



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC JR 76 OF 2018

FORMERLY MISC.APPL NO. 644 OF 2017

IN THE MATTER OF : AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF PROHIBITION, CERTIORARI, MANDAMUS AND DECLARATORY ORDERS

AND

IN THE MATTER OF : THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF : ARTICLES 10, 20, 21(1), 40(1), 40(3), 40(4), 47, 60, 64, 68, 232(1), 232(2), OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF : LAND ACT, ACT NO.6 OF 2012, & LAND REGISTRATION ACT, NO.3 OF 2012,

NATIONAL LAND COMMISSION ACT, NO.5 OF 2012, KENYA ROADS ACT, NO.2 OF 2007, ENVIRONMENT AND LAND COURT ACT (AS AMENDED AND/OR REVISED FROM TIME TO TIME)

AND

IN THE MATTER OF : THE FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

REPUBLIC OF KENYA.....APPLICANT

AND

THE NATIONAL LAND COMMISSION & 2 OTHERS.....RESPONDENTS

AND

EX-PARTE APPLICANT.....SAMUEL KUNTAI TUNAI

JUDGEMENT

Introduction.

1. The Ex-Parte Applicant, Hon Samuel Kuntai Tunai who is the Governor of Narok Country is the registered owner of LR No. 209/14434 IR No.89461 (suit property). The suit property is along Mombasa Road at the interchange of the Southern By-pass. The 1st Respondent is an Independent Commission established under the provisions of Article 67 of the Constitution of Kenya whose mandate inter alia is to manage public land on behalf of the National and County Governments as well as inquiry on how grants for public land were given so as to

determine their propriety. The 2nd Respondent is a public officer appointed under section 12 and 13 of the Land Registration Act, 2012 for the dispensation of various functions under the Act. The 3rd Respondent is an Authority established under Section 3 of the Kenya Roads Act which is charged with management, development, rehabilitation and maintenance of national Roads.

2. In or around 2004, the 3rd Respondent complained to the 1st Respondent regarding ownership of various parcels along the southern by-pass which the 3rd Respondent claimed were created out of a road reserve meant for the southern by-pass and the Railway. Following these complaints, the 1st Respondent invited the affected persons for a hearing of the review of the affected grants after which various recommendations were made. As for the suit property, the 1st Respondent recommended to the 2nd Respondent to revoke the title deed. It is this decision by the 1st Respondent which prompted the Ex-parte Applicant to file an application for grant of leave to file Judicial Review Proceedings. Upon the Ex-Partes Applicant being granted leave on 21st November 2017, the Ex-Parte Applicant filed notice of motion dated 8th December 2017 in which he sought for the following reliefs:-

1) An order of Prohibition directed at the Respondents, whether by themselves, their servants, agents officers, successors and/or assigns, prohibiting them from taking any steps which would, cumulatively or otherwise result in the revocation of the Title of the Ex-Parte Applicant herein Hon, Samuel Kuntai Tunai over land Reference No.209/14434 (Grant I.R No. 89461) and /or doing anything that would prejudice the rights and interests of the Ex-Parte Applicant over the suit property.

2) An order of Prohibition directed at the 2nd Respondent whether by itself, its servants, agents officers, successors and/or assigns, prohibiting it from revoking the Title of the Ex-parte applicant herein Hon, Samuel Kuntai Tunai over land Reference No.209/14434 (Grant I.R No. 89461)or in any other way implementing the decision and/or order of the 1st Respondent contained in the Gazette No.6865 dated 17th July 2017.

3) An order of Certiorari to remove into the High Court and quash the 1st Respondent's order and/or decision published in the Kenya Gazette, Gazette Notice No. 6865 of 17th July, 2017 by which the 1st Respondent purported to revoke the Title of the Ex-parte Applicant herein Hon, Samuel Kuntai Tunai over land Reference No.209/14434 (Grant I.R No. 89461) and directed that the 2nd Respondent to revoke the said title pursuant to section 14(5) of the National Land Commission Act in total abrogation of the Ex-Parte Applicant's right to fair administrative action.

