, 47 and 50 and submitted that it had proved that it had a prima facie case and that it would suffer real danger and prejudice as a result of the violation of its rights. It also relied on Section 4 of the Fair Administrative Actions Act in asserting the manner in which a notice ought to be given to a person whose rights or fundamental freedoms are likely to be affected adversely by some administrative action as well as the right to a fair hearing.
14. In the Petitioner's opinion, NLC backdated its decision to bear the date 28/4/2017 to make it appear as if the decision were made before NLC's statutory power to review grants of public land to establish their propriety or legality lapsed on 2/5/2017. The Petitioner relied on Article 40 of the Constitution and urged that it would be deprived of the Suit Property were NLC's decision in the letter dated 8/1/2019 directing the 2<sup>nd</sup> Interested Party to revert the Suit Property to the 1<sup>st</sup> Interested Party to be implemented.
15. The Petitioner relied on various decisions contained in the digest of cases filed in court on 17/5/2020 which included **Patrick Musimba v National Land Commission & Others [2016]eKLR** and **Republic v National Land Commission: Estate of Fred Kubai (Interested Party); Ex parte Comply Industries Limited [2018] eKLR**, that dealt with the jurisdiction of this court.
16. The Respondent submitted that it had the jurisdiction to hear the complaint lodged by the 1<sup>st</sup> Interested Party pursuant to Articles 67 and 68 of the Constitution. It relied on the decisions of Angote J. in **Republic v National Land Commission, Ex parte Krystalline Salt Limited [2015] eKLR** in where the Judge stated that NLC could only fulfil its responsibility by querying the process under which public land was

converted to private land even where the land was already registered as private property. Judge Angote reiterated this position in **Republic v National Land Commission, Ex parte Holborn Properties Limited [2016] eKLR** while emphasising that NLC could review grants that fell within the purview of private land but which were initially public land with a view to recommending that the Registrar revoke the title. The Respondent urged that the 1<sup>st</sup> Interested Party's complaint fell within its jurisdiction and relied on the decision in **Compar Investments Limited v National Land Commission & 3 Others [2016] eKLR** on the point that the rigid requirements in a court room situation were not to be imported into NLC proceedings when it was reviewing grants of public land to establish their propriety.

17. The 1<sup>st</sup> Interested Party submitted that the Petitioner had not satisfied the grounds for grant of an injunction and contended that this petition was a private law dispute that did not fall within the realm of public law. Further, that the Petitioner had not demonstrated how NLC failed to comply with the requirements of Article 47 of the Constitution.

18. The Petitioner filed further submissions in which it regurgitated its earlier submissions and added that the dispute before NLC revolved around a transfer involving private entities over private land and cited the case of **Republic v National Land Commission; Estate of the late Fred Kubai (Interested Party), Ex parte Comply Industries Limited [2018] eKLR** in support of its contention that NLC lacked jurisdiction to hear the complaint. The Petitioner contended that NLC's action of backdating its decision was in violation of Article 25 (c) of the Constitution and infringed on its right to a fair trial.

19. The issue for determination is whether the court should grant the orders sought in the petition. The 1<sup>st</sup> Interested Party who lodged the complaint before NLC produced a copy of the further affidavit that it filed before NLC on 27/10/2016. This proves that by the time NLC purports to have heard the dispute on 8/7/2016 parties had not filed the documents which it purported to have relied on in arriving at its determination. NLC delivered a ruling on the Petitioner's preliminary objection on 20/4/2017. It dismissed the objection and directed that the matter would be heard on 14/6/2017 at 10 am. This further confirms that if NLC conducted any hearing it could only have done so after 20/4/2017 and not on 8/7/2016 as indicated in the impugned decision.

