



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

PETITION NO. 8 OF 2019

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS UNDER ARTICLE 40,47 AND 50 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ILLEGAL AND ARBITRARY DEPRIVATION OF PROPERTY AND GAZETTMENT OF
CANCELLATION OF TITLES EMANATING FROM TITLE NO THIKA MUNICIPALITY/BLOCK 20**

BETWEEN

NGOINGWA COMPANY LIMITED.....PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

By a Constitutional Petition dated 1st July 2019, the Petitioner herein brought this suit against the Respondents seeking for the following orders;-

- 1) A declaration that the actions of the 1st and 2nd Respondents in purporting to carry out investigations and determinations in relation to the Petitioner's land and in relation to the entire THIKA MUNICIPALITY BLOCK 20 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 Article 47 and 50 of the Constitution of Kenya.**
- 2) A declaration That in purporting to order the recovery of/nullification of the Petitioner's land parcel THIKA MUNICIPALITY BLOCK 20, without notice or recourse to the Petitioner, the 1st Respondent acted illegally, unconstitutionally, unlawfully and irregularly and that the action constitutes an arbitrary deprivation of the Petitioner of its property contrary to Article 40 of the constitution.**
- 3) A Permanent Injunction do issue Restraining the 1st and 2nd Respondents their employees, and/or their agents from revoking, cancelling, altering or in anyway interfering with registers of title emanating from THIKA MUNICIPALITY/ BLOCK 20.**
- 4) That an Order of Certiorari do issue removing the report of the Thika District Land office on municipality /block 20 dated 12th September 2018 and quash it.**
- 5) That an Order of Certiorari do issue removing the report of the National Lands Commission, Historical injustices Committee dated 7th February 2019 in so far as it reports on THIKA MUNICIPALITY/ BLOCK 20 and quash it.**
- 6) That an Order of Certiorari do issue removing gazette notice no 1995 dated 1st March 2019 item no 14 thereof referenced NLC/HLI/537/2018 in so far as it reports on THIKA MUNICIPALITY/ BLOCK 20 and the plots thereof and quash it.**

7) *An order barring the 1st, 2nd and 4th Respondent from any further interference with the petitioner's right to property in respect of the affected parcels herein.*

8) *Costs of the suit*

9) *Such other and /or further remedy as this honorable court may deem fit and just to grant.*

In its Petition, the Petitioner averred that it owned the land comprising of LR NO.4914 and LR NO.11342, situated in Thika Municipality which were later amalgamated to form Thika Municipality/ BLOCK 20. That on 4th October 1987, the Petitioner applied for subdivision and the same was approved by the then Commissioner of Lands, subject to certain conditions. That among the conditions, the Petitioner was required to surrender all public purpose plots earmarked for open spaces, Police Station, Health Centers, Post Office and Primary School site to the Government, free of charge. That the Petitioner did not accept all the conditions and via correspondences, it sought to have condition 4 reconsidered.

That on 7th January 2002, the Commissioner of Lands wrote to the Petitioner and informed it of the acceptance of and revision of the conditions for subdivision and that the requirement to surrender the public user plots had been removed except in respect of the plot set aside for a Police Post. That of the 14 plots set aside, those set aside for open spaces, car park and lagoon would have title issued to the Company at Peppercorn Rent and those set aside for Commercial purposes i.e. Schools, Health Center and Post Office would have titles issued at rents to be accessed by the Commissioner of Lands. The Petitioner accepted the said conditions and the Commissioner of Lands issued certificate of leases for the said subplots as per the new agreed upon conditions.

That on diverse dates between January 2016 and September 2018, some individuals looking to unlawfully acquire the Petitioner's land for personal gain attempted to interfere with some of the parcels through the offices of the Director of Physical Planning but the Petitioner resisted the said efforts. Further that in late March 2019, the Petitioner discovered that the 1st Respondent had issued gazette Notice No 1995 dated 1st March 2019, in which the 1st Respondent under item 14 ref NLC/HLI/537/2018 purported to nullify some of the Petitioner's titles on Thika Municipality/ Block 20, stating that the titles should revert to the National and county Government. Further that the Gazette Notice was issued without any recourse to the Petitioner, notwithstanding that some of the parcels are registered in the Petitioner's name and the Petitioner originated the title of other affected owners.

That upon conducting investigations, the Petitioner established that the 2nd Respondent purportedly issued a report dated 12th September 2018 touching of parcels within Thika Municipality Block/ 20 which recommended that some plots be surrendered to the government on the pretext that the same constitute public land. That at no time was the Petitioner informed or contacted for information by the 2nd Respondent during his purported investigations. That the said report is full of factual errors.

Further that the 1st Respondent purported to have had a hearing, following a claim lodged by an entity referred to as Mangu Block 19 residents, pursuant to which the 1st Respondent through its Report dated 7th February 2019, adopted the 2nd Respondent's report to surrender the titles.

That further investigations have established that the purported complaint was never properly lodged with the Secretariat at the Historical Injustices Committee, but was merely planted in their records. That the restrictions was placed by the 2nd Respondent on Thika Municipality/ Block 20/ 707, of which the Petitioner holds title to without any recourse to it.

