



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC PETITION NO. 12 OF 2019

FRANCIS GITHINJI NGATIA.....PETITIONER

=VERSUS=

NATIONAL LAND COMMISSION.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

LAND REGISTRAR KIAMBU.....3RD RESPONDENT

COUNTY GOVERNMENT OF KIAMBU.....4TH RESPONDENT

DIRECTOR OF SURVEYS.....5TH RESPONDENT

JUDGMENT

Introduction

1. The facts in this petition and the facts in **Thika ELC Petition No. 16 of 2019** are largely the same. The only distinctive features relate to the parcel numbers, the names of the registered proprietors, and the identity of the person from whom the exparte applicants purchased their respective parcels of land. The petitioners in the two petitions were represented by the same advocate. The pleadings, evidence and submissions were similar. Responses were similar too. It is for those reasons that the judgments in the two petitions are more or less similar.

2. Through a petition dated 24/9/2019, the petitioner, **Francis Githinji Ngatia** challenged the determination and directions published by the National Land Commission [the 1st respondent] on 9/11/2018 as **Gazette Notice No 11714** in the **Kenya Gazette Vol. CXX-No 138**. The Gazette Notice was dated 28/4/2017 but published in the Kenya Gazette on 9/11/2018. The Gazette Notice contained information on determinations and directions which the 1st respondent had made in exercise of its grants review mandate under **Article 68(c)(v)** of the Constitution and **Section 14** of the National Land Commission Act 2012. Title Number **Ndumberi/Riabai/2673** relating to a parcel of land located at Kirigiti, Kiambu County, and registered in the name of the petitioner [**the suit property**] was one of the titles that had been reviewed. The 1st respondent determined that the land was reserved as part of Kiringiti Market and directed that the petitioner's individual title be revoked and the land be re-planned for use as a market and the petitioner be accommodated by issuance of a lease to him by the Kiambu County Government.

3. Aggrieved, the petitioner sought the following verbatim reliefs against the respondents:

a) A declaration that the 1st respondent is in gross violation of the petitioner's rights under Articles 2, 3, 27, 40, 47, 48, 50, 67(2), 68(v), 165(6) and 260 of the Constitution of Kenya 2010.

b) An order do issue to bring forth to this honourable court to quash the decision of the 1st respondent in Kenya Gazette (Special Issue) Vol. CXX-No. 138 of 9th November 2018 that made determination/ recommendations to the 2nd respondent to cancel and re-plan the petitioner's title No Ndumberi/Riabai/2673.

c) An order of prohibition do issue directed to the 2nd and 3rd respondents prohibiting the cancellation of the petitioners title No Ndumberi/Riabai/2673 or in any manner effecting the 1st respondent determination /recommendations contained in Kenya Gazette (special issue) Vol. CXX-No. 138 of 9th November 2018 touching on land parcel Ndumberi/Riabai/2673.

d) An order of prohibition do issue directed to the 1st, 2nd, 3rd, 4th, and 5th respondents prohibiting them from re-planning the

petitioner's land parcel Ndumberi/Riabai/2673 or in any manner whatsoever effecting the 1st respondent's determination/recommendations contained in Kenya Gazette (Special Issue) Vol. CXX – No. 138 of 9th November 2018 touching on land parcel Ndumberi/ Riabai/2673.

e) An order directing the 3rd respondent to reinstate and/or rectify the land records/Green card for land parcel No Ndumberi/Riabai/2673.

f) An order directing the 5th respondent to reinstate and/or correct the survey map for land parcel Ndumberi/Riabai/2673.

g) A declaration that the petitioner is the lawful owner of the land parcel No Ndumberi/Riabai/2673.

h) Damages for the violations of the constitution rights of the petitioner.

i) The costs of this suit be borne by the respondents.

j) Any other relief that the court may deem fit.

Petitioner's Case

4. The case of the petitioner was that, he bought the suit property from one **Lucy Njoki Kimani** for **Kshs 1,400,000**. He was registered as proprietor and issued with a title deed in the same year. Prior to purchasing the suit property, he conducted due diligence and established that the title was unencumbered. He further contended that he had developed a multi million commercial building on the suit property.

