



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC MISC APPLICATION NO. 15 OF 2019

(FORMERLY MISC APPLICATION NO. 164 OF 2016)

REPUBLIC.....APPLICANT

VERSUS

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

THE REGISTRAR OF TITLES, NAKURU.....2ND RESPONDENT

AND

ASIS STORE LIMITED.....1ST INTERESTED PARTY

WILLIAM NJOROGE KARANJA.....2ND INTERESTED PARTY

EX-PARTE

KENYA NATIONAL TRADING CORPORATION

J U D G E M E N T

1. Pursuant to leave granted on 9th May 2016 the Ex parte Applicant, the Kenya National Trading Corporation Limited filed the substantive Notice of Motion application for Judicial Review dated 16th May 2016 on 20th May 2016. The Exparte Applicant prayed for orders that:-

1. The Honorable Court be pleased to grant an order of Certiorari to remove into this Court and quash the proceedings and Orders of the 1st Respondent titled "hearing Report on Review of Grants and Disposition of Public Land Nakuru County for Nakuru Municipality Block6/158" which report is dated 17th December 2015 (hereafter referred to as "the Decision of 17th December 2015").

2. The Honorable Court be pleased to grant an order of prohibition to restrain the 1st Respondent and the 2nd respondent by themselves or through any person whomsoever from executing, benefiting from, relying on or implementing the Decision of 17th December 2015.

3. Costs of this Application be provided for.

2. The application was based on the statutory statement dated 21st April 2016 and the verifying affidavit sworn by Michael Munyao the Internal Auditor of the Applicant on 20th April 2016 which were both annexed to the Notice of Motion. The applicant was aggrieved by the decision/ruling made by the National Land Commission, the 1st Respondent herein in its purported exercise of its mandate conferred under the Constitution and under the National Land Commission Act to review the propriety of grants/titles relating to public properties. The Applicant's assertion was that it was the lawful owner of land Grant I.R No.451/1305 Nakuru Municipality registered under the Registration of Titles Act, Cap 281 Laws of Kenya for a term of 81 years from 1st January 1967. The Grant was converted on or about 13th July 1987 and registered under the Registered Land Act, Cap 300 Laws of Kenya as **Nakuru /Municipality Block 6/42** in the exparte Applicant's name and a certificate of lease was issued to the Applicant on 29th October 2001.

3. The exparte Applicant averred that sometime in October 1996 the 1st interested party without the knowledge of the applicant applied to the Nakuru district Plot Allocation Committee to be allocated a portion of the Applicant's land that the Applicant had not developed. The District plot allocation committee without the knowledge of the Applicant approved the 1st interested party's application and issued the 1st interested party with a letter of allotment leading to the subdivision of the applicant's land into two parcels namely **Nakuru Municipality Block 6/158** and **Nakuru Municipality Block 6/159**. The 1st interested party was issued a lease for **Nakuru Municipality Block 6/158** for a term of 99 years from 1st June 1997. The lease was registered on 27th September 1999 and on the same date was transferred to the 2nd interested party for the consideration of Kshs2,300,000/= pursuant to an agreement of sale between the 1st interested party and the 2nd interested party.

4. The Applicant further averred that it was sometimes in 2007 that they discovered that their land had been subdivided and a portion thereof allocated and registered in the 1st interested party's name and that prompted the applicant to report the matter to the Kenya Anti-Corruption Commission (KACC) - now Ethics and Anti-corruption Commission (EACC) to carry out investigations to ascertain under what circumstances the transactions were carried out. The KACC obtained an order from the High Court preserving the suit property vide Nakuru HC Misc application No.386 of 2007 on 28th June 2007. The KACC subsequently filed suit for recovery of the land transferred to the 1st interested party and then to the 2nd interested party vide Nakuru HCCC No. 11 of 2008 which suit has since been transferred to the Environment and Land Court at Nakuru. The suit is yet to be heard and determined by the Court.

