



**Maina v National Land Commission & 4 others (Environment & Land
Petition 7 of 2020) [2022] KEELC 3100 (KLR) (7 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3100 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND PETITION 7 OF 2020**

BM EBOSO, J

JUNE 7, 2022

BETWEEN

ROSEMARY WANJIRU MAINA PETITIONER

AND

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

1. This is one of the various petitions that were brought challenging the determination and directions published by the National Land Commission on November 9, 2018 in relation to what hitherto existed as land parcel number Ndumberi/Riabai/682. The land was initially surveyed and titled in the name of Kiambu County Council. The relevant parcel register shows that in 1998, the land was transferred to one Lucy Kimani of ID number 13795102. It was subsequently subdivided into various parcels and transferred to third parties. The title which is the subject matter of this petition is one of the parcels that were surveyed and titled as subdivisions out of the said parcel of land. The subdivision was surveyed and titled as parcel number Ndumberi/ Riabai/2676.
2. The facts in this petitions are, by and large, the same as the facts in the other petitions in the same series. One of the key issues to be determined in this petition, like in the other petitions in the series, is whether the rights of the petitioner were violated by the 1st respondent to warrant the quashing of the decision published on November 9, 2018.



Petitioner's Case

3. Through the petition dated August 12, 2020, the petitioner, Rosemary Wanjiru Maina, challenged the determination and directions published by the National Land Commission [the 1st respondent] on November 9, 2018 in Gazette Notice No 11714 in the Kenya Gazette Vol CXX-No 138. The Gazette Notice was dated April 28, 2017 but published in the Kenya Gazette on November 9, 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/2676 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 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.
4. 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/2676.
 - c. An order of prohibition do issue directed to the 2nd and 3rd respondents prohibiting the cancellation of the petitioners title No Ndumberi/Riabai/2676 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/2676.
 - 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/2676 or in any manner whatsoever effecting the 1st respondent's determination/ recommendations contained in Kenya Gazette (Special Issue) Vol CXX – No 138 of November 9, 2018 touching on land parcel Ndumberi/ Riabai/2676.
 - e. An order directing the 3rd respondent to reinstate and/or rectify the land records/Green card for land parcel No Ndumberi/Riabai/2676.
 - f. An order directing the 5th respondent to reinstate and/or correct the survey map for land parcel Ndumberi/ Riabai/2676.
 - g. A declaration that the petitioner is the lawful owner of the land parcel No Ndumberi/ Riabai/2676.
 - 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.
5. The case of the petitioner was that she purchased the suit property from one Lucy Kimani Njoki for Kshs 1,200,000 on October 26, 1998. She was registered as proprietor of the land and issued with a title deed in the same year. Prior to purchasing the suit property, she conducted due diligence



- and established that the title was unencumbered. She further contended that she developed the suit property and there was an ongoing business in the premises.
6. She added that on March 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 March 13 to 16, 2017. Her title was one of the titles listed for review. Through her advocate, she wrote to the 1st respondent requesting to be supplied with the written complaint and supporting documents relating to her title. The 1st respondent neither availed the complaint nor the documents. That notwithstanding, she submitted a memorandum of response dated March 23, 2017 to the 1st respondent, indicating that she was a bonafide purchaser for value without notice of any defect in the title. She 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 May 2, 2017. It was her case that the legal period within which the review was to be concluded lapsed without the 1st respondent conducting a hearing relating to her title.
 7. The petitioner contended that on November 9, 2018, the 1st respondent published the impugned decision. Despite her request to the 1st respondent to avail to her a written determination relating to her title, none was availed to her. She faulted the 1st respondent for dating the Gazette Notice April 28, 2017 and publishing it on November 9, 2018. She further faulted the 1st respondent for undertaking a review of her title without any gazetted rules and regulations and without serving her with any complaint. She contended that no review hearing was conducted by the 1st respondent relating to her title.
 8. The petitioner contended 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.
 9. 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 her access to the land records relating to the suit property and/or removed, hidden and or destroyed them. She contended that the 5th respondent had deleted and/or erased the survey map relating to the suit property.
 10. The petitioner further contended that the recommendation for re-planning of the suit property was a violation of her constitutional rights under Articles 2, 3, 27, 35, 40, 47, 48, 50, 67(2), 68(v), 165(6) and 260 of the Constitution. She added that she had suffered huge losses amounting to Kshs 20,000,000 due to inability to get loans using the title.

