



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT NAIROBI**

**ELC PETITION NO. 13 OF 2016**

**JANET NGINA NZUKI.....PETITIONER**

**VERSUS**

**THE NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**CHIEF LAND REGISTRAR.....2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**MARGARET ITOTIA**

**(Sued as the administrator of the estate of PETER ITOTIA).....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

The Petitioner brought this petition against the Respondents on 13<sup>th</sup> October, 2016 seeking the following reliefs;

1. A Declaration that the review process conducted by the 1<sup>st</sup> Respondent on the 13<sup>th</sup> day of February 2015 in respect of the property known as Land Reference Number 22318 (hereinafter referred to as “the suit property”) was unconstitutional.
2. An order of certiorari to remove to this Honourable Court for the purposes of being quashed, the decision by the 1<sup>st</sup> respondent delivered on 5<sup>th</sup> April, 2016 with respect to revocation of the Petitioner’s title to the suit property and allocation of the property to the 4<sup>th</sup> Respondent.
3. A declaration that the determination by the 1<sup>st</sup> Respondent and the directions to the 2<sup>nd</sup> Respondent to revoke the Petitioner’s title was unconstitutional and illegal.
4. A declaration that the Petitioner is the legal and rightful owner of the suit property.
5. A declaration that the 4<sup>th</sup> Respondent whether by herself and /or her servants, agents or otherwise are trespassers on the suit property and should vacate the same forthwith and that the OCS Machakos Police Station and/or any other officer in charge of the Administration Police in Machakos County or any officer acting under him do implement and/or supervise the implementation of the order herein.
6. Cost of and incidental to this suit be awarded to the Petitioners.
7. The Honourable Court do issue such orders and give such further directions as it may deem fit to meet the ends of justice.

The petition was supported by an affidavit sworn by the Petitioner, Janet Ngina Nzuki on 13th October, 2016. The Petitioner averred that on or about 28<sup>th</sup> May, 1998, she was issued with a Letter of Allotment reference number 191452/4 by the Government of Kenya in respect of the suit property. The Petitioner averred that the suit property is situated in Machakos County and measures approximately 4.339 hectares. The Petitioner averred that the said letter of allotment had special conditions to be complied with by the Petitioner and indicated that the Government had canceled the Letter of Allotment reference number as 14308/III dated 23rd May, 1997.

The Petitioner averred further that upon complying with the terms of the said letter of allotment, she was issued with Grant Number I.R 135639 and subsequently registered as the owner of the suit property. The Petitioner averred that the suit property had earlier been allocated to the 4<sup>th</sup> Respondent's husband, one, Peter Itotia, deceased (hereinafter referred to as "the deceased") through a Letter of Allotment dated 23<sup>rd</sup> May, 1997. The Petitioner averred that the deceased failed to comply with the conditions of the allotment which required among others that the deceased undertakes a formal written acceptance of the offer and also pays the allotment charges in the sum of Kshs.108, 475/= within a period of 30 days.

The Petitioner averred further that it was a term of the offer of the suit property to the deceased that if acceptance was not received within the said period of 30 days from the date thereof, the offer would be considered to have lapsed. The Petitioner averred that as a result of the default on the part of the deceased to accept the offer and pay the requisite charges, the offer lapsed.

The Petitioner averred that the 4<sup>th</sup> Respondent in her capacity as the administrator of the estate of the deceased made an application to the 1<sup>st</sup> Respondent to review the Petitioner's title on the basis that the deceased had proprietorship rights over the suit property based on the said Letter of Allotment dated 23<sup>rd</sup> May, 1997. The Petitioner averred that pursuant to the said application, the 1<sup>st</sup> Respondent invited the Petitioner and the 4<sup>th</sup> Respondent to a public hearing to determine the legality of the Petitioner's title to the suit property. The Petitioner averred that the said hearing was conducted on 13<sup>th</sup> February, 2015. The Petitioner averred that the 1<sup>st</sup> Respondent through a letter dated 5<sup>th</sup> April, 2016 addressed to the Petitioner and the 4<sup>th</sup> Respondent informed them that it had reached a determination that the Petitioner's title to the suit property should be revoked and the ownership of the property restored to the 4<sup>th</sup> Respondent. The Petitioner averred that the 1<sup>st</sup> Respondent directed the 2<sup>nd</sup> Respondent through the same letter to revoke the Petitioner's title. The Petitioner averred that the 1<sup>st</sup> Respondent also directed the Director of Land Administration to issue a new letter of allotment in respect of the suit property to the 4<sup>th</sup> Respondent.

