



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CONSTITUTIONAL PETITION NO 4 OF 2019**

**IN THE MATTER OF ARTICLE 22 (1) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF SECTION 4, 7, 9 AND 11 OF THE FAIR ADMINISTRATIVE ACTION**

**AND**

**IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT**

**BETWEEN**

**SBM BANK (KENYA) LIMITED.....PETITIONER**

**AND**

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

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

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

**AND**

**MUGUGA GREENS APARTMENTS**

**MANAGEMENT LIMITED..... INTERESTED PARTY**

**JUDGEMENT**

1. The Petitioner herein SBM Bank (Kenya) Limited filed this petition dated 28<sup>th</sup> January 2019 claiming that there were violations of the constitution by the 1<sup>st</sup> respondent, namely:-

*(a) That the Commission made a directive for the cancellation of land title LR NO 209/8873/2 when proceedings relating to ownership of the said land were still pending before it, the Bank's right to fair administrative action guaranteed under Article 47 of the Constitution was violated.*

*(b) To the extent that the Commission made a recommendation for cancellation of land title LR NO 209/8873/2 belonging to the bank when the proceedings relating to ownership of the said land were still pending before it, the Banks rights to a fair hearing as guaranteed under Article 50 of the Constitution was violated.*

*(c) To the extent that the Commission arbitrarily made a directive for the cancellation of land title NO LR NO 209/8873/2 without affording the Bank an opportunity to be heard, the Bank's right to property as enshrined under Article 40 was violated.*

2. The Petitioner therefore seeks the following reliefs:-

*(a) A declaration that the 1<sup>st</sup> respondent in purporting to recommend the revocation of the Petitioner's title over land LR NO 209/8873/2 (now LR NO 209/12948) when the proceedings involving the said parcel of land were still pending before it, violated*

*the petitioner's fundamental rights and freedoms guaranteed under Articles 40, 47 and 50(1) Constitution of Kenya.*

*(b) A judicial review order in the nature of Certiorari quashing the Gazette Notice 6882 Vol CXIX- No 97 dated 17<sup>th</sup> July, 2017, and the National Land Commissioner's determination dated 25<sup>th</sup> April, 2018 to the extent that each of them directs the revocation of the title to land LR NO 109/8873/2 (now LR NO 209/12948 HELD BY Fidelity Commercial Bank Limited for allocation to Nairobi County Government for an open space to hold in trust for Muguga Greens residents.*

*(c) A permanent injunction restraining the Chief Land Registrar and or any land officer and or any other person acting on his behalf or with the authority from revoking and or taking any steps towards revoking and or cancellation and or taking over and or interfering in any manner whatsoever with the Petitioner's interest in land LR 209/8873/2 (now LR NO 20199/12948) or interfering otherwise with the petitioner's quiet occupation and possession of an title of land LR 209/8873/2 (now LR NO 12948).*

*(d) In the alternative to prayer (a), (b), (c) reinstatement of land LR NO 209.8873/2 (now LR NO 209/12948) in the name of SBM Bank (Kenya) Limited.*

*(e) In the alternative to prayers (a), (b) and (d) the respondents do compensate the petitioner in the sum of Kshs117,000,000'- as per the valuation report of Redfearn Valuers Limited plus interest at court rates from 19<sup>th</sup> July, 2017 to the date of payment in full.*

*(f) Costs of the Petition.*

3. The petition is supported by the affidavit of George Odete Head of Legal and Company Secretary of the petitioner, sworn on the 29<sup>th</sup> January 2019.

4. Together with the petition, the petitioner filed a Notice of Motion dated 28<sup>th</sup> January 2019 seeking that there be a stay of decision of the 1<sup>st</sup> respondent recommending the revocation of the plaintiff's title over LR NO 209/8873/2 (now LR NO 209/12948) pending the hearing and determination of this petition. It also sought to have the petition be heard with **ELC NO 2195 of 2007; Muguga Greens Apartments Limited vs The Attorney General & Others.**

5. On the 29<sup>th</sup> May 2019, this court granted orders of status quo with regard to the register pending the hearing and determination of ELC 2195 of 2007. It should be noted that the said matter has since been heard and determined. Judgement was delivered on 18<sup>th</sup> June 2020

6. In answer to the petition, the 1<sup>st</sup> respondent filed a replying affidavit sworn by Brian Ikol, Acting Director, Legal Affairs and Enforcement on the 8<sup>th</sup> March 2021. There is also a replying affidavit sworn by Gordon Ochieng, Deputy Director Land Administration, with the Ministry of lands and Physical Planning, on the 10<sup>th</sup> September 2019.

