



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

JUDICIAL REVIEW NO. 3 OF 2017

**IN THE MATTER OF AN APPLCIATION BY ABOKO JOHN SAMUEL KUMENDA AND FLORENCE WAITHIEGENI
GATUNE FOR WRIT/ORDERS OF JUDICIAL REVIEW IN THE NATURE OF (CERTIORARI AND PROHIBITION)**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF NATIONAL LAND COMMISSION ACT

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACT, 2015

AND

IN THE MATTER OF LAND REGISTRATION ACT NO. 1 OF 2012

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CHAIRMAN NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE NATIONAL LAND COMMISSION.....2ND RESPONDENT

THE CHIEF LAND REGISTRAR.....3RD RESPONDENT

THE COUNTY LAND REGISTRAR (KISII COUNTY).....4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....5TH RESPONDENT

AND

PACIFICA MWANGO as administrator of the estate of

SIMON KEGESA.....INTERESTED PARTY

AND

ABOKO JOHN SAMUEL KUMENDA1ST EX PARTE APPLICANT

FLORENCE WAITHIEGENI GATUNE.....2ND EX PARTE APPLICANT

J U D G M E N T

1. The Ex Parte Applicants pursuant to leave granted by the Court on 20th September 2017 filed the substantive Notice of Motion for Judicial Review dated 21st September 2017 and sought the following orders:-

1) The Honourable court be pleased to grant an order in the nature of writ and/or order of certiorari, removing into this court and quashing, the proceedings and processes culminating into the decision conveyed vide the Kenya Gazette Notice Number 6882, Volume CXIX No. 97 published on the 17th day of July 2017, containing the determination of the 1st and 2nd Respondents reached and conveyed vide the said Kenya Gazette Notice, directing the Chief Land Registrar (3rd Respondent herein or 4th Respondent) to revoke, divest and/or annul the title in respect of parcel of land otherwise known as LR No. Kisii Municipality/Block II/301 and directing that the land and title thereof be vested and/or registered in the name of one Pacifica Mwangi as the alleged administrator of one Simon Kegesa (the interested party herein)

2) The Honourable Court be pleased to grant an order in the nature of writ or order of Certiorari removing into this Court an quashing any administrative step(s), action or measures initiated or put in process/motion by the Respondents, upon the determination of the 1st and 2nd Respondents being reached and conveyed vide the Kenya Gazette Notice Number 6862, Volume CXIX – No. 97 published on the 17th day of July 2017, with a view to giving the same effect, perfect or alter the entry in the records and registers, held by the Respondents, in particular, the 2nd, 3rd and 4th Respondents, in an attempt or in bid to implement or give effect to the impugned decision of the 1st and 2nd Respondents as conveyed vide the Kenya Gazette Notice Number 6862, Volume CXIX – No. 97 published on the 17th day of July 2017, including any alteration in the register and records kept by the 2nd, 3rd and 4th Respondents, if any, aimed at giving effect to the impugned decision.

3) The Honourable Court be pleased to grant an order of judicial review in the nature of writ and/or orders of prohibition, against the Respondents, prohibiting the same from dealing with the impugned decision of the 1st and 2nd Respondents conveyed vide Kenya Gazette Notice Number 6862, Volume CXIX – No. 97 published on the 17th day of July 2017, in howsoever or whatsoever manner or implementing the same, as decreed vide the decision conveyed or contained in Kenya Gazette Notice Number 6862, Volume CXIX – No. 97 published on the 17th day of July 2017, or other means touching on LR No. Kisii Municipality/Block III/301.

4) That the leave so granted by this Honourable court, do operate as an order of stay against the Respondents implementing or enforcing the decision of the 1st and 2nd Respondents as conveyed vide Kenya Gazette Notice Number 6882, Volume CXIX – No. 97 published on the 17th day of July 2017 or other means touching LR No. Kisii Municipality/Block III/301.

5) The Ex parte Applicants be at liberty to apply to the Honourable Court for all necessary and/or consequential orders that, the Honourable Court may deem fit to grant.

6) Costs of this application be borne by the Respondents and the Interested Party.