5. He added that on 3/3/2017, the 1st respondent published a notice in the **Daily Nation** notifying the public that it was going to conduct hearings relating to review of grants under **Article 68(c)(v)** of the Constitution and **Section 14** of the National Land Commission Act from **13th to 16th March 2017**. His title was one of the titles listed for review. Through his advocate, he wrote to the 1st respondent requesting to be supplied with the written complaint and supporting documents relating to his title. The 1st respondent did not avail the complaint nor the documents. That notwithstanding, he submitted a memorandum of response dated 7/2/2017 to the 1st respondent, indicating that he was a bonafide purchaser for value without notice. He contended that the scheduled hearings were postponed twice and the five year period within which the reviews were to be concluded by the 1st respondent lapsed on 2/5/2017. It was his case that the legal period within which the review was to be concluded lapsed without the 1st respondent conducting a hearing relating to his title.

6. The petitioner contended that on 9/11/2018, the 1st respondent published he impugned decision. Despite his request to the 1st respondent to avail to him a written determination relating to his title, none had been availed to him. He faulted the 1st respondent for dating the gazette notice **28/4/2017** and publishing it on **9/11/2018**. He further faulted the 1st respondent for proceeding to undertake a review of his title without any gazetted rules and regulations and without serving him with any complaint. He contended that no review hearing was conducted by the 1st respondent relating to his title.

7. The petitioner added that the suit property had been the subject of litigation in **Kiambu Misc Application No 10 of 2007** in which the defunct Municipal Council of Kiambu consented to the vacation of a restriction which had been registered against the title.

8. The petitioner added that the County Government of Kiambu [the 4th respondent] was alleged to have been the complainant in the review proceedings before the 1st respondent and that the 3rd respondent had denied him access to the land records relating to the suit property and/or removed, hidden and or destroyed them. He added that the 5th respondent had deleted and/or erased the survey map relating to the suit property.

9. The petitioner contended that the recommendation for re-planning of the suit property was a violation of his constitutional rights under Articles 2, 3, 27, 35, 40, 47, 48, 50, 67(2), 68(v), 165(6) and 260 of the Constitution. He contended that he had suffered huge losses amounting to Kshs 20,000,000 due to inability to get loans using the title.

10. This court [Gacheru J] directed that the petition be canvassed by way of written submissions. The petitioner filed his submissions dated 19/7/2021 through the firm of *Gatitu Wang'oo & Co. Advocates*. Counsel identified the following as the issues falling for determination in the petition: (i) Whether the petitioner was a bonafide purchaser for value of land parcel number **Ndumberi/ Riabai/2673**; (ii) *Whether due process was followed in revoking the petitioner's title for Ndumberi/ Riabai/2673* (iii) *Whether the 1st respondent had mandate to review the petitioner's title for land parcel Ndumberi/ Riabai/2673* (4) *Whether the petitioner's rights were violated; and* (5) *Whether the petitioner is entitled to the orders sought.*

11. *On whether the petitioner was a bonafide purchaser for value, counsel submitted that the petitioner purchased the suit property from Lucy Njoki Kimani for Kshs 1,400,000 and in the same year, he was registered as the owner of the suit property and was lawfully issued with a title deed in his name thus he was a bonafide purchaser. Counsel relied on the decision in the Ugandan case of Katende v Haridas & Co. Ltd (2008) 2EA 173.*

12. *On whether due process was followed, it was counsel's submission that the 1st respondent was not supposed to embark on the review process without first fulfilling its mandate of making rules and regulations as ordered by the High Court in Sceneries Limited Vs National Land Commission (2017) eKLR. Counsel further contended that the determination was taken without proper fair hearing as provided under*

Section 14(3) and 14(8) of the National Land Commission Act. Counsel added that no written reasons or formal decision was afforded to the petitioner for him to understand the reasoning that led to revocation of his title.

13. On whether the 1st respondent had the mandate to undertake the grants review exercise, counsel submitted that the 1st respondent did not have any mandate to review the petitioner's grant as its mandate lapsed after 5 years. Counsel contended that the 1st respondent acted without jurisdiction. Counsel relied on the decision in (i) **Sceneries Limited Vs National Land Commission (2017) eKLR**; and (ii) **Kenya Country Bus Association v Cabinet Secretary for Transport and Infrastructure & 5 Others (2014) eKLR**.

