



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC JR. NO. 38 OF 2019

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 20210, THE LAW REFORM ACT CAP 26,

LAWS OF KENYA THE NATIONAL LAND COMMISSION ACT, NO. 5 OF 2012

FAIR ADMINISTRATION ACT, NO. 4 OF 2015

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF SECTION 14 OF THE NATIONAL LAND COMMISSION ACT NO. 5 OF 2012

AND

IN THE MATTER OF REVIEW OF TITLE LR. NUMBER 25470/1

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE NATIONAL LAND COMMISSION.....RESPONDENT

THE KENYA AIRPORTS AUTHORITY.....INTERESTED PARTY

JUDGMENT

1. The *ex-parte* Applicant filed a chamber summons application dated 17.7.019 seeking leave to file a judicial review suit of which such leave was granted. The substantive motion was filed on 6.12.2019 where the following orders have been sought.

1. That an order of Certiorari do issue for the purposes of quashing the decision/report of the Respondent as published on 15th February, 2019 and on 8th February, 2019 purporting to have investigated and directing/recommending reviewing of the title to the ex-parte Applicant's Parcel of land Known as LR No. 25470/1 registered as I.R No. 103792/1 and requiring documents and representations from the Applicant in relation to the said land.

2. That an order of Prohibition do issue restraining the Respondent by itself, its agents or persons acting on its behalf from requiring or compelling the Ex-parte Applicants to, for the representations relating to its parcel of land known as LR No. 25470/1 registered as I.R No. 103792/1 and an order of prohibition restraining the Respondent by itself, its agents or persons acting on its behalf from conducting a review of holding hearings or implementing any decision or resolution from a review

relating to the Applicants' Parcel of Land being LR No. 25470/1.

3. That an order of prohibition do issue restraining the Respondent by itself, its agents or persons acting on its behalf from acting in a manner that violates the Applicant's right to the occupation and use of its Parcel of land known as LR No. 25470/1 registered as I.R No. 103792/1, or in a manner that violates the Applicant's right to property guaranteed under Article 40 of the Constitution of Kenya and an order of prohibition restraining the Respondent by itself, its agents or persons acting on its behalf from acting in relation to the ex-parte Applicant's said parcel of land in a manner that contravenes the Constitution of Kenya and the National Land Commission Act.

4. That this Honourable court be pleased to make such other and/or further orders that it may deem appropriate in the circumstance.

5. That costs of this application be provided for

2. The suit was opposed by the National Land Commission (NLC) vide their Replying Affidavit dated 8.3.2021. The Attorney General and the Interested party have not filed any documents in support or in opposition to the suit.

Case for the Ex-parte Applicant

3. The case for the *ex-parte* Applicant is premised on the ground set out in the substantive notice of motion and the supporting affidavit of Premji Shivji Gondariya who introduces himself as the director of the *ex-parte* Applicant. He contends that they are the owners of the suit **property LR No. 25470/1** situated in Embakasi having purchased the same from Heartland holdings limited. That the *Ex-Parte* Applicant has been having quiet ownership until the month of November 2018, when the Respondent (NLC) advertised in the Daily Newspaper notifying the owners of the properties surrounding the Airports that it would hold reviews on 5 & 6th December 2018 to investigate the grants of the aforementioned properties. The *ex-parte* Applicants requested for further and better particulars of the claim, but this was not forthcoming.

4. In the month of May 2019, the *ex-parte* Applicants received a copy of the report of the investigations undertaken by NLC in which a recommendation had been made for their title to be revoked and for the Kenya Airport Authority to issue them with sub-lease of their own property.

5. The *ex-parte* Applicant avers that the mandate of the Respondent is only limited to the initial allottee who is not the Applicant. Further the initial allottee of the public land did transfer the suit land to a *bonafide* purchaser for value without notice of defects of the title. Therefore, the Respondent does not have the jurisdiction to revoke such title and has no mandate to make such recommendations.

6. In their submissions, the *ex-parte* Applicants framed the following issues for determination:

i. Jurisdiction and mandate of the National Land Commission.

ii. Whether the subject land was compulsorily acquired by the interested party.

iii. The basis of orders of Certiorari and prohibition sought.

