



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC PETITION NO. 82 OF 2018

IN THE MATTER OF ARTICLES 19, 22, 23, 40, 47, 50, 64, 165 & 258 OF THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS FREEDOMS AND RIGHT TO PROPERTY UNDER
ARTICLE 19, 20, 40, 47 AND 50 OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF THE LAND ACT, 2012

AND

**IN THE MATTER OF THE PURPORTED REVOCATION OF TITLE LR NO. 209/11963 SOUTH C NAIROBI AND
ALLOCATING THE SAME TO THE NAIROBI COUNTY GOVERNMENT**

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT, 2012

BETWEEN

GATMA HOLDINGS LIMITED.....1ST PETITIONER

AMBASSADEUR INVESTMENT LTD.....2ND PETITIONER

- VERSUS -

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

NAIROBI CITY COUNTY.....2ND RESPONDENT

REGISTRAR OF TITLES.....3RD RESPONDENT

RULING

1. This is a petition dated 26th March 2018. The petitioners are two limited liability companies registered under the companies Act (cap 486 of the Laws of Kenya) That they are the registered proprietors of all that parcel of land known as LR NO. 209/11963 (IR No. 6389) situated at South C Nairobi within the Republic of Kenya hereinafter referred to as (**“the suit property”**). That on the 27th October 2009 they acquired the leasehold interest in the suit property after registration of an assent in their favour consequent to a grant of letters of

administration intestate and certificate of confirmation of grant in the estate of one Maina Gatonga (deceased).

2. That upon a grant by the President of the Republic of Kenya, the late Maina Gatonga had been duly registered as the proprietor of the suit land on 23rd November 1994 in consideration of the sum of Kshs.468,000/- stand premium by way of payment of the requisite fees. The requisition of the grant in favour of the late Maina Gatonga was registered with the full consent of the Commissioner of Lands by an order of the President of the Republic of Kenya on 23rd November 1994. The deceased since acquisition of the suit property paid the applicable land rent on annual basis as demanded as well as land rates to the defunct City Council of Nairobi now County Government of Nairobi which trend has been duly followed by the petitioners with payments being upto date in that regard. The Petitioners have since acquisition of the suit property invested substantially on it and developed comprehensive plans with a clear business and economic projection thereof.

3. The petitioners cite three wrongs by the respondents separately as follows:-

a. 1st respondent; revoking title to LR No. 209/11963 (IR No. 6389) vide special gazette notice dated 17th July 2017.

b. 2nd respondent; revoking title to LR No. 209/11963 (IR No. 6369) vide letter dated 26th August 2016 and minutes dated 5th September 2016.

c. 3rd respondent; placing a caveat on 26th June 2016 on LR No. 209/11963 (IR No. 6369).

4. The petitioners by a search conducted with the 3rd respondent on 21st July 2017 came to realize that the 3rd respondent had on 29th June 2016 placed a caveat on the suit land claiming an interest under Section 65 (1) (f) of RTA (Cap 281) (repealed) under section 76 of the Land Registration Act No. 3 of 2012. That upon the petitioners' representatives various inquiries and visits to the 3rd respondents offices, no reason or answer was given nor has ever been given by the 3rd respondent as to what his interests were on the suit property to warrant lodging of the caveat nor has any letter of communication been made in written to them by the 3rd respondent.

5. The petitioners seek the following reliefs.

a. An order of certiorari do issue to bring to this honourable court for the purposes of being quashed, the following three (3) decision for being unconstitutional invalid and in breach of articles 40 and 47 of the constitution.

a. Decision by the 1st respondent to have revoked the petitioner's title to Lr NO. 209/11963 (IR No. 63894) vide special Kenya Gazette Notice dated 17th July 2017.

b. Decision of the 2nd respondent to have revoked and reverted to the public the petitioners title to LR No. 209/11963 (IR No. 63894) vide its letter dated 26th August 2016 and minutes dated 5th September 2016.

c. Decision of the 3rd respondent to placing caveat on the petitioner's title to Lr No. 209/11963 (IR No. 63894 on 29th September 2016.