2. The application was supported on the grounds set out on the face of the application and the affidavit sworn in support of the Notice of Motion by Aboko John Samuel Kumenda on 21st September 2017. Amongst the grounds upon which the Ex parte Applicants seek judicial review are as follows:-

c) That the 1st and 2nd Respondents herein have without jurisdiction purported to direct the Chief Land Registrar, to revoke the Ex parte Applicant's title and cause the said parcel of land and title to be vested, in one Pacifica Mwangi as the alleged administrator of one Simon Kegesa, on allegation that the said land was not available for allocation to third parties on allegations that the same was freehold and family land. (See Gazette Notice Number 6862, Volume CXIX – No. 97 published on the 17th day of July 2017.

d) That Ex parte Applicants were never notified of the proceedings and processes of the 1st and 2nd Respondents which culminated into the determination conveyed vide the Kenya Gazette Notice Number 6862, Volume CXIX – No. 97, which purported to direct the 3rd and 4th Respondents to annul and/or revoke the Ex parte Applicants title to land parcel number LR No. Kisii Municipality/Block III/301, thus the same have been condemned unheard.

e) That besides, the decision of the 1st and 2nd Respondent's unilateral proceedings and processes culminating into determination purported to revoke, annul and divest the Ex parte Applicant's title and rights over land parcel number LR No. Kisii Municipality/Block III/301, contravenes the provisions of Articles 41, 47, 50(1) of the Constitution of Kenya, Section 14(1 & 8) of the National Land Commission and Section 4(3) of the Fair Administrative Act, 2015 and thus, the determination as reached and conveyed is null and void abinitio and cannot therefore be effectuated.

h) That the 1st Ex parte Applicant only came to learn of the determination of the 1st and 2nd Respondents through a friend who called him on the 4th day of September 2017, who drew their attention to the contents of LR No. Kisii Municipality/Block III/301 wherein the 1st and 2nd Respondents had purported to revoke, annul and/or divest the title and

interests over the suit property herein.

i) That the 1st and 2nd Respondents violated the mandatory provisions of Section 14 (1) and (8) of the National Land Commission Act, 2012 under which they purported to act which provision required that the 1st and 2nd Respondent:

“to give every person who appears to the Commission to have interests in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and inspect any relevant documents.”

j) That the National Land Commission (the 1st and 2nd Respondents) not only acted ultra-vires the Constitution and its won enabling statute, but it also breached the cardinal rules and Principal of Natural Justice.”

k) That the decision of the 1st and 2nd Respondents was illegal and irrational in light of the very clear provisions of Article 64 of the Constitution (on the definition of private land) and Article 68 (c) (v) (the power of review only relates to public land).

3. The affidavit sworn in support basically reiterates the grounds set out in support on the face of the application. The issues thus are whether the 1st and 2nd Respondents had the jurisdiction and mandate to render the decision they did; whether the Ex Parte Applicants were given notice of the hearing of the matter by the 1st and 2nd Respondents as statutorily required; and further whether they were afforded a fair hearing as provided under the Constitution and the Fair Administrative Action Act, 2015.

4. The 1st and 2nd Respondents filed a replying affidavit sworn by Brian Ikol, Deputy Director, Legal Affairs and Enforcement of the National Land Commission dated 3rd September 2018 in response to the Ex parte Applicants Notice of Motion dated 21st September 2017. The deponent stated that the 2nd Respondent was an Independent Commission established under Article 67(1) of the Constitution with mandate to manage public land on behalf of the National and County Governments. He further deposed that the National Land Commission was operationalised through the enactment of the National Land Commission Act No. 5 of 2012 which under Section 14 mandated the Commission to review all grants and dispositions of public land, either on its own motion or upon receipt of a complaint, with a view of establishing the legality or propriety of the grant and/or the disposition thereof.

5. The deponent deposed that the 1st and 2nd Respondent complied with the provisions of the law in hearing the complaint affecting the Applicants parcel of land maintaining that the provisions of Section 14(3) of the National Land Commission Act, that requires that every person who appears to have an interest in the grant or disposition under review be served with a notice and to be afforded an opportunity to appear before the Commission and to inspect any relevant documents was complied with. It would appear the 1st and 2nd Respondents are relying on paragraphs 12, 13, 14 and 15 of the deponent’s replying affidavit to assert their compliance with the law in regard to service of notice and opportunity for fair hearing

6. Paragraphs 12, 13, 14 and 15 of the affidavit are in the following terms:-

12. THAT the 2nd Respondent invited, through letters of invitation copied to all the interested parties for hearing in respect of the properties as well as requesting the interested parties to make written submissions and oral representation if need be before the Commission at the hearing date.

