



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

KISUMU ENVIRONMENT & LAND PETITION NO. 12 OF 2019

SIDIAN BANK LTD.....PETITIONER

VERSUS

NATIONAL LAND COMMISSION

AND 2 OTHERS.....RESPONDENTS

AND

SIGTUNES COMMUNICATIONS

LIMITED AND ANOTHER.....INTERESTED PARTIES

JUDGMENT

The petitioner herein filed the petition dated 27th August 2018 seeking a declaration that the petitioner was entitled to be personally served with the complaints lodged with the 1st Respondent and all notices of the proceedings and was also entitled to respond and submit memoranda and submissions in response to the complaints and had a right to participate fully in the proceedings. Moreover, a declaration that failure by the 1st Respondent to personally serve the petitioner with the complaints lodged with the 1st Respondent relating to the ownership and acquisition of Property Title No. Kisumu Municipality/Block 4/832 and all notices of the proceedings and/or failure by the 1st Respondent to grant the Petitioner an opportunity to respond and submit memoranda and submissions in response to the complaints and/or to participate in the proceedings amounted to a violation of the petitioner's right to prior notice and/or an opportunity to be heard and/or written reasons for the action under articles 47 and 50 of the Constitution, section 14 (3) of the National Land Commission Act and section 4(3) of the Fair Administrative Actions Act.

Furthermore, the petitioner seeks a declaration that Consequent to the foregoing, the proceedings before the National Land Commission touching on investigations into Property Title No. Kisumu Municipality/Block 4/832 including the purported determination made on 04/10/2016 and published in Gazette Notice No.6862 Of 17/07/2017 (Volume No. Cxix-No. 97) were tainted with illegality and therefore null and void for all purposes.

She seeks further an order of Certiorari to be issued to quash the entire proceedings and/or ruling and or determination made on 04/10/2016 and published in GAZETTE NOTICE NO. 6862 OF 17/07/2017 (VOLUME NO. CXIX-NO.97) and touching on PROPERTY TITLE NO. KISUMU MUNICIPALITY 4/832. She also seeks an order of MANDAMUS be issued compelling the 1st Respondent to undertake the review of propriety and legality and or conduct investigations in respect of PROPERTY TITLE NO. KISUMU MUNICIPALITY/BLOCK 4/832 in accordance with the law.

In the alternative, the petitioner seeks an order directing the 1st 2nd and 3rd Respondents to indemnify the Petitioner for the sum of Kshs 5,000,000/- together with all interests and costs accrued therefrom and arising from the petitioner's inability to enforce its security in Property Title No. Kisumu Municipality/Block 4/832 and an order that the costs of and/or arising from and/or relating to these proceedings to be met by the 1st Respondent.

FACTUAL BACKGROUND

The petition was based on the following facts that the 1st respondent vide a Gazette Notice No. 6862 of 17th July 2017(VOL.CXIX-NO. 97) revoked the title to the subject piece of land which was registered in the name of the 1st interested party, while the same was being held as security by the Petitioner for a loan advanced to the 1st Interested Party. The loan was guaranteed by the 2nd Interested Party. That the 1st Respondent did not invite the petitioner to any hearings before arriving at the decision. That subsequently as a result of the above-mentioned revocation a suit vides KISUMU ELC NO. 264 has been filed which if granted would permanently bar the petitioner from exercising its

statutory power of sale.

That as such the orders made by the 1st Respondent were in breach of Articles 40,47 and 50 of the constitution and Section 4(3) of the fair administrative Actions Act. Since the Petitioner relied on information and/or records kept, certified or made by the 2nd Respondent.

It was the Petitioner's assertion vide the supporting affidavit attached to the petition that they advanced a loan of Kshs 5,000,000/- to the 1st Interested party to be secured by the title of KISUMU MUNICIPALITY/BLOCK 4/832.

The petitioner further asserted that the 1st Interested Party defaulted in payment of installments and fell into arrears as a consequence of which they decided to exercise their statutory power of sale. The petitioner contended that its first attempt to sell the security was thwarted when the Interested Parties filed proceedings at the magistrate's court stopping the sale. A second attempt was also thwarted when another suit was filed by an individual known as Awatt Jared vide KISUMU ELC 264 OF 2017, in which interim orders stopping the sale were issued.

It was the petitioner's averment that a search at the 2nd Respondent's would have revealed its interests on the piece of land herein and as such therefore due to the lack of due diligence they would be entitled to indemnity from the Respondents for the loss of its security if they can't exercise their statutory power of sale.