7. On jurisdiction, the *ex-parte* Applicant averred that the mandate of NLC is clearly spelt out under **Article 67** of the Constitution of Kenya and Part A of the National Land Commission as follows:

a) to manage public land on behalf of the National and County Governments.

b) to recommend a National Land Policy to the National Government.

c) to advise the National Government on a comprehensive programme for the registration of title in land throughout Kenya.

d) to initiate investigations on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.

e) to encourage the application of traditional dispute resolution mechanisms in land conflicts.

f) to assess tax on land and premiums on immovable property in any area designated by law and to monitor and have oversight responsibilities over land use planning throughout the country.

8. The *ex-parte* Applicant contends that NLC has no mandate to determine a dispute in respect of private land. To this end, the *ex-parte* Applicant relied in the case of **Owners of Motor Vehicle Lillian "S" vs. Caltex Limited No. 1989 Kenya Law Report 1.**

9. The *ex-parte* Applicant contended that where it is alleged by the state that the land has been acquired illegally, the state must follow due process to establish such illegality and that the title of a *bonafide* purchaser for value without notice of fraud could not be impeached. The Applicant relied on the case of **Isaac Gathungu Wanjohi and another vs. AG. and 6 Others (2012) (eKLR)** as well as the case of **Charles Karathe Kiarie and 2 Others vs. Administrators of the Estate of John Wallace Muthare (Deceased) and 5 others.** The *ex-parte* Applicant also cited the provisions of **Section 80** of the **Land Registration Act**, **Section 7** of the **National Land Commission** as well

as **Article 162 (2)** of the Constitution.

10. On the issue of Compulsory Acquisition of the Suit Land, it was submitted that the **Land Acquisition Act** (now repealed) provided for the procedure to be followed in the compulsory acquisition of property by the Government. It was further submitted that the mandate to carry out the compulsory acquisition was bestowed upon the Minister through the Commissioner of Lands. Thus the Commissioner of Lands had the responsibility of ensuring that all the procedures related to compulsory acquisition of land were complied with. Further the burden of prove that there was proper compulsory acquisition of the suit land lies with the interested party and that the Gazette Notice dated 30.4.1971 remained as an intension.

11. It was also submitted that failure to complete the compulsory acquisition led to failure to surrender the titles, which then led parties to transact without knowledge of the purported acquisition.

12. Citing the provision of **Article 40 (3)** of the Constitution, the *ex-parte* Applicant avers that they should not be deprived off the suit property in an arbitrary manner. On this point, reference was made to the case of **Virendra Ramji Gudka and 3 others vs Attorney General (2014)eKLR**.

13. As regards the order of Certiorari and Prohibition, the *ex-parte* Applicant contends that neither revocation nor recommendation for revocation of title can be effected and that any claim of the interested party is only exercisable if the due process of the law has been followed. In that regard, the *ex-parte* Applicant avers that the principles of natural justice were not followed rendering the decision of NLC invalid. To this end, the *ex-parte* applicant relied on the cases of **Republic vs. National Land Commission 2 others, Ex-parte Archioceose of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West (2018)eKLR**; where the Court held that:

“In my finding, a process by which an administrative body makes findings and proceeds to make recommendations before affording persons affected thereby cannot by any stretch of imagination be termed as fair in order to meet the provisions of Article 50 of the Constitution.....”

14. The Applicant therefore prays that the orders sought be allowed.

Case for the National Land Commission

15. The Respondent’s case is anchored on the Replying Affidavit of Brian Ikol, an Acting Director, legal and regulatory Affairs of the Respondent. He avers that they received a complaint from the Interested Party (Kenya Airports Authority) to the effect that titles had been issued to land reference **No. LR. No. 21919** within **Jomo Kenyatta International Airport (JKIA)**.