4) An order of Mandamus directed at the 1st Respondent compelling the Commission to forthwith withdraw Gazette Notice No. (Table 16) published in the Kenya Gazette dated 17th July 2017 in so far and to the extent it purports to revoke the Title of the Ex-Parte Applicant herein, Hon, Samuel Kuntai Tunai over land Reference No.209/14434 (Grant I.R No. 89461).

5) An order of Mandamus directed at the 1st Respondent compelling the commission to follow the statutory requirements set out at section 14(3) of the National Land Commission Act, No.5 of 2012 hold an inquiry with respect to the subject property.

6) A Declaration that the 1st Respondent, in directing the 2nd Respondent to revoke the Title of the Ex-Parte Applicant herein, Hon, Samuel Kuntai Tunai over land Reference No.209/14434 (Grant I.R No. 89461) has violated the Ex-parte Applicant's right to property, as enshrined in Article 40 of the Constitution of Kenya and amounts to unfair administrative action as contemplated under the Fair Administrative Action Act.

7) A declaration that the 1st and 3rd Respondents, on account of the various matters complained of in this application have breached the right of the Ex-Parte Applicant herein, Hon, Samuel Kuntai Tunai to a fair administrative action, as guaranteed under Article 47 of the Constitution, Section 14 of the National Land Commission Act, Part VIII of the Land Act and as provided further under Sections 3,4,5 and 6 of the Fair Administrative Action Act.

8) A declaration that the actions and/or commissions by the Respondents herein, to the extent that they violate the right to property of the Ex-Parte Applicant herein Hon, Samuel Kuntai Tunai as enshrined under Article 40 of the Constitution of Kenya, 2010 and that further their failure to hear the Ex-Parte Applicant or afford him a reasonable opportunity to be heard, amounts to an unfair administrative action.

9) A Declaratory order that, in the exercise of their powers as vested in it by statute and otherwise, the 1st Respondent has failed to comply with the requirements and tenets of fair administrative action contrary to the provisions of section 5 of the Fair Administrative Action Act, Section 14 of the National Land Commission Act, and Articles 10 and 232 of the Constitution of Kenya,2010.

10). An order for monetary compensation on account of the 1st Respondent's violation of the Constitutional and Statutory Rights of the Ex-Parte Applicant herein, Hon. Samuel Kuntai Tunai such damages to comprise general, aggravated and punitive damages.

11. An order do issue that the costs of this application be awarded to the Ex-Parte Applicant, Hon. Samuel Kuntai Tunai.

Ex-Parte Applicant's case

3. It is the Ex-Parte Applicant's contention that he was not given an opportunity to be heard before his title was revoked and that the decision by the 1st Respondent to revoke his title was ultra vires the powers of the 1st Respondent which acted without jurisdiction. The Ex-Parte Applicant argues that failure to give him a hearing was contrary to the Fair Administrative Action Act. The Ex-parte Applicant further argues

that he was not given reasons for the revocation of his title and that the 1st Respondent was statutorily bound to give him reasons for revoking his title.

3rd Respondent's case

4. The 3rd Respondent opposed the Ex-parte Applicant's application based on a replying affidavit sworn by Milcah Muendo on 18th May 2018. The deponent is a surveyor attached to the survey Department of the 3rd Respondent. She contends that the suit property fell within the reserve for the Transport Corridor, Rail and Road (Embakassi - Kibera Railway and the Nairobi Southern By-Pass) and was therefore not available for allocation to the Ex-Parte Applicant. The deponent further contends that the Nairobi South structure Plan No.42/28/85/9 of 5th June 1985 which was prepared by the Department of Physical Planning (Ministry of Lands and Physical Planning) is the one which guides Development and Land use in the area and that that plan did not make provision of private property where the suit property is located.

5. The 3rd Respondent further argued that the plan has never been amended and that no part development plan was prepared as a pre-requisite for allocation of the suit property. The 3rd Respondent argues that a detailed design study of the southern by –pass was undertaken in 1989/1990 and that the suit property was created later on in 1999. The 3rd Respondent forwarded a list of the properties which were illegally created from the road and rail reserve to the 1st Respondent which published a list and called those affected to attend hearings where the owners of the affected grants were to be heard. The call to attend was made through the press but the Ex-parte Applicant did not attend.

