



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC PETITION NO. 11 OF 2018

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS & FREEDOMS

AS ENSHRINED UNDER ARTICLES 19, 20, 21, 22, 23, 24, 40, AND 47 OF THE

CONSTITUTION OF KENYA, 2010

=AND=

IN THE MATTER OF THE GOVERNMENT LAND ACT, CAP 265

(NOW REPEALED)

=AND=

IN THE MATTER OF THE LAND PLANNING ACT, CAP 303

(NOW REPEALED)

=AND=

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT, 2012

=AND=

IN THE MATTER OF THE REVOCATION OF LR NO.1160/262/2, MBANGATHI RIDGE,

KAREN VIDE GAZETTE NOTICE NO.6862 OF 17TH JULY 2017

=BETWEEN=

RIVER TREES MANAGEMENT COMPANY LIMITED.....PETITIONER

=VERSUS=

THE NATIONAL LAND COMMISSION & ANOTHER.....RESPONDENTS

JUDGEMENT

Introduction

1. The Petitioner is a Limited Liability Company incorporated under the provisions of the companies Act and is the registered owner of LR No. 1160/262/2 (suit property). The 1st Respondent is a commission established pursuant to the provisions of Article 67(2) of the Constitution of Kenya and its functions inter-alia include management of public land on behalf of the National and County Governments as well as review of grants to ascertain their propriety. The 2nd Respondent is an officer appointed under section 12 of the Land Registration

Act No.3 of 2012 to undertake various functions under the Act.

2. The suit property is a sub-division of L.R No.1160/262 which was originally owned by George Irvine Robertson. This property was about 19.745 acres. When Robertson wanted to sub-divide the land, the Nairobi City Council advised him to surrender 10% of the land for public purposes as a condition for approval of the subdivision. Robertson was unwilling to surrender 10% of his land. He instead requested the City Council of Nairobi to reserve the 10% for him to construct a surgery where doctors could operate for the benefit of the residents of Karen.

3. Materials presented by the Petitioner show that Nairobi City Council approved the subdivision subject to Robertson surrendering 0.8 hectares to Nairobi City Council for a nursery school. The land was subsequently subdivided into six portions. Robertson had the suit property registered in his name on 16th November 1999. He later transferred the suit property to Graham John Alder and Sara Caroline Wekeham on 11th November 2004. The two then transferred the suit property to River Trees Development Company on 8th November 2012. The suit property was finally transferred to the Petitioner on 4th November 2013.

4. In or around 2014, Dr and Mrs Mogere who are the residents of Karen made a complaint to the 1st Respondent on the ground that the suit property which had been surrendered for public utility purposes had been registered in the name of private entities. The 1st Respondent invited the Petitioner to appear before it on 27th November 2014 for purposes of review of the grant it had but the Petitioner declined to attend arguing that the 1st Respondent had no jurisdiction to deal with private property.

5. The 1st Respondent proceeded to review the grant held by the Petitioner and found that the suit property had been surrendered for public purposes. The 1st Respondent recommended that the 2nd Respondent proceed to revoke the title held by the Petitioner. This is what prompted the Petitioner to file this Petition in which it seeks the following reliefs:

1. A declaration that the Petitioner's fundamental rights and freedoms as enshrined under Articles 40(1), 40(2) (a), 40(3),(b), (i) and 47(1) and 47(2) of the Constitution of Kenya 2010, have been contravened and infringed upon by the Respondents herein.

2. An order of Certiorari to remove into this Honourable Court and quash in its entirety the Gazette Notice No. 6862 dated 17th July 2017 revoking the Petitioner's title LR No.1160/262/2 the suit property herein.

3. An order of mandamus ordering and compelling the Respondents to immediately and without fail remove the caveat registered on the title L R No1160/262/2 on the 29th August 2017.

4. An order of Prohibition directed towards the Respondents restricting /prohibiting the Respondents ,their agents ,officers ,and any person acting under them from interfering in whatever manner whatsoever with the Petitioner's proprietary interest in title LR No.1160/262/2.

5. General, exemplary and aggravated damages under Article 23(3) of the Constitution of Kenya 2010 for the unconstitutional conduct of the Respondents.

