



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC JR 3 OF 2019

DOMINIC MUKUI KIMATTA.....APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

AND

SAMSON KIPLAGAT NG'ETICH.....INTERESTED PARTY

J U D G M E N T

1. The Exparte Applicant was granted leave to institute Judicial Review Proceedings on 20th March 2019. The substantive Notice of Motion dated 21st March 2019 was filed on 22nd March 2019 and prayed for the following orders: -

(a) That this Honourable Court be pleased to issue an order of certiorari to bring to the court for purposes of being quashed and to actually quash the Respondent's proceedings and findings contained in the Respondent's letter /document dated 15th January 2019.

(b) That the costs of the Motion and the chamber summons for leave be borne by Dr clement Lenachiru and /or Mr Kosiom Ole Kibelekenya the officials of the Respondent.

2. The application was supported on the affidavit sworn by Dominic Mukui Kimatta verifying the facts and the statutory statement annexed to the chamber summons seeking leave to institute Judicial Review proceedings dated 20th March 2019. It was the Exparte applicant's contention that he validly and properly purchased land parcel **Dundori /Mugwathi Block 2/81** from one Rael Kandagor which was duly transferred to him and he was issued with a Title Deed in his name on 8th August 2014. The Applicant averred that at the time he entered into the sale agreement for purchase of the land on 11th September 2012 (sale agreement marked "DMKIII") the suit land was free of any encumbrances as per the records held at the Lands office at Nakuru.

3. The exparte applicant further averred that after he purchased the suit land in 2013 some persons trespassed onto the land prompting him to file Nakuru ELC No.317 of 2013 where the interested party, Samson Kiplangat Ngetich, was the 9th defendant. The suit was duly heard and a judgment was on 29th March 2017 delivered in favour of the exparte applicant. The Court decreed the exparte applicant to be the rightful owner of the suit property and the 9th defendant (present interested party) was ordered to move out of the suit property and was restrained by way of permanent injunction from entering, cultivating, leasing or in any other manner dealing with the suit land . The exparte applicant further stated the judgment in Nakuru ELC No.317 of 2013 was never challenged and/or appealed against by anybody.

4. The applicant averred that on 2nd August 2018 he was served a letter by the National Land Commission Nakuru County Summoning him to participate in proceedings initiated by the interested party who was the 9th defendant in the already determined suit which proceedings were intended to inquire into the ownership of land parcel **Dundori/Mugwathi Block 2/81** which the Court had already dealt with.

5. The exparte application responded to the National Land Commission vide a letter dated 24th August 2018 and drew the Respondent's Notice to the fact that they lacked jurisdiction to deal with the matter as it fell outside their mandate. Further the applicant explained the matter had been the subject of litigation in ELC No. 317 of 2013 and that the Court had rendered its judgment on the matter.

6. The applicant therefore put forth the following grounds in support of the application for judicial review:-

1. That the Respondent's actions, proceedings and findings were all undertaken in excess of and without any jurisdiction.

2. That the actions, proceedings and findings were all conducted *ultra vires* the powers of the Respondent.

3. That the Respondent allocated itself the appellate jurisdiction in investigating and making a finding /judgment relating to land parcel **No.Dundori Mugwathi Block 2/81**, a matter which had been heard and decided on merits in Nakuru ELC No 317 of 2013: *Dominic Mukuri Kimatta -vs- Regina Ngoiri & 8 others*.

7. The National Land Commission, the Respondent herein did not appear or file any response in spite of being served with the Notice of Motion and all the other accompanying documents.