On its part the 1st Respondent through a replying affidavit sworn by Brian Ikol stated that the commission was clothed with powers to review grants and dispositions of public land. It averred that it received complaints from the Ministry of Transport, Infrastructure, and Housing and Urban Development that Parcel no. Kisumu MUNICIPALITY BLOCK 4/832 had been allocated to the 1st Interested Party. That this warranted it to invoke its jurisdiction to review the grant of the subject piece of land. It was their contention that in line with this power they issued a public notice for a hearing on a local daily with wide circulation.

It was their contention that despite the public notice the Petitioner chose not to attend the hearing. They averred that by issuing the notice they had complied with the provisions of the constitution and the Fair Administrative Action Act.

That they thereafter recommended for revocation of the title after finding out that the property had been converted to private property without proper consultation and was therefore contrary to Government policy.

They concluded by saying that their action of exercising its constitutional mandate can not be said to be in breach of the Petitioner's rights under Article 40.

In response to the application Peter Okore on behalf of the 1st interested Party generally supported the petition stating that he lawfully bought the subject piece of land sometime in 2011 after observing due diligence. He further stated that the 1st Respondent by dint of Section 14 of the National Land Commission Act had a limited period of five years from 2/5/2012 to 2/5/2012 within which to investigate and review any grant or disposition, Which period had since passed by the time revocation of the subject title herein was done, thereby rendering the revocation null and void ab initio.

He did not deny having charged the subject piece of land and obtaining a loan from the Petitioner. It was his contention that he was also not summoned to any hearing by the 1st Respondent and that the 1st Respondent's action was in bad faith.

It is the Petitioner's submission that the 1st Respondent never provided proof that a complaint was raised by the Ministry of Transport, Infrastructure, and Housing and Urban Development. It was also their submission that the evidence relied on in deciding to revoke the title was not availed.

The petitioner further submitted that they were not served with the notice as required by Sections 151 of the Land Act and 14 (3) of the National Land Commission Act considered together with Sections 4(3) and 6(1),(2) of The Fair Administrative Action Act.

It was their contention that the provision of service through a local daily was only secondary and could only be resorted to in instances where personal service could not be effected. In support of this contention counsel for the Petitioner relied on the cases of Mwangi Stephen Muriithi Vs National Land Commission & 3 Others [2018]eKLR.

It was the Petitioner's counsel's further submissions that the notice did not meet the required standard for want of information. That the notice was not adequate for the following reasons:

- i. No reasons were given necessitating the public hearing relating to this plot
- ii. There were no notices advising on the potential outcomes of the hearings;
- iii. There was no mention of the name of the registered owner of the property;
- iv. There was no mention of any registered interests thereon and more specifically that of the Petitioner;

v. There was no invitation to any one who may have been interested in the property to inspect any relevant documents and an indication where such inspection would be conducted.

In support of his case on inadequacy of notice counsel relied on the **Mwangi Stephen Murithi** (supra) in which it was stated that;

“The right to be heard transcends mere notice and extends to the person being given sufficient information to enable them prepare and/or present their case.”

Counsel for the Petitioner argued that the right for reasons before and after an administrative action was crucial. It was his submission that the 1st Respondent did not give reasons for the decision they made in utter disregard of Article 47 (2) of the constitution. And despite being prompted by a letter from the Petitioner the 1st Respondent did not give any reasons for their action.

He argued that since there was no extension of the mandate of the 1st respondent to review dispositions to land past the five-year period then the revocation by the 1st Respondent was ultra vires. Counsel also staked the petitioner’s claim to indemnity basing it on the torrens system as codified under article 40(3) of the Constitution. He urged the court to allow the application as prayed.

The 1st Respondent in their submissions reiterated the fact that they were legally mandated to review all grants or dispositions of public land to establish their propriety or legality. It was their submission that the subject piece of land herein was once public land but was converted to private use through change of user by the Petitioner. They argued that the right to property under article 40 of the constitution did not extend to illegally acquired property.

It was their further submission that the notice issued through the local dailies was sufficient, and that they followed the laid down procedure when they also published the Gazette notice of their decision in the local dailies. They concluded by urging the court to dismiss the petition with costs.

At this point, it is important to note that counsel for the 2nd and 3rd Respondents had indicated that they won’t be filing any responses to the petition but would be aligning themselves with the submissions of the 1st Respondent.

ISSUES FOR DETERMINATION

1. Whether the 1st Respondent followed the right procedure in revocation of the subject title herein
2. Whether the Petitioner is deserving of the Judicial Review orders sought.
3. Whether the 1st 2nd and 3rd Respondents are liable to indemnify the petitioner in case they are unable to enforce their security over the subject piece of land.

1. WHETHER THE 1ST RESPONDENT FOLLOWED THE RIGHT PROCEDURE IN REVOCATION OF THE SUBJECT TITLE HEREIN

It is my view that if the above question is determined then it should be able to dispense with prayer a), b) and c) of the petition. The High court is mandated under Article 165 (3)(d)(ii) of the constitution to determine the question of whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, the Constitution.