20. The court notes from NLC's impugned decision dated 28/4/2017 that NLC's Chairman referred to **Misc. Appl No. 172 of 2017** in which the Petitioner had challenged NLC's jurisdiction to hear the complaint regarding the Suit Property lodged by the 1<sup>st</sup> Interested Party. The Chairman wrote as follows:

*"... On the issue, the court held that the National Land Commission acted within its powers. Also, the court stated that the Applicant did not show that the power exercised by the National Land Commission was not as provided under the law."*

21. Judge Mativo delivered the ruling which NLC's Chairman mentioned in his decision on 26/7/2018. That means that by the time NLC made the decision dated 28/4/2017, Judge Mativo had already delivered his ruling. This further proves that NLC's decision was backdated. NLC gave its determination on the 1<sup>st</sup> Interested Party's complaint after its mandate to review grants over public land to establish their propriety had expired. It therefore made its determination without jurisdiction.

22. The Petitioner contended that NLC lacked jurisdiction to determine the dispute in the first place because it could not inquire into transfers of private property from one private entity to another. Further, that NLC's mandate was restricted to inquiries into public land and the conversion of public land to private land. Article 67 of the Constitution outlines the functions of NLC as managing public land; recommending a national land policy; advising the national government on a programme for the registration of title in land in Kenya; conducting research on land use and the use of natural resources and making recommendations to appropriate authorities; initiating investigations into historical land injustices and recommending appropriate redress; encouraging the application of traditional dispute resolution mechanisms in land conflicts; assessing tax on land and premiums on immovable property in areas designated by law; monitoring and overseeing responsibilities over land use planning in the country; and any other functions prescribed by national legislation.

23. Article 68 (c) (v) of the Constitution enjoined Parliament to enact legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality. Parliament enacted the National Land Commission Act in 2012, Section 14 of which empowered NLC to undertake the review of grants of public land to establish their propriety or legality. The review was to be undertaken by NLC within five years of 2/5/2012 when that Act came into force. Other land statutes enacted after the promulgation of the Constitution gave NLC additional functions. These include being consulted by the Cabinet Secretary alongside the county governments regarding constituting land registration units and their variation under Section 6 of the Land Registration Act; management of public land under Part II of the Land Act; administration of public land under Part III of the Land Act; acquisition of land for public purposes and payment of compensation under Part VIII of the Land Act. NLC's other mandate pursuant to Section 14 of the National Land Commission Act includes alienating public land on behalf of and with the consent of the national and county governments; ensuring state agencies manage the land they hold in a sustainable manner for the intended purposes and developing and maintaining an effective land information system for the management of public land.

24. The Environment and Land Court (ELC) is mandated by Article 162 of the Constitution to hear and determine disputes relating to the environment and the use, occupation and title to land. Section 101 of the Land Registration Act clothes ELC and subordinate courts with the jurisdiction to hear and determine disputes, actions and proceedings under that Act whose object is to revise, consolidate and rationalize the registration of titles to land. ELC and subordinate courts are granted similar jurisdiction by Section 150 of the Land Act whose object is to give effect to Article 68 of the Constitution, revise, consolidate and rationalize land laws as well as provide for the sustainable administration and management of land and land based resources.

25. The Constitution classifies land as either public, community or private. It defines public land under Article 62. Registered land held by a person under a freehold title, land held under leasehold tenure or any land declared to be private land under the law constitute private land under Article 64 of the Constitution.

26. The procedure for acquisition of public land was set out under the repealed Government Lands Act. Under the current legal framework, title to land may be acquired in the manner prescribed by Section 7 of the Land Act, which is through allocation, land adjudication process, compulsory acquisition, prescription, settlement programs, transmissions, transfers, long term leases of private land exceeding 21 years or in

any other manner prescribed by law. If there is a dispute as to how land was acquired then it is the ELC and subordinate courts to determine such a dispute except where the contention is that the land in question was public land and that it was improperly or illegally acquired.

27. The role to be played by the NLC on one hand and the ELC and subordinate courts on the other hand are clearly delineated by law. The jurisdiction of NLC to review grants of public land, which in any event lapsed on 2/5/2017, did not extend to dealing with interests over private land. That fell within the domain of the ELC and the subordinate courts.

28. Parliament deemed it fit to limit the period within which NLC could review grants over public land to establish their legality to five years when it enacted the National Land Commission Act even though the Constitution did not set time limits in Article 68. In this court's view, the role to determine the propriety or legality of grants or dispositions over public land now falls on the ELC and subordinate courts in proceedings commenced under the Ethics and Anti-Corruption Commission Act for the recovery of lost or irregularly alienated public assets or other legislation.

