



**REPUBLIC OF KENYA**  
**ENVIRONMENT AND LAND COURT AT NAIROBI**  
**MISC. ELC APPLICATION NO. 195 OF 2019**  
**IN THE MATTER OF THE NATIONAL LAND COMMISSION**

**AND**

**IN THE MATTER OF AN APPLICATION FOR THE ENFORCEMENT OF AWARD**

**IIMBANI DISPENSARY PROJECT.....APPLICANT**

**AND**

**ABDULRAHAMAN MOHAMED ABDI .....RESPONDENT**

**RULING**

**Introduction**

1. The Applicant herein has filed the Chamber Summons Application dated the **12<sup>th</sup> November 2019**, in respect of which the Applicants seeks the following Reliefs;

*a. The National Land commissions award dated the **18<sup>th</sup> April 2018**, and gazette on **the 9<sup>th</sup> November 2018**, by the chair person, national land commission in this matter be enforced in the same manner as a decree or order of the High Court to the same effect.*

*b. Cost of this Application be borne by the Respondent.*

*c. The Respondent be ordered to pay all such costs and expenses as are incidental to the enforcement and execution of the said award.*

2. The said Chamber summons application, is supported by an affidavit sworn by the Applicant herein on the **12<sup>th</sup> November 2019**, to which the Applicant has annexed a number of exhibits, including the Recommendations by the National Land Commission dated the **18<sup>th</sup> April 2018**, as well as a copy of the valuation dated the **16<sup>th</sup> October 2019**.

3. It appears that the Applicant herein, endeavored to serve the Respondents with the Chamber summons under reference, but however, same were unable to effect service in the usual manner.

4. Owing to the failure and/or inability of the Applicant to serve the subject Application upon the Respondent, the Applicant herein came back to court and in this regard sought for and/or obtained leave of the Honourable Court to effect service by way of substituted means and in particular, by way of advertising the summons to enter appearance and the consequential court process, in one of the local Dailies, namely, The Nation Newspaper.

5. Having sought for and obtained leave of the honourable court, to effect service by way of substituted means, the Applicant proceeded to and advertised the Chamber summons vide the daily nation on the 1<sup>st</sup> May 2021, in line with the orders which were issued on **the 19<sup>th</sup> April 2021**.

6. Be that as it may, it appears that despite the service by way of substituted means, the Respondent herein, was still not jolted into action and/or by entering appearance and filing suitable responses.

7. In the premises, the Chamber summons application, filed by and/or on behalf of the Applicant herein, has thus not been opposed and/or otherwise challenged, by the filing of any Documents, whatsoever.

## **BACKGROUND**

8. On or about the year 2018, the Applicant herein lodged and/or mounted a Complaint before the National land commission, pertaining to and/or concerning the allocation, alienation and registration of all that piece of land otherwise known as **L.R. No. 209/10772, (now L.R No 209/16432 and L.R No. 209/16433)** respectively, which are subdivisions arising from the original parcel of land.

9. It is upon the receipt of the complaint, that National land commission proceeded to registered same and thereafter invited the parties to make necessary representation, pertaining to and/or concerning the issue of how the suit property, was transferred to and registered in the name of the Respondent herein.

10. Subsequently and upon hearing the complaint, with notice to the Respondent, the National land commission proceeded to and rendered a Recommendation dated the 18<sup>th</sup> April 2018, and wherein the commission found *inter-alia* that the allocation of the suit property to the Respondent, was irregular, unlawful and thus legally untenable.

11. On the other hand, the National land commission also proceeded to and made a further Recommendation that the Respondent does compensate the Applicant herein on account of the surrender of the suit properties, subject to a valuation, which was to carried out and/or undertaken by the office of the National land commission.

12. Following the delivery of the Recommendation, one would have expected the Respondent herein, to either challenged same before the courts and/or otherwise take such proceedings, towards vindicating its property rights. However, no such proceedings, were ever commenced and/or granted.

13. Other than failing to challenge the award or the Recommendation, Respondent/Judgment Debtor, was also supplied with a copy of the national land commission valuation, as well as the gazettelement of the award and in this regard, it must be assumed that the Respondent is conversant of the outcomes of the proceedings before the Commission.

14. Notwithstanding the foregoing ,the Respondent herein was again served, but same did not enter appearance nor filed any pleadings and in this regard the subject application is essentially unopposed

### **Submissions**

15. The Chamber summons Application came for hearing on the **25<sup>th</sup> May 2021**, on which day the honourable court, ordered and/or directed that the same be canvassed and/or disposed of by way of written submissions.