6. The 1st Respondent proceeded to determine the validity of the grants and proceeded to publish its decisions thereof. The 3rd Respondent therefore argues that the Ex-Parte Applicant cannot be heard to complain that he was not given a fair hearing. The 3rd Respondent further argues that the suit property was not subject to the process of compulsory acquisition and that therefore the issue of compensation does not arise.

1st Respondent's Contention.

7. The 1st Respondent filed a preliminary objection dated 12th February 2018 in which it contended that the High Court had no jurisdiction to hear the Ex-Parte Applicant's Notice of Motion. These proceedings had initially been filed in the High Court, Judicial Review Division. During the hearing of the application for leave, the issue of jurisdiction was raised by the 1st Respondent but in a ruling delivered on 21st November 2017, Justice Aburili held that she had jurisdiction to deal with the Application. When the 1st Respondent later renewed the issue jurisdiction, Justice Aburili directed that the issue of jurisdiction was to be dealt together with the main application for Judicial Review. The Judge however left the Judicial Review Division of the High Court and the matter was taken over by Justice Mativo who transferred the matter to the Environment and Land Court *suo moto*.

Analysis.

8. I have carefully considered the Ex-Parte Applicant's application as well as the opposition, to the same by 3rd Respondent. The parties had been directed to dispose of the application by way of written submissions. The Ex-Parte Applicant filed his submissions on 15th October 2018. As at 28th January 2020 when this judgement was reserved, the Respondents had not filed their submissions. The Respondents were given 14 days within which to file their submissions. This Judgement was supposed to be delivered on 19th March 2020 but was not due to the disruption by the Covid 19 pandemic. As at the time of writing this judgement in May 2020, the Respondents had not filed their submissions and if any were filed, then they are not in the court file.

9. The issue of jurisdiction has already been overtaken by events in that this matter was transferred from the Judicial Review Division of the High Court to the Environment and Land Court. I therefore do not wish to address the issue even though the EX-Parte Applicant has submitted on it. In any case, these submissions were filed before the file was transferred to this court. The only issue which remain for determination are as set out in the Ex-Parte Applicant's submissions. As I deal with the issues, I remain alive to the fact that in matters to do with judicial review, the court is concerned with the process leading to the decision and not the merits of the decision.

Whether the 1st Respondent has jurisdiction to revoke titles to land where it finds , after an inquiry that such title was irregularly or illegally acquired.

10. I have carefully looked at the submissions of the Ex-Parte Applicant on this issue. The Ex-Parte Applicant submits that the 1st Respondent had no jurisdiction to revoke its title. The Ex-parte Applicant argues that the 1st Respondent should have recommended to the Chief Land Registrar to revoke the title and not for the 1st Respondent to revoke the title by itself. I have looked at the Gazette Notice which was published on 17th July 2017. At page 4243 under the heading **“DETERMINATION OF REVIEW OF GRANTS AND DISPOSITON OF PUBLIC LAND IN RESPECT OF THE FOLLOWING GRANTS AND ORDERS”**, the 1st Respondent stated as follows:-

“IN EXERCISE of the powers conferred by Article 68 (c) (v) of the Constitution of Kenya and section 14 of the National Land Commission Act, 2012, the Chairman of the National Land Commission informs the general public that the National Land Commission upon receipt of complaints from the National Government, County Governments and members of the public, undertook review of grants and dispositions (titles) of public land to establish their legality or otherwise. The Commission via public notices in the national dailies invited all interested parties to appear before it to inspect documents and make written and oral representations and submissions. Consequently, the Commission has made determinations in respect of the following grants/Titles and orders for revocation, regularization, upholding of the titles where applicable as indicated or give further orders. Where the order calls for revocation, the Chief Land Registrar is thereby directed to revoke as per Section 14(5) of the National Land Commission Act and attendant laws.(underling mine).

