



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 632 OF 2016

IN THE MATTER OF: AN APPLICATION BY SATELLITE INDUSTRIAL SUPPLIES LIMITED FOR ORDERS OF CERTIORARI, PROHIBITION, DECLARATION AND STAY

AND

IN THE MATTER OF: ARTICLES 40, 47 AND 67(2) OF THE CONSTITUTION

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW UNDER SECTIONS 7, 8, 9 AND 11 OF THE FAIR ADMINISTRATIVE ACTION ACT, SECTIONS 8 AND 9 OF THE LAW REFORM ACT AND ORDER 53 OF THE CIVIL PROCEDURE RULES

BETWEEN

THE REPUBLIC.....APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

SATELLITE INDUSTRIAL SUPPLIES LIMITED.....EX-PARTE APPLICANT

RULING

1. Pursuant to leave granted on 27th February, 2017, the ex-parte applicant filed a Notice of Motion dated 2nd March, 2017 brought under Articles 2, 40, 47, 62, 64 and 67(2) of the Constitution, Sections 7, 8, 9 and 11 of the Fair Administrative Action Act, the Law Reform Act and Order 53 of the Civil Procedure Rules seeking the following orders:

- a) An order of certiorari to move into the High Court and quash the decision of the National Land Commission to call for a public hearing for purposes of review of the grant and disposition of the title comprised in property known as L.R No. 209/13539/42 or any other private property.
- b) An order of prohibition restraining the Respondent from calling or conducting any hearing or review in respect of the property known as L.R No. 209/13539/42 or any other private property.
- c) A declaration that the National Land Commission has no jurisdiction to deal with land that has acquired the status of private land pursuant to Article 62 as read with 64 of the Constitution and it is only the Environment and land Court that has jurisdiction to investigate and determine the legality of such a title.
- d) An order that there be a stay of any further proceedings and implementation of any decision made by the Respondent as a result of any hearing or meeting held by the Respondent pursuant to the public notice advertised on the national dailies of 28/20/2016 or any other forum.
- e) Costs of this application be provided for.
- f) Any other order or relief as the honourable court may deem fit and expedient to grant.

The application is premised on the grounds set out therein and those in the Statutory Statement dated 2nd March, 2017 and the supporting

affidavit sworn by SIMON KAMUIRU on the same date.

2. The ex-parte applicant purports to be the registered owner of land parcel known as L.R No. 209/13539/42 (hereinafter to be referred to as the suit land). The Applicant alleges that the Respondent issued a public notice in the national dailies on 28/10/2016 calling for public hearings for the purpose of reviewing grants and dispositions of certain properties including the suit property.
3. The applicant claims that the suit land is private land as defined under Article 64(b) of the Constitution and as such is outside the jurisdiction of the Respondent. The applicant contends that the Respondent under Article 68 of the Constitution can only review grants and dispositions of public land to establish their propriety.
4. The applicant suggests that it is only the Environment and Land Court that can investigate and determine the legality of a title in relation to private land.
5. The applicant contends that the Respondent failed to inform the applicant about the reasons for the public hearing so as to enable the applicant to respond. This failure was in breach of Section 4(3) of the Fair Administrative Action Act. To further buttress this issue, the applicant pointed out that Section 14 (3) of the National Land Commission Act requires the Respondent to issue the applicant with a notice of review of grant of title, which notice was not provided in this case.
6. It is the applicant's case that the Respondent acted beyond its jurisdiction by calling for a public hearing for the purpose of reviewing the grant and disposition of land that is considered to be private. Also, the applicant alleges that its right to property guaranteed by Article 40 of the Constitution will be gravely prejudiced if the Respondent is not restricted from conducting any public hearing in relation to the suit land.

The Response

7. The Respondent opposed the application by way of Grounds of Opposition filed on 26th April, 2017.
8. The Respondent admits that under Section 14 of the National Land Commission Act, the Respondent is mandated to review all grants and dispositions of public land either on its own motion or upon receipt of a complaint to establish their legality. In pursuit of this mandate, the Respondent claims that it may have to investigate the process of conversion of a public land to private land. Therefore, the Respondent believes that the mere registration of land as private land does not oust its jurisdiction to review the grant and disposition to such land.
9. The Respondent faults the applicant for instituting these proceedings. The Respondent contends that the applicant ought to have filed a preliminary objection with the Respondent challenging the jurisdiction of the Respondent to review the grants and dispositions to the suit land.
10. On the issue that the applicant was not informed of the nature of the complaint, the Respondent opines that the applicant ought to have appeared before the Respondent and requested for the same.
11. The Respondent alleges that the applicant has instituted these proceedings in a bid to avoid scrutiny on the legality of the title to the suit land.
12. It is the Respondent's case that the right to protection of property under Article 40 (1) of the Constitution is not an absolute right as the right does not extend to land that was illegally acquired. Further, the Respondent avers that public interest overrides private interest and in this case public interest shifts in favour of establishing whether the suit land was public land that was illegally converted into private land.