It is therefore trite law that constitutional petitions are not an avenue for sitting on appeal for decisions taken by public bodies but as a challenge to the constitutionality of the process taken in reaching the decision.

Viewed from this angle therefore the orders of Mandamus and Certiorari if granted would only be on the basis of the unconstitutionality of the process carried out by the 1st Respondent.

This point was buttressed by the High Court in the case of **Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & Another (2011) eKLR** where the court stated as follows in a similar issue touching on constitutionality of appointment process:”

*“On the other hand, the question that is for our determination is about the process and it is our view that no step is greater than the other and any of the three steps are equally important and constitutionally mandatory. Therefore, what is at stake is the process used to nominate and appoint the Supreme Court Judges. It is our duty to evaluate and assess whether the business conducted by the Judicial Service Commission was in accordance with the law, fairness and justice. **If the process of appointment is unconstitutional, wrong, unprocedural or illegal, it cannot lie for the Respondents to say that the process is complete and this Court has no jurisdiction to address the grievances raised by the Petitioners. In our own view, even if the five appointees were sworn in, this Court has the jurisdiction to entertain and deal with the matter. The jurisdiction of this Court is dependent on the process and constitutionality of appointment. In this sense, if the Judicial Service Commission a State Organ does anything or omits to do something under the authority of the Constitution and which contravenes that Constitution, that act or omission when so proved before the High Court shall be invalid. Accordingly, we find and hold that we are properly seized of this Petition as we have the requisite jurisdiction.**”*

On the strength of this therefore this court is tasked with testing the constitutionality of the process of revocation of the title by the 1st Respondent to find out whether the same was above reproach.

It was the Petitioner's contention that the process of revocation carried out by the 1st Respondent was unconstitutional to the extent that notice was not issued in accordance with Section 14 of the National Land Commission Act as read with Articles 47(1), (2) and 50(1) of the constitution. The 1st Respondent on their part stated that the newspaper advert was sufficient.

The provisions of law relied on by the Petitioner are as hereunder.

Section 151 of the Land Act which provides on substituted service that If the Commission is satisfied that a notice cannot be served personally or by post, either because the person to be served is evading service or for some other reason the Commission may order service to be effected by

(a) affixing a copy of the notice in a conspicuous place—

(i) on or as near as may be to the land where possible; and

(ii) if the land is community land, at the offices of the Community Land Committee or other public place within the village; or

(iii) if the land is public land, at the offices of the county government having jurisdiction in the area where the land is located or other public place in the area where the land is located; and

(b) publishing a copy in the Gazette and if it thinks fit, one or more newspapers circulating in Kenya.

Section 4 (3) of the fair Administrative Action Act provides that;

Administrative action to be taken expeditiously, efficiently, lawfully etc.

(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.

Section 6 (1) and (2) of the fair Administrative Action Act provides that

6. Request for reasons for administrative action

(1) Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with section 5.

(2) The information referred to in subsection (1), may include—

- (a) the reasons for which the action was taken; and
- (b) any relevant documents relating to the matter.

And lastly Article 47 (1) and (2) and 50 (1) of the constitution provides that;

47. Fair administrative action

- (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.

50. Fair hearing

- (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

A look at Section 151 of the Land Act clearly shows that advertisement in the local newspaper should be the last resort after the commission has failed to serve the interested parties in person. In this instant case the 1st Respondent has not provided proof that they tried to serve the petitioner and failed warranting their service of Notice through the Newspaper. Further the 1st Respondent only alludes to the presence of a complaint but never served the same on all the parties, in line with Section 6 of the Fair Administrative Actions Act.

I agree with the Petitioner that the right to be heard transcends mere notice and extends to the person being given sufficient information to enable them prepare and/or present their case.

The petitioner was entitled to be furnished with the complaint, and all the relevant documents regarding the land. A perusal of the documents herein clearly shows that none of the above was done.

It is my view therefore that the Interested persons were not given sufficient notice.

They were also not furnished with the complaint and or accorded the chance to inspect all the relevant documents with regard to the proceedings. As such therefore their right to fair administrative action under Article 47 (1), (2) and the right to fair hearing under Article 50 were contravened.

Given the adverse effects of the 1st Respondent's Actions it would only be prudent if they were given the chance to give their side of the story.

The proceedings before the 1st Respondent leading up to the revocation therefore did not meet the constitutional threshold of a fair hearing.

2. Whether the Petitioner is deserving of the Judicial Review orders sought

Article 23 of the constitution gives this court the authority to uphold and enforce the bill of rights. As at sub-article (3)(f) the court may grant an order for Judicial review if it is of the opinion that a party's rights have been infringed.