5. The 2nd Interested party notwithstanding the suit pending before the High Court proceeded and made a complaint to the 1st Respondent and invited the 1st Respondent in exercise of its Review of Dispositions and Grants jurisdiction under section 14 of the National Land Commission Act No.5 of 2012 to investigate and review the disposition to him and determine that he was an innocent purchaser for value of land parcel **Nakuru Municipality Block 6/158** claimed by the Applicant as public property. That although the Applicant raised objection to the competency and jurisdiction of the 1st Respondent to deal with the matter owing to the pendency of the suit in the High Court, involving the same subject matter, the 1st Respondent nonetheless dealt with the matter and made a decision that the 2nd interested party was a bonafide purchaser for value without notice of any defect in the title and directed the 2nd interested party's occupation of the land to be regularized.

6. The applicant averred that notwithstanding their objection the 1st Respondent proceeded to fix the 2nd interested party's complaint for hearing without any notification to the applicant and that the applicant was not accorded an opportunity to make any representations before the 1st respondent made the impugned decision. It is the Applicant's averment that the 1st Respondent denied the applicant the opportunity of being heard contrary to the rules of natural justice. On that account it is the applicant's contention that the 1st respondent's said decision is amenable to an Order of judicial review in the nature of certiorari and seeks the same to be quashed.

7. The 2nd interested party swore a replying affidavit in opposition to the applicant's Notice of Motion dated 13th September 2016 filed in Court on 23rd September 2016. The 2nd Interested party deponed that he was a bonafide purchaser for value of the suit property without notice of any defect of title. He stated that his company Nakuru Modern feeds Ltd which manufactures animal feeds was in 1999 looking for premises in Nakuru to put up a plant and that he identified a vacant plot adjacent to the Kenya National Trading Corporation which upon inquiry and on conducting a search at the Lands Office he learnt was registered in the name of Asis Stores Ltd, the 1st Interested party herein. The 2nd interested party stated that after he had carried out due diligence and being satisfied the 1st interested party was the proprietor of land parcel Nakuru Municipality Block 6/158 he agreed to purchase the property for a consideration of Kshs2,300,000/= as per the agreement for sale dated 13th September 1999. The 2nd interested party stated that upon purchasing the property he took possession and erected thereupon a factory and a godown and that he enjoyed quiet possession of the property until the year 2007 when the Applicant raised the issue of ownership of the property. The 2nd Interested party averred that the applicant never raised any objection to the 2nd interested party's occupation of the property since 1999 including, during the period the 2nd Interested party was constructing on the property. He stated the applicant never initiated any Court action to recover the land until the KACC commenced their investigations and the Court action.

8. While acknowledging KACC filed Nakuru HCCC No.11 of 2008 against himself, Asis stores Ltd and two other parties, the 2nd interested party contended that the Applicant was using KACC as a front in a fishing expedition. The 2nd interested party nonetheless conceded that the suit was transferred to the Environment and Land Court and has not been concluded.

9. In regard to the proceedings before the National Land Commission, the 2nd Interested party averred that it was the applicant who initiated the complaint before the commission being fully aware that there were pending proceedings before the Court. The 2nd Interested party contended that the Applicant submitted itself to the jurisdiction of the National Land Commission who under Section 14 of the National Land Commission Act, had the power and mandate to handle the matter. The 2nd interested party's position is that the commission procedurally arrived at the decision that they did and the applicant's complaint that the National Land Commission lacked jurisdiction to deal with the matter and/or that the Applicant was denied an opportunity of being heard is without any basis.

10. The 1st Respondent filed a replying affidavit sworn by Brian Ikol, Ag. Director Legal Affairs and Enforcement of the 1st Respondent and the secretary to the Review of Grants and disposition secretariat of the National Land Commission dated 12th November 2018 filed in Court on 14th November 2018.

10. The 1st Respondent deponed that the applicant wrote to the 1st Respondent requesting that land parcel **Nakuru/Municipality Block 6/158** reserved for the applicant's use be regularized in favour of the 2nd interested party. The 1st Respondent affirmed that all the parties were invited by the commission and appeared before the Commission for review hearing on 12th February 2015 though the hearing did not proceed as the parties requested for an adjournment since among other issues the parties were trying to amicably settle the matter.