8. On 9th April 2019 the interested party vide an application of even date applied to be enjoined in these proceedings as an interested party. The court allowed the application for joinder on 24th July 2019. The interested party subsequently on 22nd October 2019 filed a replying affidavit in response to the applicants substantive motion dated 21st March 2019. In the replying affidavit the interested party stated he was the representative of the estate of Kipsoi Arap Kerich who he said was the original proprietor of the suit property. The interested party acknowledged there was a suit ELC No.317 of 2013 involving the suit premises where he was named as the 9th defendant. He acknowledged judgment was entered against him in the suit which he stated he intended to apply to be set aside and/or appeal. He stated that it was upon realizing that a judgment had been made against him in the suit that he decided to lodge a complaint with the National Land Commission. He contended that the National Land Commission had the mandate to handle the matter.

9. Parties filed written submissions which I have duly considered. The primary issue in this application is whether the National Land Commission had jurisdiction to deal with the dispute relating to land parcel **Ndundori/Mwangwathi Block 2/81** firstly, because the court vide ELC 317 of 2013 had dealt with the dispute and the National Land Commission could not exercise appellate jurisdiction over the decision of the Environment and Land Court and secondly, that the National Land Commission had no jurisdiction to investigate titles relating to private land unless the land was initially reserved for public purposes.

10. Both the *ex parte* application and the interested party admit there was a suit Nakuru ELC 317 of 2013 where the *ex parte* applicant was the plaintiff and the interested party was the 9th Defendant. The suit against the 1st – 8th defendants was withdrawn and the plaintiff proceeded with the suit as against the 9th defendant (the present interested party). Judgment in the suit was delivered on 29th March 2017. The court in the judgment made the following orders: -

(i) *That it is hereby declared that the 9th defendant, Samson Kiplangat Ngetich, has no rights whatsoever over the land parcel Dundori/ Mugwathi Block 2/81 which land is registered in the name of Dominic Mukui Kimatta, the plaintiff herein.*

(ii) *That a mandatory injunction is hereby issued directing the 9th defendant, Samson Kiplangat Ngetich and/or his servants/agents and assigns, to forthwith upon service of this judgment and/or decree, move out of the land parcel Dundori/Mugwathi Block 2/81 and in default an order of eviction to issue.*

(iii) *That a permanent injunction is hereby issued restraining the 9th defendant, Samson Kiplangat Ngetich from entering, being upon, cultivating, utilizing, leasing, or in any other way dealing with the land parcel Dundori/Mugwathi Block 2/81.*

(iv) *The plaintiff shall have the costs of this suit as against the 9th defendant, Samson Kiplangat Ngetich.*

11. The National Commission Act did not provide that the Commission would have exclusive jurisdiction in handling matter falling within its jurisdiction and besides its mandate under section 14 (1) of the Act was limited to 5 years from the date of the commencement of the Act. Further and significantly there was no provision that the commission would have jurisdiction to review and/or reopen any matters that may have been heard and determined by the courts or such matters as would be pending before any competent court. If such a situation were to be permitted it would definitely breed confusion and legal anarchy as matters which were long settled would be liable to be reopened and/or that there would be ongoing parallel proceedings where a matter was active before a competent court and another party opted to commence proceedings before the National Land Commission.

12. This court in the case of **Republic -vs- The National Land Commission & 2 others (Nakuru ELC Misc Civil Application No 15 of 2019) 2020 eKLR** in a situation where a party initiated proceedings before the National Land Commission when there was a pending active litigation before this Court and one of the parties objected to the Commission handling the matter on the basis that the commission lacked jurisdiction as the matter was pending before the court, this court in its judgment *inter alia* stated:-

“—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 the 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.”

13. Olola J in the case of **Azzuri Ltd -Vs- George Kadenge Ziro & 5 others (2017) eKLR** held and I agree with him that the National Land Commission could not legitimately proceed to hear and determine a matter that was pending before the court as that would of necessity offend the subjudice rule within the meaning of section 6 of the Civil Procedure Act, Cap 21 Laws of Kenya. the judge in his

judgment stated thus:-

“ 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 any 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.”

14. Equally in the case of **Republic -vs- National Land Commission & 2 others (2015) eKLR** Korir J held that even though the National Land Commission and the Environment and Land Court may have concurrent jurisdiction in that Environment and Land Court could competently handle the matter reserved for the National Land Commission the two cannot have parallel proceedings concerning the same subject matter.