13. THAT by an invitation letter dated the 23rd of September 2016 as well as a public notice appearing in all the local dailies with nationwide circulation, all interested parties were invited for hearing at the Kisumu Tom Mboya Labour College on the 5th of October 2016 with a view of establishing the legality of the title documents over the parcels of land published in the said gazette and that the suit parcel was among the gazetted parcels of land in the aforementioned Notice. (Annexed herein and marked as “B1-2” is a copy of the said notice as well as the invitation which was copied and communicated to all the interested parties, the Applicant herein inclusive).

14. THAT the Affidavit of Service sworn by one Henry Motanya Oyugi on the 4th of October 2016 confirms indeed that all the Interested Parties to the properties were served. (Annexed herewith and marked as “B1-3” is a copy of the said Affidavit of Service).

15. THAT consequently on the 10th of July 2017, the 2nd Respondent through the office of the 1st Respondent, having reviewed the legality of the grant over the suit parcel prepared a report of its findings on the legality of the grant in question. (Annexed herewith and marked as “B1-4” is a copy of the said determination which was directed to the Chief Land Registrar and copied to all the interested parties vide the letter dated the 2nd of May 2017).

7. The 1st and 2nd Respondents contended therefore that the protection of property under Article 40 of the Constitution was not absolute and that it was in this context that the Constitution under Article 68(c) (v) provided that Parliament was to enact legislation to enable review of grants and disposition of public land to establish their propriety or legality. Hence the 1st and 2nd Respondents asserted that where property is found to have been illegally acquired, the same could not be protected and contended that the Applicants were not entitled to the judicial review orders sought.

8. The interested party, Pacifica Mwango as the administratrix of the estate of Simon Kegesa who were the beneficiaries of the decision of the 1st and 2nd Respondents revoking the title of the Ex parte Applicants swore a replying affidavit dated 17th July 2018 basically in support of the 1st and 2nd Respondents actions. The Interested party averred that the 1st and 2nd Respondents followed due process in reaching the decision that they did.

9. The County Government of Kisii vide a Notice of Motion dated 14th November 2018 applied to be enjoined as an Interested Party in these proceedings. The Court on 4th March 2019 allowed the County Government of Kisii to be enjoined as an interested Party in the proceedings and granted them leave of 21 days to file their response to the judicial review application and their submissions. The County Government of Kisii did not comply with these directions and filed no response to the Ex parte Applicant's application or any submissions.

10. The Ex parte Applicants filed their submissions on 23rd April 2018 and further submissions on 13th November 2018. The Interested Party, Pacifica Mwangi, filed further affidavits on 25th September 2018, 11th October 2018 and 13th May 2019 but filed no submissions. The further affidavits sought to clarify matters relating to the succession proceedings in regard to her late father's estate. The further affidavit filed on 13th May 2019 affirmed that the decision by the 1st and 2nd Respondents had been given effect and that the affected titles including the Ex parte Applicants title had been revoked. The Interested Party's averment was that all the affected persons including the Ex parte Applicants had been given notice of hearing by the 1st and 2nd Respondents and were afforded the opportunity of a fair hearing.

11. The Ex parte Applicants in their filed submissions reiterated the facts as set out in the affidavit sworn in support of the Notice of Motion. The Ex parte Applicants were the registered co-owners of **LR No. Kisii Municipality/Block III/301** and their complaint was that they were never notified by the 1st and 2nd Respondents of the intention to review their title to the land and they were therefore not afforded the opportunity to be heard. The Applicants thus contended the decision of the 1st and 2nd Respondents to revoke their title was *ultra vires* as it was made by the 1st and 2nd Respondents outside the scope of their mandate and jurisdiction and was reached in contravention of the rules of natural justice and in breach of Articles 47 and 50 of the Constitution on fair administrative action and fair hearing.

12. The issues in the instant judicial review are twofold. Firstly, whether the 1st and 2nd Respondents acted within the scope of their mandate and jurisdiction in making the decision to revoke the Ex parte Applicants title and secondly, whether the 1st and 2nd Respondents followed due process in reaching the decision that they did. The Applicants contend that their right to fair administrative action guaranteed under Article 47 of the Constitution was violated and therefore the decision of the 1st and 2nd Respondents violated the cardinal rules of natural justice and that the same ought to be quashed.

