REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 261 OF 2018

ELIAS KIBATHI.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

JUDGEMENT

1. The Petitioner, Elias Kibathi, filed the petition dated 26th July, 2018 seeking for the Court to declare sections 3, 6(2) and 7 of the Cabinet Secretary to the Treasury (Incorporation) Act, Cap. 101 ('Act') unconstitutional, illegal and void in their entirety.

2. The petition is premised on the grounds that sections 3, 6(2) and 7 of the Act are inconsistent with the Constitution as they purport to grant the Cabinet Secretary to the Treasury power to deal with public land yet these functions are solely vested on the National Land Commission ('NLC') as stipulated in Article 62(2) of the Constitution.

3. The Petitioner asserts that the impugned sections violate the principles of public finance as the Cabinet Secretary is able to deal with public property and funds in a manner he deems fit without accounting to anyone. The Petitioner alleges that this creates the risk of public funds being misappropriated and embezzled.

4. It is contended that the Petitioner reached out to the Respondent, the Attorney General, to advise Parliament on the unconstitutionality of the impugned provisions but the Respondent refused to take remedial action.

5. The Respondent filed grounds of opposition on 24th September, 2018 averring that the Petitioner has failed to demonstrate how his constitutional rights have been infringed by the Respondent, or how the impugned sections are unconstitutional or violate the Constitution.

6. The Respondent asserts that the Petitioner has not taken into account the history behind the enactment of the impugned provisions and that the provisions are protected by the doctrine of presumption of constitutionality which places the burden on the Petitioner to prove that the provisions are unconstitutional.

7. It is consequently contended that the petition is frivolous, vexatious, incompetent and improperly before the Court.

8. The question to be answered in this judgement is whether sections 3, 6(2), and 7 of the Act are unconstitutional, illegal and void in their entirety.

9. The Petitioner calls upon the Court to take into account the historical background of land in Kenya as was cautioned in the decision in **Advisory Opinion Reference No. 2 of 2014, Re Speaker of the Senate, Sup, Ct. Advisory Opinion Reference No. 2 of 2013 [2013] eKLR**. The Petitioner draws on the history of abuse of power in land dealings as was established by *the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land* ('the Ndungu Report'). It is pointed out that as a result of the findings in the Ndungu Report, Chapter 5 of the Constitution was incorporated, which established the NLC at Article 67. Thereafter the Land Act and the Land Registration Act were enacted in 2012 as a remedial step to harmonise and consolidate the land laws in Kenya.

10. It is submitted that the intention of establishing the NLC was to have a sole institution dealing with public land in Kenya. The Petitioner complains that Section 7 of the Act seeks to vest all land that is vested in a body corporate pursuant to the provisions of the Chief Secretary (Incorporation) Ordinance, 1958 (now repealed) in the corporation established by the Act. However, according to the Petitioner, such land as described in Section 7 of the Act was declared public land and is therefore within the ambit of the NLC. Reliance is placed on the decision in **Re the Matter of the Interim Independent Electoral Commission [2012] eKLR**.

11. The Petitioner contends that if the impugned provisions continue to exist this will result in power wrangles between the Cabinet Secretary

and the NLC and will handicap and eliminate the NLC. The Petitioner submits that it is the Court's duty to take into account the constitutional principles to ensure that organs bearing primary responsibility for effecting operations that crystallise enforceable rights are enabled to discharge their obligations.

12. On the matter of whether the Court can declare a statute unconstitutional, the Petitioner opines that although the presumption of constitutionality exists, the same is subject to abuse through the enactment of frivolous legislations, and therefore the Court must invoke its jurisdiction to determine the alleged unconstitutionality of the statute. This position is buttressed by reference to the case of **Doctors for Life International v Speaker of the National Assembly & others [2006] (6) SA 416 (CC).**

13. On the principles governing the determination of the unconstitutionality of a statute, the Petitioner relies on the decisions in **R v Big M Drug Mart Ltd [1985] 1 S.C.R. 295; Hambardda Dawakhana v Union of India Air [1960] AIR 554; The County Government of Nyeri & another v Cecilia Wangechi Ndungu;** and **U.S. v Butler, 297 U.S 1 [1936].**

14. It is further submitted by the Petitioner that the Court should examine the provisions of sections 6(2) and 7 of the Act against Articles 62 and 67 of the Constitution, as the land contemplated in the Act falls within the purview of the NLC. The Petitioner further complains that the doctrine of oversight is absent in the impugned provisions thereby contravening Article 62(4) of the Constitution.

15. The Petitioner asserts that although the NLC is independent, it is subject to the Constitution. On this, the Petitioner relies on the decisions in **Re the Matter of the Interim Independent Electoral Commission (supra);** and **Communications Commission of Kenya & 5 others v Royal Media Services & 5 others [2014] eKLR.**

16. It is additionally alleged that Section 3 of the Act is ambiguous as against the holdings in **Keroche Industries Limited v Kenya Revenue Authority & 5 others [2007] KLR 240**; and **Thomas v Minister of Home Affairs 2000 (3) SA 936 (CC).**

17. The Respondent by way of submissions filed on 11th June, 2020 submits that in order for a statute to be declared unconstitutional the court must bear in mind the principles in Articles 259 and 159(2)(e) of the Constitution; the general presumption of constitutionality of every Act of Parliament; the object and purpose of the impugned statute; the effect of the statute; and the need to give purposive and liberal interpretation of the Constitution and read it as an integrated whole.

18. The Respondent in interpreting Article 62(2) of the Constitution asserts that public land is to be managed in a manner contemplated in the said provisions, and the provisions are not absolute and can be limited where necessary. Reliance is placed on the holding in **U.S. v Butler, 297 U.S. 1 [1936]**.

19. The Respondent submits that the Petitioner has failed to show inconsistency between the impugned provisions of the Act and the Constitution and therefore the Court cannot grant the prayers sought. It is asserted that the threshold for unconstitutionality is that the provisions must be ambiguous and incapable of reconciliation with the provisions of the Constitution as was held in **Council of County Governors v Attorney General & another [2017] eKLR.**

20. The Respondent agrees with the provision that grants the Cabinet Secretary to the Treasury power to deal with moveable and immovable property as it is a State corporation which can own and acquire property without approval or management by the NLC or the counties. It is averred that the Cabinet Secretary to the Treasury does not take away the constitutional mandate of the NLC. Reliance is placed on the decision in **Kimoi Ruto & another v Samwel Kipkosgei Keitany & another [2014] eKLR.**

21. On the matter of the presumption of constitutionality, the Respondent relies on the decision in **Council of County Governors v The Attorney General & the Independent Electoral Boundaries Commission [2017] eKLR.**

22. The principles of constitutional and statutory interpretation have been extensively discussed and determined by the courts in a number of cases. Moreover, both parties have provided this Court with decisions on statutory and constitutional interpretation, and therefore I shall merely highlight the principles and apply them to the facts of this case.

23. The starting point of interpreting a statutory instrument is to apply the plain language of the statute. In the case of **Council of County Governors v Attorney General & another [2017] eKLR,** it was posited that the language of the statute should be taken as conclusive, particularly where the language is clear. In that regard the Court stated:

> **"There are numerous rules of interpreting a statute, but in my view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive.[…]**
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> **Thus when the language is clear, then it is not necessary to belabour examining other rules of statutory interpretation. […]"**

24. Furthermore, in **Law Society of Kenya v Kenya Revenue Authority & another [2017] eKLR** it was postulated that:

> **"Where the words of a statute are plain, precise and unambiguous, the intention of the Legislature is to be gathered from the language of the statute itself and no external aid is admissible to construe those words. It is only where a statute is not exhaustive or where its language is ambiguous, uncertain, clouded or susceptible of more than one meaning or shades of meaning that the external aid may be looked into for the purpose of ascertaining the object which the Legislature had in view in using the words in question."**