Submissions

13. The application was determined by way of written submissions. The ex-parte applicant filed its submissions on 12th September, 2018 while the Respondent did the same on 11th May, 2017.
14. Mr.Njenga, Counsel for the ex-parte applicant submitted that the response filed by the Respondent which is titled "grounds of opposition" in its contents takes the form of an affidavit. Counsel contends the purported affidavit is neither sworn by the deponent nor commissioned by a Commissioner of Oaths. Therefore, Counsel argued that the response was defective and incurable in law. Further, Counsel opined that in line with Order 53 Rule 2 and 3, a judicial review application can only be responded to by way of an affidavit and not grounds of opposition. Counsel urged the court to find that the document filed as a response to the application is defective and to strike it out.
15. As to whether the Respondent has the jurisdiction to call for public hearings to review grants and dispositions to private land, Mr. Njenga submitted that the Respondent as established under Article 67 of the Constitution can only review grants and dispositions relating to private land. Counsel cited the case of **Republic v. National Land Commission Ex-parte Cecilia Chepkoech Leting & others, J.R No. 117 of 2016**, where the court held that:

"It is however my view and I so find that though land which was unlawfully acquired does not confer a good title and is not protected under Article 40 of the Constitution, where the land in question has acquired the status of private land pursuant to Article 62 as read with 64 of the Constitution, it is only the Environment and Land Court that has jurisdiction to investigate and determine the legality of such title. To permit the Commission to investigate all types of land no matter their status would amount to clothing the Commission with jurisdiction it does not have, yet it is trite that a judicial or quasi-judicial tribunal, such as the Commission herein has no inherent powers".

Counsel submitted that the suit land was alienated on 4/20/1999 prior to the promulgation of the Constitution of Kenya, 2010. Therefore, Counsel stated that at the time of establishment of the Respondent the suit land was already private land, which does not fall within the scope of the mandate of the Respondent.

16. Mr. Njenga submitted that the Respondent's call for public hearings to review the grants and dispositions to the suit land breached the applicant's right to fair administrative action as the applicant was not informed about the nature of complaint before the Respondent and the reasons for the public hearing. Counsel suggested that the applicant was placed in a peculiar position as it could not prepare a response to any complaint.

17. Mr. Mbuthia, Counsel for the Respondent, submitted that under Section 14 (1) of the National Land Commission Act, the Respondent can on its own motion or upon a complaint by the national, county government, community or an individual review grants and dispositions of public land to establish their propriety or legality. In doing so, Counsel argued that the Respondent can investigate the process through which public land was converted and registered as private land and if indeed the process was lawful. Counsel cited the case of **Republic v. National Land Commission ex-parte Krystalline Salt, 334 of 2014**, where the court opined as follows:

“Under Section 14 of the National Land Commission Act, the Respondent is given jurisdiction to enforce Article 69 (c) (v) of the Constitution and review all grants and 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 reach of the Respondent for the mere reason that it is registered as private property”.

18. Mr. Mbuthia submitted that the Respondent received a complaint regarding the suit land alleging that the suit land was acquired unlawfully necessitating issuance of the public notice to investigate the process through which the land was converted from public land to private land.

19. Mr. Mbuthia submitted that the right to protection of property provided under Article 40 of the Constitution does not extend to property that was unlawfully acquired. Counsel contended that if the applicant purports to have legally acquired the suit land, it is incumbent upon the Respondent to prove the same and if it does, then the Respondent cannot revoke its title to the land.

20. Mr. Mbuthia submitted that it is the standard procedure for the Respondent to publish adverts in the dailies whenever it intends to review grants. Counsel stated that the adverts contain the location and date of the hearings and the titles that will be the subject of the hearings. Counsel further pointed out that the Respondent sends follow up letters which invite the title owners to attend the public hearings and make their presentations regarding the subject land including presentation of any documents in the company of a legal representative.