Even then it is trite law that the procedure for Judicial review is different and one has to follow the provisions of the Law Reform Act and Order 53 of the Civil Procedure Rules. Further Judicial Review orders must be sought within 6 months from the time the decision was made.

In the present case the decision of the 1st Respondent was made on the 17/07/2017. The Petitioner herein claims to have learnt of the 1st Respondent's decision when KISUMU ELC 264 OF 2017 was brought to court.

It is thus not clear whether the Petitioner was within the 6-month period or not. However, the above notwithstanding and given the fact that the constitution provides a remedy of judicial review, it is my considered view that this case qualifies as one in which Judicial review orders may be granted given the special circumstances surrounding it. And given that the petitioner was not a party to the proceedings that gave rise to the decision. I'm persuaded by the case of **Dr. Ignatius L. M. Muturi v The District Land Disputes Tribunal & 2 others [2011] eKLR** in which the court held that the applicant was not bound by the time limit because he was not a party to the proceedings which gave rise to the decision in question.

On the strength of the foregoing it is my firm view that the Petitioner herein is deserving of the Judicial Review Orders sought.

3. Whether the 1st 2nd and 3rd Respondents are liable to indemnify the petitioner in case they are unable to enforce their security over the subject piece of land.

Article 23 (3) provides for various reliefs that may be granted to a petitioner whose rights have been infringed. Specifically, Sub article (e) provides for compensation. The indemnity being sought by the Petitioner falls under this category. This claim falls within the realm of Special Damages which must be specifically pleaded and proved. The Petitioner herein has pleaded the amount of Kshs 5,000,000/= in their pleadings. The respondents on their part have not in any way refuted this claim and/or dealt with it in their reply or submissions.

The court in **Bangue Indosuez vs DJ Lowe and company Ltd** [2006] 2KLR 208 this Court held inter alia that;

“It was trite that special damages must not only be claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and probability of proof required depends on the circumstances and the nature of the acts themselves.”

The Petitioner has attached loan account statements evidencing the amounts owed by the interested parties which evidence is uncontroverted by the other parties herein. Further the 1st interested Party does not refute having taken a loan from the Petitioner which continues accruing interest. It is also important to note that whether pleaded or not, the fact of breach of fundamental right will in appropriate cases attract the remedy and it is a remedy at the discretion of the Court. This was the holding of the court in **FREDRICK GITAU KIMANI V ATTORNEY GENERAL & 2 OTHERS[2012]eKLR**

RELIEFS

With the foregoing in mind, I do find that the petitioner has proved his case and do issue a declaration that the petitioner was entitled to be personally served with the complaints lodged with the 1st Respondent and all notices of the proceedings and was also entitled to respond and submit memoranda and submissions in response to the complaints and had a right to participate fully in the proceedings. Moreover, I do issue a declaration that failure by the 1st Respondent to personally serve the petitioner with the complaints lodged with the 1st Respondent relating to the ownership and acquisition of Property Title No. Kisumu Municipality/Block 4/832 and all notices of the proceedings and/or failure by the 1st Respondent to grant the Petitioner an opportunity to respond and submit memoranda and submissions in response to the complaints and/or to participate in the proceedings amounted to a violation of the petitioner's right to prior notice and/or an opportunity to be heard and/or written reasons for the action under articles 47 and 50 of the Constitution, section 14 (3) of the National Land Commission Act and section 4(3) of the Fair Administrative Actions Act.

Furthermore, the court grants a declaration that Consequent to the foregoing, the proceedings before the National Land Commission touching on investigations into Property Title No. Kisumu Municipality/Block 4/832 including the purported determination made on 04/10/2016 and published in Gazette Notice No.6862 Of 17/07/2017 (Volume No. Cxix-No. 97) were tainted with illegality and therefore null and void for all purposes.

An order of Certiorari is hereby issued quashing the entire proceedings and/or ruling and or determination made on 04/10/2016 and published in GAZETTE NOTICE NO. 6862 OF 17/07/2017 (VOLUME NO. CXIX-NO.97) and touching on PROPERTY TITLE NO. KISUMU MUNICIPALITY 4/832.

Last but not least, I do order that the 1st respondent to indemnify the Petitioner for the sum of Kshs 5,000,000/- together with all interests and costs accrued there-from and arising from the petitioner's inability to enforce its security in Property Title No. Kisumu Municipality/Block 4/832. The costs of and/or arising from and/or relating to these proceedings to be met by the 1st Respondent

DATED AT KISUMU THIS 21st DAY OF MAY, 2021

ANTONY OMBWAYO

JUDGE

This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE