



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC PETITION NO. 25 OF 2018

JOSEPH MUSIKALI MUTEMI.....PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE REGISTRAR OF TITLES NAIROBI.....2ND RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....3RD RESPONDENT

JUDGMENT

The petitioner brought this petition on 11th April, 2018 seeking the following reliefs;

- 1) A declaration that the proprietary interest in all that parcel of land known as L.R No. 209/14436(Grant No. I.R 89652) (hereinafter referred to as “the suit property”) vests in the petitioner.
- 2) A declaration that the decision by the 1st respondent to revoke the petitioner’s title to the suit property was unlawful and amounted to an infringement of the petitioner’s right to property under Article 40 of the Constitution and petitioner’s right to a fair administrative action enshrined in Article 47 of the Constitution.
- 3) An order removing into this court for the purposes of being quashed the 1st respondent’s decision contained in the Kenya Gazette dated 17th July, 2017 as it relates to the suit property.
- 4) An injunction prohibiting the 2nd respondent, his agents, employees, servants, county officers or whomsoever from enforcing the said decision of the 1st respondent published in the Kenya Gazette dated 17th July, 2017 as relates to the title of the suit property.
- 5) A mandatory injunction directed at the 2nd respondent compelling him to restore the petitioner as the lawful owner of the suit property.
- 6) Any other order or relief as the court may deem necessary for the ends of justice.
- 7) The costs of the petition.

The petition was brought on the grounds set out therein and on the supporting affidavit of the petitioner. The petition was brought under Articles 20, 22(1), 23(3), 40, 47, 48, 50(1), 159(2), 162(2)(b), 165(3) and (5)(b) and 258(1) of the Constitution of Kenya. The petitioner’s case as set out in the petition and the affidavit filed in support thereof is as follows: The petitioner purchased the suit property from one, William Nyaega Orina on or about 27th March, 2009 at a consideration of Kshs. 15,500,000/-. The suit property was registered in the petitioner’s name on 10th September, 2009. The petitioner charged the suit property to Middle East Bank Kenya Limited on the same date namely, 10th September, 2009 to secure a loan that was advanced to him by the said bank. The suit property is adjacent to a parcel of land known as L.R No. 209/14437. On 15th July, 2010 and 9th August, 2010, the 3rd Respondent and Kenya Railways Corporation respectively confirmed to the owner of L.R No. 209/14437 that the said parcel of land did not encroach on the Nairobi Southern Bypass road and railway reserve. Following that confirmation, the petitioner believed that the suit property which is adjacent to L.R No. 209/14437 was also not on the Nairobi Southern Bypass.

The petitioner averred that he enjoyed peaceful ownership and possession of the suit property from 2009 when he acquired the same until 4th

April, 2018 when the said owner of L.R No. 209/14437 informed him that the titles for the suit property and L.R No. 209/14437 had been revoked by the 1st respondent through a notice that was published in the Kenya Gazette dated 17th July, 2017. The petitioner averred that he was not given an opportunity to be heard before the decision to revoke his title to the suit property was made the 1st respondent.

The petitioner averred that, in revoking his title, the 1st respondent violated his right to acquire and own property guaranteed under Article 40 of the Constitution. The petitioner averred that the revocation of his title to the suit property was also made in breach of his right to fair administrative action guaranteed under Article 47 of the Constitution and Fair Administrative Action Act, 2015. The petitioner averred that he was entitled to be informed by the 1st respondent of the complaint that had been made with regard to his title and an opportunity to respond to the same before a decision to revoke his title was made. The petitioner averred that the decision to revoke his title was made arbitrarily and as such the same was unprocedural and unlawful.

The petitioner annexed to his affidavit in support of the petition copies of; sale agreement dated 27th March, 2009 between the petitioner and William Nyaega Orina in respect of the suit property, instrument of transfer of the suit property dated 19th June, 2009, offer of banking facility dated 2nd June, 2009, a letter from Kenya National Highways Authority dated 15th July, 2010, a letter from Kenya Railways Corporation dated 9th August, 2010 and Special Issue of Kenya Gazette published on 17th July, 2017.

