



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILINMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 402 OF 2016

**IN THE MATTER OF A CONTRAVENTION OF RIGHTS AND OR FUNDAMENTAL
FREEDOMS UNDER ARTICLES 40, 47, AND 48 AND IN THE MATTER OF ARTICLES 62
AND 64 AND 67 OF THE CONSTITUTION OF KENYA IN RELATION TO RUIRU EAST/JUJA
EAST BLOCK 2/3537**

BETWEEN

**JAMES NGOCHI NGUGI (The administrator
of the Estate of PROF. ELIZABETH NJERI NGUGI.....PETITIONER**

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

AND

ANNA MUTHONI.....INTERESTED PARTY

JUDGEMENT

Introduction

*The key question raised in these proceedings is whether or not the National Land Commission (hereinafter referred to as the Respondent) has jurisdiction to investigate the legality, validity or propriety of title to private land in exercise of its constitutional and statutory mandate. It is not disputed that the land, the subject matter of these proceedings, namely **Ruiru East/ Juja East Block 2/3537** is private land and that a one **Dr. Elizabeth Njeri Ngugi-** (hereinafter referred to as the deceased) and that the deceased was/is the registered absolute proprietor of the said land under the provisions of the Registered Land Act^[1]-(Repealed). At the outset, I wish to point out that no evidence was tendered to suggest even in the slightest manner or to demonstrate that the said land was converted from public land to private land.*

The pleadings

*The petitioner **James Ngochi Ngugi** the administrator of the Estate of the deceased. He avers that he*

received a letter dated 7th September 2016 authored by Respondent herein stating that the Respondent had received a complaint from the interested party to the effect that the above land was allocated to her, hence the letter invited the petitioner to "resolve the dispute." The letter warned that failure to attend will result in the commission investigating the legality of the title to determine its propriety. Aggrieved by the contents of the said letter, the petitioner moved to this court inter alia challenging the Respondents jurisdiction to investigate the legality, propriety or otherwise of title to private land.

The interested party filed a Replying affidavit in which she averred that the petitioner intends to prevent the course of justice aimed at unearthing alleged fraudulent activities by the deceased who allegedly illegally obtained the title to the land in question. She avers that that the deceased took advantage of her position as a director of Juja Farms (1976) Ltd and acquired the said title. She also argued that this court has no jurisdiction to stop the Respondent from performing its constitutional duties. She claims that she was allocated the said land and annexed documents in support of her claim. She also states that she has been in continuous possession of the land since it was allocated to her.

The Respondent filed a Replying affidavit on 13th December 2016 sworn by **Brian Ikol**, its Deputy Director, legal affairs enforcement and the secretary to the Review of Grants and Dispositions of Public Land Committee who reiterated the Respondents constitutional and statutory mandate, and confirmed that the Respondent received a complaint from the interested party and unsuccessfully attempted to summon the deceased but after her death the Respondent summoned the administrator and that the Respondent and it had not yet heard all the parties and urged the court to allow the commission to carry out its mandate and determine the matter and if the petitioner is not dissatisfied with the application, he can apply for judicial review orders. The last part of this statement seems to ignore the fact that a court can issue an order of prohibition to stop the commission of intended illegal act, hence it is not necessary for a party to await the outcome of a process or a decision and to challenge it. If there are grounds to issue an order or prohibition, a party will perfectly be entitled to seek such a relief.

In a supplementary affidavit filed on 8th December 2016, the petitioner reiterates that the Respondent and the interested party failed to capture the key issue in the petition which is the jurisdiction of the Respondent, but went further to cast aspirations' on the petitioners character.

Advocates submissions

Counsels for all the parties filed detailed written submissions which I have considered. The petitioners counsel submitted that the Respondents jurisdiction is founded on Articles 67 and 68 of the constitution and insisted that under the constitution or the National Land Commission Act,^[2] the Respondent has no authority to deal with private land.^[3]

Counsel for the Respondent submitted that the Respondent has jurisdiction over private land and cited Article 68 (c) (v) of the constitution by investigating the process under which public land was converted to private land and insisted that the right to property under article 40 (1) of the constitution is not an absolute right nor does it extent to illegally acquired property.^[4] Counsel also cited the decision in Republic vs National Land Commission Ex parte Krystalline Salt^[5] in support of this position.

