



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

JUDICIAL REVIEW APPLICATION NO. 1 OF 2019

IN THE MATTER OF: AN APPLICATION BY DENMAN PROPERTIES LIMITED, BOND STREET PROPERTIES LIMITED AND GREEN LILY LIMITED FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF: THE DETERMINATION OF INVESTIGATIONS ON GRANTS AND DISPOSITIONS ON PUBLIC LAND IN RESPECT OF KILIFI JIMBA WHICH APPEAR IN GAZETTE NOTICE NUMBER 1549 CONTAINED IN THE SPECIAL ISSUE VOL. CXXI-NO. 21 AND DATED THE 15TH DAY OF FEBRUARY, 2019 BY THE VICE-PERSON, NATIONAL LAND COMMISSION.

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT, NO. 5 OF 2012

AND

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

AND

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

AND

IN THE MATTER OF: CIVIL PROCEDURE RULES, 2010

REPUBLIC.....APPLICANT

VERSUS

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

THE CHIEF LAND REGISTRAR.....3RD RESPONDENT

AND

DENMAN PROPERTIES LIMITED.....1ST EX PARTE APPLICANT

BOND STREET PROPERTIES LIMITED...2ND EX PARTE APPLICANT

JUDGMENT

1. By this Notice of Motion dated and filed herein on 12th March 2019, Messrs Denman Properties Ltd, Bond Street Properties Ltd and Green Lily Limited(the Ex Parte Applicants) pray for the following judicial review orders to issue against the four (4) Respondent Government agencies named herein:-

1. An order of Certiorari to bring to this Honourable Court for purposes of being quashed the 1st Respondent's determination on the 1st Ex Parte Applicant's Plot Nos. 342, 335, 340, 341, 427, 338, 353, 333, 334, 311, 331, 337, 317, 336, 345, 328, 343 and 344 situate in Kilifi/Jimba which appear at pages 559, 558, 567, 560 (and) 556 of the Gazette Notice No. 1549 contained in the Special Issue Vol. CXXI-No 21 and dated the 15th day of February 2019 at pages 537-568 on the Determination of the Investigations on Grants and Dispositions on Public Land in respect of Kilifi Jimba (hereinafter referred to as "the Gazette Notice");

2. An order of certiorari to bring to this Honourable Court for purposes of being quashed, the 1st Respondent's determination on the 2nd Ex Parte Applicant's Plot Nos. 315, 319, 316, 314, 346 and 312 situate in Kilifi/Jimba which appear at pages 556, 557 and 559 of the Gazette Notice;

3. An order of certiorari to bring to this Honourable Court for purposes of being quashed, the 1st Respondent's determination on the 3rd Ex Parte Applicant's Plot No. 323 situate in Kilifi/Jimba which appears at page 557 of the Gazette Notice.

4. An order of prohibition to prohibit and restrain the 3rd and 4th Respondents by themselves, servants, agents or whosoever authorized on their behalf from giving effect or implementing in any manner whatsoever the 1st Respondent's determination on the 1st Ex-Parte Applicant's Plot Nos. 342, 335, 340, 341, 427, 338, 353, 333, 334, 311, 331, 337, 317, 336, 345, 328, 343 and 344 situate in Kilifi/Jimba which appear at pages 559, 558, 567, 560(and) 556 of the Gazette Notice.

5. An order of prohibition to prohibit and restrain the 3rd and 4th Respondents by themselves, servants, agents or whosoever authorized on their behalf from giving effect or implementing in any manner whatsoever the 1st Respondent's determination on the 2nd Ex-parte Applicant's Plot Nos. 315, 319, 316, 314, 346 and 312 situate in Kilifi/Jimba which appear at pages 556, 557 and 559 of the Gazette Notice;

6. An order of prohibition to prohibit and restrain the 3rd and 4th Respondents by themselves, servants, agents or whosoever authorized on their behalf from giving effect or implementing in any manner whatsoever the 1st Respondent's determination on the 3rd Ex Parte Applicant's Plot No. 323 situate in Kilifi/Jimba which appears at page 557 of the Gazette Notice;

7. An order of mandamus to issue compelling the 1st Respondent to clear the 1st Exparte Applicant's Plot Nos. 342, 335, 340, 341,427, 338, 353, 333, 334, 311, 331, 337, 317, 336, 345, 328, and 344 situate in Kilifi Jimba; the 2nd Ex-parte Plot Nos. 315, 319, 316, 314, 346 and 312 situate in Kilifi/Jimba; and the 3rd Ex Parte Applicant's Plot No. 323 situate in Kilifi/Jimba; and