b. An order of prohibition do issue to prohibit the respondents' by themselves their servants, agents or whomsoever from alienating the petitioner's parcel of land comprised in title LR No. 209/11963 (IR 63894) or in any manner interfering with the petitioners' ownership and possession of the said land.

c. An order of prohibition do issue to prohibit the respondents' by themselves, their servants, agents or whomsoever from in any manner issuing any title and/or license in respect to the petitioners land comprised in title LR No. 209/11963 (IR 63894 or registering any encumbrance thereon.

d. A declaration be made that the certificate of title to the petitioners in respect to the suit property LR No. 209/11963 (IR 63894) is conclusive evidence of ownership and that the petitioners are the absolute and indefeasible owner of the suit property.

e. A declaration do issue that the 1st respondent gazette notice number 6865 dated 17th July 2019 purportedly revoking the petitioners title to LR No. 209/11963 is unconstitutional and invalid and in breach of articles 40 and 47 of the constitution.

f. A declaration that the petitioners are the absolute and legitimate owners of plot title LR No. 209/11963 having inherited the same from a bonafide purchaser for value and who derived his title through a legal established process and therefore cannot be deprived and or disposed of such private property without due compensation by the respondents of its true and current market value for being contrary and in violation of the constitution.

g. An order of injunction be issued to restrain the respondents by themselves, their servants, agents, workers, officers or whenever authorized on their behalf from giving effect or implementing in any manner whosoever the gazette notice number 6865 dated 17th July 2019 alienating, revoking, allotting or in any manner interfering with the petitioners possession of LR No. 209/11963 for being in violation fo articles 40 and 47 of the constitution.

h. Costs of this suit.

6. The petition is supported by the affidavit of James Gatonga Maina a director of the 1st petitioner sworn on the 26th March 2018 and a supplementary affidavit sworn by John Kaguma Maina a director of the 2nd petitioner, on the 26th March 2018.

7. The petition is opposed. There is a replying affidavit sworn by Brian Ikol, the Acting Director Legal Affairs and Enforcement of the 1st respondent, sworn on the 22nd November 2018. He also deposes that he is a member of the Review of Grants and Dispositions Committee, established within the National Land Commission to oversee the review of grants and dispositions of public land pursuant to Section 14 of the National Land Act.

8. He further deposes that the 1st respondent sought to review the legality of the grants over parcel of land known as LR No. 209/11963 (IR No. 6389) situated at South C Nairobi. The decision to review the legality of this grant was made following a complaint made by the County Government of Nairobi alleging that the grant was acquired in an unlawful manner.

9. That before commencing review of grant over suit property, the 1st respondent caused to be published notice as appearing on 28th October 2016 in the standard newspaper, informing members of the public of the 1st respondent's intention to review the legality of the grants contained therein in the notice. The notices also required all interested parties to tender their written representations and documentation to the 1st respondent. The suit property was amongst the listed properties and scheduled for hearing at ACK Bishop annex on 17th November 2016. That pursuant to the notices all parties who appeared before the 1st respondent with claims over the said suit properties, were accorded fair opportunity to put forward their case and present all the relevant documents in their possession for inspection by the 1st respondent.

10. There are also grounds of opposition filed by the 2nd respondent dated 23rd October 2018. It appears the 3rd respondent did not do any response to the petition.

11. On the 5th February 2019 the court directed that the petition be canvassed by way of written submissions.

The Petitioner's Submissions

12. The petitioners acquired the said plot legally and lawfully through transmission from the Estate of Maina Gatonga. The deceased vide a sale agreement dated 4th November 1991 purchased the suit property from Keriyeke Clinics Developers who had been allotted the same vide a letter of allotment dated 23rd July 1993. The 2nd respondent on 13th February 1997 approved the petitioners' predecessor's building plans for construction of domestic building, shops and flats. The plans were approved by the offices of the Director of City Planning and Architecture which department was well versed with the user of the subject property.