The Petitioner averred that the 1<sup>st</sup> Respondent lacked jurisdiction to conduct the said review and to make a determination thereon. The Petitioner averred that there was no evidence placed before the 1<sup>st</sup> Respondent of any illegality or fraud in the allocation of the suit property to the Petitioner. The Petitioner averred that the 1<sup>st</sup> Respondent violated the doctrine of legitimate expectation. The Petitioner contended further that the 1<sup>st</sup> Respondent considered irrelevant matters and failed to consider relevant matters and as such its decision was arbitrary and irrational. The Petitioner contended that the 1<sup>st</sup> Respondent violated her right to own property guaranteed under Article 40 of the Constitution. The Petitioner averred further that the 1<sup>st</sup> Respondent violated her rights under Article 47(2) of the Constitution as read with section 4(2) of the Fair Administrative Action Act, 2015 in that the 1<sup>st</sup> Respondent did not give the Petitioner written reasons for its decision.

In her submissions, the Petitioner framed five issues for determination by the court namely; whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were properly joined into the petition, whether the 1<sup>st</sup> Respondent acted ultra vires its mandate by revoking the title held by the Petitioner in respect of the suit property and directing the 2<sup>nd</sup> Respondent to effect the revocation, whether the review process that was conducted by the 1<sup>st</sup> Respondent contravened the Petitioner's constitutional rights, whether the 1<sup>st</sup> Respondent's actions breached the Petitioner's legitimate expectation and finally, who should bear the costs of the petition.

On the first issue, the Petitioner submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were properly joined in the petition in that the 2<sup>nd</sup> Respondent was responsible for executing the directions that were given by the 1<sup>st</sup> Respondent while the 3<sup>rd</sup> Respondent is the Chief Legal adviser of the Government. On the issue whether the 1<sup>st</sup> Respondent acted outside its mandate, the Petitioner submitted that the 1<sup>st</sup> Respondent had no power to revoke titles or to direct any other institution to facilitate the revocation of titles or allocation of land. The Petitioner submitted that after the 1<sup>st</sup> Respondent had completed its investigation and review, it had to move to the Environment and Land Court for the enforcement of its findings. The Petitioner submitted that only this court has the power to revoke titles to land. In support of this submission, the Petitioner cited Mwangi Stephen Muriithi v National Land Commission & 3 others [2018]eKLR and Republic v The Registrar of Titles Mombasa & 2 others ex parte Emfill Limited [2012]eKLR.

On whether the review process contravened the Petitioner's constitutional rights, the Petitioner submitted that the review process contravened Article 47 of the Constitution of Kenya, section 4(3) of the Fair Administrative Action Act and section 14(8) of the National Land Commission Act, 2012. The Petitioner submitted that the 1<sup>st</sup> Respondent did not notify her that she had a right to legal representation and that the 1<sup>st</sup> Respondent failed to furnish her with reasons for its decision. The Petitioner submitted that the entire process was illegal and unprocedural in that it violated her right to property and failed to respect the rights accorded to her under section 26 of the Land Registration Act, 2012. The Petitioner submitted that the 1<sup>st</sup> Respondent ignored glaring fact that the deceased husband of the 4<sup>th</sup> Respondent had failed to comply with the terms of the letter of allotment dated 23<sup>rd</sup> May, 1997 and that the allotment had lapsed after 30 days from the date of the letter before the suit property was allocated to Petitioner on 28<sup>th</sup> May, 1998. The Petitioner submitted that the said letter of allotment did not confer any title to the suit property upon the deceased or the 4<sup>th</sup> Respondent. The Petitioner cited several authorities in support of this submission.

On whether the 1<sup>st</sup> Respondent's actions breached her legitimate expectation, the Petitioner submitted that the Constitution of Kenya and various land statutes envisioned security of land rights. The Petitioner submitted that she had legitimate expectation that she will exclusively enjoy her proprietary rights to the suit property and that neither the 1<sup>st</sup> nor 2<sup>nd</sup> respondent would unreasonably interfere with the same. The Petitioner submitted that the 1<sup>st</sup> Respondent's decision that the Petitioner's title was acquired fraudulently violated the Petitioner's legitimate expectation.

On the issue of costs, the Petitioner submitted that given the wrongful and unconstitutional actions by the Respondents, the Respondents should bear the costs of the suit.