The petition was opposed by the respondents. The 1st respondent opposed the application through a replying affidavit sworn by its Deputy Director of Legal Affairs and Enforcement, Brian Ikol on 18th December, 2019. The 1st respondent contended that it is an independent commission established under Article 67(1) of the Constitution and operationalized by the National Land Commission Act, 2012. The 1st respondent contended that under section 14 of the National Land Commission Act, it was mandated to review all grants and dispositions of public land either on its own motion or upon receipt of a complaint with a view to establish their legality or propriety. The 1st respondent averred that in the course of exercising its statutory mandate aforesaid, it received a complaint from the 3rd respondent that the suit property among others had encroached onto the land that had been reserved for the expansion of the Nairobi Southern Bypass road. The 1st respondent averred that upon receipt of the said complaint, it invited all interested parties to a review of grants hearing on 27th March, 2017 to determine the legality of the titles of the properties that were alleged to have encroached on the said Nairobi Southern Bypass road.

The 1st respondent averred that it heard the 3rd respondent and some of the owners of the said properties which were alleged to have encroached on the Nairobi Southern Bypass road and also carried out its own investigations on the dispute. The 1st respondent averred that it thereafter made a determination in which it made a finding that the suit property was among those that had been illegally and/or irregularly allocated and proceeded to recommend that the titles for all the properties which were the subject of the 3rd respondent's complaint including the suit property be revoked. The 1st respondent averred that the petitioner acquired an invalid title from the previous owner of the suit property. The 1st respondent averred that the petitioner did not carry out due diligence while acquiring the suit property. The 1st respondent termed the petition an abuse of the process of the court and urged the court to dismiss the same.

The 2nd respondent opposed the petition through a Notice of Preliminary objection dated 19th February, 2019 that was wrongly indicated as having been filed on behalf of "the First, Third, Fourth and Fifth Respondents". In its preliminary objection, the 2nd respondent contended that the petition is frivolous, vexatious and amounts to an abuse of the process of the court. The 2nd respondent contended that section 14(1) of the National Land Commission Act, 2012 gave the 1st respondent power to review grants or dispositions of public land to establish their propriety or legality. The 2nd respondent averred that the 1st respondent published notices of its intention to review the legality of the grants relating to among others the suit property on 30th October, 2016 and 18th January, 2017 which notices gave the petitioner ample time to prepare for the hearing. The 2nd respondent contended that the petitioner had sufficient time to appear before the 1st respondent and to present his case. The 2nd respondent contended that the petitioner is guilty of laches having come to court almost a year after the determination by the 1st respondent. The 2nd respondent urged the court to dismiss the petition.

The 3rd respondent opposed the petition through a replying affidavit sworn by its Assistant Director, Mapping, Highway Planning & Design Directorate, Ms. Milcah Muendo on 23rd September, 2019. The 3rd respondent averred that it is an autonomous road agency established under section 3 of the Kenya Roads Act, 2007. The 3rd respondent averred that its mandate includes management, development, rehabilitation and maintenance of all national roads. The 3rd respondent averred that the suit property is situated on the Langata Road junction to the slum upgrading section of the Nairobi Southern Bypass road. The 3rd respondent averred that the suit property is on land that was reserved as a transport corridor for Embakasi-Kibera railway line and the Trans African Highway (Southern Bypass road) development, and as a buffer zone between the said transport corridor and Julia Ojiambo/Southlands/Ngei Estates. The 3rd respondent annexed to its affidavit, the Nairobi Structure Plan that was prepared in 1985 by the Department of Physical Planning in the Ministry of Works, Housing and Physical Planning in which the land on which the suit property is situated was reserved for the purposes aforesaid. The 3rd respondent averred that the said transport corridor was reserved in 1985 for the development of the said railway line and a section of the Nairobi Southern Bypass road. The 3rd respondent averred that the Nairobi Structure Plan had not been amended and that any Part Development Plan that purported to support the allocation of the suit property did not originate from the Director of Physical Planning. The 3rd respondent averred that the suit property was created when the designs of the Southern Bypass road was already in place and that the department then responsible for roads was not consulted before the creation thereof since it was created from a transport corridor. The 3rd respondent stated that it forwarded a list of illegal properties which included the suit property to the 1st respondent for review of the titles in respect thereof for their legality. The 3rd respondent averred that the 1st respondent conducted a hearing at which it appeared and presented its case. The 3rd respondent averred that the 1st respondent thereafter made a determination in which it recommended the revocation of among others the title for the suit property.

