



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

JUDICIAL REVIEW CASE NO. 27 OF 2019

REPUBLIC.....APPLICANT

-VERSUS-

NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE CHIEF LAND REGISTRAR.....2ND RESPONDENT

PEACE AND MERCY CHURCHES OF EAST AFRICA.....1ST INTERESTED PARTY

THE MINISTRY OF PUBLIC WORKS.....2ND INTERESTED PARTY

BUILSTAR CONSTRUCTION WORKS LTD.....EX PARTE APPLICANT

JUDGMENT

1. Pursuant to leave granted on 23/10/2019, the *ex-parte* applicant, Builstar Construction Works Limited, brought a substantive motion dated 24/10/2019, seeking an order of *certiorari* quashing the whole of the 1st respondent's determination in respect of **Title Number Eldoret Municipality Block 10/40 [the suit property]** as published in Kenya Gazette Notice No 11714, Vol CXX – No 138 of 9/11/2018. The said motion is the subject of this judgment.

2. In summary, the *ex-parte* applicant's case was that in December 2015, the 1st respondent invited the *ex-parte* applicant for a hearing under the 1st respondent's mandate of reviewing grants relating to hitherto public land under **Article 68 (c) (v)** of the **Constitution** as read together with **Section 14** of the **National Land Commission Act**, in relation to the suit property. At the time of the invitation, there were two parallel certificates of lease, one in the name of the *ex-parte* applicant, and the other in the name of the 1st interested party, Peace and Mercy Church of East Africa. At the conclusion of the hearing, the 1st respondent made a determination in favour of the *ex-parte* applicant.

3. In November 2016, the 1st respondent invited the applicant for hearing of yet another review in respect of the suit property, following a complaint received from the Department of Public Works, laying claim to the suit property. During the said hearing on 2/12/2016, the 1st respondent informed the *ex-parte* applicant that it had already determined the matter in their favour as against the 1st interested party and further indicated that the records showed that the 2nd interested party's land abutted the suit property. The 1st respondent further informed the applicant that its matter had been disposed and they no longer had an issue with their title.

4. The *ex-parte* applicant further contended that on 9/11/2018, the 1st respondent published the impugned Gazette Notice, directing the 2nd respondent to revoke the grant held by the *ex-parte* applicant. Efforts by the *ex-parte* applicant to obtain a copy of the full determination from the 1st respondent were in vain.

5. The *ex-parte* applicant contends that failure by the 1st respondent to furnish reasons for its decision resulted in the presumption that the impugned decision was taken without any good reason. Secondly, the *ex-parte* applicant contends that the impugned decision was taken without the 1st respondent informing the *ex-parte* applicant the accusations/allegation made against them by the 2nd interested party in relation to the suit property. Thirdly, the *ex-parte* applicant contends that the impugned decision was arrived at without affording the *ex-parte* applicant the opportunity to respond to the 2nd interested party's claim over the suit property. Fourthly, the *ex-parte* applicant faults the 1st respondent for making the impugned decision without inviting the *ex-parte* applicant to appear before it and make representations and/or submissions in response to the 2nd interested party's claim over the suit property.

6. The 1st respondent opposed the motion through a replying affidavit sworn on 3/3/2021 by Brian Ikol, the 1st respondent's Acting Director of Legal Affairs & Enforcement. He deposed that in the cause of carrying out grants review mandate, it received a complaint alleging that the suit property had two certificates of leases, one in the name of the *ex-parte* applicant and the other in the name of the 1st interested party. It

invited the two parties and upon receiving presentations from them, it determined at the time that as between the two titles, the title held by the *ex-parte* applicant was the genuine one. Soon after, it was made aware that the 2nd interested party was also laying claim to the suit property. The 2nd interested party, the *ex-parte* applicant, and the 1st interested party were all invited to a hearing and they duly attended on 02/12/2016. After the hearing, the 1st respondent considered all the presentations that were made by the three parties relating to the suit property; perused the submitted documents; and also perused the records held by the Ministry of Land and Physical Planning. The 1st respondent established that the suit property was land reserved for use by the Department of Public Works. Consequently, the 1st respondent made a determination that was published in the Kenya Gazette Vol CXX – No 138 dated 9/11/2018, directing the Chief Land Registrar to revoke the titles held by the *ex parte* applicant and the 1st interested party and regularize the allocation of the suit property to the Ministry of Transport, Infrastructure, Housing and Urban Development, State Department of Public Works.