The 1<sup>st</sup> Respondent's case:

The 1<sup>st</sup> Respondent opposed the petition through a replying affidavit sworn by Brian Ikol, the 1<sup>st</sup> Respondent's Deputy Director Legal Affairs and Enforcement on 17<sup>th</sup> January, 2018. The 1<sup>st</sup> Respondent averred that it is an independent Constitutional Commission established under Article 67(1) of the Constitution and operationalized by the National Land Commission Act 2012 an Act enacted pursuant to Article 67(3) and 68(v) of the Constitution. The 1<sup>st</sup> Respondent averred that Section 14 of the National Land Commission Act gave the 1<sup>st</sup> Respondent power to review all grants or dispositions of public land to establish their legality and propriety upon receipt of a complaint or on its own motion. The 1<sup>st</sup> Respondent averred that it was enjoined under Article 27, 40 and 47 of the Constitution while carrying out the said review to accord all affected persons administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

The 1<sup>st</sup> Respondent averred that it was not disputed that the suit property was unalienated public land that was alienated and allocated by the Commissioner of Lands on behalf of the Government of Kenya. The 1<sup>st</sup> Respondent averred that it received a complaint from the 4<sup>th</sup> Respondent of alleged unlawful acquisition of the suit property by the Petitioner. The 1<sup>st</sup> Respondent averred that it invited all interested parties to appear before it for a hearing that was scheduled for 13<sup>th</sup> February, 2015. The 1<sup>st</sup> Respondent averred that the Petitioner attended the hearing and made representations. The 1<sup>st</sup> Respondent averred that upon hearing all the parties, it made a finding that the allocation of the suit property to the Petitioner was unlawful as an earlier allocation to the 4<sup>th</sup> Respondent's deceased husband had not been withdrawn or revoked and directed that the 2<sup>nd</sup> Respondent herein to revoke the title.

The 1<sup>st</sup> Respondent averred that there was no notice of withdrawal of the allocation of the suit property to the 4<sup>th</sup> Respondent's husband (the deceased) and that failure on the part of the deceased to timeously pay for the allotment was attributable to the loss of the correspondence file which was not the making of the 4<sup>th</sup> Respondent. The 1<sup>st</sup> Respondent averred that due process was accorded to all parties and that the Petitioner is challenging the merits of its determination and not the review process hence the proper course of action for the Petitioner would have been to lodge an appeal before this court against the decision rather than filing a petition. The 1<sup>st</sup> Respondent averred that the Petitioner voluntarily submitted to its jurisdiction and participated in the proceedings without questioning its jurisdiction. The 1<sup>st</sup> Respondent averred that the Petitioner was estopped from raising the issue of the jurisdiction of the 1<sup>st</sup> Respondent at this stage. The 1<sup>st</sup> Respondent did not file submissions.

#### The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's case:

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents opposed the petition through grounds of opposition dated 8<sup>th</sup> October, 2020. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents contended that the 1<sup>st</sup> Respondent had power under section 14 of the National Land Commission Act to review the disposition of the suit property to the Petitioner and that the Petitioner submitted herself to the jurisdiction of the 1<sup>st</sup> Respondent by actively participating in the proceedings without raising any objection. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not file written submissions.

#### The 4<sup>th</sup> Respondent's case:

The 4<sup>th</sup> Respondent opposed the application through a replying Affidavit sworn on 30<sup>th</sup> June 2017 by Margaret Wambui Mbugua, the widow and one of the administrators of the estate of Peter Mbugua Itotia (deceased) who passed away on 9<sup>th</sup> June, 2004. The 4<sup>th</sup> Respondent averred that the suit property formed part of the land that was owned by the National Youth Service which comprised of 52 parcels situated adjacent to Athi River. The 4<sup>th</sup> Respondent averred that the said parcels of land could only be accessed through Yatta National Youth Service Base and that only officials of the National Youth Service were beneficiaries of the said parcels of land.

The 4<sup>th</sup> Respondent averred that her late husband (the deceased) was allocated the suit property on 23<sup>rd</sup> May, 1997 through a letter of Allotment reference number 14308/111. The 4<sup>th</sup> Respondent averred that she had been cultivating the suit property since the year 1997 and had constructed a temporary building thereon.