The Petitioner particularized unconstitutionality being that the 1st and 2nd Respondents actions were done without affording the Petitioner an opportunity to be heard, contrary to **Article 50 of the constitution**. That the Gazettement and Revocation of title by the 1st Respondent through **Gazette Notice no. 1995 dated 1st March 2019 item 14** thereof Ref **NLC/HLI/537/2018** amounted to arbitrary deprivation of property contrary to **Article 40(2) of the Constitution**. That the actions were repugnant to principles of natural justice.

In his Supporting Affidavit, **David Njehia Ngugi**, a Director of the Petitioner reiterated the contents of the Petition and averred that the hearings conducted by the 1st Respondent through its Historical Land Injustice Committee and the report by the Thika District Lands officer are contrary to principles of natural justice and are highly mischievous.

The 2nd and 3rd Respondents filed Grounds of Opposition dated 8th October 2019 stating that the Petition is frivolous and vexatious and an abuse of the Court process. That the Petition as filed intends to Curtail the statutory obligations and duties of the 2nd Respondent. Further that a Gazette Notice is not a decision capable of being quashed. That the suit properties were public utilities and the 1st Respondent could therefore deal with them as it had mandate to deal with the claims on historical Injustices. That the dispute falls under the meaning of Administrative action under the Fair Administrative Action Act 2015. That the Petition offends order 53 Rule 1 of the Civil Procedure Rules and Section 9 of the Law Reform Act.

After close of pleadings, parties filed Written Submissions in support and in opposition to the Petition. The Petitioner through the Law Firm of Gathara & Associates Advocates, filed its submissions on 5th November 2020 while the 2nd and 3rd Respondents through the office of the ATTORNEY GENERAL filed theirs on 25th November 2020. The court notes that the 1st Respondent has not filed any pleadings with regards to the application and the Petition.

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 Gazette Notice is capable of being quashed*

3. *Whether the Petitioner was accorded fair Administrative action.*

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

5. *Whether the Petition is merited.*

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

The Petitioner submitted that the suit property was private land and the 1st Respondent acted ultra vires in the subject plots since they constituted private land. It was however the 2nd and 3rd Respondent's Submissions that though the suit properties are registered in the name of the Petitioner, the specific purpose for which they were intended continues to exist.

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 Ex parte 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 Gazette Notice is capable of being quashed

It is the 2nd and 3rd Respondents contention that a Gazette Notice is not a decision capable of being quashed by certiorari and therefore the Order of Certiorari cannot be issued. From the evidence adduced in Court, the Court notes that there is no decision that has been produced alluded to a decision made by the 1st Respondent in respect to the Petitioner's property. Though the Court acknowledges that a Gazette Notice is merely informative and serves the right of transmitting a decision already made.

However, in the impugned Gazette Notice the Commission stated, that the claim allowed and proceeded to state how it arrived at its decision. In the absence of any evidence that there was another decision made apart from the Gazette Notice, the Court finds and holds that it would appear that the decision of the 1st Respondent was contained in the Gazette Notice and therefore it is a decision capable of being quashed. See the case of *Republic ...Vs... Registrar of Political Parties & 6 others Ex parte Edward Kings Onyancha Maina & 7 others [2017] eKLR* where the Court held that:-

“37. However there may be instances where there is no separate decision and in fact the Gazettement is deemed as the decision. This was the situation alluded to in Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998, where it was held that the decision to alienate land or to allocate the same was not formal because the commissioner may in most cases issue titles without necessarily identifying the decision and the date he made the decision formal and therefore the question of attacking it under Order 53 rule 7 would not arise and there is nothing capable of being exhibited thereunder. The Court further held that in a deserving case the Court can call up the file and quash whatever decision is said to be unlawful or which constitutes an error of law. In other words, where there is no specific decision, save for the gazettement, nothing stops the Court from considering the gazettement as the decision for the purposes of judicial review application. In this case, as there is no evidence that the Registrar made a different decision apart from the gazettement, nothing bars this case from quashing the gazettement.”

The Court therefore finds and holds that the instant Gazette Notice of 1st March 2019, is a decision capable of being quashed.

3. Whether the Petitioner was accorded fair administrative action.

The Petitioner has averred that it was not afforded an opportunity to be heard before the 1st Respondent recommended that their title over

the suit properties 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 Petitioner the Petitioner was 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 Petitioner who is 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.

The Court has seen the letter dated **5th September 2018**, in which the 1st Respondent summoned the Petitioner's Director in their offices, The Court has also seen the letter dated **6th September 2018**, from the Petitioner to the 1st Respondent's Deputy Commissioner, indicating their unavailability and giving a suggestion of another date. The Court has also seen a letter dated **21st September 2018**, inviting the Land Registrar for a hearing. From the Hansard of the 1st Respondent produced in evidence, there is no doubt that the alleged hearing took place on **28th September 2018**. There is no evidence adduced that the Petitioner as the registered owner of the suit property was ever invited for the hearing. In the absence of any such evidence, the Court finds and holds that the Petitioner was not afforded a chance to be heard.