8. Such other or further relief as the Court shall deem appropriate.

2. The application which is supported by a Statutory Statement dated 11th March 2019 as well as the Affidavits of Renzo Quaciari and Sophia Abdillahi Chacha is premised on the grounds inter alia, that:-

i) The 1st, 2nd and 3rd Ex-Parte Applicants are the registered proprietors of the freehold and leasehold interests in the listed parcels of land;

ii) When the Ex-Parte Applicants bought their respective properties there were no caveats or cautions and they were bona fide purchasers for valuable consideration without notice and hence their titles cannot be impeached;

iii) The Ex-Parte Applicants carried out searches for their respective suit properties prior to and after purchasing their respective properties;

iv) Properties within the Kilifi/Jimba and the Ex-Parte Applicant's properties were registered under the repealed Registered Land Act, Cap 300, which legal regime still applies by virtue of the transitional provisions in Section 107 of the Land Registration Act, 2012 and Section 162 of the Land Act, 2012;

v) The Ex-Parte Applicants and Holborn Properties Ltd having come to learn of a Report of a Task Force on Kilifi Jimba and Chembe Kibabamshe dated June 2010 questioning the legality of their titles filed Malindi High Court Petition No. 11 of 2012 wherein the National Land Commission (the 1st Respondent) was the 26th Interested Party;

vi) On 8th May 2015, this Court delivered a Judgment declaring inter alia that the Ex-Parte Applicants were the legal proprietors of the parcels of land listed hereinabove and no appeal or review was preferred against the Judgment and decree extracted on 13th May 2015;

vii) *The 1st Respondent through its Chairman has always been aware of the existence of the said suit and the Judgment made therein;*

viii) *Despite such knowledge, on 17th July 2017, the 1st Respondent caused to be published Kenya Gazette Notice No. 6862 on the Determination of Review of Grants and Dispositions of Public land in respect of the Kilifi Chembe Kibabamshe Settlement Scheme wherein it purported to review and revoke the titles issued to the Ex-Parte Applicants in regard to their respective parcels of land as listed hereinabove;*

ix) *The said determination by the 1st Respondent are ultra vires the powers of the 1st Respondent, unlawful, irrational and unreasonable; and*

x) *The Ex-Parte Applicants stand to suffer prejudice and loss as the uncertain nature of the Gazette Notice and subsequent determinations of the 1st Respondent provides an open avenue for the 1st Respondent to infringe on the Ex-Parte Applicant's Constitutional rights and freedoms as provided under Articles 25(c), 27, 40, 47 and 64 of the Constitution of Kenya, 2010.*

3. The application is opposed. By Grounds of Opposition dated and filed herein on 21st May 2019, the National Land Commission (the 1st Respondents) opposes the Motion on the grounds:-

1. That Judicial Review is concerned with the decision making process and not the merits of the decision. Therefore an Applicant making a case for Judicial Review has to show that the decision in question was illegal, irrational or procedurally defective;

2. That under Section 6 of the National Land Commission Act, the 1st Respondent has the necessary powers (to) take any measures it considers necessary to ensure compliance with the principles of land policy set out in Article 60(1) of the Constitution;

3. That the Respondent afforded the Ex-Parte Applicants reasonable opportunity to be heard when it published its notice dated 18th September 2018;

4. That the application is scandalous, frivolous and vexatious; and

5. That the application is an abuse of the Court process.

4. The application is similarly opposed by the Honourable the Attorney General, the Chief Land Registrar and the District Land Registrar Kilifi (the 2nd, 3rd and 4th Respondents respectively). In a brief Replying Affidavit sworn by the Kilifi Land Registrar Stella Gatuiri Kinyua and filed herein on 21st May 2019, the Respondents aver that sometime in the year 2015, the Kilifi Land Registry was served with a Court Order emanating from **Malindi High Court Petition No. 11 of 2012** directing the Registrar to amend the Register to reflect the position as per the Court Order issued on 13th May 2015.

5. The 2nd, 3rd and 4th Respondents aver that the Court Orders were effected and the records in respect of the suit properties continue to reflect the Ex-Parte Applicants as the registered owners thereof.

6. I have perused and considered the Application by the Ex-Parte Applicants and the response thereto. I have equally perused and considered the written submissions and authorities placed before me by Mr. Binyenya Learned Counsel for the Ex-Parte Applicants, Mr. Wahome Learned Counsel for the 1st Respondent and Ms Lutta Learned State Counsel for the 2nd, 3rd and 4th Respondents did not file any submissions.