11. The 1st Respondent further averred that none of the parties as at the time they appeared before the Commission on 15th February 2015 had disclosed there was a pending suit before the High Court that had not been determined. The 1st Respondent stated that the parties had before approaching the commission agreed that all they were seeking was a regularization of the 2nd interested party's title to the suit property and had filed with the commission all documents respecting the suit property. The 1st respondent asserted that after carrying out their investigations respecting the suit property they were satisfied the 2nd interested party was indeed a bonafide purchaser for value without any notice of any defect in the title. On that basis the 1st Respondent rendered the decision /determination dated 17th December 2015 which is the subject of the present application.

12. Responding to the Applicant's assertion that they were not accorded an opportunity to be heard, the 1st Respondent stated that due process was accorded to all the parties and that the 1st Respondent duly considered the written submissions by the parties. The 1st respondent argued that judicial review was not the appropriate forum for the Applicant to challenge the 1st Respondent's decision as the applicant in reality is challenging the merits of the decision which falls outside the purview of judicial review.

13. The application was argued by way of written submissions. The applicant's submissions were filed on 19th June; the 1st and 2nd respondents submissions were filed on 27th November 2019 and 23rd October 2019 respectively while the 2nd interested party filed his submission on 9th April 2018. I have carefully reviewed the pleadings and the filed written submissions that stand out for determination are as follows:-

(i) *Whether the 1st Respondent had jurisdiction to deal with the matter while there was a suit pending before the High court involving the same subject matter?*

(ii) *Whether the application appropriately falls within the purview of judicial review?*

14. Jurisdiction is everything. If a Court or a tribunal has no jurisdiction, it has no business to entertain a matter. If it does so, it will be acting in futility as its proceedings will be null and void for want of jurisdiction. See **owners of motor Vessel "Lillian" -vs- Caltex Oil (Kenya) Ltd (1989) KLR I** where Nyarangi JA observed thus:-

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

15. Under the provisions of Section 14 of the National Commission Act and Article 67 of the Constitution the National Land Commission is clothed with the power and mandate to review grants and disposition relating to public land to determine their propriety or legality. Under Article 68 (v) of the Constitution Parliament was required to enact legislation to empower the commission for the review of grants and dispositions to land. The National Land Commission Act No 5 of 2012 was the resultant legislation and section 14 of the Act enumerated the powers and functions of the commission and such powers included the Power of the Commission to investigate, review and make such recommendations and /or give directions as many be appropriate.

16. While it is not disputed that the National Land Commission had power to investigate and review the propriety of grants and dispositions, the issue did arise whether the National Land commission could seize itself of the matter when the matter was pending before the High Court. Earlier in this judgment it was indicated that the Kenya Anti-Corruption Commission (KACC) in exercise of its mandate under the provisions of the Anti-corruption and Economic Crimes Act, No 3 of 2003 had initiated Nakuru HCCC No.11 of 2008 where they sought recovery of the suit property registered in the name of the 2nd interested party on the basis that the land was public land that had been irregularly and fraudulently acquired by the 1st and 2nd interested parties. The 1st Respondent in its response stated that the Applicant and the 2nd interested party by the time they appeared before the Commission following a complaint by the applicant had not disclosed there was a pending suit before the High Court.

17. Though it is not clear whether after the aborted hearing of the complaint before the Commission on 12th February 2015, there was any other formal scheduled hearing, the applicant filed a preliminary objection before the commission dated 2nd June 2015 objecting to the hearing of the complaint. The applicant's preliminary objection was as follow:-

" TAKE NOTICE that the Defendant/Respondent herein will raise a preliminary point of law at the hearing of the plaintiff's case seeking to oust the jurisdiction of the tribunal to her and determine the case as :-

1. The same matter is also directly and substantially in issue in an ongoing case before the Nakuru High Court civil suit No.11 of 2008 Kenya Anti-corruption commission –vs- Asis stores and 3 others.