The Determination

21. The first issue for determination by this court is whether the response to the application by the Respondent is defective. The Respondent opposed the application by way of grounds of opposition filed on 26th April, 2017. The applicant contends that the contents of the grounds of opposition were in the form of an affidavit. Being that the document took the form of an affidavit, the applicant opined that the same ought to have been sworn by the deponent and commissioned by a commissioner of oaths. Further, the applicant faulted the Respondent for responding to the application by way of grounds of opposition and suggested that Order 53 of the Civil Procedure Rules required the Respondent to file a replying affidavit.

22. I have carefully considered this issue. I have perused the document filed by the Respondent as the grounds of opposition. I do agree with the applicant that despite the document filed on 26th April, 2017 being titled “Grounds of Opposition”, the document takes the form of an affidavit. This conclusion can be derived from the fact that the document contains averments on various facts relating to this matter and specifically at paragraph 29 it reads that **“THAT I now swear this affidavit in opposition to the Applicant's Notice of Motion, and beseech this Honourable Court to dismiss without costs”**. The averments therein, in my view, are an admission that the document is indeed an affidavit. It is trite law that grounds of opposition raise issues of law and not of fact. If indeed the document filed on 26th April, 2017 takes the form of an affidavit, is the affidavit proper?

23. Reading through the purported affidavit, the Court notes that the document at the tail end has been signed by one, S. MBUTHIA, senior legal officer for the Respondent. The S. Mbuthia named in the document is the same person who appeared as counsel for the Respondent in this matter. The court interrogated the contents of the affidavit and found that at paragraphs such as no. 28 the affidavit reads as follows:

“THAT I am further advised by the counsel on record, that from the foregoing and having reviewed that applicable law, that this application is an abuse of the court process and does not warrant issuance of the orders sought.”

24. This suggests that the averments in the document are not those of the signatory therein, Mr. S. Mbuthia as the court has already established that Mr. S. Mbuthia is the Counsel for the Respondent and hence he is the counsel being referred to in the said paragraph. Further, the facts or issues averred therein could not have been in the knowledge of Mr. Mbuthia. Mr. Mbuthia can therefore not swear the said purported affidavit. The affidavit has therefore not been sworn by the appropriate deponent.

25. In addition, the affidavit has not been commissioned by a commissioner of oaths. The affidavit, therefore does not conform to the provisions of Section 5 of the Oaths and Statutory Declaration Act, Cap 15 of the Laws of Kenya. The implication of this is that the purported document “affidavit” is not proper and thus cannot be retained as part of the court record. The purported affidavit is hereby struck out in its entirety. Despite striking out the purported affidavit, the submissions of the Respondent still remain on record as a challenge to this application.

26. The next issue for determination is whether judicial review orders should be granted to remedy the applicant's claim that the Respondent did not have the jurisdiction to call for the public hearings in relation to private land.

27. The applicant claims that under Section 14 (1) of the National Land Commission Act the Respondent is empowered to review grants and dispositions pertaining to public land and not private land. The applicant insists that the suit land is private land therefore not within the realm of the Respondent. The Respondent, on the other hand, argues that it is part of its mandate to review grants and dispositions relating to public land and to investigate the legality of the process through which public land was converted to private land.

28. Article 66 (1) of the Constitution creates the Respondent. The functions of the Respondent are listed under sub-article (2) as including:

- (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.**

29. Under Article 68 (c) Parliament is required to enact legislation for the following purposes:

- (i) to prescribe minimum and maximum land holding acreages in respect of private land;**
- (ii) to regulate the manner in which any land may be converted from one category to another;**
- (iii) to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage;**
- (iv) to protect, conserve and provide access to all public land;**
- (v) to enable the review of all grants or dispositions of public land to establish their propriety or legality;**
- (vi) to protect the dependants of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land; and**
- (vii) to provide for any other matter necessary to give effect to the provisions of this Chapter.**

30. In pursuance of Article 68(c) above, the National Land Commission Act was enacted in 2012. Section 14 of the Act provides for the review of grants and dispositions. It reads as follows:

- (1) 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.**

31. A cursory reading of the above provision would suggest that the Respondent can only review grants and dispositions of public land. Is the suit land public or private land? Article 64 of the Constitution defines private land as including:

- (a) registered land held by any person under any freehold tenure;**
- (b) land held by any person under leasehold tenure; and**
- (c) any other land declared private land under an Act of Parliament.**

32. Article 62 (1) on the other hand defines public land as:

- (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.**

33. From the documents annexed to the application, it is evident that the suit land was leased to the Applicant for a period of 99 years from 1st July, 1948. The suit land is therefore private land as defined under Article 64 (b) of the Constitution. Also, as I understood the Respondents, they do not seem to contest that the suit land is private land.