The 4<sup>th</sup> Respondent averred that following the death of her husband, she was not aware of the legal status of the suit property. The 4<sup>th</sup> Respondent averred that it was until the year 2010 that she stumbled upon the original letter of allotment in respect of the suit property in the name of the deceased that she presented to the Ministry of Lands for the purposes of regularization. The 4<sup>th</sup> Respondent averred that failure to pay the stand premium and other charges was not deliberate but was occasioned by the fact that the original letter of allotment had been misplaced. The 4<sup>th</sup> Respondent averred that upon recovery of the same, she hastened to comply with the terms thereof. The 4<sup>th</sup> Respondent averred that she had not received any notification that the said letter of allotment had been cancelled.

The 4<sup>th</sup> Respondent averred that she attempted to pay the stand premium and other charges that were to be paid for the allotment so that she could acquire a title for the property but she was advised that another letter of allotment had been issued to the Petitioner in respect of the property and that the Petitioner had been issued with a grant. The 4<sup>th</sup> Respondent averred that the allotment of the suit property to the Petitioner was made without notice to her. The 4<sup>th</sup> Respondent averred that it was at this stage that she made a formal complaint to the 1<sup>st</sup> Respondent on 23<sup>rd</sup> December 2013. The 4<sup>th</sup> Respondent averred that her complaint was heard by the 1<sup>st</sup> Respondent in the presence of the Petitioner on 19<sup>th</sup> January, 2015 and a decision to revoke the Petitioner's title to the suit property was subsequently made. The 4<sup>th</sup> Respondent filed written submissions on 11<sup>th</sup> November, 2020 in which she reiterated the contents of her replying affidavit and contended that the decision of the 1<sup>st</sup> Respondent challenged in the petition was lawful.

#### Determination:

I have considered the petition together with the affidavit filed in support thereof. I have also considered the replying affidavits and grounds of opposition filed by the Respondents in opposition to the petition. Finally, I have considered the submissions by the advocates for the parties and the authorities cited in support thereof. The issues arising for determination in the petition in my view are the following;

1. Whether the 1<sup>st</sup> Respondent had jurisdiction to review the grant in respect of the suit property and to direct the 2<sup>nd</sup> Respondent to revoke the Petitioner's title.
2. Whether the review of the grant in respect of the suit property was conducted by the 1<sup>st</sup> Respondent in a manner that contravened the Petitioner's constitutional rights.
3. Whether the decision that was made by the 1<sup>st</sup> Respondent following the said review violated the Petitioner's fundamental rights.

Whether the 1<sup>st</sup> Respondent had jurisdiction to review the grant in respect of the suit property.

The 1<sup>st</sup> Respondent was established under Article 67 of the Constitution of Kenya which also spelt out some of its functions. Article 68 of the Constitution directed Parliament to enact legislation providing for among others the review of all grants or dispositions of public land to establish their propriety or legality. The National Land Commission Act, 2012 was enacted pursuant to the provisions of Articles 67(3) and 68 of the Constitution. Pursuant to Article 68(c) (v) of the Constitution, the 1<sup>st</sup> Respondent was given power under the National Land Commission Act, 2012(hereinafter referred to only as "the Act" where the context so permits) to review grants and dispositions of public land. Section 14 of the Act provides as follows:

**14. (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).**

The Petitioner had contended that the 1<sup>st</sup> Respondent had no power to revoke titles. As stated earlier, the Petitioner contended that the 1<sup>st</sup> Respondent's power was limited to making a recommendation whose execution could only be undertaken by the Environment and Land Court. I am not in agreement with this contention and I have not been persuaded by the cases that were cited by the Petitioner in support thereof. Section 14 (4), (5) and (6) of the National Land Commission Act, 2012 reproduced above is very clear on the review powers of the 1<sup>st</sup> Respondent. Section (14(4) of the said Act gave the 1<sup>st</sup> Respondent power to make a determination after reviewing of a grant or disposition of public land. Article 67(3) of the Constitution gave Parliament power to confer more functions on the 1<sup>st</sup> Respondent. The functions of the 1<sup>st</sup> Respondent were therefore not limited only to those set out in Article 67 of the Constitution. It cannot be argued therefore that the function conferred upon the 1<sup>st</sup> Respondent under section 14(4) of the National Land Commission Act, 2012 to make a determination is inconsistent with Article 67(2)(e) of the Constitution as suggested in some of the authorities cited by the Petitioner. In any event, whether you call it a recommendation of redress or a determination, the effect is the same. It is a decision made by the 1<sup>st</sup> Respondent after carrying out a review. Section 14(5) of the Act gives the 1<sup>st</sup> Respondent power to direct the Land Registrar to revoke a title when it makes a finding that the title was acquired unlawfully. Finally, section 14(6) provides that where the 1<sup>st</sup> Respondent finds that the title was acquired irregularly, it has power to correct the irregularity.