29. NLC was only clothed with the mandate to review grants of public land the first time such land was converted to either private or community land. If there was no question as to the propriety or legality of how a title over public land was initially converted to private land and the dispute related to transactions effected over private land, then NLC had no power to inquire into such disputes as that legally fell within the realm of the ELC and the subordinate courts.

30. It is useful to reproduce the impugned decision made by NLC in order to determine whether NLC had the jurisdiction to determine the dispute regarding the transfer of the Suit Property. The findings NLC made were as follows:-

*1. The transfer of the subject property was done after the demise of the owner, Njeru Munge which points to illegalities.*

*2. The transfer was to Karaini Investment Limited and seven other individuals, a company in which Njeru Munge was director. There are no minutes prepared of meetings held when njeru munge was alive to the effect that he agreed to transfer the land to the company.*

*3. The co-directors of Karaini Investment Limited said the deceased was holding the property in trust for them, an allegation which the family of Njeru Munge denies categorically. We find that this allegation is in question as it cannot be proven that indeed he was holding the property in trust for the other seven members of Karaini Investment Limited.*

*4. No credible evidence has been presented by Karaini Investment Ltd to rebut the strong claim that the land belonged to Njeru Munge (deceased) personally and not the group or Karaini Investment Limited.*

#### **DETERMINATION**

*Having made the above findings the commission determines as follows;*

*1. That the property LR No. 36/I/14 situated in Eastleigh be reverted back to the Estate of Njeru Munge by Karaini Investment Company Limited.*

*2. The Chief Land Registrar is directed to effect this determination.*

31. The title over the Suit Property was issued under the Government Lands Act. Through the conveyance dated 21/12/1970, Abdul Khaliq transferred his interest in the Suit Property to Njeru Munge. The conveyance mentioned that through a certificate of sale dated 30/6/1958 issued by the Executive Officer of the Resident Magistrate's Court at Nairobi in Civil Suit Number 5160 of 1957, Abdul Khaliq became vested as beneficial owner of fee simple of the Suit Property. If NLC were to have inquired into the propriety of the grant over the Suit property then it would only have inquired into how the land was initially allocated to the first allottee when it constituted public land. By the time the suit land was transferred to Abdul Khaliq, it did not constitute public land. When the land was transferred to the Petitioner in 1986 it had ceased to be public land and NLC therefore could not have determined the dispute between the Petitioner and the Estate of the late Njeru Munge.

32. Based on its legal mandate prescribed by the law, NLC did not have jurisdiction to determine whether the Suit Property was lawfully transferred from the late Njeru Munge to seven other individuals and subsequently to the Petitioner. Additionally, NLC could not make a determination as to whether or not the late Njeru Munge held the Suit Property in trust for the other members of the Petitioner.

33. No basis was made for the grant of an order to restrain the Interested Parties from trespassing or interfering with the Suit Property. The court makes no orders regarding a fresh hearing and determination of the dispute before the Environment and Land Court. It is up to the parties to move the court as they deem fit.

34. The Respondent's conduct of the proceedings in relation to the complaint lodged by 1<sup>st</sup> Interested Party relating to the Suit Property violated the Petitioner's right to fair administrative action enshrined in Article 47 of the Constitution.

35. The Respondent's decision dated 28/4/2017 and directive to the 2<sup>nd</sup> Interested Party vide the letter of 18/12/2018 offended the rules of natural justice and is therefore null and void.

36. The Petitioner is granted the costs of the petition to be borne by the Respondent.

**Delivered virtually at Nairobi this 26<sup>th</sup> day of April 2021.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Ms. Gathoni Ibrahim for the Petitioner

Mr. Solomon Mbuthia for the Respondent

Mr. Paul Wainaina for the 1<sup>st</sup> Interested Party

Mr. B. Njagi holding brief for Ms. R. Kerubo for the 2<sup>nd</sup> Interested Party

Mr. V. Owuor- Court Assistant