2. The rule of subjudice bars the tribunal from hearing this matter as the same is pending for hearing and determination at the High Court.

3. The Nakuru High Court has jurisdiction to hear and determine the case.

18. The preliminary Objection was duly received by the National Land Commission as the copy annexed to the Motion shows the same was received at the Commission's Legal Registry on 26th June 2015. There is nothing on record to show that the National Land commission dealt with the preliminary objection in any manner. Through the preliminary objection, the National Land Commission was notified that there was in existence a suit before the High Court where the land that was subject of their investigation was in issue. The High Court and now the

Environment and Land court had the competence and jurisdiction to deal with the suit instituted by KACC against the 2nd interested party and 3 others. The National Land commission could not properly oust the jurisdiction of the High Court and confer upon itself jurisdiction to handle the matter to the exclusion of the High Court /ELC which was already seized of the matter. That amounted to usurping the jurisdiction of the Court and constituted an affront to the administration of justice.

19. As I have noted the National Land Commission's attention was drawn to the existence of the pending suit before the High Court when the applicant filed the preliminary objection, and the Commission was therefore duty bound to make an inquiry to ascertain whether or not the matter referred to it was in fact pending before the High Court. If the Commission had bothered to make the inquiry, it would have become evident that indeed the matter was pending before the Court, and thus the commission could not legitimately proceed to hear the same.

20. Olola, J somewhat was faced with a similar situation in the case of **Azzuri Limited – vs- George Kadenge Ziro –vs- Kambi Kadenge Ziro & 5 others (2017) eKLR** where the National Land Commission proceed to entertain and hear a matter and render a decision when the same matter was pending before the Malindi ELC. The judge in the case held and I agree with him that the National Land Commission could not legitimately proceed to hear a matter that was under active consideration by the Court as that would offend the sub-judice rule. The judge under paragraphs 19 and 20 of the Court's ruling in the case stated as follows:

19. The proceedings herein were commenced on 19th November 2014. While it would appear that both sides in the litigation were compliant in bringing up the matter at least in the initial stages with the National Land Commission, it is clear in my mind that when the Commission purported to hear the dispute on 5th February 2016 and to issue a Ruling thereon on 17th February 2017, the dispute was pending consideration by this court and was therefore unavailable for discussion by the Commission.

20. Indeed while nothing was placed before me to demonstrate that the Commission was aware of the pending Judicial proceedings, I think it was incumbent upon the Commission as advised by the Supreme Court herein-above to establish first and foremost whether that was a matter in which they could legitimately proceed with their inquiry. As it is evident from the material placed before this Court the proceedings and determination by the Commission were made while these proceedings were pending before this court. Those proceedings in my considered view amount to nothing but an affront to the powers granted to this Court under Article 162 of the Constitution. To the extent that the Commission proceeded to deal with a matter pending consideration, their findings are but a nullity and of no consequence in law.

21. The 1st Respondent and the 2nd interested party have submitted that it was the Applicant who initially submitted the matter to the National Land Commission and thus the Applicant acquiesced to the Commission exercising jurisdiction and therefore the applicant ought not to raise the issue of jurisdiction of the National Land Commission. The subjudice rule is intended to safeguard the independence of the Courts in the exercise of their judicial functions and to prevent abuse of the judicial process. If parties were to be allowed to commence judicial processes relating to same subject matter and involving same parties in different Courts and/or at various times that would breed confusion. The Court process would be liable to abuse.

22. In the case of **Republic -vs- National Land commission and 2 others (2015) eKLR** Korir J stated that even though the National Land Commission and the Environment and Land Court may have concurrent jurisdiction in that the Environment and Land Court could competently handle the matters reserved for the National Land Commission, he nonetheless held that the National Land Commission and the Environment and Land Court cannot have parallel proceedings concerning the same subject matter in the judgment at paragraphs 59 and 60 he stated thus :-

59. However, I do not envisage a situation where both the Respondent (National Land Commission) and the ELC can entertain parallel proceedings between the same parties litigating over the same issues concerning the same parcel of land. Ideally, where the respondent has jurisdiction it ought to be given an opportunity to deal with the dispute. That does not mean that the ELC cannot deal with a dispute in which the Respondent has jurisdiction.

