



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

JUDICIAL REVIEW No. 29 OF 2018

REPUBLIC.....APPLICANT

VERSUS

NATIONAL LAND COMMISSION..... RESPONDENT

ESTATE OF FREDRICK KUBAI (DECEASED).. INTERESTED PARTY

SAMSON NG'ANG'A MWANGI..... EX PARTE APPLICANT

JUDGMENT

1. The ex parte applicant herein having obtained leave to commence judicial review proceedings on 27th November 2018 filed Notice of Motion dated 13th December 2018 in which he seeks the following orders:

1. THAT this Honourable Court be pleased to issue an order of Certiorari to call for and quash the decision of the Respondent herein vide the Kenya Gazette Notice 11714 of 9th November, 2018 page 3978 and 3979, fourteenth row and first row respectively in respect of cancelling title LR. No. 1144/845 whose location has erroneously been stated as NAIROBI in the name of the Ex-parte Applicant/Subject and for the same to revert back to the Interested Party.

2. THAT this Honourable Court be pleased to issue an order of Prohibition prohibiting the Respondent from dealing in any manner whatsoever, investigating and reviewing the title of the property known as L.R. No. 1144/845 Original Grant no. I.R. 37534.

3. THAT costs of this application be provided for.

2. The application is supported by an affidavit sworn by the ex parte applicant. He deposed that he is the registered proprietor of the property known as L.R. No. 1144/845 situated in Naivasha Township. That he purchased the property from Fredrick Kubai (deceased) and that it was transferred to him. He has been in possession of the property since 1993 and that he has developed it and resides on it with his family. He added that he learnt that proceedings to review his title were commenced following complaints by members of the deceased's estate who alleged that he acquired it fraudulently. He later learnt that the respondent had through Gazette Notice 11714 of 9th November 2018 made a determination and ordered the Chief Land Registrar to revoke his title. He added that the respondent never gave him notice of the review.

3. The respondent filed grounds of opposition in which it stated that the application does not meet the threshold for judicial review, that the issues raised touch on ownership of the property which can only be determined in an ordinary suit and that the subject decision was made in quasi-judicial proceedings hence the proper remedy ought to be an appeal as opposed to judicial review proceedings. Beyond filing the grounds of opposition, the respondent did not file any replying affidavit or even written submissions as directed by the court. It equally did not attend court.

4. On its part, the interested party was represented in court by counsel and informed the court that it does not oppose the application. Additionally, the interested party entered into a consent with the ex parte applicant to the effect that no costs herein should be ordered against it.

5. In his submissions, the ex parte applicant argued that the suit property is private land and that in view of the provisions of **Article 68 (c) (v)** of the **Constitution** and **Section 14(1)** of the **National Land Commission Act**, the respondent lacks the mandate to review grants of private land. Consequently, the respondent acted beyond its mandate and judicial review orders are available. The cases of **Republic v National Land Commission Ex-Parte Cecilia Chepkoech Leting & 3 others [2016] eKLR** and **Republic v Chairman & Members of National Land Commission Ex Parte Turf Developers Ltd [2016] eKLR** as well as **Section 7 (2)** of the **Fair Administrative Action Act** were cited in support of that argument. Additionally, the ex parte applicant argued that it was deprived of a hearing.

6. I have carefully considered the application, the supporting affidavit, grounds of opposition and the submissions. As previously noted, the

responded did not file any replying affidavit and the interested party does not oppose the application. Thus, the facts placed before the court by the ex parte applicant are uncontested. From the material on record, I am satisfied that the ex parte applicant is the registered proprietor of the property known as L.R. No. 1144/845 Grant Number I.R. 37534 situated in Naivasha Township. The property was transferred to him on 19th May 1993. Prior to that date, the registered proprietor was Fredrick Polwarth Kibuthu Kubai who had obtained a grant from the Government of Kenya on 1st March 1982. On the basis of Gazette Notice 11714 of 9th November 2018, I am further satisfied that the respondent undertook a review of ex parte applicant's title to the suit property, made a determination that the property was acquired fraudulently and ordered that title to the property reverts to the estate of Fredrick Kubai (deceased).

