



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC PETITION CASE NO. 2 OF 2018

**IN THE MATTER OF; CONTRAVENTION FUNDAMENTAL RIGHTS AND FREEDOMS AS ENSHRINED UNDER
ARTICLES 19, 20, 21, 22, 23, 24, 27, 35, 40, 47, 50, 67, AND 165 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTIONS ACT 2015

IN THE MATTER OF: THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF: THE LAND ACT NO. 6 OF 2012

AND

IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT NO. 5 OF 2012

BETWEEN

HELLEN WANDIGA NGERUPETITIONER

-VERSUS-

THE NATIONAL LAND COMMISSION RESPONDENT

RULING

1. In his undated amended Petition of 2018, the Petitioner had sought for the following orders;

i. A Declaration that the Petitioner is the legitimate owner of land parcel Nyeri Municipality Block/917

ii. A Declaration do issue that the actions and decisions of the Respondent in respect of the purported direction and decision contained in the Kenya Gazette issue of 17th July 2017 revoking title of land parcel Nyeri Municipality Block/917 was null and void and unconstitutional for lack of a fair hearing and fair administrative action as mandated in the Constitution of Kenya.

iii. An order of Certiorari to remove and bring to this honorable Court and quash the Respondent's decision published in the Kenya Gazette issue of 17th of July 2017 revoking title of land parcel Nyeri Municipality Block/917.

iv. An Order of Mandamus do issue compelling the Respondent to cause to be removed the restriction placed on land parcel Nyeri Municipality Block/917.

v. General damages under Article 23 (3) of the Constitution of Kenya 2010 in favour of the Petitioner against the Respondent being compensation for the Respondent's violation of the Petitioner's rights under Article 40, 47 and 50 of the Constitution of Kenya.

vi. Costs of the suit and the interest thereon at Court's rate from the date of filing suit until payment in full.

vii. Any other or further relief that the Court may deem apt in the circumstance.

2. Pursuant to the filing of the afforested Petition, and before the same could be heard, the Respondent herein conducted a hearing on the 22nd March 2018 in the absence of the Petitioner wherein it made a determination that the certificate of lease held by the Petitioner in relation to the suit property be upheld. This determination was also gazetted in the Kenya Gazette issue of 15th February 2019. Vol. CXXI No.21 therefore compromising prayers i-iii of the Petitioner's Petition. By consent, parties agreed to file written submissions to the remaining prayers of the Petition.

3. The Petitioner framed the issues for determination as follows:

i. The legality of the actions and decisions of the Respondent and procedural impropriety in respect to the purported direction and decision contained in the Kenya Gazette issue of 17th July 2017 revoking the title of the land parcel Nyeri Municipality Block/917.

ii. If there was a breach of the Petitioner's right, whether the Petitioner shall be compensated for such breach by the Respondent.

iii. Who pays for the cost.

4. On the first issue for determination, it was the Petitioner's submission that Article 47(1) of the Constitution provided every person with the rights to administrative action that was expeditious, efficient, lawful reasonable and procedurally fair. That Article 50(1) also granted every person with the right to have any dispute that could be resolved by the application of the law, decided in a fair and public hearing before a Court, or if appropriate, another independent and impartial tribunal or body. That Section 4 of the Fair Administrative Actions Act resonated with Article 47 of the Constitution.

5. The Petitioner further submitted that Section 14(3) of the National Land Commission and Article 50 of the Constitution had provisions for the steps that the Respondent ought to have taken in pursuit of their mandate.

6. That through a letter dated 13th October 2015, the County Land Management Board had asked the Petitioner to present some documents for their perusal and to stop further developments on the suit property. The letter had no time lines on when the documents were to be availed to the Respondent neither did it have any information on a tentative date that the Petitioner could appear before it and inspect any documents from the claimant. This according to the Petitioner did not meet the threshold that was envisaged by Section 14(3) of the National Land Commission Act and Article 50 of the Constitution as sufficient and adequate notice. The Petitioner relied on the decided case of **R vs. Ontairo Racing Commissioners(1969)8D.L.R (3d) 624 at 628 (Ont HC)**

7. While relying on the case of **Republic vs. Secretary of State for the House Department [2003] UKHL 36**, Petitioner submitted that there was no proof of the Respondent having investigated the title and having conducted a hearing before publishing the determination to revoke the Petitioner's title without serving the Petitioner with reasons for such revocation and/or with all proceedings leading to such a determination, which adversary affected the Petitioner.

8. On the second issue for determination, it was the Petitioner's submission that Article 23(3) of the Constitution granted the Court with power to grant appropriate relief including a declaration of a right and an order of compensation as prayed by the Petitioner. That the Respondent through its actions and omissions had infringed on the Petitioner's rights to both property and Fair Administrative action to which the Petitioner suffered insurmountable damage.

9. That through the Respondent's action, the Petitioner had to evict tenants who were in occupation of the rental suit property thereby denying her income from the said rental houses. That the Petitioner was in the process of adding residential units to the property and subdividing the same so as to sale part of it to a potential buyer, which activity was halted by the Respondent's action. That it had now been five years since the Respondent had prevented the Petitioner from developing the property thus denying her the right to enjoy the fruits of her hard work. The Petitioner therefore was deserving of compensation in terms of damages against the Respondent. Reliance was placed on the case of **Siewchand Ramanoop vs. the AG of T & T Pc Appeal No. 13 o 2004** to buttress their submissions.

10. On the issue of costs, the Petitioner relied on the case of **Nyeri HCCC No. 17 of 2014 Cecilia Karuru Ngayu vs Barclays Bank of Kenya & Another** where they submitted that the decision to revoke the Petitioner's title was made on 28th April 2017 two (2) months before the same was gazetted by the Respondent. That the state of affair would have been avoided if the Respondent had procedurally followed the guidelines as stipulated in various statutes. The Respondent's conduct subjected that the Petitioner to humiliating and malicious circumstance aimed at unjustly robbing her property which she had worked hard for.

11. The Respondent was guilty of material non-disclosure by concealing the fact that a determination had been made before the commencement of this suit and as such needed to be punished. That the Petitioner was entitled to general damages, costs and punitive damages to deter the Respondent from engaging in a similar conduct. That the Petitioner was now owed land rent and rates by the Nyeri County Government for five (5) years from the year 2015 to 2019, rent and rates which they prayed the Respondent be ordered to pay.

12. The Application was opposed by the Respondent who submitted that it had undoubtedly acted in pursuance of its mandate as provided for under Article 67(2) (a), 62 and 68(v) of the Constitution as well as Section 14 of the National Land Commission Act where they made their decision in regard to the suit property on the 28th April 2017 and subsequently gazetted the same on 17th to July 2017.

13. That pursuant to the Petitioner's submission forwarded to them for their consideration albeit it being submitted late, the Respondent in good faith granted a review of its decision and thereafter proceeded to gazette in their amended decision on the 15th February 2019 thus curing the present Petition. That in this regard, the only issue remaining was the issue of payment of costs.

14. The Respondent relied on the provision of Section 27 of the Civil Procedure Act as well as on the decided case of **Republic vs. Rosemary Wairimu Munene, Ex-parte Applicant vs Ihururu Dairy Farmers Co-operative Society Limited (sic)** to submit that it was imperative to bear in mind the various steps taken by the parties in the Petition so as to appreciate the trouble taken since the suit was filed. By the conduct of the parties and more so the Respondent to wit that they had proceeded in good faith in reviewing its decision aimed at enabling the Petitioner ample time to forward her submission during the review. To that end, the Respondent could not be penalized for exercising its Constitutional mandate

15. That the successful settlement of the suit before the Court could be attributed to both parties and specifically to the Respondent after it had reviewed its decision thereby necessitating a correction on its earlier decision.

16. The Respondent further relied on the case of **Rufus Njuguna Murithi & 2 Others [2012] eKLR** to submit that costs were a discretion of the Judge/Court.

17. The Respondent also submitted that pursuant to the provisions of Article 68(c) (v) of the Constitution, the law mandated the Respondent to review all grants and disposition of public land with a view to establishing their propriety and legality. That the provisions of Section 14(1) of the Respondent's Act were coached in mandatory terms which made it an obligation on the part of the Respondent to review all grants and disposition of public land.

18. That the Respondent therefore did not occasion a breach of the Petitioner's right under Article 47 of the Constitution through its actions and decision to revoke the Petitioner's title to the suit property. That the Respondent had ensured that the review proceedings were procedurally fair by following the procedures and guidelines laid down under the National Land Commission Act and Review of Grants and Dispositions of Public Land Regulation. That in the case of **Kenya Revenue Authority vs Menginya Salim Murgani [2010] eKLR** it was held that decision-making bodies were masters of their own procedures and were only required to achieve some degree of fairness appropriate to their tasks. That the Court would only intervene if the Respondent had failed to do that which was demanded of them by the Constitution as held in the case of **Diana Keithi Kilonzo & Another vs. Independent Electoral and Boundaries Commission and 10 Others [2013] eKLR**.

19. They sought that the amended Petition be dismissed with no orders to costs.

Determination

20. Pursuant to the above submissions I find the issue for determination as being whether the Petitioner is entitled to cost and damages as prayed, the Petition having been overtaken by events which in essence settled it.