7. The Attorney General filed grounds of opposition dated 2/3/2021 on behalf of the 2nd respondent and 2nd interested party. He contended that; (i) the revocation was done in accordance with **Section 14(1) and 14 (5) of the National Land Commission Act**; (ii) the 1st respondent had powers to direct the revocation of all dispositions of grants that were acquired unlawfully; (iii) illegally or fraudulently acquired property did not enjoy protection under **Article 40 of the Constitution**; (iv) the motion was defective because the *ex-parte* applicant had failed to annex a copy of the impugned decision; and (v) the motion did not disclose any reasonable cause of action.

8. The motion was canvassed through written submissions dated 24/6/2020 and supplementary submissions dated 11/3/2021. Urging the court to grant the motion, counsel for the *ex parte* applicant submitted that the impugned decision was rendered by the 1st respondent without: (i) informing the *ex-parte* applicant the accusations/allegations made against it by the 2nd interested party in relation to the suit property; (ii) granting the applicant the opportunity to respond to the 2nd interested party's claim over the suit property; and (iii) inviting the applicant to appear before it in order to examine the documents, make representations and/or submissions in response to the 2nd interested party's claim to the suit property.

9. The *ex-parte* applicant contended that the 1st respondent violated the provisions of **Articles 47 and 50 of the Constitution, Section 14 of the National Land Commission Act and Section 6 (4) of the Fair Administrative Action Act.**

10. On their part, counsel for the 1st respondent submitted that the single issue falling for determination was whether the 1st respondent followed the rules of national justice in arriving at the impugned decision. Counsel submitted that the 1st respondent duly invited the *ex-parte* applicant and the 1st interested party to the 1st hearing through a notice published in the Daily Nation Edition of Tuesday 17th November 2015 and the hearing proceeded on 4/12/2015 in the presence of the parties. Counsel added that when the 1st respondent was moved by the State Department of Public Works [2nd interested party] to conduct a second review hearing, they invited the Principal Secretary and copied the invitation to the *ex-parte* applicant and the 1st interested party and all the three parties attended the scheduled hearing on 2/12/2016. It was the position of the 1st respondent that since it had received presentations and documents from the *ex-parte* applicant as well as the 1st interested party during the 1st hearing, it properly disposed the matter.

11. Counsel submitted that grants review proceedings were *quasi-judicial* and were not expected to be the same as proceedings before a court of law. Counsel cited the decision in **Compar Investments Ltd v National Land Commission & 3 Others (2016)eKLR** to buttress this point. Counsel urged the court to dismiss the motion.

12. The Attorney General filed written submissions dated 2/3/2021. The Learned State Counsel reiterated that the motion was defective because the impugned decision was not attached to the motion. The Attorney General itemized the following as the two issues falling for determination: (i) Was the 1st respondent acting within its mandate in reviewing the grant? and (ii) What was the role of the 2nd respondent?

13. The Learned State Counsel submitted that the 1st respondent's mandate emanated from **Article 68 (c) (v) of the Constitutions and Section 14 of the National Land Commission Act.** On the second itemized issue, the Learned State Counsel submitted that **Section 14 (5) of the Land Commission Act** mandated the 1st respondent to revoke any irregularly acquired title. The Attorney General urged the court to dismiss the motion.

14. I have considered the motion, the parties responses to the motion, the parties respective submissions, the relevant provisions of the Constitution and statutes, and the relevant jurisprudence on the key issue falling for determination in the motion. The single issue falling for determination in this motion is whether the National Land Commission's decision contained in Gazette Notice No 11714 Vol CXX –No 138 dated 9/11/2018 directing the Chief Land Registrar to revoke the *ex-parte* applicant's title and regularize the allocation of the suit property to the Ministry of Transport, Infrastructure, Housing and Urban Development's State Department for Public Works was made in breach of the rules of national justice, particularly the requirements of **Article 47 of the Constitution and Section 14 of the National Land Commission Act.**