7. Land in Kenya is categorized under **Article 61** of the **Constitution of Kenya 2010** as being either public, community or private. Public land is defined at **Article 62(1)** as follows:

62. Public land

(1) Public land is—

- (a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;**
- (b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;**
- (c) land transferred to the State by way of sale, reversion or surrender;**
- (d) land in respect of which no individual or community ownership can be established by any legal process;**
- (e) land in respect of which no heir can be identified by any legal process;**
- (f) all minerals and mineral oils as defined by law;**
- (g) government forests other than forests to which Article 63(2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;**
- (h) all roads and thoroughfares provided for by an Act of Parliament;**
- (i) all rivers, lakes and other water bodies as defined by an Act of Parliament;**
- (j) the territorial sea, the exclusive economic zone and the sea bed;**
- (k) the continental shelf;**
- (l) all land between the high and low water marks;**
- (m) any land not classified as private or community land under this Constitution; and**
- (n) any other land declared to be public land by an Act of Parliament—**
 - (i) in force at the effective date; or**
 - (ii) enacted after the effective date.**

8. On the other hand, private land is defined at **Article 64** as follows:

Private land consists of —

- (a) registered land held by any person under any freehold tenure;**
- (b) land held by any person under leasehold tenure; and**
- (c) any other land declared private land under an Act of Parliament.**

9. Since the ex parte applicant is the registered proprietor of the suit property herein, the said land can only fit under the description of private land as defined at **Article 64**. This court has not been shown any evidence that disproves the ex parte applicant's ownership of the suit property.

10. According to the respondent, it undertook a review of the ex parte applicant's title pursuant to **Article 68 (c) and (v)** of the **Constitution**

and Section 14 of the National Land Commission Act. Article 68 (c) and (v) provides:

Parliament shall—

...

(c) enact legislation—

...

(v) to enable the review of all grants or dispositions of public land to establish their propriety or legality; [Emphasis supplied]

11. On the other hand, Section 14 of the National Land Commission Act provides:

14. Review of grants and dispositions

(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). [Emphasis supplied]

12. A reading of Article 68 (c) and (v) of the Constitution and Section 14 of the National Land Commission Act reveals that the mandate of the respondent to review grants or dispositions under the said provisions is limited to public land only. I had occasion to consider the scope of that mandate in Republic v National Land Commission; Estate of the Fred Kubai (Interested Party); Ex-parte: Comply Industries Limited [2018] eKLR where I stated as follows:

11. While I agree that the respondent can in its review mandate enquire into a grant of public land to an individual, nowhere in the law is the respondent given mandate to review a grant from one private individual to another. That is the remit of the court. The respondent's main function is to manage public land on behalf of the national and county governments. That function has been widened by section 14 of the Act to include reviewing grants or dispositions of public land to establish their propriety or legality. The reasoning behind that is clear: if public land has been improperly converted to private land then the respondent has the mandate to revert it to the public. That jurisdiction does not extend to being arbiter in entirely private disputes. Besides, the respondent's limited resources, which are public resources, must be utilised prudently, to protect public land which is facing threat left right and centre. ...

13. My position on the law in this regard remains the same. I am not alone in that persuasion. See Republic v Chairman & Members of National Land Commission Ex Parte Turf Developers Ltd (supra). It will be noted that in this case, the respondent upon ordering the Chief Land Registrar to revoke the ex parte applicant's title, went ahead to order that ownership of the suit property reverts to the deceased's estate, a private entity. Clearly, the review by the respondent served purely private as opposed to public interests. In purporting to review the ex parte applicant's title to the suit property which was private land at the time of the review, the respondent acted in excess of its mandate and without jurisdiction. In such circumstances, certiorari and prohibition can be granted. See Kenya National Examination Council v Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR. The contention by the respondent that the application does not meet the threshold for judicial review, or that the issues raised touch on ownership of the property which can only be determined in an ordinary suit or that the subject decision was made in quasi-judicial proceedings hence the proper remedy ought to be an appeal as opposed to judicial review proceedings simply do not hold.

14. In view of the foregoing, I am satisfied that the ex parte applicant has made a case for the judicial review orders of certiorari and prohibition. I therefore make the following orders:

a) An order of certiorari is hereby issued quashing the decision of the respondent herein contained in Kenya Gazette Notice Number 11714 of 9th November, 2018 at pages 3978 and 3979 thereof directing the Chief Land Registrar to revoke the ex parte applicant's title to the parcel of land known as L.R. No. 1144/845 Grant Number I.R. 37534.

b) An order of prohibition is hereby issued prohibiting the respondent from dealing in any manner whatsoever, investigating and reviewing the ex parte applicant's title to the parcel of land known as L.R. No. 1144/845 Grant Number I.R. 37534.

c) The ex parte applicant is awarded costs of these proceedings. The said costs to be paid by the respondent.

15. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 30th day of January 2020.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Karanja Mbugua holding brief for Mr Kahiga for the ex parte applicant

No appearance for the respondent

No appearance for the interested party

Court Assistants: Beatrice & Lotkomoi