21. The Petitioner's argument was that she had received a letter dated 13th October 2015 from the County Land Management Board which letter had required her to present some documents for their perusal. She had also been required to stop further developments on the suit property. The letter had no time lines on when the documents required from her were to be availed to the Respondent and neither did it have any information on a tentative date and the Petitioner could appear before it and inspect any documents from the claimant. This, according to the Petitioner did not meet the threshold envisaged by Section 14(3) of the National Land Commission Act and Article 50 of the Constitution as sufficient and adequate notice.

22. That the Petitioner had obliged and presented her papers to the County Land Management Board around the month of June 2016 where she had been informed that another party had lay claim to the property. That when she sought to inspect the purported claimant's documents, she had been informed that she would be given an opportunity to inspect the documents and also defend her clean on the suit property.

23. This was not to happen as what followed next was the publication of the gazette notice of the 17th July 2017 by the Respondent herein revoking her title to the suit land herein being Nyeri Municipality Block1/917. A restriction was also registered to the said land. Following this turn of events the Petitioner instructed her counsel who wrote to the Respondent demanding for an explanation as to the turn of events and giving the Respondents notice of their intention to sue.

24. Subsequently the current Petition was filed but before it was set down for hearing, the Respondent informed the Court that it had conducted its hearings on 22nd March 2018 in accordance to Section 14 of the National Land Commission Act where they had made a determination that the certificate of lease held by the Petitioner in relation to the suit property was to be upheld. In essence therefore the Petition was overtaken by events and what remained now was the issue of costs.

25. The Petitioner has argued that following the unconstitutional conduct of the Respondent herein, she had closed down her rental business on the suit premises thereby occasioning her loss of five (5) years rental income. That she had also halted further developments on the land after having already sought for subdivision of the suit land. That now she was owed land rent and rates by the Nyeri County Government for a period of five years from the year 2015 to 2019, rent and rates which she prayed that the Respondent be ordered to pay.

26. The Petitioner has impressed upon the Court that she was entitled to damages. I find that it is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position so far as money can as if his rights had been observed.

27. The law is also clear that for one to be awarded damages there needs to be evidence tendered on the specific sums pleaded. The Petitioner ought to have quantified what she considered to have been the loss she suffered, and even gone further to particularize the same. This way there would be absolutely no basis upon which I would have denied her the damages.

28. It was not enough for the Petitioner to state that she had lost rent income of five years, when her business was closed or that she was unable to develop the suit land.

29. Special Damages must be both **pleaded and proved**, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in **Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716**, at P. 717, and 721 where the Learned Judges of Appeal – Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – held:

Special damages must not only be specifically claimed (*pleaded*) but also *strictly proved*...for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.

30. To this effect the Petitioners prayer for damages fails.

31. On the Second issue touching on cost, Section 27 of the Civil Procedure Act provides as follows:-

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

provided that the costs of any action, cause or other matter or issue shall follow the event unless the Court or judge shall for good reason otherwise direct.

32. Whether the filing of the suit and the various steps taken by the parties and the subsequent resolution of this suit by the Respondent aforesaid amounted to an event as envisaged under section 27 Civil Procedure Act, the issue was handled by Justice (Retired) Richard Kuloba in his book titled, **Judicial Hints on Civil Procedure, 2nd Edition, at page 99** where the Retired Judge stated as follows:-

“The words “the event” mean the result of all the proceedings to the litigation. The event is the result of the entire litigation. It is clear however, that the word “event” is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the “events” of separate issues in an action. Thus the expression “the costs shall follow the event” means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgment in the whole or in part”

At page 101 of the same book, Kuloba authoritatively states as follows:-

“The law of costs as it is understood by Courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the Court to deprive him of his costs-the Court has no discretion and cannot take away the plaintiffs right to costs. If the defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course”

33. The **High Court in Election Petition No. 6 of 2013 Party of Independent Candidate of Kenya and Another -vs- Mutula Kilonzo & Others held as follows:**

That the Principle underlying the award of costs is twofold-

- i. The award of costs is a matter of discretion of the Court that ought to be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at.
- ii. The general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.

34. In the case of **Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd in Judicial Review application No. 6 of 2014** the Court held as follows:-

"The issue of costs is the discretion of the Court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.

35. In the above matter, and after considering the steps taken by the Petitioner to file this Petition after the Respondent had infringed on her right, I find no reason to deny the Petitioner costs. To this effect thereof the Respondent shall pay to the Petitioner the costs of this case and interest at court's rate from the date of filing suit until payment in full.

It is so ordered.

Dated and delivered at Nyeri this 23rd day January of 2020

M.C. OUNDO