11. The 1st Respondent did not revoke the Ex-Parte Applicant's title. The 1st Respondent merely directed that the 2nd Respondent proceed to revoke the title in accordance with Section 14(5) of the National Land Commission Act. The Ex-Parte Applicant took the remarks "revoke" in column No.5 in item No.132 table 16 of the gazette to mean that it is the 1st Respondent which revoked his title. This was taken in isolation of the clear directions as contained in the quote in paragraph 10 hereinabove. It is therefore clear that the 1st Respondent acted within its mandate and did not act *ultra vires* its powers.

Whether the 1st Respondent was under a duty to accord the Ex-Parte Applicant an opportunity to be heard and if so, whether the Ex-Parte Applicant was heard before his title was revoked.

12. The Ex-Parte Applicant contends that his title was ordered revoked without him being accorded an opportunity to be heard. On the other hand, the 3rd Respondent contends that the Ex-parte Applicant was afforded an opportunity to be heard but he squandered the chance. I have looked at the pleadings herein. On Friday 17th march 2017, the 1st Respondent invited persons whose titles the southern bypass had affected to attend a public hearing at its offices at the Kenya Bankers Sacco Centre 3rd Ngong Avenue at 10.00 am. Among the properties whose grants were to be reviewed, is the suit property which is listed at number 132 .

13. This Notice was given pursuant to the provisions of the National Land Commission Act which provides that before a title is recommended for revocation , the affected person has to be given an opportunity to be heard. The Ex-parte Applicant was given an opportunity to attend the public hearing but he did not attend. He cannot therefore be heard to complain that the decision by the 1st Respondent was taken without him being afforded an opportunity to be heard. Where a party is given opportunity to be heard but chooses not to attend, hearing can proceed ex-parte and such a person cannot be heard to say that he/she was not given an opportunity to be heard. The Ex-parte Applicant was able to see the Gazette Notice of 17th July 2017 which has limited circulation as compared to publication in a newspaper like the Daily Nation with wide circulation in Kenya. The Ex-Parte Applicant cannot say that he did not see the advertisement. The southern by-pass was constructed in 2012 and the ownership disputes on properties abutting it were in public knowledge. There were cases in court over some of the properties affected. There is no requirement under the National Land Commission Act that notification should be through personal service. I therefore find that the Ex-Parte Applicant was afforded opportunity to be heard but he did not seize it.

Whether the 1st Respondent is under statutory duty to provide reasons for determination that the suit property was illegally or irregularly acquired .

14. The Ex-Parte Applicant contends that he was not given any reason for the decision taken by the 1st Respondent. On this, the Ex-Parte Applicant argues that this was contrary to the provisions of Section 6 (1) and (2) of the Fair Administrative Action Act. This section provides that any person who is likely to be affected or has been affected by any administrative action has a right to be informed of the reasons for such action. In the instant case, the 1st Respondent gave a reason for recommending revocation of the title to the suit property. The reason given which was published in the Gazette Notice was that the suit property among others had been illegally allocated as the land was public utility land. The Ex-Parte Applicant cannot therefore claim that the 1st Respondent did not give any reason as to why the title to the suit property was revoked.

Whether the Ex-Parte Applicant is entitled to the judicial review orders sought.

15. It is clear from the analysis herein above that the 1st Respondent went through a proper process leading to the recommendation to revoke the title to the suit property. There is therefore no basis upon which the court can either grant an order of prohibition, certiorari or mandamus as prayed. Equally, there is no basis upon which any of the declarations sought can be granted. I have already found that the Ex-Parte Applicant's rights under the Fair Administrative Action Act were never violated. This therefore means that the Ex-Parte Applicant is not entitled to any compensation.

Conclusion.

16. For the reasons given hereinabove, I find no merit in the Ex-Parte Applicant's application which is hereby dismissed with costs to the Respondents.

Dated, Signed and delivered at Nairobi on this 21st day May of 2020.

E.O.OBAGA

JUDGE

In the virtual Presence of:

M/s Okina for Ex-Parte Applicant

M/s Masinde for 1st Respondent

Court Assistant: Hilda

E.O. OBAGA

JUDGE