16. Following the orders of the honourable court, the applicant herein proceeded to and indeed filed her written submissions on the **21<sup>st</sup> September 2021**, whereas no submissions were filed by the Respondent.

### **Issues for determination**

17. Having reviewed the Chamber summons application, the supporting affidavit as well as the written submissions, filed by and/or on behalf of the applicant herein and there being no contrary depositions, to challenge, controvert and/or impeach the applicant's position, it is my humble view that the following issues, would be appropriate for determination or disposal of the subject matter;

I. *Whether the National land commission had jurisdiction to make the Recommendation under reference.*

II. *Whether the award/Recommendation has the force of law*

III. *Whether the award is capable of being adopted and/or enforced in the same manner as a Decree and/or order of the court.*

### **ANALYSIS AND DETERMINATION**

18. The National land commission is one of the Independent and Constitutional commissions created pursuant to the provisions of **Article 67 of the Constitution, 2010**, which Article also stipulates the functions and/or otherwise the mandate of the said commission.

19. On the other hand, though established pursuant to Article 67 of the constitution, the National land commission has also been operationalized by an act of parliament, namely, the National land commission act, 2012, which *inter-alia* enumerates and/or elaborates on the functions and/or mandate of the said commission.

20. Suffice it to say, that the National land commission is mandated and/or authorized to *inter-alia* initiate investigations, on its own initiative or on a Complaint and also to Review grants and/or dispositions involving public land.

21. Nevertheless, to understand the full extent of the mandate of the National land commission, it is imperative to reproduce Section 14 of the National land commission Act, 2012, which is reproduced as hereunder;

#### **14. Review of grants and disposition**

*s (1) Subject to Article 68(c)(v) of the Constitution, the Commission shall, within five years of the commencement of this Act, on*

*its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality. (2) Subject to Articles 40, 47 and 60 of the Constitution, the Commission shall make rules for the better carrying out of its functions under subsection (1). (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. (4) After hearing the parties in accordance with subsection (3), the Commission shall make a determination. (5) Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title. (6) Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders. (7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title. (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. (9) The Commission may, where it considers it necessary, petition Parliament to extend the period for undertaking the review specified in subsection (1).*

22. From the provision of **Section 14 of The National Land Commission, Act**, alluded to in the preceding paragraph, the national land commission is mandated to review the allotment, alienation and transfer of what was *hitherto* public land and upon such review to make appropriate Recommendation pertaining to the outcome of her findings and/or determination.

23. In respect of the subject matter, it is common ground that the commission received a complaint from the applicant pertaining to and/or concerning the propriety and/or legality and/or alienation of the suit property in favor of the Respondent and the commission returned findings to the effect that the alienation, transferred registration of the suit property in favor of the Respondent was illegal and unlawful. See the recommendation dated **18<sup>th</sup> April 2018**.

24. It is my humble opinion that the National land commission was mandated to carry out the review as pertains to the alienation and/or allocation of suit property and thereafter to arrive at the Recommendations, which were handed down in terms of the decision made of the **18<sup>th</sup> April 2018**.

25. On the other hand, having rendered the decision dated the 18<sup>th</sup> April 2018, the National land commission proceeded to and directed the valuation of the suit properties with a view to ascertaining the value thereof. In this regard, the valuation was indeed undertaken by and/or on behalf of the commission and the said valuation, constitutes and addendum to the Recommendation, *hitherto* arrived at and/or handed down on the 18<sup>th</sup> April 2018.

26. In any event, the decision and/or recommendation of the national land commission, which are the subject of the instant matter, have not been impeached and/or otherwise challenged.

27. In the premises, it is my finding and holding that the National land commission acted within its jurisdiction and/or mandate in handing down the award/recommendation in favor of the applicant. **See Article 68 (5) of the Constitution 2010.**

### **Issue number 2**

28. It is common ground that the National land commission is one of the Independent and Constitutional commissions provided for and/or enumerated pursuant to the provision of Articles 248 of the constitution, 2010. Besides, the objects and purposes for the establishment of the said Independent and constitutional commissions, are contained in Article 249 of the said constitution, 2010.

29. By virtue of being a Constitutional commission, the National land commission was clothed with the requisite mandate to carry out the mandate provided for and thereafter to make a binding Recommendation capable of enforcement under the law.

