



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CONST. PETITION NO. 1 OF 2018

IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23, 24, 25, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ALLEGED VIOLATION OF THE RIGHT OF PROPERTY UNDER ARTICLE 40 AND ARTICLE 36 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE INFRINGEMENT OF THE NON-DEROGABLE RIGHT TO A FAIR HEARING ENSHRINED UNDER ARTICLE 49, 50 AND 25 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ALLEGED INFRINGEMENT OF THE RIGHT TO FAIR ADMINISTRATION ACTION ENSHRINED IN ARTICLE 47 AND ARTICLE 10 TO THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF ARTICLES 23, 159, 165(3) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF DETERMINATION AND REVOCATION OF TITLE OVER L.R. NO. 337/2838, MACHAKOS COUNTY

BETWEEN

SOFIA MUKAMI MUTHENGI

(Suing as the administratrix of the estate of

JOHNSON MUTHENGI KITHETE).....PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

MEAT TRAINING INSTITUTE.....3RD RESPONDENT

JUDGEMENT

By an amended Petition dated the 18th April, 2018, the Petitioner prays for judgement against the Respondents for:

1. A permanent injunction do issue to the 4th Respondent, their servants and/or agents restraining them from trespassing upon, evicting, alienating, transferring and/or dealing in any way manner whatsoever interfering with the Petitioner's right to property known as L.R. No. 337/2838 situated at Machakos County measuring four (4) Hectares.
2. An order of certiorari do issue to remove into this Honourable Court for the purpose of being quashed the decision of the Chief Land Registrar and the National Land Commission, the Respondents herein contained in the Gazette Notice No. 6862 published in Special Issue of the Kenya Gazette dated 17th July, 2017 revoking the Petitioner's title to her respective parcel of land known as L.R. No. 337/2838 situated in Machakos County, measuring four (4) Hectares) registered in the name of Johnson Muthengi Kithete (deceased).
3. An order of prohibition do issue to prohibit the Chief Land Registrar and the National Land Commission, the Respondents herein, their servants and/or agents from alienating, allocating, trespassing upon, evicting, handing over possession of or vesting the title of the property known as L.R. No. 337/2838 situated in Machakos County, measuring four (4) Hectares registered in the name of Johnson Muthengi Kithete (deceased) to any other person and from having any other dealings with the said property or taking any further proceedings or actions in relation thereto.
4. An order of mandamus do issue directing the Chief Land Registrar and the National Land Commission, Respondents herein commanding them to reinstate the Applicant's title over the suit property by, *inter alia*, reinstating the name of her late husband's name Johnson Muthengi Kithete (deceased) in the respective Register of the property known as L.R. No. 337/2838 situated in Machakos County as the respective proprietor of the respective leasehold and to revoke and/or cancel any dealings therein with the said title and any entry in the register of the said property made pursuant to the purported revocation of the title.
5. A declaration that the Respondents purported revocation of the Petitioner's title to all that parcel of land comprised in title number L.R. No. 337/2838 is unconstitutional, null and void.
6. A declaration that the Certificate of Title to the Petitioner in respect to the property known as L.R. No. 337/2838 situated in Machakos County is conclusive evidence of ownership and that the Petitioner is the absolute and indefeasible owner of the suit property.
7. Damages.
8. Costs of this Petition be awarded to the Petitioner.
9. Any other or further relief as this Honourable Court may deem fit and just to grant.