The 3rd respondent averred that the petitioner was given an opportunity by the 1st respondent to make representations before a decision was made on the review of his title to the suit property but he failed or neglected to do so. The 3rd respondent averred that the 1st respondent put up a public notice in a newspaper of nationwide circulation on 17th March, 2017 of its intention to review grants of among others the suit

property and proceeded to conduct a hearing on 27th March, 2017 and thereafter. The 3rd respondent annexed a copy of the public notice of 17th March, 2017 to its affidavit. The 3rd respondent averred that the protection accorded to ownership of property under Article 40 of the Constitution does not extend to property found to have been acquired illegally. The 3rd respondent averred that the suit property is public property that was illegally acquired and as such the revocation of its title did not violate the petitioner's constitutional right. The 3rd respondent averred that land that was reserved for public purpose could not be alienated for use for any other purpose than that for which it was intended. The 3rd respondent averred that public interest demands that land meant for use as a public road reserve should not be appropriated for private use. The 3rd respondent denied that the petitioner's right to fair administrative action was violated and urged the court to dismiss the petition.

The petition was argued by way of written submissions. The petitioner filed his submissions on 28th October, 2020 while the 1st, 2nd and 3rd respondents filed their submissions on 2nd December, 2020, 22nd June, 2020 and 10th September, 2020 respectively. In his submissions, the petitioner framed four issues for determination by the court namely; whether the petitioner is the lawful owner of the suit property, whether the 1st respondent's decision to revoke the petitioner's title to the suit property infringed on the petitioner's right to fair administrative action and right to property, whether the petitioner is entitled to the remedies sought and lastly, who shall bear the costs of the petition.

On the first issue, the petitioner submitted that he had proved that he was the registered proprietor of the suit property. The petitioner cited section 23(1) of the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed) and section 26(1) of the Land Act, 2012 and submitted that the certificate of title in respect of the suit property that he produced was prima facie evidence that he was the absolute and indefeasible owner of the suit property. The petitioner submitted further that he had placed evidence before the court which rebutted the respondents' claim that the suit property was created from land that was reserved as a transport corridor for the Nairobi Southern Bypass road and a railway line.

The petitioner submitted that the alleged Nairobi South Structure Plan dated 15th May, 1985 that was relied on by the 3rd respondent in support of its contention that the suit property was carved out of a transport corridor was not approved by the Commissioner of Lands and as such the same had no force of law. The petitioner cited Teresia Kamene King'oo v Harun Edward Mwangi [2019] eKLR and submitted that since the Commissioner of Lands issued a grant in respect of the suit property in exercise of its statutory power, there was a presumption in law that such action was regular. The petitioner submitted that the respondents did not tender any evidence to rebut that presumption. The petitioner urged the court to rely on the decision in ELCC No. 963 of 2012 which concerned L.R No. 209/11437 that is adjacent to the suit property in which the court made a finding that the said property had not encroached on a road or railway reserve.

On whether his right to fair administrative action and fair hearing was violated, the petitioner reiterated that he was not notified of the proceedings leading to the revocation of its title to the suit property. The petitioner submitted that the respondents produced contradictory evidence as to when he was allegedly notified of the said proceedings and when the hearing was conducted. The petitioner submitted that the said contradiction lends credence to his contention that he was not given a notice of the 1st respondent's proceedings. In conclusion, the petitioner urged the court to grant him the reliefs sought in the petition.

