



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. MISC. APPLICATION NO. 46 OF 2019 - JR

IN THE MATTER OF AN APPLICATION BY GIDEON MULI MUSEMBI FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION DIRECTED AT NATIONAL LAND COMMISSION AND CHIEF LAND REGISTRAR

AND

IN THE MATTER OF THE DECISION OF THE NLC/HLI/259/2017

BETWEEN

REPUBLIC

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

DISTRICT LAND REGISTRAR MACHAKOS.....3RD RESPONDENT

AND

GREGORY KAVINYA MUVEVI.....INTERESTED PARTY

AND

EX-PARTE APPLICANT GIDEON MULI MUSEMBI *a.k.a* GIDEON MULI

JUDGMENT

1. In the Notice of Motion dated 3rd October, 2019, the Ex-parte Applicant has sought for the following Judicial Review orders:

a) Certiorari directed at the Respondent to remove and bring to the Environment and Land Court Machakos to be quashed proceedings, determination and recommendations of the National Land Commission Nairobi undated and disclosed to the Applicant herein on 17/9/2019 in NLC/HLI/259/2017.

b) Prohibition directed at the Respondents, their servants, and/or agents, or any land officer/Surveyor or whomsoever acting on the basis of the aforesaid determination and recommendations from enforcing the order by way of execution implementation or causing to be implemented the determination/recommendation made in NLC/HLI/259/2017 or in any other manner.

c) That cost of this Application be provided for.

2. The Application is supported by the Verifying Affidavit and Statement of the Ex-parte Applicant who has deponed that the issue of ownership of the suit property were determined by the District Commissioner on 17th August, 1979 where it was ordered that plot number 888 belonged to the Applicant subject to a refund of Kshs. 3,610 which he paid.

3. According to the Ex-parte Applicant, the Interested Party was notified by the Land Adjudication Officer by a letter dated 18th August, 1979 that the money had been deposited with the District Commissioner, Treasury from where he was to collect it and that a Title Deed was issued to him on 3rd December, 1973 after the dismissal of the Appeal by the Minister.

4. According to the Ex-parte Applicant, he has never been served with any pleadings or notifications from the National Land Commission in respect to the suit property; that on 17th September, 2019, he received summons from the Chief of Mwala Location and that when he responded to the summons, he was served with a letter dated 16th September, 2019 on which the determination of the National Land Commission was attached.
5. According to the Ex-parte Applicant, it transpired from the said letter that the Respondent (*the National Land Commission*) had set down the dispute for hearing on 2nd August, 2018 and 4th October, 2018 without his knowledge and that the Respondent held that the claim by the Interested Party in respect to the suit property was valid because it met the Historical Land Injustice Admissibility Criteria.
6. It was deponed by the Interested Party that the Respondent further directed that the suit property should revert to the Interested Party owing to the fact that he never refunded money as directed; that the Chief Land Registrar was directed to lift the existing restriction and that the said finding was wrong because he had refunded the money before being issued with the Title Deed in 1973.
7. The Ex-parte Applicant finally deponed that he was never heard by the National Land Commission; that the Respondent has no power to cancel the Title Deed and or order the land to be referred back to the Interested Party and that the Respondent did not have jurisdiction to issue the orders that are now under challenge.
8. In response, the Interested Party deponed that the decision under challenge was pronounced on 1st March, 2019 by the 1st Respondent; that the Notice of Motion is in breach of Order 53 Rule 2 of the Civil Procedure Rules having been filed out of time and that the 1st Respondent did not overstep its mandate as alleged by the Ex-parte Applicant.
9. The Interested Party deponed that the 1st Respondent dealt with the dispute before it under Article 67 (2) (e) of the Constitution; that he has never received a refund of Kshs. 3,610 as alleged by the Ex-parte Applicant and that the Application should be dismissed. The Respondents did not file any response to the Application.
10. In his submission, the Ex-parte Applicant's counsel stated that the action or decision of the 1st Respondent which is undated and attached to the Chief's letter dated 16th September, 2019 purporting to cancel the Title Deed of the Applicant by holding that the land should revert to the original owner, Gregory Kavinya Muvevi, is un constitutional and ought to be quashed by this Honourable Court.
11. Counsel submitted that the adjudication process was finalized and a Certificate of Title issued to the Applicant as evidenced by the official search; that the Applicant has a constitutional right to acquire and own property and that to the extent that the 1st Respondent was acting in a quasi-judicial capacity and exerting statutory powers, it was obligated to follow the rules of natural justice.
12. Counsel submitted that Applicant was neither informed of the plan to have his Certificate of Title cancelled and the land reverted back to the original owner after the adjudication process had been finalized and the Certificate of Title issued to the Applicant and that the Applicant by virtue of the said decision has been condemned unheard. Counsel relied on the case of ***Falim Yasin Twaha & Another vs. District Land Registrar Lamu (2011) eKLR*** where it was held as follows:

“It has long been settled, that a decision affecting the Legal rights of an individual which is arrived at by procedure which offends against the principles of Natural justice is outside the jurisdiction of the decision making authority.”
13. Consequently, it was submitted, the decision by the National Land Commission is without jurisdiction as the Applicant was denied the right to a hearing; that the Applicant was not invited to explain the nature of his ownership of the suit property before the 1st Respondent arrived at its decision to cancel Applicant's title and that the Application should be allowed.
14. It was further submitted that the undated decision of the 1st Respondent and forwarded to the Applicant on 17th September, 2019 was *ultra vires*, arbitrary, without and/or in excess of jurisdiction and that the Constitution of Kenya did not vest in the National Land Commission with power to cancel or revoke titles. Counsel relied on the case of ***Mwangi Stephen Murithi vs. National Land Commission & 3 Others (2018) eKLR*** where it was held as follows:

*“I find that there is no provision empowering the Commission to revoke titles even where it is established that the same were unlawfully or irregularly acquired. The power to revoke title is vested in the Registrar and not the Commission which can only recommend. In this regard I fully associate myself with the sentiments of Odunga, J. in the case of **Robert Mutiso Lelli and Cabin Crew Investments Ltd v national Land Commission & 3 others (2017) eKLR**. In any case, the provision of Article 67(2) of the commission cited above is clear and overrides the provisions of Section 14(4) of the act which provides that “after hearing the parties in accordance with subsection (3), the commission shall make a determination.” The constitution is the supreme Law of the Land as is indeed espoused under Article 2(4)...”*
15. It was submitted that it is only the court that has jurisdiction to order for the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake as provided for by Section 80(1) of the Land Registration Act.
16. The Applicant's counsel submitted that the National Land Commission had no jurisdiction to conduct proceedings for review of title when the dispute over ownership of the said Certificate of Title was determined by the Minister during the adjudication process and that the issue of ownership was determined by the Minister who was competent to determine the same.
17. It was submitted by counsel that the Applicants were not aware whether the decision had been made until 17th September, 2019 when the

same was served on the Applicant; that it was the duty of the 1st Respondent to bring to the attention of the parties its decision and that the suit is not time barred.

18. The Interested Party's advocate submitted that the 1st Respondent was possessed of the requisite jurisdiction when it entertained the Interested Party's claim and that there is no material placed before this court to suggest that the 1st Respondent overstepped its statutory mandate in relation to the Interested Party's claim before it.

19. It was submitted that the 1st Respondent is established under Article 67(1) of the Constitution of Kenya; that its functions are outlined in Article 67(2) which include, *inter alia*, the power to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress and that the said function is supplemented by the provisions of Sections 5(1)(e) and 6(1) and 6(2)(a) of the National Land Commission Act, 2012.

20. The Interested Party's advocate submitted that the Interested Party herein lodged a complaint touching on historical land injustice in terms of both Article 67(2) (e) of the Constitution of Kenya and Sections 5(1)(e) and 15 of the National Land Commission Act and that the Applicant's submission that the 1st Respondent acted *ultra vires* is clearly a misapprehension of the law.

21. Counsel submitted that the Applicant's allegation that the 1st Respondent breached the rules of natural justice and particularly the right to be heard is misplaced and an afterthought; that the 1st Respondent scrupulously complied with all the procedures relating to hearing of complaints/claims before it and that the Applicant was duly served with all the processes of the 1st Respondent but chose not to appear consequent upon which the 1st Respondent rendered a decision based on the facts presented by the Interested Party.

22. Again, it was submitted, before pronouncing itself on the matter, the 1st Respondent must have been satisfied that the Applicant had been notified of the 1st Respondent's hearing sessions of 2nd August, 2018 and 4th October, 2018 respectively and that by deliberately failing to respond to the Interested Party's claim, the Applicant should not be heard groaning under the weight of his self-inflicted distress.

23. The Interested Party's advocate submitted that it appears that the Applicant has cunningly omitted to annex copies of the Hearing Notices/Summonses requiring him to appear before the 1st Respondent for the hearing of the Interested Party's complaint and that the Applicant's Notice of Motion woefully fails to meet the legal criteria for grant of the Judicial Review reliefs sought.

24. It is not in dispute that the Applicant is the registered owner of parcel of land known as Mwala/Kibau/888 (*the suit property*). According to the official search and the copy of the Land Certificate, the Applicant was registered as the owner of the land on 8th August, 1973.