7. There is also a replying affidavit sworn by Anil Kapila, a director of the Interested Party sworn on the 14<sup>th</sup> February 2020. He also swore a further affidavit on the 3<sup>rd</sup> February 2021.

8. On the 14<sup>th</sup> October 2019, the court with the consent of the parties directed that the petition be canvassed by way of written submissions.

#### **The Petitioner's Submissions**

9. They are dated 28<sup>th</sup> January 2020. The right to property is safeguarded under Article 40 of the Constitution. In the proceedings under challenge, the Commission was acting pursuant to Article 67 of the Constitution and Section 14 of the National Land Commission Act. When read conjunctively, Articles 47 and 50(1) of the Constitution and Section 14 of the National Land Commission Act and Section 4 of the Fair Administrative Action Act require that the Commission in conducting review hearings should observe the rules of natural justice and would as a minimum issue advance notice to all persons with an interest in land under review; afford all interested persons room to understand the dispute and allow the registered owner confront any evidence made against them before the commission can make any determination.

10. It has put forward the cases of **Republic vs National Land Commissioner & Another Exparte Patel Ravji Lalji & Another; Tom Owiny & 2 Others (Interested Parties) (2019) eKLR; Bhavesh Nemchad Haria vs National Land Commission & Another [2019] eKLR; Republic vs National Land Commission Exparte Lesmat Ltd [2019] eKLR; Brimingham Holdings Limited vs National Youth Service & 5 Others; National Land Commission (Interested party) (2019) eKLR. Supa Nova Properties Ltd vs National Land Commission [2019] eKLR.**

The honourable court has previously not hesitated to fault the Commission where it conducted its review hearings in disregard of the rules of natural justice.

11. The Bank acquired the suit property for Kshs.6,500,000. The commission did not have any reason at the time it recommended the revocation of the Bank's title to the suit property but subsequently prepared a determination to justify the revocation only that they forgot to back date the determination.

12. The purported action on the part of the Commission in respect of review hearings of grants and disposition outside the statutory period without any extension of the five year period would be without jurisdiction. It has put forward the case of **Samuel Kamau Macharia &**

**Another vs Kenya Commercial Bank Ltd & 2 Others [2012] eKLR.**

13. It urges the court to quash the decision of the 1<sup>st</sup> respondent and grant the reliefs sought.

#### **The 1<sup>st</sup> Respondent's Submissions**

14. They are dated 15<sup>th</sup> April 2020. They set out four issues for determination. They are:-

- 1. Whether the Commission had jurisdiction to conduct review of grants and dispositions proceedings relating to the said land.*
- 2. Whether the Petitioner is a bonafide purchaser for value without notice of defect.*
- 3. Whether the suit property falls under the protection offered in Article 40 of the Constitution.*
- 4. Whether the Commission is liable to pay the Petitioner compensation.*

The 1<sup>st</sup> respondent's fundamental function is the management of public land on behalf of the National and County Governments. Under section 14, it was to review grants and dispositions of public land as one of the ways through which it would fulfil its duty to manage public land.

15. The Commission received a complaint from the Interested Party and proceedings commenced under section 14 of the National Land Commission Act. The 1<sup>st</sup> respondent conducted most of the oral proceedings as well as received the parties written submissions by the time its mandate under Section 14 lapsed.

16. For the Petitioner to be rightfully reviewed as a bona fide purchaser for value without notice of defect in the title it must pass the test as laid out in **Katende vs Haridar Company Ltd [2008] 2EA 173**. It has also put forward the case of **Samuel Kamere vs Land Registrar, Kajiado [2015] eKLR**.

17. Due diligence should not stop at merely conducting a search. The Petitioner was under an obligation to carryout a background check on the owner of the suit property and/or even establish the history of the land to ensure that the title was good.