In its submissions, the 1st respondent framed three issues for determination by the court namely, whether the petitioner is a bona fide purchaser of the suit property for value without notice of any defect in its title, whether the petitioner conducted due diligence and whether the 1st respondent could legally revoke title to land. On the first issue, the 1st respondent submitted that a bona fide purchaser for value without notice was defined in Katende v Haridar & Company Ltd. [2008] 2 E.A. 173, where the Court of Appeal of Uganda stated that a bona fide purchaser is; "a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly". The 1st respondent submitted that the court went further in that case and gave the conditions under which one may be successfully described as a bona fide purchaser as follows;

- i. The person must hold a certificate of title.
- ii. The property was purchased in good faith.
- iii. He did not know about the fraud.
- iv. He purchased the property for valuable consideration.
- v. The vendor had apparent valid title.
- vi. He purchased without notice of any fraud and
- vii. He was not a party to any fraud.

On the same point, the 1st respondent also cited Samuel Kamere v Land Registrar, Kajiado, Civil Appeal No. 28 of 2005 where the Court of Appeal stated that:

"...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property..."

The 1st respondent submitted that the petitioner had not demonstrated that he conducted due diligence to ensure the legality of the title of the suit property before purchasing the same. The 1st respondent submitted that due diligence goes beyond merely conducting a search on the

title of a property. The 1st respondent submitted that the suit property could not enjoy the protection guaranteed under Article 40 of the Constitution since the person who sold the property to the petitioner had a flawed title. The 1st respondent submitted that Article 40(6) of the Constitution provides that the rights under Article 40 of the Constitution do not extend to any property that has been found to be unlawfully acquired as is the case herein.

The 1st respondent submitted further that since the suit property was reserved for public use, the same was not available for allocation for private use. The 1st respondent submitted that the petitioner did not acquire a valid title from the person who sold the suit property to him. The 1st respondent submitted that the whole transaction leading to the issuance of a title for the suit property was void *ab initio*.

On whether the 1st respondent exceeded its mandate in revoking the petitioner's title, the 1st respondent submitted that it followed due process in recommending the revocation of the petitioner's title. The 1st respondent submitted that it lawfully exercised its mandate under section 14 of the National Land Commission Act. The 1st respondent submitted that it did not overstep its mandate in recommending the revocation of the petitioner's title. In conclusion, the 1st respondent submitted that the petition does not warrant the issuance of the orders sought and prayed for the same be dismissed with costs.

In his submissions, the 2nd respondent framed three issues for determination namely; whether the petitioner is the lawful owner of the suit property, whether the 1st respondent had power to review grants and whether the petitioner is entitled to the orders sought. On the first issue, the 2nd respondent submitted that the fact that the petitioner had a title in respect of the suit property did not mean that the title was acquired lawfully. The 2nd respondent submitted that when the root of a title is under challenge, the holder of such title has to go beyond the title and demonstrate that the title was acquired through a lawful process. In support of this submission, the 2nd respondent cited Daudi Kiptugen v Commissioner of Lands and 4 others [2015] eKLR. The 2nd respondent submitted further that the petitioner was not a bona fide purchaser of the suit property for value without notice of any defect in the title thereof. The 2nd respondent submitted that the petitioner did not demonstrate that the person from whom he acquired the suit property had acquired the same procedurally and that he conducted due diligence before purchasing the property. In support of this submission, the 2nd respondent cited Samwel Kamere v Chief Land Registrar [2015] eKLR and Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR. The 2nd respondent submitted that the petitioner had not demonstrated that he acquired the suit property procedurally and that the person who sold the property to him also acquired the title to the property legally.

On the second issue, the 2nd respondent submitted that section 14 of the National Land Commission Act, 2012 gave the 1st respondent power to review grants or dispositions of public land. The 2nd respondent submitted that the 1st respondent's review powers extended to land that was once public land but had been alienated to private persons or entities. In support of this submission, the 2nd respondent cited Nicholas Mwatika Mulei v National Land Commission & 3 others [2018] eKLR and Belgo Holdings Limited v National Land Commission & another [2017] eKLR.