30. In support of the foregoing submissions I take guidance from the decision in the case of **Commission on administration of justice v Kenya vision 2030 delivery board & 2 others (2019) eKLR**

*“We therefore find nothing in the above Article to suggest that the only remedy available to a beneficiary of the appellant’s recommendations for redress to a public entity in the discharge of its undoubted public investigative and oversight mandate is limited to reporting of such findings to the National Assembly. Neither do we find anything in the said Article to suggest that such recommendations have no force of law and are therefore not amenable to enforcement by a court of law.”*

31. My understanding of the foregoing observation by the court of appeal, which have been reproduced herein before, is that the Recommendation of a Constitutional commission, [like the Commission on Administration of Justice], the former which was the subject of the decision herein, and those of national land commission not excepted, have the force of law and are otherwise enforceable by a court of law.

32. In the premises, I find and hold, that the award by the national land commission, which is the subject of the instant matter, cannot be treated as mere sheet of paper. Same is a binding pronouncement and the Recommendation therein, can thus not be discarded, disregarded and/or otherwise be overlooked.

33. Simply put, the Recommendations beforehand binds the parties thereto and same thus creates rights and obligations, which are amenable to be actualized, either way, including, in my humble view by filing the subject proceedings.

### **Issue number 3**

34. The Applicant herein has approached the honourable court with a view to having the award contained in the letter dated the 18<sup>th</sup> April 2018, as well as the valuation dated the **16<sup>th</sup> October 2019**, to be adopted and thereafter be enforced as a decree of this honourable court.

35. I must say, that the provisions of **Article 67 & 68 of the Constitution, 2010**, as well as the provisions of the National land commission act, 2012, do not contain express provisions for purposes of adoption and consequential enforcement of the Recommendation of the National land commission.

36. Nevertheless, the lack and/or absence of an express legal position both under the constitution and the constitutive act, in my humble view, does not bar and/or prohibit the honourable court from adopting and enforcing a binding Recommendation of a Constitution Commission, which Recommendations have the force of law.

37. In any event, I must observe that the Recommendations at hand, were not made for its own sake and to fail to enforce the said recommendation, merely on account of lack of an express provisions to do so, would be to water down the legal meaning, import, and tenor of such recommendations

38. Notwithstanding the foregoing, I am also alive to the position in law that where an act is not expressly excluded and/ or prohibited, such an Act (*unless same relates to jurisdiction*) can be attended to pursuant to the inherent powers of the honourable court.

39. In support of the forgoing observations I invoke and adopt the decision in the case of **Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints [2016] eKLR**, where the court considered the meaning, extent and tenor of Inherent jurisdiction and observed as hereunder;

“The extent of inherent powers of the court was eloquently explained by the authors of the **Halsbury’s Laws of England, 4<sup>th</sup> Edn. Vol. 37 Para. 14** as follows;

*“The jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”* See also **Meshallum Waweru Wanguku** (supra)

40. On the other hand, I am vindicated to proceed and adopt the award under reference, in line with the powers conferred upon me by the provisions of Section 13 (7) of the Environment and Land court Act.

***7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including***

***2 (a) interim or permanent preservation orders including injunctions; (b) prerogative orders; (c) award of damages; (d) compensation; (e) specific performance; (g) restitution; (h) declaration; or (i) costs.***

#### **COSTS.**

41. The Respondent herein was aware of the Decision and/or Recommendation of the National land commission as pertains to the propriety and/or legality of the title allocated in his favor, however the Respondent herein has neither filed any Petition nor Judicial Proceedings to challenge the Recommendations.

42. On the other hand, *whilst* not challenging the Recommendations of the National land commission, which I have found to be binding, the Respondent has similarly chosen not to comply with the terms thereof.

43. In this regard, the conduct of the Respondent, is such that, same is not keen to abide by and/or comply with decisions of legitimate of constitutional agencies and such conduct should attract penalization with an order for costs.

#### **Final disposition**

44. In conclusion, I hereby proceed to allow the Chamber summons Application dated the **12 November 2019**, in terms of prayer 1 thereof, subject however, to the rider that the Applicant is only entitled to Compensation on Account of the value of Land, but not the Improvements thereto, the latter which were done by the Respondent.

45. Besides, the Applicant herein is awarded costs of the subject Application..

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF OCTOBER 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT

MILIMANI

In the presence of:

June Nafula Court Assistant

NA For Applicant

NA For Respondent