13. The petitioner's predecessor (Maina Gatonga) acquired a valid and legal title pursuant to the allotment of the suit property by the Commissioner of Lands and requisition of the title and change of user by the 2nd respondent was proper. The Petitioners were not invited to the Nairobi City County Executive Committee on its meeting of 24th August 2016 or any other. They were also not notified by the 3rd Respondent of the registration of the caveat or the reason for registering the said caveat against their title. The petitioners were never furnished with the complaint or any investigation carried out or documents to establish the allegations or complaint of the 2nd respondent, that the suit property was set aside for use as a children's play grounds for deliberation or consideration by the 1st respondent.

14. Article 47 of the constitution as read together with the Fair Administrative Actions Act, 2015 guarantees every citizen a fair administrative action while articles 50(1) of the Constitution guarantees every person a right to a fair hearing which right the petitioners' were totally denied. The 1st respondent in exercising its administrative duties ought to bear in mind the rules of natural justice and in particular the right to a fair hearing.

15. The 2nd respondent through its relevant departments was made aware, notified and approved the change of user of the subject property and hence the reason why it has been invoicing the petitioners for land rates and receiving land rates payments. The 2nd respondent has not demonstrated that it had any title to the property. It has not demonstrated that the suit plot had been allocated to any public body for public use or at all. The respondents' decisions having contravened section 23(1) of the RTA ought to be quashed. The respondents have not demonstrated that the suit property is public land as defined under Article 62(1) of the Constitution for it to fall within the jurisdiction of the 1st respondent. They have put forward the case of **Stephen Mwangi Murithi vs National Land Commission & 3 Others [2018] eKLR**. The petitioners pray that the orders be granted.

The 1st Respondent's submissions

16. The 1st respondent operates as a quasi judicial body within the full meaning of Article 169 (1) of the Constitution and the procedure of carrying out this mandate is clearly set out under section 14 of the National Land Commission Act. The said property was originally public land converted to private land. The 1st respondent is supposed to probe how private individuals acquired public land. It has put forward the case of **Muktar Saman Olow vs National Land Commission JIR 376 of 2014**.

17. Where as Article 40 of the Constitution protects right to ownership of the property this particular right is not absolute, Article 40(6) provides that right under this Article cannot extend to any property that has been found to have been unlawfully acquired.

18. The 1st respondent accorded all parties who appeared before it an opportunity to present their case and all relevant documents thereto for inspection by the 1st respondent. The 1st respondent sitting as a quasi-judicial body was able to carry out its proceedings and made its determination, one which that the petitioner's were not happy with requiring them to prefer an appeal and not a constitution petition against its determination. The 1st respondent did not in any way violate the petitioners' constitutional rights. It prays that the petition be dismissed

with costs to the 1st respondent.

The 2nd Respondent's Submissions

19. Article 67(2) (e) of the Constitution Section 5(1)(e) of the National Land Commission Act 2012, provides that anybody can initiate a complaint to the National Land Commission including the National Land Commission itself on its own motion. There was no decision made by the 2nd respondent capable of being challenged at the stage of the 2nd respondent's executive committee meeting. It has put forward the case of **R vs Registrar of Political Parties & 6 Others Ex parte Edward Kings Onyancha Maina & 7 Others [2017] eKLR**. The only decision maker whose decision would be final as adverse to or in the interest of the petitioner would be the National Land Commission.

20. It is before the National Land Commission that the petitioners ought to claim the issue of fair hearing and fair administrative action. The 2nd respondent was merely a complainant to an administrative body, the 1st respondent. The provisions of the County Government, Act 2012 do not contemplate the presence of the petitioners at the County Executive Committee meeting. The 2nd respondent is not liable for any of the reliefs sought against it and the petition ought to be dismissed.

21. I have considered the petition, the affidavits in support and the annexures. I have considered the affidavits in response, the grounds of opposition, the written submissions made on behalf of the respective parties together with the authorities cited. The issues for determination are:-

i. Whether the 1st respondent had jurisdiction to review the grant with respect to LR No. 209/11963 (IR 6389) ("the suit property").

ii. Whether the petitioners' constitutional rights were violated?

iii. Whether the petitioners are entitled to the reliefs sought.

iv. Who should bear costs?