On whether the petitioner had notice of the review proceedings, the 2nd respondent submitted that the Gazette Notice annexed to the petitioner's affidavit in support of the petition shows that the petitioner was given notice of the said proceedings. On whether the court should quash the decision of the 1st respondent, the 2nd respondent submitted that the order of certiorari sought by the petitioner was time barred under section 9(3) of the Law Reform Act and Order 53 (2) of the Civil Procedure Rules 2010 which provides for a 6-month limitation period for applications seeking an order of certiorari. The 2nd respondent submitted that the decision sought to be quashed was published on 17th July, 2017 while the proceedings before the court were instituted more than 9 months later. In support of this submission, the 2nd respondent relied on Fredrick Mworira v District Land Adjudication Officer Tigania West/East & 3 others [2016] eKLR. In conclusion, the 2nd respondent urged the court to dismiss the petition.

In its submissions, the 3rd respondent also framed three issues for determination that it submitted on. The issues are the following; whether the 1st respondent's act of recommending revocation of the petitioner's title contravened Article 40 and Article 47 of the constitution, whether the petitioner's constitutional right to own property was violated and whether the petitioner is entitled to the reliefs sought in the petition. On the first issue, the 3rd respondent referred to the functions of the 1st respondent set out in Article 67(2) of the Constitution, the powers conferred upon the 1st respondent under section 14 of the National Land Commission Act, 2012 and the decisions in Republic v National Land Commission Ex parte Holborn Properties Ltd [2016] eKLR and Mwangi Stephen Muriithi v National Land Commission & 3 others [2018] eKLR and submitted that the 1st respondent had power to review the grant in respect of the suit property for its propriety or legality.

The 3rd respondent submitted that Article 47 of the Constitution sets the threshold to be met by any institution that exercises administrative function that has the potential of impacting or affecting interests of others adversely. The 3rd respondent admitted that a right to property is constitutionally protected and a person can only be deprived of that right as provided under the Constitution. The 3rd respondent submitted further that both under the Constitution and the relevant statutes a registered proprietor's title to land cannot be arbitrarily cancelled without the proprietor being afforded an opportunity of being heard. The 3rd respondent submitted however that the right to protection of property conferred under Article 40(1) of the Constitution is not an absolute right in itself as the protection does not extend to property that is found to have been unlawfully acquired. The 3rd respondent submitted that section 14 of the National Land Commission Act, 2012 mandated the 1st respondent to review all grants and dispositions of public land, either on its own motion or upon receipt of a complaint with a view to establish their legality or propriety.

The 3rd respondent submitted that a grant is said to have been acquired legally where it complies with all administrative processes and approvals before being issued and a grant is said to have been acquired unlawfully when a title is issued to a piece of land which is not legally available for allocation or has been created as a direct result of one or more illegal acts. In light of the foregoing, the 3rd respondent submitted that the original title of the suit property was not acquired legally. The 3rd respondent admitted that under section 14(7) of the

National Land Commission Act, a title held by a bona fide purchaser of land for value without notice of any defect therein cannot be revoked. The 3rd respondent submitted however that this doctrine of bona fide purchaser is not applicable where the original grant or disposition of public land was unlawful and/or illegal, thus making the whole transaction void *ab initio*.

The 3rd respondent submitted that it is clear from the Gazette Notice dated 17th July, 2017 that the 1st respondent gave public notices through newspapers of national circulation and invited all interested parties to appear before it to inspect documents and make written and oral representations during the review of grants of among others the suit property. The 3rd respondent submitted that it appeared before the 1st respondent and presented its case and all relevant documentation showing that the suit property was public land not available for alienation. The 3rd respondent submitted that the 1st respondent thereafter made a determination in which it directed the Chief Land Registrar to revoke among others the petitioner's title to the suit property.

The 3rd respondent submitted that in carrying out its mandate, the 1st respondent adhered to the provisions of the Constitution of Kenya, the Fair Administrative Action Act, 2015, the Land Act, 2012, the National Land Commission Act, 2012 and all other relevant statutes and as such the allegations of violation of the Constitution and Fair Administrative Action Act made by the petitioner are false and misleading. The 3rd respondent submitted that the petitioner was given an opportunity to make representations but failed or neglected to do so in good time. The 3rd respondent submitted that delay defeats equity and as such the petitioner cannot claim that the respondents violated and infringed on his right to property and fair administrative action.