In this case, the 1<sup>st</sup> Respondent made a finding that the title held by the Petitioner was acquired illegally through manipulation and backdating of records at the offices of the Commissioner of Lands. The 1<sup>st</sup> Respondent found that due process was not followed in the cancellation of the letter of allotment that had been issued to the deceased husband of the 4<sup>th</sup> Respondent, Peter Mbugua Itotia. The Petitioner did not rebut these factual findings by the 1<sup>st</sup> Respondent. From the proceedings of the 1<sup>st</sup> Respondent, the Petitioner found it hard to explain how she came to know that the suit property was available for allocation. The statement that the Petitioner gave on how she acquired the suit property was hard to believe and backdating and manipulation of documents could not be ruled out.

Although the Petitioner's letter of allotment is dated 28<sup>th</sup> May, 1998, the Petitioner told the 1<sup>st</sup> Respondent that the suit property was

allocated to her after she met the former Commissioner of Lands Mr. Mabea in 2010. There was also no explanation why the Petitioner who has contended in the present petition that the letter of allotment issued to the 4<sup>th</sup> Respondent's deceased husband had lapsed after 30 days of issuance, did not accept her own allotment and make payment until 13 years later on 1<sup>st</sup> August, 2011. It also turned out that as at the time of the review of her title in 2015; that is about 17 years after the property was allegedly allocated to her, the petitioner had not visited the property and had difficulty explaining to the 1<sup>st</sup> Respondent the location of the property. For the foregoing reasons, I find no fault in the findings by the 1<sup>st</sup> Respondent and with the 1<sup>st</sup> Respondent's direction to the 2<sup>nd</sup> Respondent to revoke the Petitioner's title. Section 14(5) gave the 1<sup>st</sup> Respondent power to do that. In my view the fact that the 1<sup>st</sup> Respondent stated in its findings that it had revoked the Petitioner's title made no difference. The revocation could only be carried out by the Land Registrar. The 1<sup>st</sup> Respondent acknowledged that fact and directed the Land Registrar to revoke the title as provided by law.

Due to the foregoing, it is my finding that the 1<sup>st</sup> Respondent had power to review the grant in respect of the suit property and to make the determination that it made. I therefore find no merit in the Petitioner's argument that the 1<sup>st</sup> Respondent acted ultra vires its powers in reviewing the Petitioner's title and directing its revocation.

Whether the review of the grant in respect of the suit property was conducted by the 1<sup>st</sup> Respondent in a manner that contravened the Petitioner's constitutional rights.

The Petitioner contended among others that the 1<sup>st</sup> Respondent failed to take cognizance of the fact that the Petitioner's title was absolute and indefeasible thereby depriving the Petitioner of her right to property guaranteed under Article 40 of the Constitution. The Petitioner contended further that the 1<sup>st</sup> Respondent violated her rights under Article 47(2) of the Constitution and section 4(2) of the Fair Administrative Action Act, 2015 by failing to give her reasons for its decision. The Petitioner also contended that she was not advised of her right to legal representation. There was also the argument that the 1<sup>st</sup> Respondent violated the Petitioner's legitimate expectation. Sections 14(3) of the National Land Commission Act, 2012 that I have reproduced above provides that the 1<sup>st</sup> Respondent in exercise of its review powers was supposed to give every person who had an interest in the grant or disposition the subject of its review a notice of such review and an opportunity to appear before it and to inspect any relevant documents. Section 8 of the same Act also reproduced above provides that in exercise of its review powers, the 1<sup>st</sup> Respondent was to be guided by the principles set out under Article 47 of the Constitution which provides as follows:

**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.**

Article 40 of the Constitution provides that,

**40. (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.

In Evelyn College of Design Ltd v Director of Children's Department & another [2013] eKLR the court stated that:

**“....if the land has been illegally acquired, then the State must use due process to recover it. The requirement of due process is underpinned by several provisions of the Constitution. First, it is implicit in Article 40(2)(a) which prohibits the legislature from passing legislation that arbitrarily deprives a person of any interest in or right over any property of any description. Second, Article 40(6) is clear that rights acquired under this Article do not extend to any property that is found to have been unlawfully acquired. Such “finding” cannot be by any other means other than due process. Third, Article 47(1) guarantees every person fair administrative action which includes due process.”**