The 1st Respondent filed a replying affidavit sworn by Brian Ikol, its Deputy Director, Legal Affairs and Enforcement, who is also Secretary of the Review of Grants and Dispositions of Public Land Committee, a committee established within the National Land Commission to oversee the review of grants and dispositions of public land. He highlighted the mandate of the 1st Respondent and explained that the Commission received a complaint from the Meat Training Institute (the 3rd Respondent, hereinafter referred to as (MTI) alleging that the suit property measuring approximately 12 Ha (originally known as L.R. No. 337 Zone 5/3) which was reserved for the Kenya Meat Commission MTI was illegally excised from its land and subdivided and that, one Johnson Muthengi Kithete was claiming ownership of one of the parcels of land known as L.R. Number 337/2838. He contends that after it determined that the complaint held merit, the Commission vide an advertisement placed in the Daily Nation of Tuesday November, 18th 2014 invited all parties with an interest in the said land to appear before it and make their submissions. Further, the first public hearings were held on 1st December, 2014 with subsequent hearings thereafter. He avers that during the hearings, the MTI submitted through Dr. James Karitu that it is a public institution under the Ministry of Agriculture, Livestock and Fisheries established around 1972 for the purpose of training meat inspectors who inspect meat in Kenya and the region to ensure that it is safe for consumption. Further, that the suit property is part of what was originally known as L.R. No. 337 Zone 5/3 before it was sub-divided into 3 parcels and that the Principal Secretary of the Ministry of Livestock placed a caveat on the resultant titles forbidding registration or any other dealings related to them. He confirms that the Task Force on irregular appropriation of public land in Athi River recommended that L.R. No. 337/2838 which is the suit property herein among others be revoked as they were irregularly obtained from MTI land then allocated to private individuals. He states that the Ministry of Agriculture, Livestock and Fisheries via a letter dated 9th September, 2014 addressed to the Commission stated that neither the said ministry nor the MTI was consulted at any time before the land was allocated to private developers. Further, the Ministry also stated that there was no cabinet approval and neither is there evidence of the Board of MTI authorizing the hiving off and allocation of their land. He reiterates that in response to the above, the Petitioner submitted that her deceased husband Johnson Muthengi was the registered proprietor of the land and that she was the beneficiary of his estate together with her children and she confirmed that Letters of Administration were granted in Machakos HCSC No. 449 of 2012. Further, she explained that the land had two Letters of Allotment as the original one was revised, with the original one dated 8th May, 1997 and its file number at Ardhi House is 233050 while the revised one is dated 15th July, 2009 with its reference number being 233050. He reaffirmed that the County Government of Machakos via a letter reference number GMC 4/24/10/13 dated 24th October, 2013 confirmed that the Petitioner owned the land while a grant dated 21st August, 2009 and prepared by P.N. Mburu, Registrar of Titles and witnessed by Zablon P. Agwata, Commissioner of Lands was issued to them. Further, after taking into account the submissions made by the parties and inspecting the documents procured before it, the Commission made a determination which included its decision on the matter and the reasoning behind the same. He claims the Commission concluded that the suit property was originally set aside in 1950 for use by the Kenya Meat Commission and currently hosts the MTI founded in 1972 and is under the Ministry of Agriculture, Livestock and Fisheries. Further, the allocation of land is governed by laws and regulations laid down in statute and buttressed by case law and they have to be followed for any allocation to be declared legal. He reiterates that the Commission determined that the land was improperly acquired and directed that the Chief Land Registrar revoke grants emanating from the sub-division including L.R. No. 337/2838 which is the suit property herein and that the land vest in the Permanent Secretary Treasury to be held in trust for the MTI.

The Petition was canvassed by way of written submission but it is only the Petitioner that filed hers.

Analysis and Determination:

Upon consideration of the materials presented in respect to the Petition including the Petitioner's submissions, the following are the issues for determination:

- Whether the Petitioner was accorded a fair hearing and a fair administrative action by the 1st Respondent before the title to the suit property was revoked.
- Whether the 1st Respondent had jurisdiction to interrogate the Petitioner's title and make a finding for its revocation.
- Whether the Petitioner's Constitutional Rights were violated by the Respondents.
- Whether the Petitioner is entitled to the Orders sought in the Petition.

I will deal with all these issues jointly.

The Petitioner in her submissions reiterated her averments and insists the deceased Johnson Muthengi Kithete held a valid and indefeasible title to the suit property. She submitted that the revocation of the title over the suit property by the National Land Commission and the subsequent vesting of the property to the Meat Training Institute was unprocedural and illegal. To buttress her averments she relied on the following decisions: **Margaret Njeri Wachira V Eliud Waweru Njenga (2018) eKLR; Charles Karathe Kiarie & 2 Others Vs Administrators of the Estate of John Wallance Muthare (deceased) & 5 Others; Mwangi Stephen Muriithi V National Land Commission & 3 Others (2018) eKLR; Robert Mutiso Lelli and Cabin Crew Investments Ltd V National Land Commission & 3 Others (2017) eKLR; Sceneries Limited V National Land Commission (2017) eKLR; and Samwel D. Omwenga Angwenyi V National Land Commission & 2 Others (2019) eKLR.**

It is the Petitioner's case that the deceased husband was allotted the suit property and was later issued with a grant dated 21st August 2009. Her contention is that the 1st Respondent proceeded to revoke the title claiming it belonged to the 3rd Respondent. The Petitioner has sought for various orders including revocation and reverting the title to the deceased estate. The Petitioner insists the 1st Respondent did not have jurisdiction to cancel the deceased title. The 1st Respondent in their replying affidavit denied any wrongdoing and insisted the title to the suit property was a resultant subdivision of a larger parcel of land which was public land meant for the Meat Training Institute. Further, that it acted within its mandate and the title to the suit property was cancelled after a hearing where the Petitioner participated in this violence. I wish to highlight various relevant Constitutional as well as legal provisions herebelow:

Article 67(2) of the Constitution stipulates the functions of the National Land Commission as follows: **'The functions of the National Land Commission are— (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 conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities; (e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress; (f) to encourage the application of traditional dispute resolution mechanisms in land conflicts; (g) to assess tax on land and premiums on immovable property in any area designated by law; and (h) to monitor and have oversight responsibilities over land use planning throughout the country.'**

While Article 47 (1) and (2) of the Constitution provides that: **' 47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.'**

Further, Article 40 provides that: **' (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property— (a) of any description; and (b) in any part of Kenya. (2) Parliament shall not enact a law that permits the State or any person— (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4). (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation— (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that— (i) requires prompt payment in full, of just compensation to the person; and (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law. (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land. (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya. (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.'**

As for the mandate of the 1st Respondent, section 14 of the National Land Commission Act provides that:

'(1) Subject to Article 68 (c) (v) of the Constitution, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.