6. Any other orders and directions as this Honourable Court may consider appropriate.

7. Costs of this Petition.

8. Interest.

Petitioner's case

6. The Petitioner contends that the suit property was registered in its name on 4th November 2013 and as such it is private property. The Petitioner therefore contends that the 1st Respondent had no jurisdiction to deal with private property. The Petitioner further contends that the 1st Respondent's action amount to compulsory acquisition of the suit property. As a result of the 1st Respondent's action, the Petitioner's constitutional rights under Article 40 and 47 of the Constitution has been infringed.

7. The Petitioner argues that it is LR No. 1160/262/1 which had been surrendered for purposes of construction of a road and that the suit property was not surrendered. The petitioner contends that even if the suit property would have been surrendered, it would not have been developed as it is part of riparian land that borders River Mbagathi and could only be developed with approval of the National Environment Management Authority. The Petitioner further argues that under the Nairobi City Council Town Planning Committee Policy Statement of 12th October 1995, if surrendered properly was not developed as envisaged, then the same would be released to the private sector to develop it with priority being given to the original owner. The petitioner argues that as the suit property was not developed by Nairobi City Council, it should have been surrendered back to George Irvine Robertson at market value for private development. This was not done.

First Respondent's Case.

8. The 1st Respondent's case is that it had jurisdiction to deal with the suit property following a complaint by Dr and Mrs Mogere. The 1st Respondent states that following receipt of the complaint, it invited the Petitioner for a public hearing in which the grants including the suit property were to be reviewed. The Petitioner refused to attend arguing that the 1st Respondent had no jurisdiction to entertain a complaint touching on private property. The 1st Respondent further argues that the petitioner has expressly admitted in its pleadings particularly paragraph 23 of the petition that the suit property is riparian land and therefore the 1st Respondent has jurisdiction to deal with riparian land

which falls under the definition of public land.

Analysis

9. The parties to this Petition were directed to file written submissions in respect of the Petition. The Petitioner filed its submissions on 21st February 2019. The 1st Respondent filed submissions on 13th March 2020. I have gone through the Petition as well as the opposition to the same by the 1st Respondent. I have also gone through the submissions filed by the Petitioner and the 1st respondent. The issues which emerge for determination are as follows:-

1. Whether the 1st Respondent had jurisdiction to deal with the suit property.

2. Whether the petitioner's constitutional rights were violated.

3. Which order should be made on costs

Whether the 1st Respondent had jurisdiction to deal with the suit property.

10. The petitioner argues that the 1st Respondent had no jurisdiction to review grant in respect of the suit property. The Petitioner further argues that the 1st Respondent acted outside its jurisdiction when it purported to review the grant in respect of the suit property. In support of the Petitioner's arguments, it has relied on the decision in **Anisimic Vs Foreign Compensation (1969) 2 AC 147**, where it was held as follows:-

“ It cannot be for the commission to determine the limits of its powers. Of course if a party submits to a tribunal that its powers are wider than in fact they are, the tribunal must deal with that submission. But if they reach a wrong conclusion as to the width of their powers, the Court must be able to correct that, not because the tribunal has made an error of law, but because as a result of making an error of law they have dealt with and based their decision on a matter with which, on the true construction of their powers, they had no right to deal”.

11. The Petitioners also relied on the case of **Republic Vs Nation Land Commission Ex-parte Cecilia Chepkoech Leting & 3 Others (2016) eKLR** where Justice Odunga held as follows:-

“ It is therefore clear that a Tribunal's power must be conferred by the Statute establishing it which statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly. As has been held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority”.

12. In the **Cecilia Chepkoech Leting case (supra)** Justice Odunga went on to state as follows:-

“As I have said above, the jurisdiction of the Commission is, as far as relevant to these proceedings, not defined by the process of acquisition of the land but the status of the land at the time of the investigation and at the effective date. Apart from the Constitution it has not been pointed out to me that there is another definition of public land that would bring private land as defined under the Constitution within the ambit of public land in order for the Commission to have jurisdiction to review its disposition in order to establish the propriety or legality thereof”.

13. Finally the Petitioner relied on the case of **Republic Vs National Land Commission & 3 others Ex-parte Safeway Hypermarkets Limited (2017) eKLR** where Justice Odunga stated as follows:-

“ The court acknowledges that the National Land Commission is an independent commission under the Constitution but the powers and functions vested in it under several statutes including the National Land Commission Act and Article 68 of the Constitution are not absolute powers. Those powers must be exercised within the confines of the law...Therefore, whereas I need not over emphasize that the National Land Commission has power under Section 14 of the Constitution to review titles and dispositions to public land to establish the legality of the titles, that power is not absolute”.

14. In submitting that the 1st Respondent had jurisdiction to entertain the complaint regarding the suit property, the 1st Respondent relied on the decision in **Republic Vs National Land Commission Ex-parte Krystalline Salt 334 of 2014** where Justice Korir stated as follows:-

“Under Section 14 of the National Land Commission Act, the Respondent is given jurisdiction to enforce Article 68(c)(v) of the Constitution and review all grants or dispositions of public land to establish their propriety or legality. In my view, the Respondent can only fulfil this responsibility by querying the process under which public land was converted to private land. I do not see how an unlawfully and irregularly acquired parcel of land becomes out of the reach of the Respondent for the mere reason that it is registered as private property”.

15. The 1st Respondent also relied on the decision in **Republic Vs National Land Commission Ex-parte Holborn Properties Limited (2016) eKLR** where Justice Angote held as follows:-

“I will now deal with the issue of whether the Respondent's mandate is confined to dealings in public land as defined by the Constitution or private land, that is land which has been registered under a freehold or leasehold tenure.....

Although it is true, as submitted by the Applicant's counsel, that for the first time, the 2010, Constitution comprehensively defined at Article 62 what public land entails, the same Constitution recognises the fact that there were other definitions of “public land” even before its promulgation in the year 2010.

I say so because the Constitution has defined “public land” in Article 62 (1) (n) (i) as follows:-

“62 (1) Public land is-

(n) any other land declared to be public land by an Act of Parliament-

(i) in force at the effective date;....

Having recognised the fact that even before it defined in detail what “public land” entailed there still existed “public land”, the review of grants or dispositions of public land to establish their property or legality was retrospective.

The body that was to be given the mandate to review such grants or dispositions by Parliament was not only supposed to deal with public land that was illegally or irregularly allocated after the promulgation of the Constitution but even before. That is what the Kenyan people wanted as discerned from the Ndung'u Commission Report and the National Land Policy, which preceded the Constitution.

Although the Constitution has defined private land to consist land registered under any freehold or leasehold tenure, and whereas Section 14(1) of the National Land Commission Act gives the Respondent the powers to review all grants or disposition of public land, it follows that such a review can only entail land that has been converted from public land to private land.

I say so because the Respondent cannot review what is still, according to the records, public land. One must have acquired land that was initially public land and issued with a title document, either as a freehold or leasehold, for a review to be done.

It is therefore not true that once land falls under the purview of the definition of “private land”, the same cannot be reviewed. Indeed, it is only such parcels of land that can be reviewed by the Respondent with a view of recommending to the Registrar to revoke the title...”.

16. The 1st Respondent dealt with the suit property in accordance with its mandate under sections 14(1) of the National Land Commission Act which provided as follows:-

“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”

17. Section 14(1) of the National Land Commission Act was enacted pursuant to the provisions of Article 68 of the Constitution which provides as follows:-

Parliament shall-

a.

b.

c. enact legislation-

i.

ii.

iii.

iv.

v. to enable the review of all grants or dispositions of public land to establish their propriety or legality;

vi.

vii.

18. A complaint was made to the 1st Respondent that the suit property had been surrendered for public purpose, that is construction of nursery school but had instead been registered in the name of a private person. The 1st Respondent then embarked on the process of ascertaining the propriety or legality of the title. It was found that the suit property had been surrendered for public purpose and therefore could not be transferred to a private person. The 1st Respondent then recommended that the 2nd Respondent revoke the title. The 1st Respondent acted within its mandate as granted in the constitution and governing statute. I do not agree with the reasoning by Justice Odunga in the decision in Cecilia Chepkoech Leting case (supra). The mandate of the 1st Respondent was to review how grants or disposition of public land to establish their propriety or legality. It is clear that the 1st Respondent was to review how public land was converted from public to private and ascertain whether the process was proper. The review process was retrospective and had no effective date. It does not require any interpretation to ascertain what a grant or disposition is. A disposition or grant in relation to land simply means a transfer from one person to another. The 1st Respondent was therefore mandated to establish how public land was transferred to an individual. This is why I agree with the reasoning of Justice Korir and Justice Angote in the decisions cited by 1st Respondent.