16. Given that the complaint was made with regard to public land, the Respondent in line with its constitutional mandate commenced inquiries touching on the process on the legality of the aforementioned title. To this end the Respondent placed an advertisement in the Daily Newspaper indicating that it intended to conduct investigation relating to the title of parcel of land **LR 21919** on 5th and 6th December 2019. That the notice gave the name of the location as well as time when the proceedings should commence. Affected parties were invited to avail their documents to prove their claims.

17. NLC avers that the *ex-parte* Applicant and other interested parties did appear before the commission, submitted their documents and made their representation regarding their claims of ownership to the suit properties. Some of the claimants stated that they had applied for the allocations to the Commissioner of lands or the President. Others stated that they were purchasers and were not aware of any government interest or defect in their title.

18. The Respondent avers that the suit property was one of the titles listed in the public notice. That the Kenya Airports Authority (KAA) had presented a case whereby the dimensions of the Nairobi Aerodrome, the pre-cursor to the **JKIA** were originally contained in the **Aerodrome Act** under **Gazette Notice Nos. 1149 and 1150 both of 1953** of which the Airport was later expanded by way of compulsory acquisition vide Gazette Notice No. 1105 of 1971.

19. That the KAA indicated that through Plan No. NBI/C/018 of 1991 the boundaries of the Airport were finally defined and forwarded to the Commissioner of Land to facilitate gazettelement and reservations. The land was reported to be 5,098 hectares. Thereafter, via the Kenya Airports Authority vesting orders of 1994, all properties and assets under the Department of Aerodromes including the JKIA, were vested in the authority.

20. That KAA was then issued with a grant registered on 13th August 1996 as L.R. No. 21919 but the land was already less due to illegal hiving off of the JKIA land. That even with the issuance of a grant, the illegal excising and allocation of the land continued and in 1999, the Commissioner of Lands alleged that there were errors during the survey of the JKIA land facilitating further acquisition of the land by private entities.

21. That 62 plots were listed as parcels allegedly allocated or acquired on JKIA land after the survey, vesting and issuance of a title in 1996. 56 plots were reported as overlapping with surveyed JKIA land but were supposedly acquired before JKIA was issued with a title.

22. NLC also relied on its report (the subject matter of this suit) which has been availed by the *ex-parte* Applicant as annexure PSG5 in the affidavit of Premji Shivji Gondariya.

23. It was further averred by NLC that in accordance with the laws of Kenya, land set aside for a public purpose is never available for allocation. This means that any allocation made of such land is illegal and any resulting title invalid. Consequently, any subsequent transfer of such titles is a transfer of a flawed title and the whole transaction is void ab initial. This applies to all further ensuing transfers and is not

only limited to the initial allottee as claimed by the ex-parte Applicant. Thus a claim to be a bona fide purchaser for value without notice is not enough to be acknowledged as such.

24. The Respondent contends that although under **Section 14(7)** of the **NLC Act**, no revocation of title shall be affected against a *bonafide purchaser for value*, one had to show that indeed they are such *bonafide* purchasers.

25. That the proceedings conducted before the Commission regarding titles in JKIA were not reviews of grants and disposition but rather the commission was conducting inquiries and investigations as per the public notice. Thus the ex-parte Applicant is mistaken when it avers that the Respondents assumed jurisdiction it did not have. The Respondent did not revoke the title to the suit property as alleged by the Applicant. It only made a recommendation that one of several of the long-term leases of 99 years affecting KAA Land be revoked in favour of lease as per terms and conditions approved by KAA.

26. The NLC frames issues of determination as follows:

Whether the Commission had jurisdiction to conduct the proceedings and whether the ex-parte Applicant is entitled to the orders sought.

27. On jurisdiction, NLC reiterated that the Commission was not conducting review of grants and dispositions, rather, it was conducting enquiries under Section 6 of the **National Land Commission Act**. Reference was made the case of **Republic vs. National Land Commission ex-parte Krystalline Salt 33 of 2014** where the court stated that;

“ In my view the Respondent can only review this responsibility by querying the process under which public land was converted to private land. I do not see how unlawfully and irregularly acquired parcel of land becomes out of reach for the Respondent for the mere reason that it is registered as private property.”

