



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC JUDICIAL REVIEW NO 37 OF 2018**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF SECTION 14 OF THE NATIONAL LAND COMMISSION ACT CAP 5D OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF SECTIONS 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTIONS ACT OF 2015**

**AND**

**IN TE MATTER OF REVIEW OF TITLE LR NUMBER 209/383/356**

**AND**

**IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

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

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

**EXPARTE APPLICANT.....BAKER STREET INVESTMENT LIMITED**

**JUDGEMENT**

1. This is the Notice of Motion dated 19<sup>th</sup> October 2019 brought under section 8 and 9 of the Law Reform Act cap 26 Laws of Kenya, section 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya, order 53 rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.

2. It seeks orders:-

***1. Certiorari to remove into this honourable court for the purposes of quashing the decision of the 1<sup>st</sup> Respondent as published in the issue Vol.CXIX-No.97 of the Kenya Gazette published on 17<sup>th</sup> July 2017.***

**2. Prohibition restraining the 2<sup>nd</sup> Respondent by itself, its agents or persons acting on his/her behalf from implementing the 1<sup>st</sup> respondent's decision contained in Vol.CXIX-No. 97 of the Kenya Gazette to revoke the applicant's title number LR Number 209/7383/356.**

**3. Prohibition restraining the Respondents by themselves, their agents or persons acting on their behalf from acting in a manner that violates the Applicant's right to occupation and use of its parcels of land known as LR Number 209/7383/356 or in a manner that violates the Applicant's rights to property guaranteed under Article 40 of the Constitution of Kenya.**

**4. The costs of this Application be provided for.**

3. The grounds are on the face of the application and are set out in paragraphs 1 to 8. It is supported by the verifying affidavit of Vittono Veneziani, Director of the Exparte Applicant sworn on the 19<sup>th</sup> October 2018.

4. The application is opposed. There is a Replying Affidavit sworn by Bernard K. Njau, Chairman of Kimathi Estate Welfare Association sworn on the 7<sup>th</sup> December 2018. The 1<sup>st</sup> Respondent filed a replying affidavit through the Director of Legal Services and Enforcement Mr. Brian Ikol.

5. He deponed that the 1<sup>st</sup> Respondent's mandate to review all grants or dispositions of public land is provided for by Section 14 of the National Land Commission Act. The 1<sup>st</sup> Respondent was acting pursuant to complaints it received from the Kimathi Estate Residents. That the Applicant had an opportunity to ventilate its position, during the hearing before the 1<sup>st</sup> Respondent made its recommendation. Further that the excise of grants and dispositions of public land is a constitutional function of the 1<sup>st</sup> Respondent.

#### **The Exparte Applicant's Submissions**

6. They are dated 29<sup>th</sup> January 2019 and 20<sup>th</sup> September 2021. They raise five issues for consideration: -

**1. Whether the 1<sup>st</sup> Respondent had jurisdiction to order the revocation of the exparte applicant's title to the suit property?**

**2. Whether the respondent violated the exparte applicant's right to Fair Administrative Action, the right to natural justice and the right to fair hearing?**

**3. Whether the contents of an affidavit carry any probative value if the deponent refuses to be examined?**

**4. Whether the refusal to honour a notice to produce has any effect in law.**

**5. Whether refusal to be cross examined has any known effect in law.**

7. In the gazette notice published on 17<sup>th</sup> July 2017 the 1<sup>st</sup> Respondent revoked the Applicant's title and purported to vest the same in the County Government of Nairobi. The 1<sup>st</sup> Respondent had no mandate in law to revoke the title. It has put forward the case of **Mwangi Stephen Muriithi vs National Land Commission & 3 Others [2018] eKLR**.

8. The suit property belonged to the City Council as at April 1944 and that it was the council that sold the suit property to George Kiarie. It has put forward the case of **Republic vs National Land Commission; Exparte Krystalline Salt Limited [2015] eKLR; Registered Trustees of Arya Pratindhi Sabha East Africa vs National Land Commission [2016] eKLR**.

The 1<sup>st</sup> Respondent rendered a determination instead of a recommendation and proceeded to direct the 2<sup>nd</sup> Respondent to revoke the title to the Applicant's lawfully and regularly acquired land.

9. The Applicant's right to a fair hearing were violated as the 1<sup>st</sup> Respondent did not exhibit impartiality and independency during the said inquiry.

10. The Respondents claimed to have followed the law and afforded the Applicant an opportunity to be heard. They have an obligation to tender evidence to support their claim. They did not. It has put forward the case of **Jack Kaguu Githae vs Kenya Commercial Bank [2021] eKLR**. The Applicant seeks that the replying affidavit of Brian Ikol be struck out in default of the documents supporting the averments.

11. The process leading to the revocation of the title was unprocedurally conducted in blatant disregard of the set down laws on the procedure of fair administrative action. It prays that the application be allowed.

#### **The 3<sup>rd</sup> Interested Party's Submissions**

12. Bernard K. Njau a representative of Kimathi Estate Welfare Association, stated that he initiated the proceedings before the 1<sup>st</sup> Respondent.