1st Respondent's Case

11. The 1st respondent filed a replying affidavit sworn on December 10, 2021 by Brian Ikol, its Deputy Director - Legal Affairs. He deposed that in the process of carrying out its grants review mandate, the 1st respondent received a complaint alleging that the suit land was meant for public use as a market but was instead privately held. The 1st respondent subsequently published a notice, inviting interested parties to attend its review hearings. On March 13, 2017, the petitioner was represented at the scheduled review hearing by Mr Kimani Charagu who requested for more time. It was agreed that parties would liaise and exchange all necessary documents and that hearing would proceed on April 13, 2017. However, due to unforeseen circumstances, the Commission was forced to post-pone its hearings. Since the 5 year term of the Commission was almost lapsing, the Commission decided to rely on the documents already submitted by the parties and proceeded to make a determination without the intended hearing.



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

12. The 2nd, 3rd and 5th respondents filed grounds of opposition dated October 5, 2020 in which they contended that the suit property was a public utility land that had been reserved for extension of a market and was not capable of alienation, terming the alienation as illegal. They added that the protection offered under Article 40 of the Constitution did not extend to illegally acquired property. They further contended that the 1st respondent properly exercised its mandate, adding that the decision dated April 28, 2017 was made before expiry of the grants review mandate of the Commission. They added that no evidence had been presented by the petitioner to demonstrate that she had applied for relevant land and survey records and the same had been denied or that the records relating to the suit property were non-existent. They urged the court to dismiss the petition. The 4th respondent did not file a response to the petition.

Submissions

13. The petition was canvassed through written submissions dated September 29, 2021, filed by the firm of Kimani Charagu & Co. Advocates. Counsel for the petitioner identified the following as the issues falling for determination in the petition: (i) Whether the petitioner is a bona fide purchaser for value of the suit property; (ii) Whether due process was followed in revoking the petitioner's title; (iii) Whether the 1st respondent had the mandate to review the petitioner's title; (iv) Whether the petitioner's constitutional rights were violated; and (v) Whether the petitioner is entitled to the orders sought.
14. Citing the decision in the Ugandan case of *Katende v Havidas & Co Ltd* (2008)2 EA 173, counsel submitted that the petitioner was a *bonafide* purchaser for value whose title was protected under Section 26 of the Land Registration Act. Counsel faulted the Commission for failing to supply the petitioner with a copy of the complaint against her despite a formal request for a copy of the complaint. Counsel further faulted the Commission for proceeding to make the impugned decision in the absence of rules and in violation of the High Court order which had directed it to make rules. Counsel added that the impugned determination was made without a proper or fair hearing in violation of Article 47 of the Constitution.
15. Counsel for the petitioner further submitted that the term of the Commission having expired on May 2, 2017, it had no mandate to undertake a grants review determination post - May 2, 2017. Counsel contended that the impugned decision violated the petitioner's right to fair administrative action under Articles 47 and 50 of the Constitution. Counsel urged the court to award the petitioner the orders sought in the petition.
16. The 1st respondent filed written submissions through Ms Cecilia Masinde. Counsel for the 1st respondent identified the following as the issues falling for determination in the petition: (i) Whether the petitioner was afforded a fair hearing by the Commissions (ii) Whether the petitioner is a bonafide purchaser for value without notice; (iii) Whether the suit land is protected under Article 40 of the Constitution; and (iv) Whether the Commission was at fault for operating without rules as required by the law.
17. Counsel submitted that the Commission properly invited the petitioner through a notice in the Daily Nation Newspaper and the petitioner responded to the complaint. Counsel added that although the Commission intended to conduct further hearings, it was constrained by the limited time which it had before the lapse of its mandate, hence it decided to rely on the documents that had been presented before it. Counsel added that proceedings before the Commission were quasi judicial and were not expected to be conducted like court proceedings. It was the view of counsel that the petitioner was sufficiently heard and her documents were taken into account. Counsel added that under Section 23(3)



of the *Interpretation and General Provisions Act*, the Commission was empowered to continue with the review exercise and make determinations post - May 2, 2017.