15. The *ex-parte* applicant has advanced four grounds on why the impugned decision should be quashed. The first ground is that the 1st respondent failed to inform them the accusations/allegations made against them by the 2nd interested party. There is common ground that the suit property was the subject matter of review by the 1st respondent under **Article 68 (c) (v) of the Constitution and Section 14 of the National Land Commission Act.** Secondly, in paragraph 30 of the supporting affidavit sworn by Jackson K. Cbebett, the *ex-parte* applicant confirmed that they received an invitation on 21/11/2016, through which the 1st respondent invited the *ex-parte* applicant for **"yet another review in respect of the suit land due to what the 1st respondent stated was a claim over the suit land by the 2nd interested party"**. Indeed, the 1st respondent's letter annexed as exhibit **"JKC 6"** was clear on the fact that the 2nd interested party was claiming ownership of the suit property. It is therefore not true that the 1st respondent failed to disclose to the *ex-parte* applicant the nature of claim which the 2nd interested party had put forth.

16. The second ground advanced by the *ex-parte* applicant is that the 1st respondent failed to grant the applicant the opportunity to respond to the 2nd interested party's claim over the suit property. I have examined all the evidential materials placed before this court by the *ex-parte* applicant. It is clear from the transcript of the 1st respondent that the review exercise relating to the suit property was done in two phases. It is also clear that the 1st respondent made two invitations to the *ex-parte* applicant relating to the two phases of the review exercise relating to

the suit property. The first invitation related to the review hearing involving the *ex-parte* applicant and M/s Peace and Mercy Church of East Africa. The second invitation was prompted by a claim of ownership of the suit property by the State Department of Public Works. It is apparent from the record that the *ex-parte* applicant was invited and given a hearing relating to the claim by the State Department for Public Works. The *ex-parte* applicant having earlier been given the opportunity to explain how they procured their title, and the 1st respondent having informed the *ex-parte* applicant that the State Department for Public Works was claiming the suit property, I do not agree with the *ex-parte* applicant's contention that he was denied the opportunity to respond to the interested party's claim. Indeed, there is no evidence in the transcript presented by the *ex-parte* applicant to suggest that the *ex-parte* applicant made a specific request to interrogate the 2nd interested party's claim and they were denied the opportunity to do so. I therefore find no merit in this ground.

17. The third ground is that the 1st respondent failed to invite the applicant to appear before it in order to examine the documents and make representations and or submissions in response to the 2nd interested party's claim to the suit property. I have rendered myself on this in the preceding paragraph. If the *ex-parte* applicant desired to tender further evidence or to examine documents, they were at liberty to make request when they attended the hearing. There is no evidence to suggest that when they attended the hearing they made a request and they were denied the opportunity.

18. Fourthly, the *ex-parte* applicant has urged the court to find that there were no reasons for the impugned determination because they have not been furnished with one. The Gazette Notice through which the impugned determination was published notified the public that the full determinations may be collected from its Legal Directorate's Registry, 4th Floor, Wing C, from Monday to Fridays, 8.00am to 5.00 pm, during official working hours. There is no indication at this point to suggest that the *ex-parte* applicant went to the said Directorate and were denied a copy of the determination. There is similarly no evidence of any communication addressed to the said Legal Directorate. Were the *ex-parte* applicant to go to the said Directorate and be denied the full determination, there would be the avenue of redress through an order of *mandamus*. Regrettably the *ex-parte* applicant did not seek that relief. It would not be in the public interest to quash the grant review determination of the National Land Commission on account of a post determination default before the *ex-parte* applicant exhausts the redress mechanism available under the law.

19. Lastly, although the *ex-parte* applicant contends that a prior determination had been made by the 1st respondent in their favour, there is no evidence of any other duly signed or published determination by the 1st respondent. The only determination is what is contained in the impugned Gazette Notice. The totality of the foregoing is that the court is satisfied that the rules of natural justice were observed during the review of the disposition relating to the suit property.

20. In the end, the motion dated 24/10/2019 is declined. Because this is a public law and public interest litigation, parties will bear their respective costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF JULY 2021**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr. Kiprono for the Ex-Parte Applicant

Ms Fatma h/b for Mr. Njage for 2nd Respondent & 2nd Interested party

Court Assistant: June Nafula