25. The Ex-parte Applicant's case is that he was summoned by the Chief, Mwala Location and was given a letter dated 16th September, 2019, on which letter the determination/recommendation of the National Land Commission was attached. The Determination of the 1st Respondent is titled as follows:

"In the matter of Article 67 (2) of the Constitution of Kenya and in the matter of Historical Injustice Reference No. NLC/HLI/259/2017."

26. The undated determination of the 1st Respondent shows that the dispute between the Applicant and the Interested Party was heard on 2nd August, 2018 and 4th October, 2018. The said determination does not summarize the evidence that was adduced by the parties and witnesses, if any, neither does it show that indeed the Applicant was notified of the hearing date. Indeed, the determination does not indicate the documents that the 1st Respondent relied upon before arriving at its decision.

27. In its conclusion, the 1st Respondent stated as follows:

"9. The claim is valid as it meets the Historical Land Injustice Admissibility Criteria.

10. In the circumstances, the Commission makes the following recommendations pursuant to Article 67 (2) (e) of the Constitution and section 15 of the National Land Commission Act.

a) The land reverts back to the original owner Gregory Kavinya Muvevi owing to the fact that the respondent never paid the money to the claimant as directed by the District Commissioner.

b) The Chief Land Registrar to lift the restriction on the land and makes necessary adjustments to the records."

28. There is no evidence that was placed before me by the 1st Respondent or the Interested Party to show that the Applicant was notified of the dispute that was to be resolved by the 1st Respondent. Indeed, there is no evidence to show that the Applicant has ever received any pleading or notice of the dispute before the National Land Commission in respect of the suit property.

29. That being the case, it is my finding that the action or decision of the 1st Respondent which is undated and which was forwarded to the Applicant vide a letter dated 16th September, 2019 purporting to cancel the Title Deed for the Applicant by holding that the land should revert to the original owner, Gregory Kavinya Muvevi, and for the Chief Land Registrar to lift the restriction on the land and make necessary adjustments, was arrived at without hearing the Ex- parte Applicant.

30. The evidence before me shows that the adjudication process was finalized and a Certificate of Title issued to the Applicant in 1973. It is trite that being the registered proprietor of the suit land, the Applicant should have been given an opportunity of being heard before any adverse order could be made in respect of the suit property.

31. Contravention of the principles of natural justice is a ground upon which Judicial Review orders ought to be granted. One of the cardinal rule of natural justice dictates that a person must be accorded the right to be heard before a decision is made, which right is based on the principle that no man shall be condemned unheard. The Ex-parte Applicant was never informed of the hearing to have his Certificate of Title cancelled and to have the land reverted to the Interested Party.

32. In the case of *Falim Yasin Twaha & Another vs. District Land Registrar Lamu (2011) eKLR* the court held as follows:

“It has long been settled, that a decision affecting the Legal rights of an individual which is arrived at by procedure which offends against the principles of Natural justice is outside the jurisdiction of the decision making authority. See page 8 of the bundle of authorities.”

33. In the case of *De Souza vs. Tanga Town Council (1961) E.A 377*, the court, in granting an order of certiorari, stated that:

“If the principles of Natural Justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of departure from the essential principles of justice that decision be declared to be no decision.”

34. The Applicant was not invited to explain the nature of his ownership of the suit property before the decision to cancel his Certificate of Title and the land to revert to the original owner was made. The Applicant was not given any notice whatsoever which could have accorded him the right to a hearing before the purported cancellation of his title and reverting the land to the purported original owner was made.

35. That being the case, it is my finding that the 1st Respondent denied the Applicant the right to be heard before making the impugned undated decision. The Ex-parte Applicant having not been given an opportunity to be heard, the undated decision by the National Land Commission, the 1st Respondent, which was forwarded to the Applicant on 17th September, 2019 through the Chief of Mwala Location, is without jurisdiction and therefore null and void.

36. Having found that the Ex-parte Applicant was not granted an opportunity to be heard, and having declared the undated decision of the 1st Respondent purporting to revert the suit property to the Interested Party null and void, I will not delve into the issue of whether the said decision was merited.

37. For those reasons, I allow the Notice of Motion dated 3rd October, 2019 as follows:

a) An order of Certiorari be and is hereby issued directed at the Respondents to remove and bring to this court to be quashed the proceedings, determination and recommendations of the 1st Respondent, the National Land Commission, contained in the undated “Determination” referenced as NLC/HLI/ 259/2017.

b) An order of Prohibition be and is hereby issued directed at the Respondents, their servants, and/or agents, or any land officer/Surveyor or whomsoever acting on the basis of the aforesaid determination and recommendations from enforcing the determination by way of execution, implementation or causing to be implemented the determination/recommendation made in NLC/HLI/259/2017 or in any other manner.

c) The costs of this Application to be paid by the National Land Commission, the 1st Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 21ST DAY OF MAY, 2021.

O. A. ANGOTE

JUDGE