14. On whether the petitioner's rights were violated and whether the petitioner is entitled to the orders sought, counsel submitted that the petitioner's right to fair administrative action under Article 47 and the right to a fair hearing under Article 50(1) of the Constitution had been violated. Counsel cited the case of **Aaron Kitura Matti & 2 Others v National Land Commission & 2 Others(2021) eKLR**. Finally, counsel submitted that the petitioner was entitled to orders of judicial review and to general and exemplary damages for infringement of his constitutional rights.

1st Respondent's Case

15. The 1st respondent did not respond to the petition. Similarly, the 1st respondent did not file written submissions. Affidavits of service filed in the proceedings indicate that the 1st respondent was routinely served with appropriate notices. It is not known why it elected not to file a response to the serious allegations levelled against it in this petition.

Case of the 2nd, 3rd and 5th Respondent

16. The Attorney General filed written submissions dated 18/10/2021 through **Ms Mwihaki Ndundu**, Senior State Counsel, on behalf of the 2nd, 3rd and 5th respondents. Counsel indicated that she filed grounds of opposition opposing the petition on the grounds that: (i) there was no evidence presented to demonstrate that the applicant had applied for land and survey records relating to the suit property; (ii) there was no evidence presented to demonstrate that the survey records of the suit property were non-existent, having been deleted; (iii) the petitioner had not demonstrated that the respondents failed to discharge their constitutional mandate; and (iv) the application (sic) was misconceived, frivolous and vexatious. Counsel further submitted that the 3rd respondent had filed a replying affidavit sworn by **Ruth Nyamongo** who deponed that the suit property was still registered in the petitioner's name and that the impugned decision of the 1st respondent had not been implemented.

17. The learned senior state counsel, for the 2nd, 3rd and 5th respondents, filed written submissions dated 18/10/2021 in which she identified the following as the three key issues falling for determination: (i) *Whether the 1st respondent violated the petitioner's constitutional rights*; (ii) *Whether the 2nd, 3rd and 5th respondent violated the rights of the petitioners*; and (iii) *Whether the petitioner is entitled to the prayers sought on the petition as against the 2nd, 3rd and the 5th respondents*.

18. On whether the 1st respondent violated the petitioner's constitutional rights, counsel submitted that the 1st respondent who issued the impugned decision did not file any documents in court to controvert the allegations made by the petitioner hence the petitioner's allegations remained un-controverted. It was the learned state counsel's submission that the 1st respondent violated the petitioner's rights as alleged and that the petitioner was entitled to the judicial review orders sought.

19. On whether the 2nd, 3rd and 5th respondents violated the petitioner's rights, the learned senior state counsel submitted that constitutional rights violations or threatened constitutional rights violations must be pleaded with reasonable degree of precision as established in **Anarita Karimi Njeru v AG (1979) KLR 154** and that the 2nd, 3rd and 5th respondents had not violated the petitioner's rights. Counsel cited the case of **Umoja 111 Central Limited V Nairobi City County Government, Director of Survey & 2 Others (Interested Parties) (2021) eKLR**. Lastly, counsel submitted that the petitioner had failed to establish a case of violation of his rights by the 2nd, 3rd and 5th respondents. Counsel urged the court to dismiss the petition as against the 2nd, 3rd and 5th respondents.

4th Respondent's Case

20. At the time of writing this judgement, the 4th respondent had not put in their response with regard to the petition. However, during the subsistence of the petitioner's interlocutory notice of motion application dated 24/9/2019, the 4th respondent filed their response to the notice of motion. Briefly, the court will outline their response to the interlocutory application for the purpose of getting the significance of their case.

21. In response to the petitioner's application dated 24/9/2019, the 4th respondent filed grounds of opposition dated 25/11/2019 and contended that the petitioner lacked the locus standi to bring this petition; there was no reasonable cause of action against the 4th respondent; the issue of survey records fell within the mandate of the 5th respondent; and the application was frivolous, vexatious and an abuse of the court process.