28. The Respondent also relied on the case of *Isaac Gathungu*

Wanjohi and another vs. Attorney General and 6 Others (2012)eKLR, as well as **Republic v Cabinet Secretary, Ministry of Agricultures, Livestock & Fisheries; Cabinet Secretary, Ministry of Industry, Trade & Co-operatives (Interested Party) Tanners Association of Kenya Suing through its Chairman Robert Njoka Ex-parte Applicant (2019)eKLR** where it was stated inter alia that:

“...the most basic rules of administrative law are first, that decision makers may exercise only powers which are conferred on them by law and second, that they may exercise those powers only after compliance with procedural prerequisites. so long as administrators comply with these two rules, their decisions are safe”

29. NLC therefore avers that the complaint made by KAA related to the Airport Land which is public land and the unauthorised activities thereof are dangerous given the nature of use of Airport land. Thus the Commission had a right to make inquiries into the allegations raised to ensure that public land was not being used for anything other than its intended purpose.

30. On whether the *e-xparte* Applicants are entitled to the orders sought, it was submitted that the inquires of titles within JKIA public land LR No. 21919 was not a determination, rather it was just a document that gives a summary of the submissions made before it by all the parties. Thereafter the commission simply gave recommendations and not orders or directives.

31. It was further submitted that the orders sought by the *ex-parte* Applicants are discretionary and on this point, reference was made to the case of **Republic vs. Cabinet Secretary for Interior and Co-ordination National Government and another (Peter Adiele Mmegwa and another 2020 eKLR)** where it was stated that;

“discretion will not be exercised to impede an authority ability to perform its functions or deliver fair administration, or where the judge considers that an Alternative remedy could have been pursued”

32. NLC avers that its report is not a legally binding document since no orders or directives were made, hence it cannot attract the orders sought.

Determination

33. Having regard to all the arguments advanced by the *ex-parte* Applicant and the National Land Commission, the legal frame work and the prevailing jurisprudence, I find that the key issues arising for determination relate to; Jurisdiction of NLC and whether the said entity failed to comply with the rules of natural justice.

34. Before embarking on analysis of these issues, I must remind myself that the proceedings herein are in the ambit of Judicial Review, thus the court must set out the scope thereof. In the case of **Republic v National Land Commission & 4 others Ex parte Mutuma Angaine & 4 others; Ontulili Mt. Kenya Forest Squatters & 3 others Interested Parties [2021] eKLR** While making reference to a legion of authorities including the Ugandan case of **Pastoli V Kabale District Local Government Council & Others [2008] E.A. 300 at 303-304**, I stated thus;

“ ... the scope of judicial review proceedings is limited to the decision making process in relation to the decision which is being

challenged. The role of the court is therefore supervisory and the court should not attempt to delve into the “forbidden appellate approach”.

35. The implication of the above analysis is that the court cannot delve into the merits of the decision or recommendations contained in the report made by NLC. Thus the court cannot examine the question of how the land by JKIA or the *ex-parte* applicant was acquired.

36. The question of jurisdiction appears to form the gist of the matter with the *ex-parte* Applicant contending that the land in question is private land. Therefore, NLC went beyond its mandate as set out in **Section 14 (1)** of the **NLC Act**. NLC on the other hand contends that it was conducting inquiries under the provisions of **Section 6** of the aforementioned act.

37. This court takes cognizance of the fact that the entity known as NLC came to be due to historical land related injustices which took many forms such as illegal hiving off of public and trust lands. In the case of **Pati Limited vs. Funzi Island Development Limited & 4 Others (2021) eKLR**, Pati limited were the registered owners of the land L.R. NO. 20247 which had previously been allocated to a Hon Mwamzandi. The question of whether the land was forest/beach land hence public land was litigated upon all the way to the Supreme court of Kenya which upheld the Court of Appeal decision which had unanimously quashed the allocation of the said land to Hon Mwamzandi and later to Pati Limited.