22. It all started with the minutes of the 2nd respondent dated 5th September 2016 during a meeting of the County Executive Meeting held on 24th August 2016, it was resolved:-

"Children's playground in South C- LR NO. 209/11963"

A report on the children's playground on South C-LR No. 209/11963 was submitted. It was noted that the ministry of lands allocated the plot to a Mr. Maina Gatonga on 23rd November 1993. The members considered the matter and it was recommended that the allocated be cancelled and the land be repossessed.

Resolved; that CECM-urban planning & land address a letter to the ministry of lands for the allocation to be cancelled and the land be repossessed.

Action by: CECM, urban planning and Lands".

23. On 26th August 2016, the 2nd respondent wrote to the 1st respondent regarding the suit property inviting the commission to investigate the allocation of the suit property to private proprietors.

24. The 1st respondent after putting the requisite notices in the Daily Newspapers revoked the said title. The said revocation was later gazetted and the 3rd respondent placed a caveat.

25. I agree with the 2nd respondents submissions that no decision was made in its executive committee meetings capable of being challenged. Section 2 of the Fair Administrative Action Act 2015, defines a decision as follows:-

"Decision" means any administrative or quasi-judicial decision made, proposed to be made or required to be made, as the case may be".

As stated above the 2nd respondent did not make any decision capable of being challenged hence the reliefs sought by the petitioners against the 2nd respondent cannot lie.

26. The 1st respondent is an independent commission established under article 67(1) of the constitution and is operationalized by the National Land Commission Act, and has as its fundamental functions the management of public land on behalf of the National and County Government. Section 14 of the National Land Commission Act mandates 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.

I am guided by the case of **Muktar Saman Olow vs National Land Commission JR 316 of 2014**.

27. Whereas Article 40 of the Constitution protects the rights to property, this protection does not extend to title founded on an unlawful acquisition. Article 40(6) of the Constitution provides that:-

“The rights under this Article do not extend to any property that has been found to be unlawfully acquired”.

28. It is not clear how Kenya Developers Limited acquired the suit property which they later purportedly sold to Mr. Maina Gatonga (deceased). It is not clear if the said Maina Gatonga did due diligence to establish that the initial allottee had acquired the suit property legally and procedurally.

29. In the case of **Chemey Investment Ltd vs A.G & 2 Others [2018] eKLR** the Court of Appeal held thus:

“As this court’s stated in Arthi Highway Developers Limited vs West End Butchery Limited & 76 Others (Supra), only a foolhardy, and we may add, a careless or fraudulent investor would purchase land such as the suit property “with the alacrity of a potato dealer in Wakulima Market”. And further in Flemish Investments Ltd vs Town council of Mariakani, CA No. 30 of 2015, in an appeal where the appellant who had fraudulently obtained registration of public property in his name but claimed to be an innocent purchaser for value without notice, this court stated:-

A bona fide purchaser exercising due diligence would be expected to inspect the property he is buying, to ascertain its physical location, persons, if any, in occupation, developments, buildings and fixtures thereon, among others. If indeed the appellant honestly believed that plot no. 34 and the cattle dip on it were part of the suit property, he would have rehabilitated the cattle dip as his property, or simply demolished it, not to pester the respondent for its relocation. For a party who was buying a commercial property rather than a ranch, the presence of a cattle dip on the property should have rung alarm bells”.

30. I find that the 1st respondent accorded all parties who appeared before it on opportunity to present their case and all relevant documents thereto for inspection by the 1st respondent. I find that it complied with Articles 47 and 50 of the Constitution. I agree with the 1st respondent’s submissions, if the petitioners had an interest on the review proceedings then they were under an obligation to appear before the 1st respondent state their claim, submit all relevant documents in support of their case and participate in the proceedings thereon.

31. I find that the petitioners have failed to prove that their constitutional rights have been violated and/or infringed. It follows therefore that they are not entitled to the reliefs sought. Consequently, I find no merit in this petition and the same is dismissed with costs to the 1st and 2nd respondents.

It is so ordered.

Dated, signed and delivered in Nairobi on this 30th day of January 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Gichohi advocate for the Petitioners

Ms Kabuthu for Mr. Ataka for the 2nd Respondent

No appearance for the 1st Respondent

Kajuju - Court Assistant