18. On whether the petitioner was a bonafide purchaser for value without notice, counsel for the 1st respondent submitted that a party claiming the rights of a bonafide purchaser for value must demonstrate that she exercised reasonable due diligence to ascertain the sanctity of the title that she purchased. Counsel contended that the petitioner had failed this test.
19. On whether the suit land is protected under Article 40 of the *Constitution*, counsel submitted that the rights conferred by Article 40 of the *Constitution* do not extend to property which is found to have been acquired improperly. Lastly, counsel submitted that the Commission could be faulted for operating without rules because it drafted and submitted the rules to Parliament for scrutiny. Counsel urged the court to dismiss the petition.
20. The 2nd, 3rd and 5th respondents filed written submissions dated January 31, 2022 through Ms Mwihaki Ndundu, Senior State Counsel. The learned counsel identified the following as the issues falling for determination in the petition: (i) Whether the 1st respondent violated the petitioner's Constitutional rights; (ii) Whether the 2nd, 3rd and 5th respondents violated the right of the petitioner; and (iii) Whether the petitioner is entitled to the prayers sought in the petition as against the 2nd, 3rd and 5th respondents.
21. Counsel submitted that the 1st respondent had demonstrated in the replying affidavit sworn by Mr Ikol that it complied with Articles 47 and 50 of the *Constitution* because by filing a response, the petitioner had responded to the allegations that formed the basis of the review. Counsel added that the petitioner had failed to explain how the 2nd, 3rd and 5th respondents violated her rights under the various Articles enumerated in the petition. Counsel submitted that other than alleging that the register and survey plans for the suit property had been altered, the petitioner had not adduced any evidence to demonstrate the previous position in relation to the parcel register and registry index map relating to the suit property. Counsel added that the petitioner had not demonstrated that she sought information from the 2nd and 5th respondents and that the latter declined to avail the information. Counsel argued that because the petitioner had failed to discharge the legal burden of proof, she was not entitled to the reliefs sought against the 2nd, 3rd and 5th respondents. The 4th respondent did not file written submissions.

Analysis and Determination

22. I have considered the petition, the affidavit evidence presented in support of the petition; the 1st respondent's replying affidavit; the grounds of opposition filed by the Attorney General; 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. 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 in relation to land parcel number Ndumberi/Riabai/2676? I will make brief sequential pronouncements on the two issues in the above order.
23. The cause of action disclosed in this petition is the 1st respondent's decision contained in Gazette Notice No 11714 published in Kenya Gazette Vol CXX- No 138 on November 9, 2018. The tenor and import of the decision is that it determined and directed a revocation of the petitioner's title relating to



land parcel number Ndumberi/Riabai/2676. Further, the impugned decision directed that the land be re-planned as a market and the County Government of Kiambu does accommodate the petitioner through issuance of a lease to her. The key gravamen of the petitioner is that the said decision was reached against her without the 1st respondent conducting a hearing and without her being accorded a chance to be heard, among other allegations.

24. 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.
25. 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 Moijo 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.”

26. It is clear from the evidence presented by the petitioner that the 1st respondent did not present to her a copy of the allegations that were made against her title and the materials supporting those allegations. Similarly, the 1st respondent did not invite the petitioner for a hearing after the earlier scheduled hearings were adjourned. The term of the 1st respondent lapsed before the 1st respondent had undertaken a hearing relating to the petitioner's title. Having failed to procure an extension of the grants review term, the 1st respondent decided to make a review decision without conducting the envisaged hearing. Further, the 1st defendant decided to backdate its decision. In the circumstances, the court is satisfied that the procedure followed in arriving at the impugned decision violated the petitioner's constitutional right to a fair hearing under Articles 47 and 50 of the Constitution. Consequently, the court is satisfied and finds that the petitioner has established a violation of his rights by the 1st respondent, warranting the quashing of the impugned decision.
27. The second question falling for determination in the petition is whether this petition is 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 she was never presented with the allegations made against her title. This court does not, in the circumstances, conclusively 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 held by the petitioner.
28. Secondly, the relevant parcel registers indicate that the suit property is a subdivision out of land parcel number Ndumberi/Riabai/682. The said parcel existed as a surveyed and titled piece of land as at



November 24, 1976. The Kiambu County Council was registered as proprietor of Parcel Number 682 on April 22, 83 after various parcels were purchased and amalgamated by the Council. On September 22, 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 conclusive pronouncements on the validity or legality of the title without proper proceedings and evidence.

29. 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. She is the right person to explain how she acquired the title which she subsequently passed to the petitioner. 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. If any party wishes to seek a determination on the legality or validity of the petitioner's title, let that person file an ordinary civil suit to which all the parties necessary for the effectual and complete adjudication of the issue will be made parties.
30. On general damages, counsel for the petitioner 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 for breach of her right to a fair hearing under Articles 47 and 50 of *the Constitution*.
31. There was no conclusive 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

32. Ultimately, this petition is disposed as follows:
 - a. It is hereby declared that the 1st respondent, in its grant review determination relating to title number Ndumberi/Riabai/ 2676, 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/ 2676 contained in Legal Notice No 11714 in Kenya Gazette Vol CXX-No 138 dated November 9, 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 violation.
 - d. Issues or disputes relating to the validity, legality or lawfulness of Title Number Ndumberi/Riabai/2676 which until 1998 existed as a surveyed and titled public land may be adjudicated in proper ordinary civil 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 7TH DAY OF JUNE 2022

B M EBOSO



JUDGE

In the Presence of: -

Mr Mumo holding brief for Mr Charagu for the Petitioner

Ms Masinde for the 1st Respondents

Court Assistant: Lucy Muthoni