22. In response to the petition, the 4th respondent filed written submissions dated

18/10/2021 through *David Mararo, County Counsel*. Counsel identified the following as the issues falling for determination in the petition: (i) *Whether the petition as filed raised any reasonable cause of action as against the 4th respondent*; (ii) *Whether due process was followed in revocation of the title to the suit property*; (iii) *Whether any appeal was filed against the Kenya Gazette special issue Vol CXX-138 of 9/11/2018*; (iv) *Whether the petitioner is entitled to the reliefs sought in the petition*.

23. On issue numbers (i) (ii) and (iii), counsel submitted that no cause of action had been disclosed as against the 4th respondent. Counsel added that due process was followed in revocation of the title to the suit property. On issue numbers (iii) and (iv), counsel submitted that in line with **Sections 6 and 14** of the National Land Commission Act, the 1st respondent held public hearings to review grants and dispositions

of public land in Kiambu County on diverse dates and pursuant to the provisions of the law, the 1st respondent established that the suit property was set aside for expansion of a market. Counsel relied on the decisions in the case of **R v National Land Commission Ex parte Krystalline Salt 334 of 2014**, among others.

24. On issue number (iv), counsel noted that the petitioner had not filed an appeal against the decision. Counsel further noted that the petitioner did not claim that he was prejudiced in any way during the review hearing. On whether the 1st respondent violated the petitioner's rights under **Article 47** of the Constitution or under any other Article of the Constitution, counsel submitted that an adversarial hearing was not necessary.

25. On whether the petitioner was a bonafide purchaser for value of the suit property without notice, counsel submitted that the petitioner could not have been a bonafide purchaser for value because the suit property had been unlawfully acquired. On whether the petitioner is entitled to the reliefs sought, counsel submitted that the petitioner is not deserving of the orders sought as he had not met the threshold for grant of judicial review orders of certiorari and prohibition.

Analysis and Determination

26. I have considered the petition, the affidavit evidence presented in support of the petition; the grounds of opposition filed in the proceedings; and the written submissions presented by the parties. I have also considered the relevant constitutional and statutory frameworks. Similarly, I have considered the relevant jurisprudence on the key issues in the petition. Parties did not present a common statement of issues for determination by the court. Secondly, the National Land Commission, the party whose decision is the cause of action in this petition, neither filed a response to the petition nor submitted on it. Against the above background, the following, in my view, are the two key issues that fall for determination in this petition: (i) Has the petitioner demonstrated a case of violation of his rights by the 1st respondent to warrant the quashing of the impugned Gazette Notice in so far as it relates to the suit property; and (ii) Is this petition the appropriate platform on which the court would make conclusive pronouncements on the legality or validity of the title held by the petitioner? I will make brief sequential pronouncements on the two issues in the above order.

27. The cause of action disclosed from the pleadings and evidence presented in this petition is the 1st respondent's decision contained in **Gazette Notice No 11714** published in **Kenya Gazette Vol CXX- No 138** on 9/11/2018. The tenor and import of the decision was that it determined and directed a revocation of the petitioner's title relating to land parcel number **Ndumberi/Riabai/2673**. The key gravamen of the petitioner is that the said decision was reached against him without the 1st respondent conducting a hearing and without him being accorded a chance to be heard, among other allegations.

28. Despite being served with suit papers and notices, the National Land Commission elected not to respond to the allegations made against it in the petition. Consequently, the allegations of procedural impropriety made against the 1st respondent remain uncontroverted. Similarly, the evidence of procedural impropriety presented against the 1st respondent remain uncontroverted. In the absence of any response or controverting evidence by the 1st respondent on how it carried out the grant review hearing leading to the impugned decision, the court will accept the evidence presented by the petitioner, to the effect that there was no hearing and that the petitioner was not accorded an opportunity to interrogate and challenge the allegations made against his title.

29. The right to be heard before a decision affecting one's constitutional right is underpinned by various Articles of the Constitution, among them Articles 47 and 50. Similarly, the Fair Administrative Actions Act contains an elaborate framework that is mandatory whenever a decision affecting one's constitutional rights is contemplated.