13. The scope of judicial review was ably articulated by the Court of Appeal in the case of **Municipal Council of Mombasa -vs- Republic & Another CA No. 185 of 2001 [2002]eKLR** where the court while approving its decision in the earlier case of **Kenya National Examination Council -vs- Republic ex parte Geoffrey Gathenji Njoroge & Nine Others (Civil Appeal No. 266 of 1996)** (unreported) stated as follows:-

“...judicial review is concerned with the decision making process, not with the merits of the decision itself...”

The court further stated:-

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e the jurisdiction to make it? Were the persons affected by the decision heard before it was made? These are the kind of questions a Court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going to the merits of the decision itself - such as whether there was or there was not sufficient evidence to support the decision and that, as we have said is not the province of judicial review.”

14. It is thus clear that this court cannot interrogate the merits of the decision on the basis of the availed evidence and is restricted to considering whether the Applicants were given fair treatment by the 1st and 2nd Respondents and whether due process was followed.

15. Respecting the mandate and jurisdiction of National Land Commission to review grants or dispositions of public land to establish their propriety or legality, the Commission is under Article 67(2) of the Constitution which sets out its functions and Section 14 of the National Land Commission Act, 2012 conferred with the jurisdiction and mandate to carry out those functions.

16. The functions of the National Land Commission are set out under Article 67 (2) of the constitution of Kenya and include:

- 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.

17. Section 14 of the *National Land Commission Act*, on the other hand outlines the mandate of the Commission and provides as follows:

(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).

18. Jurisdiction of National Land Commission was considered in the case of **Republic -vs- National Land Commission Ex parte Holborn Properties Ltd [2016] eKLR**, where the court held that the Commission had power to review titles that are privately held where such titles were initially public land and were converted to private holdings with a view of ascertaining whether the title was properly and legally acquired.

19. The question this Court is called upon to determine is whether the 1st Respondent in carrying out its mandate to investigate the title infringed the rights of the Applicants. Article 47 of the Constitution of Kenya makes provision for the threshold to be met by any institution that exercises any administrative function that has the potential to impact or affect the interest of a person adversely. Article 47 provides:

- 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.**
- 3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-**
 - a. provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and**
 - b. promote efficient administration.**

20. The Court of Appeal in the case of **Judicial Service Commission -vs- Mbalu Mutava & Another [2015] eKLR** held as follows:

“In exercise of its powers under the Constitution or under legislation, public officers, state officers, state organs and independent bodies or tribunals may make decisions which may be characterized as judicial, quasi-judicial or administrative depending on the empowering provision of the Constitution or the law. The landmark decision of the House of Lords in Ridge v. Baldwin [1964] AC 40 clarified the law, that the rules of natural justice, in particular right to fair hearing, (audi alteram partem rule) applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties. In that case, Lord Hodson at page 132 identified three features of natural justice as:

- i. the right to be heard by an unbiased tribunal.**
- ii. the right to have notice of charges of misconduct.**
- iii. the right to be heard in answer to those charges.**

21. The 1st and 2nd Respondents deponed that the Applicants vide a letter dated 23rd September 2016, were invited and issued public notice in the newspapers inviting interested parties to appear before them at Kisumu Tom Mboya Labour College for a review hearing on 5th October 2016 with a view of establishing the legality of the title documents held by the affected parties as published in the notice. The Applicants denied receipt of any notice from the Respondents and therefore stated they could not have attended the hearing in regard to which they had no notification. The Applicants further contended they had no information and/or documentation that would have enabled them to know the basis of the complaint against them.

22. The 1st and 2nd Respondents responding to the Applicants assertion that they were not served deponed under paragraph 14 of their replying affidavit that one Henry Motanya Oyugi a process server effected service on all the interested parties as per the affidavit of service sworn by him on 4th October 2016 exhibited as annexure “B1-3”. The Court has reviewed the affidavit of service and notes that the process server states he received the complaint letters for service on the affected parties on 3rd October 2016 and that he apparently on the same date served all the 6 interested persons named therein who included the 1st Ex parte Applicant herein. The affidavit lacks any details as to how each of the interested persons were served. The notice vide the Commission’s letter dated 23rd September 2016 constituted the statement of the complaint/charges and notice of hearing on 5th October 2016. This is the notice the process server allegedly served on the Applicants on 3rd October 2016. The affidavit of service does not specify in what manner and who was served and where the service was effected. Apart from the notice of hearing being too short as to be unreasonable the affidavit of service is deficient and the court cannot hold that there was any valid service of the notice of hearing.