18. Article 40(6) of the Constitution does not protect property that has been found to have been unlawfully acquired. It has put forward the case of **Isaac Gathungu Wanjohi & Another vs Attorney General & Others [2012] eKLR**. The fact that the title was improperly allocated given its reservation for a public use means, that the petitioner acquired a flawed title upon purchase. The petitioner's title cannot be protected under Article 40 of the constitution.

19. For compensation to be paid to the petitioner, the suit must be a subject of compulsory acquisition. The suit property is not a subject of any such proceedings rather it was subject to a review of grant and dispositions proceedings under section 14 of the National Land Commission Act. The petitioner is not owed any compensation by the 1<sup>st</sup> respondent. It prays that the petition be dismissed.

#### **The Interested Party's Submissions**

20. They are dated 4<sup>th</sup> February 2021. They raise two issues for determination. They are:-

- (a) Was the decision by the 1<sup>st</sup> respondent fair and just?*
- (b) Should the orders sought in the Petition be granted?*

21. The 1<sup>st</sup> respondent had the jurisdiction to hear and determine the issue in relation to LR NO 209/8873/2 (now LR NO 12948) which in itself is public land. The parcel of land was surrendered to the Council for special purposes of use as an open space to be as a parking lot and garden of the interested party's residents. The complaint was heard on 20<sup>th</sup> April 2017 by the 1<sup>st</sup> respondent and all parties were present during the hearing. Every party was given an opportunity to be heard and thus the process of the decision making was proper and legit.

22. In ELC 2195 of 2007 this Honourable Court having heard the parties on merit came up with the same conclusion vide the judgment delivered on 18<sup>th</sup> June 2020. The 1<sup>st</sup> Respondent was fair and just.

23. The relief sought herein ought not to be granted as a final decision has been rendered on ELC 2195 of 2007. The petitioner having been dissatisfied with the judgment and decree in ELC 2195 of 2007 has already appealed to the Court of Appeal. It has put forward the case of **Kenya Hotel Properties Ltd vs Attorney General & 5 Others [2018] eKLR**.

24. Judicial Review No 74 of 2016 was heard and determined by this honourable court where the same was dismissed with costs.

25. Due process was followed before the decision by the 1<sup>st</sup> respondent was rendered. It has put forward the case of **Chief Constable of North Wales Police vs Evan [1982]**. The respondent is not at fault and should not be condemned to bear any costs.

26. The petitioner ought to sue for a refund of purchase price from Emtol Enterprises Limited. It has put forward the case of **Kepha Maobe & 365 Others vs Benson L. Mwangi & Another [2015] eKLR**. It prays that the Petition be found to be unmerited and be dismissed with costs.

27. I have considered the petition herein, the grounds and the affidavit in support. I have considered the affidavits in response, the written submissions filed on behalf of the respective parties and the authorities cited. The issues for determination are:-

*(i) Whether the National Land Commission had jurisdiction to conduct review of grants and dispositions proceedings relating to the suit property.*

*(ii) Whether the decision by National Land Commission was justified.*

*(iii) Is the petitioner entitled to the reliefs sought?*

*(iv) Who should bear costs of these proceedings?*

28. It is not in dispute that the 1<sup>st</sup> respondent is an independent commission established under Article 67(1) of the Constitution and operationalized by the National Land Commission Act No 5 of 2012. Section 14 of the National Land Commission Act gave the 1<sup>st</sup> respondent the mandate to review grants and dispositions of public land.

29. It is also not in dispute that the 1<sup>st</sup> respondent received a complaint from the Interested Party regarding the suit property. The affidavit of Brian Ikol Acting Director Legal Affairs and Enforcement of the 1<sup>st</sup> Respondent, gives a detailed account of what transpired before the National Land Commission.

*In paragraph 6 he depones*

*“That following receipt of the complaint the commission invited all the parties laying claim to the land including the petitioner, to attend Review of Grants and Dispositions Proceedings in order to determine the legality of the suit property’s title”*

*In paragraph 9 he depones;*

*“That after the dismissal of the judicial review proceedings, the commission invited the parties to continue appearing before it and they all did, the petitioner included. While conducting its proceedings for the day on 20<sup>th</sup> April 2017 when the parties were being heard, the commission directed the petitioner to file its submissions before the next scheduled hearing date which was 18<sup>th</sup> May 2017.*

The above averments have not been controverted by the Petitioner.