30. Our courts have been unequivocal in emphasizing that the constitutional and statutory safeguards on the centrality of the right to fair hearing and fair administrative action are paramount. In **Republic vs. the Honourable the Chief Justice of Kenya & Others Ex Parte Justice Moiwo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004** the High Court while determining a question focusing on the right to fair hearing held that:

“The right to be heard has two facts, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence.”

31. It has emerged from the pleadings and from the evidence presented by the petitioner that the 1st respondent did not present to him a copy of the allegations that were made against his title and the materials supporting those allegations. Similarly, the 1st respondent did not invite the petitioner for a hearing. In the circumstances, the court is satisfied that the procedure followed in arriving at the impugned decision violated the petitioner's constitutional rights under Articles 47 and 50 of the Constitution. Consequently, the court is satisfied and finds that

the petitioner has demonstrated a violation of his rights warranting the quashing of the impugned decision.

32. The second question falling for determination in the petition is whether these proceedings are the proper platform on which to make pronouncements on the legality or validity of the title held by the petitioner. My answer to the above question is, for a number of reasons, in the negative. First, the petitioner's case is that he was never presented with the allegations made against his title. This court does not, in the circumstances, know who challenged the petitioner's title and on what grounds. The court cannot, in the circumstances, seize this petition which largely raises procedural issues to make a declaration on the validity or legality of the title.

33. Secondly, the parcel registers presented as exhibits in this petition indicate that the suit property is a subdivision out of land parcel number **Ndumberi/Riabai/682**. The said parcel existed as surveyed and titled pieces of land as at 24/11/1976. The Kiambu County Council was registered as proprietor of Parcel Number 682 on 22/4/83 after various parcels were purchased and amalgamated by the Council. On 22/9/98, the land was transferred to one **Lucy Kimani** of **ID Number 13795102**. At this point, the court has not been presented with any challenge against the petitioner's title by any of the state organs mandated to safeguard public property. Similarly, the court has not been presented with evidence relating to disposal of what in 1998 existed as public land registered in the name of Kiambu County Council. It would therefore be inappropriate for this court to make pronouncements on the validity or legality of the title without proper proceedings and evidence.

34. The third reason why the court finds it inappropriate to make a declaration on the validity or legality of the petitioner's title is that **Lucy Kimani** who procured a title to the land which previously existed as public land registered in the name of Kiambu County Council has not been joined as a party to this suit. For the above reasons, it is my finding that this petition is not the appropriate platform on which to make conclusive pronouncements on the legality or validity of the title held by the petitioner.

35. On general damages, counsel only cited the decision in **Dominic Mbugua Wainaina & another v National Land Commission & 2 others [2019] eKLR** where the court assessed general damages at Kshs 200,000. I will in the circumstances, award the petitioner nominal damages in the sum of Kshs 100,000.

36. There was no evidence tendered to demonstrate that the other respondents were privy to the violations committed by the 1st respondent nor to any other violations. I do not, in the circumstances, find evidence of violation by the other respondents.

Disposal Orders

37. In the end, this petition is disposed through the following orders:

a) It is hereby declared that the 1st respondent, in its grant review determination relating to title number Ndumberi/Riabai/ 2673, violated the petitioner's right to a fair hearing under Article 50(1) and fair administrative action under Article 47 of the Constitution.

b) An order is hereby issued quashing the grant review decision of the 1st respondent relating to Title Number Ndumberi/Riabai/ 2673 contained in Legal Notice No 11714 in Kenya Gazette Vol CXX-No 138 dated 9/11/2018 and any rectifications or cancellations made in the relevant land register or records as a consequence of the said decision are similarly quashed.

c) The 1st respondent shall pay the petitioner nominal general damages of Kshs 100,000 for the violations.

d) Issues or disputes relating to the validity, legality or lawfulness of Title Number Ndumberi/Riabai/2673 which until 1998 existed as a surveyed and titled public land may be adjudicated in proper proceedings involving the necessary parties.

e) The 1st respondent shall bear the petitioner's costs of this petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 8TH DAY OF FEBRUARY 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Gatitu for the Petitioner

Ms Ndundu for the 2nd, 3rd and 5th Respondents

Court Assistant: Lucy Muthoni