23. In the case of **Republic -vs- National Land Commission & Tropical Treasure Limited Ex-parte Krystaline Salt Limited (2015) eKLR** Korir J. held as follows:

“[68.] The notice in the newspapers did not have the name of the complainant and neither did it disclose the complaint against the Applicant’s titles. In order for the Applicant to prepare its defence it ought to have been served with the particulars of the allegations by the Interested Party and informed of the manner in which it allegedly obtained grants to public land in an illegal or improper manner.

[69.] In a matter that eventually led to the revocation of the Applicant’s title, a notice in the newspapers without any useful information was not sufficient...”

24. The 1st and the 2nd Respondents replying affidavit affirms that the Applicants amongst other persons were served with the Notice of the Commission’s intention to review their grants and/or titles vide a letter dated 23rd September 2016 and a public notice carried in local dailies inviting the Applicants and other persons named to attend hearing at Kisumu Tom Mboya Labour College on 5th October 2016. The notice through the Newspaper and the said letter dated 23rd September 2016 were deficient to the extent that they did not set out any particulars of the facts constituting any alleged illegality, irregularity and/or fraud in the alienation and/or acquisition of the property. The notices did not afford the Applicants the opportunity to know the allegations and/or case they were required to answer. The notice in my view did not satisfy the provisions of Article 47(1) of the Constitution which provides that:

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

The 1st and 2nd Respondents were in actual sense carrying out an administrative function as per its mandate yet it did not avail to the Applicants the relevant information and/or any documents to enable them to respond appropriately. The 1st and 2nd Respondents actions and the process of review they adopted was more or less in the nature of trial by ambush whereby the Respondents furnished no information, documents and/or particulars of the allegations/charges and yet one was supposed to respond to the allegations. There could be no fairness in such circumstances.

25. The Fair Administrative Action Act 2015 Section 4(3) and (4) provides as follows:

4(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

- a. prior and adequate notice of the nature and reasons for the proposed administrative action;**
- b. an opportunity to be heard and to make representations in that regard;**
- c. notice of a right to a review or internal appeal against an administrative decision, where applicable;**
- d. a statement of reasons pursuant to Section 6;**
- e. notice of the right to legal representation, where applicable;**
- f. notice of the right to cross-examine or where applicable; or**
- g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

(4)The administrator shall accord the person against whom administrative action is taken an opportunity to -

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

In the instant matter the 1st and 2nd Respondents were exercising an administrative duty and were bound to act in compliance with the provisions of Article 47 of the Constitution and the provisions of Section 4 of the Fair Administrative Action Act which gives effect and expression to Article 47 of the Constitution. I am not satisfied the 1st and 2nd Respondents acted in conformity with these provisions when they subjected the Applicants to administrative action. I am not able to find in the circumstances of this case, that the Applicants were given a fair hearing before the recommendation to revoke their title was made.

26. Justice G. V. Odunga in the case of **Republic -vs- Registrar of Titles & Another Ex parte David Gachira & Another [2014]eKLR** stated as follows in a situation where a party had not been given an opportunity to be heard:

“...It is clear that the right to property is constitutionally protected and a person can only be deprived of that right as provided under the Constitution. Both under the Constitution and relevant statutory provisions a registered proprietor’s title to land cannot be arbitrarily cancelled without the proprietor being afforded an opportunity of being heard. A decision by the Registrar to unilaterally cancel or revoke a title even if he had such powers would fly in the face of the express constitutional provisions.”

27. The net result is that I find the decision by the 1st and 2nd Respondents respecting the recommendation to revoke the title to land parcel **LR No. Kisii Municipality/Block III/301** conveyed vide Kenya Gazette Notice No. 6862 published on 17th July 2017 is unsustainable and has to be quashed. I accordingly allow the Applicants Notice of Motion dated 21st September 2017 in terms of prayers 1, 2 and 3 of the Notice of Motion. The costs of the application are awarded to the Ex parte Applicants.

28. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT KISII THIS 5TH DAY OF JULY 2019.

J. M. MUTUNGI

JUDGE