The 3rd respondent submitted that in as much as Article 40 of the Constitution provides for the right to own property, that right does not extend to property found to be illegally acquired as stipulated under Article 40(6) of the Constitution. The 3rd respondent submitted that the petitioner who seeks constitutional protection under Article 40 (1) and (2) of the Constitution cannot do so under the umbrella of a tainted title. The 3rd respondent submitted that he who seeks equity must come with clean hands.

The 3rd respondent submitted that the petitioner's constitutional rights to own property were not violated by the revocation of the title for the suit property. In support of this submission, the 3rd respondent cited Republic v Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others [2006]1 KLR (E&L) 563 that was cited with approval in Kenya National Highway Authority v Shalieu Masood Mughal & 5 others (2018) by Kiage JA as follows:

“Maraga, J (as he then was) expressed himself as follows:

"Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed....It is clear from section 75 of the Constitution that the doctrine of public trust is recognised and provided for by the superior law of the land and applies in a very explicit way as regards trust land. The doctrine is, however, not confined to trust lands and covers all common properties and resources as well as public land. Although the doctrine had origins in Roman Law it is now a common heritage in all countries who adopted the English common law..... It is quite evident that should a constitutional challenge succeed either under the trust land provisions of the Constitution or under section 1 and IA of the Constitution or under the doctrine of public trust a title would have to be nullified because the Constitution is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of section I and IA of the Constitution."

The 3rd respondent also relied on Samuel Odhiambo Oludhe & 2 others v Jubilee Jumbo Hardware Limited & Another [2018] eKLR in which the court cited with approval Chemei Investments Limited v The Attorney General & Others, Nairobi Petition No. 94 of 2005 where the court stated that:

"The Constitution protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of Milan Kumar Shah & 2 Others vs. City Council of Nairobi & Another (supra) where the Court stated as follows,

"We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest."

On whether the petitioner is entitled to the orders sought, the 3rd respondent cited Kenya Revenue Authority & 2 others v Darasa Investments Limited [2018] eKLR where the court stated as follows:

"...The next issue for consideration is whether the appellants' decision was amenable to judicial review? As we have set out above, judicial review is concerned with the decision-making process and not the merits of the decision in respect of which the application for judicial review is made. This was aptly stated by this court in Commissioner of Lands vs Kunste Hotel Ltd [1997] eKLR. As such, what the learned Judge was called upon to do was to examine the process adopted by the appellants. "

The 3rd respondent submitted that section 7 (2) of the Fair Administrative Action Act provides for grounds for review which include bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse of discretion, unreasonableness, violation of legitimate expectation or abuse of power. The 3rd respondent submitted that the petitioner has not proved any of the aforementioned grounds for review to the required standard. The 3rd respondent submitted that the petition is an abuse of the court process, unmerited and does not warrant issuance of the orders sought. The 3rd respondent urged the court to dismiss the same with costs.

Determination.

I have considered the petition together with the supporting affidavit. I have also considered the replying affidavits and Notice of Preliminary Objection filed by the respondents in opposition to the petition. Finally, I have considered the submissions by the advocates for the parties and the authorities cited in support thereof. I am of the view that the issues arising for determination in this petition are the following;

1. Whether the petitioner's constitutional rights were infringed by the respondents.
2. Whether the petitioner is entitled to the reliefs sought in the petition.
3. Who is liable for the costs of the petition?

Whether the petitioner's constitutional rights were infringed by the respondents.

The petitioner has contended that the decision by the 1st respondent recommending the revocation of his title to the suit property was made arbitrarily in that he was not given a hearing before the decision was made in violation of his right to a hearing and fair administrative action. The petitioner has contended further that the said decision violated his right to own property. Sections 14(3) and (8) of the National Land Commission Act, 2012 provides as follows:

(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.

(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.

Article 47 (1) and (2) of the Constitution provides that:

47. (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.