38. In the case of **Republic v National Land Commission ex-parte Krystalline Salt Limited [2015] eKLR**, it was stated that;

“The law (Article 40 of the Constitution and Section 26 of the Land Registration Act) only protects lawfully acquired property. Any title acquired illegally, unprocedurally or through a corrupt scheme is not protected and so is property acquired fraudulently or through misrepresentation. The Respondent (read the National Land Commission) is mandated by the law to inquire into allegedly unlawfully acquired public land and direct the revocation of the title or regularise the disposition where it finds the land to have been illegally or irregularly converted to private property.

The Applicant contended that the Respondent exceeded its jurisdiction and usurped the role of the Environment and Land Court. That argument is not supported by the law. As already demonstrated, the Respondent has jurisdiction to inquire into the legality and propriety of disposal of public land”.

39. An argument similar to the one raised by the *ex-parte* Applicant herein was raised by a Mr. Tom Dola in **Tom Dola & Others v Chairman, National Land Commission & 5 Others (2020)eKLR**. The Court of Appeal sitting in Kisumu while upholding the decision of Kibunja J. who in turn upheld the decision of NLC to recommend cancellation of Mr. Dola’s titles held thus:

“ We are satisfied that the Commission has jurisdiction, granted expressly by the Constitution and the National Land Commission Act, to review grants and dispositions of Public Land to establish their propriety as legality. That jurisdiction is specific to the Commission and cannot be usurped by any other institution or agency and if we may add, cannot be ousted or the same argument that land which was previously public land, has since become private land”

40. What resonates from the case law above is that a claim relating to public land can be raised notwithstanding that such land is in the hands of private entities.

41. The complaint which had been lodged by KAA at the NLC was that all parcels of land falling within **JKIA parcel 21919** were illegal. A quick glance at the impugned report of NLC reveals this heading; **“REPORT ON THE INQUIRIES OF TITLES WITHIN JOMO KENYATTA INTERNATIONAL AIRPORT (JKIA) PUBLIC LAND LR.NO 21919”** and this is the same heading that was put up in the Kenya gazette of 15.2.2019. It follows that the complaint by KAA related to public land as contained in the parcel L.R. 21919 even though other titles thereof had been issued. It is also clear that NLC was conducting inquiries. The fact that the parcel in question is in the hands of the *ex-parte* applicant, title et al does not in any way make the land out of reach of a claim of public land.

42. I also find that the judgment in **Vekariya Investment Limited vs. Kenya Airports Authority & 2 Others (2014) eKLR** which NLC made reference to in its report gives a sneak preview of the discussion relating to indefeasibility of title vis a vis unlawfully acquired land. Therein it was pointed out that various parcels of land including **parcels 25469-25477** (which means *ex-parte* applicants title is included, the same being no. 25470) were created out of the JKIA’s land. As pointed out earlier herein, it is not the place of this court in these judicial review proceedings to delve into the legalities of those titles. The bottom line is that the clamour for a piece of the Airport land has persisted through the decades as captured in the aforementioned judgment and other judicial pronouncement’s. See **(Kenya Airports Authority v Wambua Mila & 1066 Others (2021)eKLR**.

43. In the final analysis, I find that NLC had the mandate, hence jurisdiction to carry out the inquiries into the parcels of land within the **JKIA land No.21919** and its report merely gave recommendations. A recommendation remains as such, an appeal or advise which may be taken up or not.

44. On the issue of violations of the rules of natural justice, I find that the *ex-parte* Applicant was not clear on the sins of omission or commission by NLC. The *ex-parte* Applicant does admit that they appeared before the NLC where they submitted documents of prove of their ownership. The *ex-parte* Applicants even filed written submissions wherein they were asserting their claim to the suit land averring that they are second generation owners. Nothing in those submissions indicate that the process was flawed or that they never got documents which they had requested. The only issue raised is that they did not get a copy of the determination and were not informed of the outcome. However, the *ex-parte* Applicant has the report and there is nothing to indicate that the manner in which they acquired the same has put them in a prejudicial position.

45. The net outcome of this judgment is that the suit is not merited. The same is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9 TH DAY OF FEBRUARY 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

IN THE PRESENCE OF:-

KERUBO FOR THE ATTORNEY GENERAL

COURT ASSISTANT: EDEL BARASA