30. I agree with the 1<sup>st</sup> respondent’s submissions that the commission began investigations into the suit property title before its mandate lapsed. It was therefore allowed to conclude the said proceedings.

31. The Petitioner contends that it was not heard before the decision was made. I do not agree, given the detailed affidavit of Brian Ikol on what transpired at the proceedings before the 1<sup>st</sup> Respondent.

I find that the 1<sup>st</sup> Respondent had jurisdiction to investigate into the title in respect to the suit property.

32. It therefore means that the decision of the National Land Commission was justified given the evidence that was presented before it.

33. This court has heard to conclusion **ELC 2195 of 2007 Muguga Greens Apartments Ltd vs The Attorney General, SBM Bank (Kenya) Ltd, Richardson Properties Ltd**. The Judgment was delivered on 18<sup>th</sup> June 2020. This court made the following orders:-

*(a) That a declaration is hereby issued that LR No 209/12948 is a public utility land and no construction should be carried out thereon.*

*(b) That an order is hereby issued that the title deed for LR NO 209/12948 issued to Emtol Properties Ltd on 19<sup>th</sup> March 1996 and later on issued to the 3<sup>rd</sup> defendant on 29<sup>th</sup> December 2014 be cancelled.*

*(c) That an order is hereby issued directing the Chief Land Registrar to rectify the records by allocating to the plaintiff the Plot No Lr No 209/12948 to hold the land in trust for the residents/owners of houses constructed on LR NO 209/8873/2 upon payment of the requisite charges.*

*(d) That costs of the suit be borne by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.*

34. From the foregoing orders it can be said that the petitioner's reliefs as sought have been overtaken by events. The petitioner herein (2<sup>nd</sup> defendant) in ELC 2195 of 2007 has since preferred an appeal against the judgment of 18<sup>th</sup> June 2020 to the Court of Appeal.

35. This court has made a final decision in ELC 2195 of 2007 and granting the reliefs sought herein would result in contradiction of orders granted earlier. In the case of **Kenya Hotel Properties Ltd vs Attorney General & 5 Others [2018] eKLR**, It was held that:-

**“This is also the case with regard to the judgment in HCC No 367 of 2000 that was delivered by a Judge of this court exercising judicial authority conferred by the constitution. This court though sitting as a constitution court division of the High Court does not have superior or special jurisdiction over the court that heard and determined HCCC No 367 of 2000. It is a court of concurrent jurisdiction and for that reason it can only exercise jurisdiction conferred on it by the constitution or legislation where appropriately moved, lest it acts beyond that jurisdiction....”**

**“...The creation of a Constitutional and Judicial Review Division was an administrative act with the sole object of managing the cause list. The Chief Justice would have no jurisdiction to create a Constitution Court as opposed to creating a Division of the High Court....The fact that a Constitution Division was established did not by such establishment create a court superior to a single judge of the High Court sitting alone. It would be a usurpation of power to push forward such an approach and whatever decision which emanates from a court regarding itself as a Constitutional Court with powers of review over decisions of judges of concurrent or superior jurisdiction such decision is at best a nullity. Courts must exercise the jurisdiction and powers vested in them.....”**

36. In conclusion, I find that the Petitioner is not entitled to the reliefs sought as the issue of ownership was resolved in ELC 2195 of 2007. As regards to the alternative prayer for compensation to the tune of Kshs.117,000,000 the same is not available to the petitioner as the suit property was not a subject of compulsory acquisition.

37. All in all, I find no merit in the petition herein and the same is dismissed. Each party do bear own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2021.**

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**L. KOMINGOI**

JUDGE

**In the presence of:**

Mr. Muoki for Mr. Kanjama for the Petitioner

Ms Masinde for the 1<sup>st</sup> Respondent

Mr. Njuguna for Ms Mugambi for Interested party

Mr. Kamau for the 2<sup>nd</sup> Respondent

Steve – Court Assistant