Article 50 of the Constitution provides that:

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

It is not clear to me from the material on record whether the 1st respondent issued a notice to the petitioner of its intention to review the grant in respect of the suit property and if the notice was issued, when it was issued and whether it was adequate. It is also not clear whether the review hearing took place and if it did, the date/s of the hearing. I am in agreement with the petitioner that the respondents placed before the court conflicting evidence on the foregoing. In the Gazette Notice published on 17th July, 2017 through which the petitioner among others was notified of the 1st respondent's determination, the 1st respondent stated that it issued notices of the intended review on 30th October, 2016 and 18th January, 2017 and conducted hearings between 30th January, 2017 and 3rd February, 2017. In its replying affidavit, the 3rd respondent contended that the 1st respondent gave a notice of the intended review of grants in respect of the suit property among others on 17th March, 2017 and conducted a hearing on 27th March, 2017. The 3rd respondent annexed incomplete copy of a public notice of the intended review of grants that was published by the 1st respondent in the Daily Nation Newspaper on 17th March, 2017. In its affidavit, the 1st respondent did not commit itself as to when it gave notice or notices of the intended review of the title of suit property and did not bother to exhibit a copy or copies of the notices if any.

From the evidence before the court, it is not clear whether the notice of review of grant in respect of the suit property was given on 30th October, 2016 and 18th January, 2017 as indicated in the said Gazette Notice of 17th July, 2017 by the 1st respondent or on 17th March, 2017 as claimed by the 3rd respondent who attended the review hearing. It is also not clear whether the review hearing took place between 30th January, 2017 and 3rd February, 2017 as per the said Gazette Notice or on 27th March, 2017 as claimed by the 3rd respondent who attended the hearing session. Since it is the 1st respondent who claims to have given a notice of the review hearing and conducted the hearing, the burden was on it to prove that it indeed gave such notice and also conducted a hearing. As I have mentioned above, the 1st respondent has maintained that it gave notices on 30th October, 2016 and 18th January, 2017 and conducted hearings between 30th January, 2017 and 3rd February, 2017. The 1st respondent placed no evidence before the court in proof of these claims. Even if I was to believe the 3rd respondent's contention that the notice was given on 17th March, 2017 and the hearing conducted on 27th March, 2017, I am of the view that such notice was so inadequate as to amount to no notice. Due to the foregoing, it is my finding that the 1st respondent did not notify the petitioner of its intention to review the grant in respect of the suit property and as such the petitioner was not given a hearing before a prejudicial decision recommending the revocation of its title was given. It follows therefore that the 1st respondent violated the petitioner's constitutional right to

a fair hearing and fair administrative action guaranteed under Articles 47 and 50 of the Constitution and section 14(3) of the National Land Commission Act, 2012.

In Attorney General v Ryath [1980] AC 718 at page 730, Lord Diplock stated that:

“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”.

In Harlsbury’s Laws of England, 4th Edition at page 76 paragraph 64, the authors have stated as follows regarding the rules of natural justice:

“Implicit in the concept of fair adjudication lie two cardinal principles namely, that no man shall be a judge in his own cause (nemo iudex in causa sua), and that no man shall be condemned unheard (audi alteram partem). These principles, the rules of natural justice, must be observed by courts, tribunals, arbitrators and all persons and bodies having a duty to act judicially, save where their application is excluded, expressly or by necessary implication.”

The recommendation by the 1st respondent that the title held by the petitioner in respect of the suit property be revoked was in the circumstances arrived at through a flawed process that violated the petitioner’s constitutional rights.

Whether the petitioner is entitled to the reliefs sought in the petition.

I have set out at the beginning of this ruling the reliefs sought by the petitioner. The petitioner has sought declaratory orders and prerogative orders of Certiorari, Prohibition and Mandamus (although not expressly so worded). I am hesitant to declare that the petitioner is the lawful proprietor of the suit property. The legality of the petitioner’s title was to be determined by the 1st respondent. Since the 1st respondent’s determination on the issue was arrived at through a flawed process, the matter will have to be determined by the court after taking evidence from the parties. The legality of a contested title cannot be determined on affidavit evidence presented in a constitutional petition. In this petition, what the petitioner challenged was not the merit of the decision of the 1st respondent but the process through which that decision was arrived at. The petitioner’s complaints herein in my view should have been brought by way of judicial review rather than by way of a constitutional petition. I believe that the petitioner brought the claim by way of a petition to bypass the time limited under the Law Reform Act and the Civil Procedure Rules for making an application for an order of certiorari. All the same, the reliefs sought in the petition are for judicial review although not expressly indicated as such I believe again for fear of attracting the defence of time bar. I wish to point out that I am not in agreement with the decision that was cited by the 2nd respondent to the effect that an order of Certiorari sought in a constitutional petition is subject to the provisions of the Law Reform Act and the Civil Procedure Rules.