25. As already urged by the Respondent, it is also important for the court when determining the constitutionality of a statute to keep in mind the principle of presumption of constitutionality. This doctrine of law was stated in **Kenya Human Rights Commission v Attorney General & another [2018] eKLR** thus:

> **"47. There is a general but rebuttable presumption that a statute or statutory provision is constitutional and the burden is on the person alleging unconstitutionality to prove that the statute or its provision is constitutionally invalid. This is because it is assumed that the legislature as peoples' representative understands the problems people they represent face and, therefore enact legislations intended to solve those problems. In *Ndynabo v Attorney General of Tanzania* [2001] EA 495 it was held that an Act of Parliament is constitutional, and that the burden is on the person who contends otherwise to prove the contrary."**

26. With these principles of law in mind, my task is to determine whether the Petitioner has discharged his burden of rebutting the constitutionality of the impugned provisions. In doing so, I must establish whether any ambiguity exists in the wording of impugned provisions which would require further interpretation of this Court. Section 3 of the Act states:

> **"The corporation may acquire, purchase, take, hold and enjoy movable and immovable property of every description, and may convey, assign, surrender and yield up, mortgage, charge, demise, reassign, transfer or otherwise dispose of, or deal with, any movable and immovable property vested in the corporation upon such terms as to the corporation seems fit; and in respect of or in connexion with the matters aforesaid or any of them, the corporation may do all such things and acts as bodies corporate may lawfully do."**

27. The Petitioner complains that ambiguity lies in the use of the words *"…powers to acquire, transfer, or otherwise…deal as the corporation deems fit…"* It is asserted that this reveals that there is no transparency mechanism and accountability procedure by the Cabinet Secretary in exercising his powers and carrying out his functions. However, in further reading the same provision it is stated that the corporation is bound to *"do all things and acts as bodies corporate may lawfully do."* This confirms that there exists a control on the corporation and Cabinet Secretary in exercising his discretion, as he is not only bound by the provisions of the Constitution, but also the laws which regulate body corporates.

28. The intention of Parliament is obvious and unambiguous; that the CS and the corporation are indeed regulated and controlled by the law, and therefore the Petitioner has not proven any ambiguity in regard to the provision. Moreover, it has not been shown that Parliament has intentionally granted arbitrary powers to the Cabinet Secretary or corporation and it cannot therefore be said that the Constitution has been violated.

29. Moving to the next provision, I note that the Petitioner does not precisely set out his complaint against Section 6(2) of the Act but simply alleges that the provision, as read with Section 7, purports to vest public land upon a body corporate. The impugned sections 6(2) and 7 state as follows:

> **"6.(2) Land vested in the corporation shall not be deemed to be Government land except for the purposes of any law relating to rating for the time being in force in Kenya.**
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> **7. Upon the commencement of this Act there shall vest in the corporation by virtue of this section and without further assurance all movable and immovable property vested in, and the benefit and burden of all contracts made by or on behalf of the former Chief Secretary of the Colony and Protectorate of Kenya in the name of "Chief Secretary, Colony and Protectorate of Kenya", a body corporate by virtue of the Chief Secretary (Incorporation) Ordinance, 1958 (now repealed)."**

30. This Court is bound to read the above provisions as written and without enlarging the scope of the provisions or the intention of the legislature, particularly when the language of the provisions are plain and unambiguous. The wording of Section 6 is clear and explicit. The provision does not state that the law applicable to public land is not applicable to the land vested in the corporation.

31. As for Section 7, the Petitioner asserts that all land described in the Section was declared public land and is therefore within the ambit of the NLC. That may indeed be a correct assertion but I do not think there is a law that objects to the registration of public land in the name of a State organ or entity.

32. For purposes of comparison, Articles 62(2) and 67 of the Constitution provide 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.

(2) Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under—

(a) clause (1)(a), (c), (d) or (e); and

(b) clause (1)(b), other than land held, used or occupied by a national State organ.

(3) Public land classified under clause (1) (f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.

(4) Public land shall not be disposed of or otherwise used except in term…

67. National Land Commission

(1) There is established the National Land Commission.

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

(3) The National Land Commission may perform any other functions prescribed by national legislation."

33. The Constitution is clear as to what constitutes public land and the mandate of the NLC in managing public land. From a reading of

Section 3 of the Act and Article 62(2) of the Constitution, it is evident that the corporation is only granted rights over the moveable and immovable property vested in it. It is indeed the law that public land cannot be vested in any person or body except a State organ, and therefore a body corporate such as the CS to the Treasury can only deal with any land vested in that body in compliance with the laws applicable to public land.

34. The mandate of the NLC is to manage land held on behalf of the national and county governments. This is a constitutional mandate which cannot be usurped by any other State organ, let alone a body corporate established under an Act of Parliament. In reading all the seven sections of the Act, I cannot ascertain any phrases or words to the effect that the corporation intends to usurp the mandate of the NLC.

35. I draw support from the decision in **Kimoi Ruto & another v Samwel Kipkosgei Keitany & another [2014] eKLR** that:

> **"40. It is a fine point whether a State Corporation is a State Organ. If one defines a State Corporation to be a State agency, then a State Corporation would fall under the definition of a State Organ as provided for in Article 260 of the Constitution which provides that a State Organ *means "a commission, office, agency, or other body established under this Constitution."* Without pretending to decide the point, I am a bit uncertain as to whether an agency of the State, not specifically established within the framework of the Constitution would be a State Organ. If I hold that a State Corporation is a State Organ, then the land held by it would be public land as defined by Article 62 of the Constitution and if not, then it would fall within the ambit of private land. If it is public land, then its holding will fall under either the County Government or the National Land Commission pursuant to the provisions of Article 62 of the Constitution, unless the land is held, used, or occupied by a national state organ. I do not think that the intention of the law would be to make land held by State Corporations to be managed by the Counties or National Land Commission, or that the purchase or sale of land by a State Corporation, would need to go through the stringent provisions provided for in the Land Act, Act No. 6 of 2012, for the sale of public land."**

36. The cited decision fortifies my opinion that the land held by the Cabinet Secretary to the Treasury though not specifically delineated as public land must be dealt with in accordance with the law and principles applicable to public land. Therefore, the land held by the CS to the Treasury, and the use or disposal of such land shall be deemed to be within the confines of the law relating to public land. There is therefore no conflict between the impugned provisions and the Constitution.

37. For a court to determine that a statute is inconsistent with the Constitution, such inconsistency must be evident from the wording of the text. In **Federation of Women Lawyers Kenya (FIDA) v Attorney General & another [2018] eKLR** it was held that:

> **"27. The duty of a court in construing statutes is to seek an interpretation that promotes the objects of the principles and values of the Constitution and to avoid an interpretation that clashes therewith. If any statutory provision, read in its context, can reasonably be construed to have more than one meaning, the court must prefer the meaning that best promotes the spirit and purposes of the Constitution and the values stipulated in Article 259.**
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> **31. It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot not go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot not legislate itself.**
>
> **32. In construing a statutory provision the first and the foremost rule of construction is that of literal construction. All that the Court has to see at the very outset is, what does the provision say? If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. They are called into aid only when the legislative intention is not clear. But the courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning which cannot be warranted by the words employed by the Legislature. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation."**

38. I wish to reiterate that it is not the place of the court to read into or enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. I cannot purport to add or subtract words from the language the legislature, especially where the true intention can be ascertained from the language of the impugned provisions.

39. I therefore agree with the Respondent that the Petitioner has failed to establish that the impugned provisions of the Act are unconstitutional for usurping the mandate of the NLC.

40. As per my above analysis, I find that the Petitioner has failed to impugn the constitutionality of sections 3, 6(2) and 7 of the Act, and I find that the said provisions are constitutional. The petition is therefore without merit and the same is dismissed. Each party is directed to meet own costs of the proceedings.

Dated, signed and delivered virtually at Nairobi this 15th day of October, 2020.

W. Korir,

Judge of the High Court