13. The acquisition of the suit property which was a children's playground, by George Kiarie was tainted with illegality and fraud. Upon

subdivision of LR NO 209/7383/1-359 (now Block 51/1-359) for development in 1970 public utility land and open spaces were surrendered to the Government of Kenya. The City Council reserved no land for itself which it could allocate, sell or transfer to any person lawfully.

14. It follows that the Applicant's did not acquire a good title from the said George Kiarie. He prays that the application be found to be unmerited.

15. I have considered the notice of motion and the affidavit in support and the annexures. I have considered the responses thereto, the rival submissions and the authorities cited. The issues for determination are:-

*(i) Whether the decision of the Respondent was ultra vires and or illegal.*

*(ii) Is the Exparte Applicant entitled to the reliefs sought?*

*(iii) Who should bear costs of this application?*

16. Article 67(2) of the Constitution provides that:-

*(2) The functions of the National Land Commission are—*

*a) to manage public land on behalf of the national and county governments;*

*b) to recommend a national land policy to the national government;*

*c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;*

*d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;*

*e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;*

*f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;*

*g) to assess tax on land and premiums on immovable property in any area designated by law; and*

*h) (h) to monitor and have oversight responsibilities over land use planning throughout the country.*

17. It is the 3<sup>rd</sup> Respondent's case that Kimathi Estate was developed by the defunct City Council on LR NO 209/7383 (Now NBI/Block 51 as a 'Tenant Purchase Scheme'). That as required by the then Planning Act Cap 303 Laws of Kenya the council set aside for public purpose open spaces, amount them the suit property. The suit property was designated as a children's playground before it was wrongly allocated to George Kiarie Ng'ang'a.

18. It is not true that the assertion by the Exparte Applicant that the suit property was private land. Under Section 14(1) of the National Land Commission Act the 1<sup>st</sup> Respondent can review grants or dispositions of public land in order to establish their legality or illegality.

19. In the case of **Sanghani Investment Ltd vs Officer in Charge Nairobi Remand and Allocation Prison [2007] 1EA 354** it was held that Judicial Review proceedings is not the appropriate forum to adjudicate over a dispute on land ownership or make a determination on the authenticity of title to property.

In **Republic vs National Land Commission Exparte Holborn Properties Ltd [2016] eKLR** the court observed that:-

*“.....Although the constitution has defined private land to consist land registered under any freehold or leasehold tenure, and where as Section 14(1) of the National Land Commission Act gives the Respondent the powers to review all grants or disposition of public land, it follows that such a review can only entail land that has been converted form public land to private land.....”.*

20. In the case of **Republic vs National Land Commission Exparte Krystalline Salt Ltd [2015] eKLR** Korir J held that:-

*“It therefore follows that once a person is lawfully granted a leasehold tenure over public land, the land becomes private land and the same can only be converted to public land by (i) Compulsory acquisition once it is established that public land was converted to private land lawfully or regularly, the mandate of the respondent (National Land Commission) ends there”.*

In the instant scenario there is evidence that the suit property was irregularly transferred to George Kiarie as it was a children's play ground and was not available.

21. In the case of **Market Plaza Ltd vs Commissioner for Lands & 3 Others [2017] eKLR** the Court of Appeal referred to the case of **Axa General Insurance Ltd & Others vs The Lord Advocate [2011] UKS C46** where it was held:-

*“34. In sporring and Lonmroth vs Sweden [1982] S EHRR 35 paragraph 69, the Strasburg court declared that:-*

*“...the court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection individuals fundamental right. In Pressos Compania Nariera SA vs Belgium [1995] 21 EHRR 301 para 63 recalling this passage, the Commission said that fair balance must be regarded as upset of the person concerned had to bear an individual and excessive burden.....there must be a reasonable relationship between the means employed and the aims pursued”.*

22. The Court of Appeal in the **Market Plaza case (Supra)** further stated thus:-

*“.....The Appellant’s assertion was that it has a constitutional right to property, a claim that was contradicted by evidence that the said title was acquired by illegal/irregular means. In his judgment, the learned judge was of the opinion that the allegations that the suit property was illegally acquired were valid and should be seriously considered”.*

I am guided by the above authority in finding that the issue of validity of the title to George Kiarie the predecessor to the Exparte Applicant ought to be determined first.

23. It is not true the assertion by the Exparte Applicant that the suit property was public land. Under Section 14(1) of the National Land Commission Act the 1<sup>st</sup> Respondent can review grants or dispensations of public land in order to establish their legality and illegality.

24. The Exparte Applicant admits that it was invited for a hearing before the National Land Commission on 1<sup>st</sup> September 2014 but which took place in December 2014. This period was within the period the National Land Commission was mandated to undertake the inquiries.

25. The Exparte Applicant claims that it was not given an opportunity to challenge the evidence by the commission is neither here nor there as no material evidence was placed before this court to confirm this fact. It is on record that the Exparte Applicant was represented by an advocate. The Exparte Applicant cannot claim they did not participate in the hearings before the 1<sup>st</sup> Respondent.

26. A look at the proceedings before the 1<sup>st</sup> Respondent, confirms that the Exparte Applicant fully participated.

27. From the foregoing, I find no merit on this application and the same is dismissed with no orders as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF DECEMBER 2021.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. E. Munyua for the Applicant

Ms Njuguna for the Respondents

No appearance for the Interested Party

Steve – Court Assistant