(2) Subject to Articles 40, 47 and 60 of the Constitution, the Commission shall make rules for the better carrying out of its functions under subsection (1)

(3) In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.

(4) After hearing the parties in accordance with subsection (3), the Commission shall make a determination.

(5) Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.

(6) Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.

(7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.

(8) In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the Constitution.

(9) The Commission may, where it considers it necessary, petition Parliament to extend the period for undertaking the review specified in subsection (1)

Sections 14(3) and (8) of the National Land Commission Act, 2012 provides as follows: ‘**14(3) In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents. 14(8) In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the Constitution.**’

In her main prayers, the Petitioner sought for orders of mandamus, certiorari and prohibition which are anchored on Article 47 of the Constitution as well as the Fair Administrative Action Act. Upon perusal of the annexures herein, I note in the annexure (‘B I I’), after issuance of a public notice dated 18th November 2014 in the dailies as required by law, the 1st Respondent convened a hearing to review grant and disposition of suit property wherein the Petitioner participated, presented her documents and was actually represented by an Advocate Rodah Muriungi. **Lord Diplock** in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** clearly articulated the standards set for judicial review when he stated thus:

“Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’...By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it...By ‘irrationality’ I mean what can now be succinctly referred to as “Wednesbury unreasonableness”...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.’

While in the case of *Mumo Matemo v Trusted Society of Human Rights Alliance Civil APP.290/2012 (2013) e KLR*: the court observed that:’ **“...the principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”**

See also the case of **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001.**

In applying these principles to the circumstances at hand and relying on Article 47 of the Constitution including the Fair Administrative Actions Act, I find that the Petitioner was actually accorded a fair hearing by the 1st Respondent in respect to interrogation of her title to the suit property before the 2nd Respondent proceeded to revoke the said title. It is my considered view that the prayers the Petitioner sought which were anchored on interrogating the process and not the merit of the decision itself, cannot issue at this juncture as I find the hearing by national land commission(NLC) was properly conducted as per Article 47 of the Constitution as well as the Fair Administrative Action Act. The Petitioner claimed her rights were violated but as per Article 40(6) of the Constitution, since the suit property emanated from public land, I find the alleged property rights do not extend to property, which was unlawfully acquired.

Further, on the Petitioner’s claim that the 1st Respondent lacked jurisdiction to revoke the Petitioner’s title and that the same was done, after its mandate had lapsed, I however beg to disagree and in associating myself with the finding of Justice Okongo in **Republic v National Land Commission & 3 others Ex-parte Samuel Githegi Mbugua & 5 others [2018] eKLR**, I hold that at the point of hearing, the 1st Respondent had the mandate to interrogate grants in respect to public land but only communicated the decision as well as gazetted the

outcome later on. Further, in the Gazette Notice dated 17th July, 2017, by National Land Commission (‘SMM 10’), it clearly indicated therein that where the order calls for revocation, the Chief Land Registrar is directed to revoke the same as per section 14(5) of the National Land Commission Act including the attendant laws. I note the Petitioner did not controvert the 1st Respondent’s averments that her title emanated from a subdivision of public land owned by the Ministry of Livestock. Except for Certificate of Title(Grant dated 21st August, 2009) including her Letters of Allotment which were issued on 8th May, 1997 and revised on 15th July, 2009, as well as demonstrating that the deceased paid Land Rates and Rent, she has not furnished court on how the land was converted from public to private. To my mind, there are so many glaring issues which required viva voce evidence to be adduced to enable the court make a just determination of this matter. I opine that the dispute herein touches on a root of a title which emanated from public land and burden of proof was upon the Petitioner to demonstrate how the deceased legally acquired the said title. Mere waving of a Certificate of Title after the process of its acquisition had been interrogated by 1st Respondent that had jurisdiction to review grants in respect to public land, after which it made a decision on the same, cannot suffice. Further, since the Petitioner is seeking orders for cancellation of a title, which is already in the name of a third party, it would have be pertinent if she filed a civil suit, adduced viva voce evidence to prove the procedure the deceased underwent to obtain the said title, to enable the court make a determination that the same was not acquired illegally, instead of filing Constitutional Petition.

Based on the facts as presented while relying on the legal provisions cited above as well as associating myself with the quoted decisions, I find the Petition is premature before this Court and will proceed to dismiss it.

Each party will bear its own costs

DATED SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 7TH DAY OF FEBRUARY, 2022.

CHRISTINE OCHIENG

JUDGE