34. Does the Respondent have the jurisdiction to review grants and dispositions relating to private land? Section 14 (1) provides that the Respondent may investigate or review grants of public land. In my view, I do not think that the aforementioned Section should be interpreted restrictively. This is because private land was initially public land that was disposed of or alienated. I therefore do not think that the Respondent is strictly restricted to public land and cannot investigate the manner in which public land was converted into private land. Public interest would suggest that the Respondent owes a duty to the citizens of this nation to safeguard public land including by ensuring that no public land is irregularly converted to private land. Further, the Respondent, where there is credible reason to do so, can investigate how a public land ended into a private land. Article 40 of the Constitution guarantees every person the right to acquire and own property within the country. However, this right can be limited under sub-article (6) where it is found that the person acquired the property unlawfully. If Section 14 is to be applied to only land deemed to be public land then the implication would be that all private land is beyond reproach. Such a view, in my opinion, would not be correct. I do find that the Respondent can investigate unlawfully acquired public land in fulfillment of its duty to protect or promote public interest.

35. The applicant further alleged that its right to a fair administrative action was breached by the Respondent as the applicant was not afforded an opportunity to be heard as the notice issued by the Respondent did not indicate the nature of the complaint against the applicant, therefore, the applicant could not prepare a defence against the complaint.

36. Section 4 (3) of the Fair Administrative Action Act, where an administrative action is likely to adversely affect the rights of a person, the person affected by the decision should be given prior notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations in that regard; notice of a right to a review or internal appeal against an administrative decision; a statement of the reasons; notice of right to legal representation, where applicable; information, materials and evidence to be relied upon in making the decision or taking the administrative action.

37. Under Section 14 (3) of the National Land Commission Act, the procedure for review of the grants and dispositions is provided as follows:

- (3) In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.**

38. The above Section only states that the Respondent shall issue a notice to the person who has an interest in the land of the review and the person shall be given an opportunity to appear before it. This Section does not embody or reflect the right to a fair administrative action. In this case, the Respondent issued the notice of the review in a local daily. In my view, personal service of the notice would have been more appropriate in the circumstance.

39. The notice that was issued by the Respondent has been annexed to the affidavit of SIMON KAMUIRU sworn on 2nd March, 2017 and marked as "SK2". The said notice identifies the complainant as Nairobi County Government. However, the notice does not include the nature of the complaint or the reasons for the notice. The notice simply requires the applicant to submit copies of its representation and any relevant document to the Respondent before the hearing date. The Court is left to wonder how the applicant is meant to submit its representation without being informed of the complaint. This makes it very difficult for the applicant to prepare a response to the complaint. Although the applicant is granted an opportunity to be heard on the date of the hearing, this right seems to be superficial as the applicant is not informed in the first place of the complaint. In **Republic v National Land Commission Ex-Parte Cecilia Chepkoech Leting & 3 others [2016] eKLR**, Odunga J cited the case of **Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587** where the court discussed the principles that should guide an administrative authority sitting in a quasi-judicial capacity in relation to the person who a complaint is made against:

"...4. The person accused must know the nature of the accusation made; 5.A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view and to make any statement they may decide to bring forward; 6.The tribunal should see to it that matter which has come into existence for the purpose of the quasi-lis is made available to both sides and once the quasi-lis has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it."

40. This Court finds that the notice as set out does not afford the applicant a real opportunity to be heard and in turn contravenes the principles of natural justice. The notice does contravene the applicant's right to a fair administrative action as set out under Article 47 of the Constitution. An order of certiorari is therefore merited in this case. However, the said order will not issue to quash the decision of the Respondent to call for a public hearing in relation to the suit land as this Court has found that the Respondent does have the jurisdiction to call for public hearing to review grants and dispositions relating to private land. The order will only extend to quash the notice issued by the Respondent in the local daily calling for the public hearing. Consequently, all actions taken by the Respondent after the issuance of the notice are null and void as the notice was not proper.

41. For these reasons orders are issued as follows:

a) An order of certiorari is hereby issued to quash the notice issued by the Respondent calling for a public hearing to review grants and dispositions with regard to land parcel known as L.R No. 209/13539/42.

b) Costs of the application to be borne by the Respondent.

Dated, Signed and Delivered in Nairobi this 21st day of November, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Njenga for the Ex parte Applicant

N/A for the Respondent

Ms. Lovender Court Assistant