The Hansard and the report by the **National Land Commission** historical injustice committee dated **7th February 2019**, on the appearance section omits the Petitioner. Additionally, the Hansard Verbatim Record of the National Land Commission (investigation on the historical land injustices claims hearings) held at **Thika County Hall, Kiambu County** held on **28th September 2018**, never invited the Petitioner on its hearing though mentioning it verbatim and its registered parcels of land. Though duly serve

The Court finds and holds that the Petitioner was 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 alteram 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 was 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.

4. Whether the 1st Respondent's decision to revoke the Petitioner's title contravened the rules of natural Justice and the Petitioner's 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 it. 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. Without a proper process through which the revocation would have taken place, the Court finds and holds that the said revocation contravened the cardinal rules of natural Justice as the proper process ought to have been followed. See the case of **Republic ...Vs... Registrar of Tiles Mombasa & 4 others Ex-Parte A.K. Abdulgani Limited [2018] eKLR**, where the Court held that;

“what was the right procedure to follow in asserting the respondent's and interested parties' interest in the suit land? Surely, not by ultra vires action of revocation of grant of title but by suitable judicial proceedings in that behalf.

5. Whether the Petition is merited

The Petitioner has sought for various declarations and orders in its 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.

This Court finds that the orders sought by the Petitioner seeking to quash the decision by the 1st Respondent are merited.

Further it is clear that the Petitioner was granted the Lease by the Government of Kenya with certain conditions including a condition that the said properties would be used for various public purposes. The Court has seen various correspondences between the Petitioner’s Advocate and the Commissioner of Lands which indicate that the Petitioner was indeed allowed to use the properties provided that the same were used for public purposes that they were meant for. It was further a condition that should the said properties be used for any other purpose other than what they were intended for, then the same would revert back 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. That though the properties were meant as public utilities they remained the property of the Petitioner and did not revert to the Government. However in his letter dated 7th January 2002, the Commissioner of Lands was categorical that the portion set aside for Police Post would be surrendered to the government. It is therefore not in doubt that L.R 20/533, that reverted to the government remains a public utility and not the Petitioner’s property.

The Petitioner has 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 made various recommendations stating what the property were and further recommended the cancellation of the lease and for them to be registered as public utility. The Court is however satisfied that the Petitioner has produced evidence that show that it was allocated the property and though the same was to be used for specific purposes, they were not to be registered as public utility. In the circumstances, the Court finds that there was no factual basis made on the Land Officer’s Report and therefore the same is baseless and ought to be quashed.

The Petitioner is the registered owner of the suit property and is entitled to all the rights and privileges over the suit property as provided under Section 24 and 25 of the Land Act. The Court therefore finds and holds that the prayer for an injunction is merited

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 July 2019 is merited and the same is allowed in the following terms:-

- 1. A declaration be and is hereby made that the actions of the 1st and 2nd Respondents in purporting to carry out investigations and determinations in relation to the Petitioner’s land and in relation to the entire THIKA MUNICIPALITY BLOCK 20 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 Article 47 and 50 of the constitution of Kenya.*
- 2. A declaration be and is hereby made that in purporting to order the recovery of/nullification of the Petitioner’s land parcel THIKA MUNICIPALITY BLOCK 20 without notice or recourse to the Petitioner, the 1st Respondent acted illegally, unconstitutionally, unlawfully and irregularly and that the action constitutes an arbitrary deprivation of the Petitioner of its property contrary to Article 40 of the constitution.*
- 3. That A permanent injunction be and is hereby issued Restraining the 1st and 2nd respondents their employees, and/or their agents from revoking, cancelling, altering or in any way interfering with registers of title emanating from THIKA MUNICIPALITY/ BLOCK 20. Save for L.R 533 that was set aside for a police post.*
- 4. That an order of certiorari be and is hereby issued removing the report of the Thika District Land office on municipality /block 20 dated 12th September 2018 and quash it.*
- 5. That an order of certiorari be and is hereby issued removing the report of the National Lands Commission, Historical injustices Committee dated 7th February 2019 in so far as it reports on THIKA MUNICIPALITY/ BLOCK 20.*
- 6. That an order of certiorari be and is hereby issued removing gazette notice no 1995 dated 1st March 2019 item no 14 thereof referenced NLC/HLI/537/2018 in so far as it reports on THIKA MUNICIPALITY/ BLOCK 20 and the plots thereof and quashing it save for plot 533 meant for a Police Post*
- 7. That An order be and is hereby issued barring the 1st, 2nd and 4th Respondent from any further interference with the petitioner’s right to property in respect of the affected parcels herein.*

8. That the 1st Respondent will bear Costs of the suit

It is so ordered.

Dated, signed and Delivered at Thika this 15th day of April 2021.

L. GACHERU

JUDGE

15/4/2021

Court Assistant - Phyllis

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 His Lordship, the Chief Justice on **15th March 2020**, this **Judgement** has been delivered to the parties online with their consents. 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

M/s Gathara for the Petitioner

No appearance for the Respondent

L. GACHERU

JUDGE

15/4/2021