However, the documents annexed to the affidavit of the interested party clearly reveal a claim to the land which she states was allocated to her by Juja Farms (1976) Ltd as a share holder , but which land she claims was subsequently registered in the deceased name. In all honesty, there is no mention of public land having been converted into private land and the word conversion of public land is for the first time imported into these proceedings by counsel for the Respondent in her submissions.

Counsel for the interested party urged the court to deviate from what he referred to erroneous findings in the authorities cited by the petitioner, and, find that the National Land Commission's power and functions are applicable to all land generally in Kenya, not just public land. With respect, this suggestion is not founded on law since the jurisdiction of the Respondent is clearly stipulated under the relevant law.

Jurisdiction of this court

Article 165(1) of the Constitution establishes the High Court and vests in it vast powers including the power to ‘*determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened*’ and the jurisdiction ‘*to hear any question respecting the interpretation of the Constitution.*’ **Article 23** provides that; “23. (1) *The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.*”

Article 165 (6) provides that "The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function." Article 165 (7) provides that "For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

Applicable Law

The Respondents' function under Article 67 (2) (e) of the constitution include *(e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;*

Article 61 (2) of the constitution classifies land in Kenya as public, community or private. Article 62 of the Constitution defines public land consists of:-

“62. (1) Public land is—

(a) land which at the effective date was un-alienated 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.”

Article 64 of the Constitution defines private land as:-

“64. Private land consists of —

(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.”

Section 14 of the National Land Commission Act on Review of grants and dispositions provides that:-

*(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.***

The above provision only mentions public land and not private land. Thus, for the Respondent to invoke the above provision, the land must be public land within the above definition, or the land must have been public land that was converted to private land.

Article 40 of the Constitution protects the right to property but sub-article **(6) states that " The rights under this Article do not extend to any property that has been found to have been unlawfully acquired."** Article 40(6) of the Constitution is clear that any property that has been found to have been unlawfully acquired does not enjoy constitutional protection. No evidence has been adduced to show that the land in question was originally public land and that it was converted into private land. Section 14 of the same Act provides for review of grants and disposition of public land as per Article 68(c)(v) of the Constitution.

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 fulfill this responsibility by querying the process under which public land was converted to private land, if there is evidence that the land was once public land. I regret that the parties did not provide any material at all to show that the land into question was once public land which was converted into private land. What emerges from the complaint raised by the interested party is that herself and the deceased held shares in a private company, and that the deceased was a director of the said company and the deceased allegedly used her position as a director to cause the land to be transferred to herself. Such allegations in my view form a basis for a civil suit to be filed before the environment and land court for the interested party to establish her claim and challenge the validity or otherwise of the title in question. In short, the facts as revealed by the papers relied upon by the interested party reveal a title to private land that was allegedly transferred to the deceased. Such a dispute, in my view falls within the province of the Environment and Land Court.

Article 23 (1) of the constitution specifically sets out the remedies that the High Court can issue in cases of violation of fundamental rights and these include a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of the law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights, an orders of compensation and an order of judicial review.

Conclusion

The complaint disclosed by the documents presented by the interested party in my view disclose a claim to the land and cast aspirations on the manner in which the deceased acquired title to the land which the

interested party claims is her land. Such allegations can in my view form the basis of a claim in the Environment and land court. I reiterate that no material was presented to this court to demonstrate that the land was once public land and was converted into private land. Absence of such evidence in my view ousts the jurisdiction of the Respondent because the title held by the petitioner shows that the land in question is private land registered in the name of the deceased as the absolute lawful proprietor under the provisions of the Registered Land Act-Repealed.^[6]

The upshot is that I find and declare that the Respondent has no legal mandate to investigate the legality or propriety of title number **Ruru East/Juja East Block 2/3537** which is private land.

Each party shall bear the costs of this petition. Orders accordingly. Right of appeal 30 days

Dated at Nairobi this 7th day of **March**, 2017

John M. Mativo

Judge

^[1] Cap 300, Laws of Kenya-Repealed

^[2] Act No. 5 of 2012

^[3] R. vs National Land Commission & 4 Others ex parte Fulson Company Ltd & Another {2015}eKLR

^[4] Section 26 of Land Registration Act and R vs NLC {2016}eKLR

^[5] Pet No 334 of 2014

^[6] Supra