19. In the instant case, the suit property was found to have been surrendered for public purpose; namely construction of a nursery school. The 1st Respondent therefore had jurisdiction to ascertain how the suit property which had been surrendered for a public purpose was again registered in the name of a private individual.

Whether the Petitioner's Constitutional Rights were violated.

20. The Petitioner contends that its constitutional rights under Article 47 of the constitution were infringed. Article 47(1) and (2) of the Constitution provides as follows:-

47(1) "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action".

21. The Petitioner has not stated in what manner the provisions of Article 47(1) and (2) of the Constitution of Kenya were violated. The Petitioner was summoned to go and present its documents regarding the suit property. The Petitioner ignored to attend on the ground that the 1st Respondent did not have jurisdiction to deal with private property. The Petitioner concedes that it was summoned to attend the hearing but it did not attend. This being the case, the Petitioner cannot be heard to complain that it was not afforded an opportunity to be heard.

22. Following the hearing in the absence of the Petitioner, the 1st Respondent found that the suit property had been surrendered for construction of a nursery school. The other property that is LR No. 1160/262/1 had been surrendered for construction of a road. The 1st Respondent then recommended that the 2nd Respondent do revoke the title to the suit property. The Gazette notice which was published clearly stated the reason for the recommendation to revoke. The petitioner cannot therefore claim that its rights under Article 47 (1) and (2) were violated.

23. The Petitioner contends that the 1st Respondent has curtailed its rights to own property as enshrined under Article 40(1) of the Constitution by first dealing with private property which is outside its mandate and secondly by caveating the property thus limiting the enjoyment of the land. There is no dispute that a caveat has been registered against the title to the suit property. Article 40(1) of the Constitution provides as follows:-

" subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property:-

a. of any description;and

b. in any part of Kenya.

24. I have already found hereinabove that the 1st Respondent had jurisdiction to deal with the suit property. The caveat which was registered against the title to the suit property was done pursuant to section 76 of the Land registration Act No.3 of 2012 which forbids any improper dealings with a property. There was therefore nothing wrong in the registration of caveat or restriction of the suit property.

25. The suit property was not subject of compulsory acquisition. What the 1st Respondents did did not amount to compulsory acquisition for the petitioner to allege that the suit property had been compulsorily acquired as to call for prompt compensation. The suit property was found to have been surrendered for public purpose and was therefore not available for allocation to the same person who had surrendered it. It is therefore clear that the constitutional rights of the Petitioner under Article 40(1) and 3 (b) , (1) of the Constitution were not violated .In any case, Article 40 of the Constitution does not offer any protection to a property which has been found to have been unlawfully acquired .

26. The original owner of the suit property was aware that the suit property had been surrendered for a public purpose. He only wanted the surrendered land to be reserved for him for construction of a surgery for the benefit of residents of Karen. This did not happen. It is clear that there were two properties which were the subject of review. These are LR No. 1160/262/1 which had been reserved for construction of a road and the suit property which had been reserved for construction of a nursery school. The Petitioner in its submissions seems to suggest that as there was no construction of the nursery school as had been intended, then the suit property should have been offered back at market value to the original owner for private development. This is a clear admission albeit indirectly that the suit property had indeed been surrendered for public purpose.

27. The Petitioner engaged an expert who compiled a report which shows that the suit property cannot be put into any use as most of it is riparian land and the rest is too steep for any development for the intended purpose. This may be the case but the fact remains that the property had been surrendered for public purpose. This is clear even from the numbering of the parcels which arose from the sub-divisions. The two parcels which were surrendered for public purpose bear LR No. 1160/262/1 and 2 whereas the remaining four parcels bear the LR No. 1160/645 to 648 even though they were originally LR 1160/262/3 to 6.

Conclusion.

28. It is clear from the above analysis that this petition will not succeed. It therefore follows that none of the reliefs can be granted. The upshot of this is that this petition is dismissed with costs to the 1st Respondent.

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

E.O.OBAGA

JUDGE

In the virtual presence of :-

M/s Masinde for National Land Commission

M/s Asli for Petitioner

Court Assistant: Hilda

E.O.OBAGA

JUDGE