



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC PETITION NO. 8 OF 2016

IN THE MATTER OF: PLOT NO. MN/111/533 TITLE NUMBER CR 14272

AND

IN THE MATTER OF: ARTICLES 35, 40, 47, 50 AND 67 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTION 14 OF THE NATIONAL LAND COMMISSION ACT

CAROLINE M. MWANDIKU.....PETITIONER

VERSUS

THE NATIONAL LAND COMMISSION.....RESPONDENT

JUDGMENT

1. By Petition dated 18th May 2016 as amended on 28th February 2018. Caroline M Mwandiku(the Petitioner) prays for the following orders against the National Land Commission (the 1st Respondent):-

a) A declaration that the Respondent has infringed the Petitioner's Constitutional rights to a fair hearing, fair administrative action, right to protection of legitimately acquired property and the right to acquire and own land;

b) A declaration that the Petitioner is entitled to be provided and to access the Respondent's rules of procedure and practice and all the Judgments, decisions, orders, directions, recommendations and findings the Respondent has made or delivered since the establishment.

c) A declaration that the Respondent does not have and had no jurisdiction to interfere with the alienated land, private land, and or to entertain any complaint or purport to determine matters touching on alienated land, private land or land that has a valid title or to investigate or conduct or review any matter relating to alienated land, private land, or title of the suit property or suit land;

d) A declaration that the matter pertaining to the Petitioner's suit property concerns the occupation of and title to land whose jurisdiction is vested to the High Court Environment Court(sic) under Article 162(b) of the Constitution and the Respondent has no jurisdiction over the same;

e) An order restraining the Respondent from hearing, deliberating, reviewing, investigating, recommending for cancellation or cancelling title to the suit property;

f) An order of injunction restraining the Respondent from dealing with or in any way interfering with the suit property;

g) A declaration that the Respondent has no jurisdiction available to them to deal in any way with matters or complaints or documents whose determination is pending before the Court and in any event, the decision of the Court is final;

h) An order directing the Chief Registrar and his agents to remove all restrictions placed on the suit property by the Respondent or any other authority forthwith;

i) An order directing the Respondent to within a specified period publish and make available to the Petitioner and the general public all its Judgments, reviews, decisions and recommendations made in respect of discharging its mandate under Section 14 of the National Land Commission Act and Article 67 of the Constitution;

j) The Respondent do pay to the Petitioner damages to be assessed by this Court as compensation for breach of the Petitioner's Constitutional rights;

k) The Respondent do pay the costs of this Petition and

l) An order of certiorari do issue removing to this Court and quashing the Respondent's decision communicated under Gazette (Notice) No. 6862 of 17th July 2017 to the extent that it relates to the Respondent's decision in respect of the suit property.

2. Those prayers arise from the Petitioner's contention that she is a resident of Kikambala in Kilifi County where she has established her home on Plot No. 533 Section III MN under Title No. CR 27472(the suit property). The Petitioner avers that she has extensively developed the suit property and that she has lived thereon openly for a period exceeding 12 years.

3. Due to the length of stay on the land, the Petitioner together with one Monika Herta Elfriede Behran have filed an Originating Summons being Mombasa HCCC No. 251 of 2013(OS) against the registered owner of the land messrs Mubia Holdings Ltd seeking an order that they have become entitled thereto under the doctrine of adverse possession.

4. The Petitioner avers that while the Mombasa High Court matter was pending hearing she received a letter dated 22nd December 2015 from the 1st Respondent alleging that there was a complaint lodged against her by one Joseph Malindi Lengurie. Shortly thereafter the Petitioner saw an advertisement in a Newspaper on 14th January 2016 indicating that the complaint shall be heard on 2nd February 2016 at Malindi Red Cross Hall.

5. The Petitioner further avers that she was not provided with sufficient information regarding the complaint against her despite her attending the hearing and requesting to be supplied with the same. The Petitioner and her Advocate were eventually locked out of the proceedings and she came to Court and filed these proceedings.

6. It is further the Petitioner's case that on 19th May 2017, this Court issued a conservatory order and an order restraining the 1st Respondent from interfering with or cancelling her title. The 1st Respondent however proceeded and published its determination on 17th July 2017 wherein it directed the Chief Land Registrar to revoke the Petitioner's title.

7. The Petition was initially filed solely against the 1st Respondent. Despite service, the Respondent neither entered appearance nor filed a response to the Petition. Instead, Messrs Mubia Holdings Ltd and one Anne Wanjiru Wairagu though not sued by the Petitioner but styling themselves as the 2nd and 3rd Respondents filed an Answer to the Petition dated 1st October 2018. The answer was later amended on 9th October 2019 and filed herein on 23rd October 2019.

8. The new Respondents aver that the suit property is owned by the 2nd Respondent and that the 3rd Respondent is one of the original directors of the 2nd Respondent. While the said Answer dwells largely on ownership of the disputed property, the said 2nd and 3rd Respondents are in agreement with the Petitioner that the National Land Commission acted out of jurisdiction in considering the reference as the land in issue was private and there was a Court order barring the Commission from considering the matter.

9. I have considered the Petition and the response thereto. I have equally considered the oral submissions made before me by the Learned Advocates for the parties.

10. The Petitioner herein seeks a wide range of orders as can be discerned from the Prayers in the Amended Petition dated 28th February 2018. From the material placed before me it is apparent that the Petitioner is the Co-Applicant in Mombasa ELC Case No. 251 of 2013(OS) together with one Monika Herta Elfriede Behran. In the said case, the Applicants seeks a determination against Mubia Holdings Ltd(the 2nd Respondent herein) in regard to the following questions:-

a) Whether the Plaintiffs are entitled by virtue of adverse possession to all that parcel of land known as Plot No. 533 Section III MN registered as Title No. 14272 situate within Kilifi County (the same suit property as herein).

b) Whether the Plaintiffs should be registered as proprietors of the suit property and

c) If answers to (a) and (b) above are in the affirmative whether the Court should make declarations and orders directed to the Registrar of Titles or his successor to give effect to the said findings.

11. During the pendency of those proceedings and more precisely by a letter dated 22nd December 2015, the 1st Respondent caused the Petitioner herein to be served with a letter indicating that a complaint had been filed with the Commission against the Petitioner by one Joseph Malindi Lengurie. Subsequently by an advertisement carried out in the Daily Nation Newspaper of 14th January 2016, the 1st Respondent informed the Petitioner among others that the Complaints regarding their parcels of land would be heard on 2nd February 2016 at Malindi.

12. The Petitioner asserts that her efforts to stop the 1st Respondent from hearing the matter on the basis that she had no information about

her accuser and that the matter was before the ELC at Mombasa were disregarded by the Commission.

13. That turn of events compelled the Petitioner to rush to this Court and on 19th May 2016 she filed this Petition together with a Notice of Motion application dated 18th May 2016 seeking conservatory orders against the Respondent Commission. On the same day having heard the matter under certificate of urgency, the Honourable Angote J then seized of the matter certified the same as urgent and temporarily restrained the Respondent Commission from interfering with or cancelling the said title.

14. The Commission thereafter entered appearance and filed a Replying Affidavit opposing the said application. Subsequently and having heard both sides, the Learned Judge went on to deliver a ruling on 12th May 2017 wherein he granted the Petitioner conservatory orders and restrained the Respondent Commission from hearing, deliberating upon, reviewing, or making recommendations in regard to the suit property.

15. As it turned out, the Respondent Commission not only proceeded to hear and review the matter but they also made a determination thereon published vide Gazette Notice No. 6862 of 17th July 2017 directing the Chief Registrar of Lands to revoke the Petitioner's title and to vest the same solely upon her Co-Claimant in the Mombasa case the said Monika Herta Elfriede Behrman.

16. This turn of events must have been what led the Petitioner to amend the Petition seeking inter alia an order of certiorari to quash the Respondent Commission's decision.

17. In my view it was not open for the Respondent Commission to proceed with adjudicating the Complaint when it was aware of these proceedings and the fact that this Court had issued conservatory orders restraining the Commission from proceeding as such. The matter was sub-judice and having participated in the hearing of the application the Respondent Commission could not proceed to make its own determination on any aspect of the dispute that was before the Courts.

18. Under Article 162(2) (b) of the Constitution, it is this Court that is mandated to hear disputes relating to the environment, and the use and occupation, and title to land. Once a dispute has been filed as was done by the parties herein in the said Mombasa ELC Case No. 251 of 2013(OS) relating to use and occupation of, and title to land, the Respondent Commission could participate in those proceedings if the issues raised in the suit fall within its mandate and to thereafter abide by the decision of the Court.

19. As it were, an order of certiorari is ordinarily issued by this Court in order to bring the decision of some inferior tribunal or authority to be quashed where the same is found to have been made ultra vires.

20. In the circumstances herein and given that the substance of the dispute remains to be determined in the said Mombasa ELC Case No. 251 of 2013, I shall allow the Petitioner's Amended Petition to the extent only that an order of certiorari is hereby issued quashing the Respondent's decision communicated pursuant to Gazette Notice No. 6862 of 17th July 2017 to the extent that the same relates to the suit property.

21. The Petitioner shall also have the costs of this Petition.

Dated, signed and delivered at Malindi this 23rd day of January, 2020.

J.O. OLOLA

JUDGE