15. In my view in the same manner the National Land Commission cannot handle a matter that is actively pending in a Court competent to hear the matter, the National Land Commission cannot investigate, review and/or handle a matter that such court has heard and made a determination. To do so the National Land Commission would be exercising a power that it does not have. It cannot exercise powers of review or appeal over the decisions of a court with competence to handle the matter. Once the court has made a determination, the matter is rendered resjudicata unless the appeal process is invoked.

16. In the present matter, the court had heard and made a determination respecting the same subject matter that the interested party invited the National Land Commission to investigate and review in exercise of their mandate under section 14 of the National Land Commission Act. The National Land Commission could not purport to investigate and/or review a matter that the ELC had heard had and rendered a decision on. The National Land Commission lacked jurisdiction to handle the matter as it did not have any appellate jurisdiction over the decision of the ELC . Their proceedings relating to the matter were simply a nullity and of no legal effect.

17. Although what I have discussed above is sufficient to dispose of this matter there was the other issue whether the land the subject matter of the dispute constituted public land so as to fall within the mandate of the National Land Commission. Section 14 (1) of the National Land Commission Act sets out the broad mandate of the Commission as follows:-

14(I) 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.

Article 68 (c) (iv) of the constitution provides: -

68 parliament shall:-

(c) enact legislation-

(v) to enable the review of all grants or disposition of public land to establish their propriety or legality .

18. There is ample judicial decisions that have amplified the extent of the Land Commissions mandate. In the case of **Japheth Kipkemboi Magut -vs- National Land Commission and 2 others (2017) eKLR** cited by the interested party, Ombwanyo, J stated that the National Land Commission could review grants of public land as defined under Article 62 of the constitution that had been, converted from public land to private land. In the case of **Republic -vs- National Land Commissioner & Another (2016) eKLR** Emukule , J stated:-

“In the light of clear provisions of the Constitution and the National Land commission, the Commission has no power to revoke titles in respect of private land. The suit land had been alienated and a grant made to the predecessor in title of the applicants and from whom the applicants bought it. The Respondents had no jurisdiction to revoke such title under section 14 (7) of the National Land Commission Act, 2012 in without reference to the applicants. The purported revocation is therefore null and void.”

19. In the instant matter, there is no evidence that the suit property was at any time reserved for a public purpose. What is evident is that the property was never at any time reserved for a public purpose. What is evident is that the property formed part of land that was owned by a land buying company. Members of the company who had subscribed shares were at the time of dissolution of the company allocated land based on their shareholding. The Applicant purchased the suit property from one Rael Kandagor who was registered as proprietor pursuant to the agreement of sale dated 11th September 2012. The sale transaction was completed and the Applicant was registered as owner and issued a title deed. The title issued to the applicant was absolute and indefeasible and could only be challenged under the provisions of Section 26 (1) (a) & (b) of the Land Registration Act 2012. I am satisfied that the suit property was never public land and the disposition to the applicant could not be subject of investigation and/or review by the National Land Commission under the provisions of the National Land Commission Act, 2012. The Commission simply had no jurisdiction over the subject proceedings that gave rise to the decision/recommendation carried in the commission’s letter dated 15th January 2019 were a nullity and of no effect.

20. In the premises the Applicant’s Notice of Motion dated 21st day of March 2019 has merit and I grant the same in terms of prayer (a). As I am not persuaded the officials of the National Land Commission were acting maliciously, and being cognizant that the officers are shielded from personal liability while executing their duties in good faith, I decline to grant prayer (b) of the Notice of Motion. In exercise of my discretion, I order that each party will bear their own costs of the application.

21. Orders accordingly.

Judgment dated signed and delivered electronically at Nakuru this 30th day of April 2020.

J M MUTUNGI

JUDGE