In Henry Muthee Kathurima v Commissioner of Lands & Another [2015] eKLR, the Court of Appeal stated that:

**“We have considered the provisions of Section 26 of the Land Registration Act in light of the provisions of Article 40(6) of the Constitution and it is our considered view that the concept of indefeasibility of title is subject to Article 40(6) of the Constitution. Guided by Article 40 (6) of the Constitution, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that the title to the property was unlawfully acquired.”**

In their book, Administrative Law, 10<sup>th</sup> edition, H. W. R. Wade & C. F. Forsyth have commented as follows, at page 449, 450 and 451 on legitimate expectation:

**“It is not enough that an expectation should exist; it must in addition be legitimate.....First of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfill the expectation.....Secondly, clear statutory words, of course, override any expectation howsoever founded (see R.vs. DPP exp.Kebilene [1999] 3 WLR 972(HL)). An expectation, whose fulfillment requires that a decision maker should make unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions and express in several that the expectation must be within the powers of the decision maker before any question of protection arises. There are good reasons why this should be so; an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting unlawful practice.”**

I am of the view that the fact that the Petitioner's title to the suit property was deemed absolute and indefeasible under section 26 of the Land Act, 2012 did not shield it from the 1<sup>st</sup> Respondent's review jurisdiction. As was held in the cases that I have cited, Article 40(6) of the Constitution overrides the provisions of section 26 of the Land Act, 2012.

I am also satisfied from the affidavit of the Petitioner in support of the petition and the replying affidavits filed by the 1<sup>st</sup> and 4<sup>th</sup> Respondents that the Petitioner was accorded a fair hearing and fair administrative action by the 1<sup>st</sup> Respondent. Section 14 of the National Land Commission Act, 2012 reproduced above enjoins the 1<sup>st</sup> Respondent to give every person who appears to have an interest in a grant or disposition under review, a notice of such review and an opportunity to appear before the 1<sup>st</sup> Respondent and to inspect any relevant documents. The evidence before the court shows that the Petitioner was given a notice of the complaint by the 4<sup>th</sup> Respondent and was accorded reasonable opportunity to respond to the same and also to appear before the 1<sup>st</sup> Respondent for a hearing. From the evidence on record, the Petitioner made use of the said opportunity. The Petitioner appeared before the 1<sup>st</sup> Respondent, made oral representation and produced evidence in support of her title to the suit property. After hearing the parties, the 1<sup>st</sup> Respondent made a decision in writing and gave reasons for its decision. I am not in agreement with the Petitioner that the letter dated 5<sup>th</sup> April, 2016 was the 1<sup>st</sup> Respondent's decision. The letter merely communicated the decision. The 1<sup>st</sup> and 4<sup>th</sup> Respondents placed before the court a reasoned decision that was made by the 1<sup>st</sup> Respondent that was not disputed by the Petitioner. There is no evidence that the Petitioner requested for the decision and was denied the same. On the issue of notice of a right to legal representation, the same was not one of the grounds upon which the petition was brought. There is also no evidence that the Petitioner was disadvantaged by not having been represented during the review by an advocate. I find no merit in the Petitioner's contention that he was not accorded a fair hearing and fair administrative action.

On legitimate expectation, my view is that the 1<sup>st</sup> Respondent could not be expected to uphold the Petitioner's title after finding that it was acquired unlawfully. Such decision would have been contrary to the law. The Petitioner's expectation that the indefeasibility of her title would be upheld by the 1<sup>st</sup> Respondent was therefore not legitimate in the circumstances.

Whether the decision that was made by the 1<sup>st</sup> Respondent following the said review violated the Petitioner's fundamental rights.

My answer to this issue is in the negative. As I have found above, the review process was legal. The same was conducted in accordance with the provisions of the Constitution of Kenya and the enabling statutes. The decision that was reached through that process was in the circumstances lawful. I have already addressed the alleged violations of the Constitution earlier in the judgment and found the same to be without merit.

Conclusion:

In the final analysis, the petition fails on all the grounds on which it was brought. The petition dated 13<sup>th</sup> October, 2016 is accordingly dismissed with costs.

**DELIVERED AND DATED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2021**

**S. OKONG'O**

**JUDGE**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

N/A for the Petitioner

N/A for the 1<sup>st</sup> Respondent

N/A for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Mr. Ajulu for the 4<sup>th</sup> Respondent

Ms. C. Nyokabi - Court Assistant