60. In the case before me, the parties had already submitted themselves to the jurisdiction of the Court which has the mandate to deal with the matter. The Respondent had no business commencing parallel proceedings over the same parcel of land. The ELC is in a position to determine the rival interests of the applicant and the interested party as well as the legality of the grant

23. Under paragraph 62 of the judgment the Court further stated as follows:-

62. The attempt by the Respondent to review the grant in question while there are Court cases geared towards addressing that issue is clearly an abuse of power bordering on contempt of Court. In my view the information that the Respondent gather during its investigations will help the court in arriving at a just decision.

24. In the matter before me, the parties agree that Nakuru HCCC No.11 of 2008 which involved land parcel **Nakuru Municipality/Block6/158** was pending and has not been determined. Before the National Land commission, this was the same parcel of land that was the subject matter. The suit had been instituted by KACC on behalf of the Applicant and the public at large for recovery of the land that was alleged to have been irregularly and unlawfully allocated/transferred to the 2nd interested party. In my view the issues that the National Land Commission sought to determine were the same issues that were pending determination by the Court. The National Land Commission in essence commenced a parallel process to the one already pending before the High Court/ELC involving the same subject matter. That was irregular and constituted abuse of the Court process. The proceedings before the National Land Commission were void and a nullity. The commission lacked jurisdiction on account of the matter being subjudice.

25. Having disposed of the first issue by holding that the commission lacked the jurisdiction to deal with the matter, that essentially disposes of the entire application. The second issue flagged was whether the application fell within the scope of judicial review. The applicant has complained that they were not afforded an opportunity to be heard. Other than the record of the commission's proceedings on 12th February,

2015 when the hearing was adjourned to a date to be communicated by the commission, there is no evidence that any subsequent hearing date was communicated. The Commission's vice-Chair Mrs. Abigael Mukolwe in the proceedings on 12th February 2015 is recorded as stating as follows :-

“ We will give you a date; we will communicate with you. Try and submit quickly. I think we will have a date maybe in March. You will be told when we will have the next hearing then you can come and make presentation”.

26. The replying affidavit filed by the 1st Respondent does not indicate there was a further hearing date given by the Commission. Although the applicant filed the preliminary objection on the Commission's jurisdiction in June 2015 there is no indication how the commission disposed of the issue.

27. The impugned decision dated 17th December 2015 does not set out the dates on which the dispute was heard and it was silent on the question of jurisdiction that the applicant had raised.

28. The applicant was entitled to be accorded an opportunity of being heard before the decision was made. On the facts and material placed before me I am not able to hold that the Applicant was accorded the opportunity of being heard as envisaged under Article 47 of the constitution and section 4(4) of the Fair Administration Act 2015. The process and procedure through which the National Land Commission arrived at the decision that they did appear to have been opaque and not transparent. I am mindful that judicial review does not concern itself with the merits of the decision but rather the process/procedure through which the decision was reached. To the extent that the process/procedure is in issue I am satisfied that the application meets the threshold for judicial review. As there is no demonstration that the 1st Respondent followed due process in arriving at the decision that it did, I would in the circumstances agree with the applicant and make a finding that there was a breach of the rules of natural justice and that rendered the decision of the 1st Respondent invalid and of no legal effect.

29. The net result is that I allow the Notice of Motion dated 16th May 2016 and issue an order of certiorari and prohibition as prayed under prayers (1) and (2) of the Notice of Motion.

30. In regard to costs, having considered the attendant circumstances I find this to be a fitting case for the parties to bear their own costs of the suit. It is so ordered.

Judgment dated signed and delivered at Nakuru this 5th day of March 2020.

J M MUTUNGI

JUDGE