In Republic v National Land Commission Ex-Parte Ephraim Muriuki Wilson & others [2018] eKLR the court stated as follows:

“In this regard, it is important to mention that what emerges is that there is a land dispute, and this Court cannot allow itself to be used to resolve a land dispute disguised as a Judicial Review application. Behind the curtain of these Judicial Review proceedings is the real dispute, namely, ownership, use and or occupation of land. These questions call for the need for this Court to exercise caution, care and circumspection. First, there is the question of jurisdiction discussed earlier. Second, there is a real danger of this Court rendering a decision that will have the implication of determining ownership of the disputed land. I decline the invitation to venture into this forbidden territory.”

The upshot is that I dismiss this Judicial Review application with costs to the Interested Parties. I award no costs to the Respondent since it did not participate in the proceedings.”

In Republic v Cabinet Secretary, Ministry of Interior & Co-ordination of National Government & 2 others Ex-Parte Kisimani Holdings Ltd [2015] eKLR, the court dealing with a similar issue stated as follows:

“26. As was held in Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354:

“Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application.....Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a need for *viva voce* evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not. In cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation, and disposition, there would be need to allow *viva voce* evidence and cross-examination of the witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced.....It may indeed be true that the notice that is impugned is irregular or unlawful and an order of *certiorari* would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles.....So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of *certiorari* because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and *viva voce*

evidence at another forum preferably the Civil Courts.”

27. To grant the orders sought herein will leave the serious conflicting issues of fact raised in these proceedings unresolved hence will be a source of future conflicts since as already stated judicial review applications do not deal with the merits of the case but only with the process. In other words, in judicial review applications the Court’s jurisdiction is to determine whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts with an intention of securing a determination on the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.”

What I have before me is affidavit evidence on contested facts as to the validity or legality of the petitioner’s title to the suit property. I am unable to determine on affidavit evidence whether the suit property was created from a road and a railway reserve or not. If the property was created from land that was reserved for the Nairobi Southern Bypass road as claimed by the respondents, then its title would be invalid. On the other hand, if the property was not created from a road reserve as claimed by the petitioner, the title would be valid. This is an issue that requires *viva voce* evidence to determine. The parties will have to move the court appropriately should they wish to have the issue determined now that this court has found the proceedings before the 1st respondent to have been unprocedural. Due to the foregoing, I will not grant prayer(a) of the petition.

From my earlier findings, prayers (b), (c) and (d) of the petition have been established and I will grant the same. As concerns prayer (e) of the petition, no evidence was placed before the court showing that the petitioner’s title to the suit property was revoked. Courts do not issue orders in vain. I will therefore not grant prayer (e) of the petition.

Who is liable for the costs of the petition?

The petitioner has to a large extent succeeded in his claim. Costs is at the discretion of the court and as a general rule costs should follow the event. No reason has been put forward that would justify denying the petitioner the costs of this suit. The petitioner shall have the costs of the petition.

Conclusion.

In conclusion, I hereby enter judgment for the petitioner in terms of prayers (b), (c) and (d) of the petition dated 10th April, 2018. The petitioner shall have the costs of the petition to be paid by the 1st respondent.

DELIVERED AND DATED AT NAIROBI THIS 13TH DAY OF OCTOBER 2021

S. OKONG’O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Petitioner

N/A for the 1st Respondent

N/A for the 2nd Respondent

Ms. Muriungi for the 3rd Respondent

Ms. C. Nyokabi - Court Assistant