7. The three Ex-Parte Applicants before me were the registered proprietors of both freehold and leasehold interests in various parcels of land listed in the application and situated in Kilifi/Jimba area within Kilifi County. It was their case that when they acquired their respective parcels of land, there were no caveats or cautions registered thereon and that they were bona fide purchasers for valuable consideration thereof without notice of any defects on the titles.

8. The Ex-Parte Applicants have told this Court that both prior to and after the purchase of the suit properties they carried out official searches which reflected the previous owners before the purchase and themselves as the owners upon transfer. The Ex-Parte Applicants have further told this Court that prior to their being registered as the proprietors of their respective suit properties, the original titles as held by the previous proprietors and the transfer documents were produced and shown to the District Land Registrar Kilifi (the 4th Respondent) as is required by law.

9. It was further their case that ever since they purchased their respective suit properties, they have enjoyed quiet possession and occupation thereof without any interference from the Respondents or any other persons and that they have been meeting all the requisite outgoings such as land rent and rates to the concerned authorities.

10. The Ex-Parte Applicants assert that having purchased the said parcels of land from the registered proprietors, they were not required to go behind the titles of the said parcels of land and they were never informed by the Respondents of any defects in the titles they acquired.

11. From the material placed before me, the foregoing averments arise from the history of the suit properties. From a perusal of the Judgment of this Court delivered on 8th May 2015, in **Malindi ELC Petition No. 11 of 2012; Denman Properties Ltd & 5 Others –vs- The**

Honourable Attorney General & 7 Others, it was apparent that about a decade ago, the Ex-Parte Applicants had to contend with serious challenges in regard to their ownership of the very same parcels of land that are the subject matter herein.

12. Apparently a number of individuals had raised various Complaints in regard to some purported irregularities to the allocation and issuance of titles for the Ex Parte Applicants mentioned and other properties within Kilifi/Jimba and Chembe Kibabamshe Settlement Schemes. In order to resolve the said complaints, the Ministry of Lands and Settlement set up a Ministerial Special task Force which was charged with identifying and establishing the rightful owners of some 20 parcels of land within the area.

13. In its Report dated June 2010, the Special Task Force concluded that a number of Plots in the area were irregularly acquired and it proceeded to give a schedule of those plots in an annexure to the Report. The suit properties were some of the parcels of land indicated to have been acquired although their registration status was not indicated.

14. Consequent to the conclusion of the Ministerial Special Task Force Report in June 2010, the 4th Respondent herein commenced the process of issuing new titles to various third parties in regard to the parcels that were shown to have been irregularly acquired. Aggrieved by the decision which in essence appeared to have revoked their titles, the three Ex-Parte Applicants herein and two other entities known as Holborn Properties Ltd and Royal Tulia Estate Ltd moved to Court and filed the said **Malindi ELC Petition No. 11 of 2012**.

15. Among the entities sued were five National Government entities including the Ministerial Task Force on Land issues in Coast Province. Also enjoined as Interested Parties were a number of personalities to whom the titles had been re-issued as well as other Government agencies that were deemed proper parties in light of the orders sought. The 1st Respondent appears in those proceedings as Interested Party No. 27.

16. Having heard the dispute, the Honourable Justice Angote on 8th May 2015 delivered a Judgment in favour of the Petitioners as follows:-

a) A declaration be and is hereby issued that the issuance of Certificate of Leases based on the Report of the Task Force on Kilifi Jimba and Chembe Kibabamshe dated June 2010 and the letter by the Hon Gideon Mung'aro dated the 20th day of August 2010 was in violation of Articles 3, 10, 27, 40 and 47 of the Constitution and Sections 10, 33 and 143 of the Registered Land Act, Cap 300 of the Laws of Kenya (Repealed) hence unconstitutional, null and void ab initio.

b) A declaration be and is hereby issued that the 1st Petitioner is the legal proprietor of Parcels of Land Known as Kilifi/Jimba/342, 335, 340, 341, 427, 338, 353, 333, 334, 311, 337, 317, 336, 345, 328, 342, and 344.

c) A declaration be and is hereby issued that the 2nd Petitioner is the legal proprietor of Parcels of Land known as Kilifi/Jimba/315, 319, 316, 314, 346 and 312.

d) A declaration be and is hereby issued that the 3rd Petitioner is the legal proprietor of a Parcel of Land known as Kilifi/Jimba/323.

e) A declaration be and is hereby issued that the 4th Petitioner is the legal proprietor of a Parcel of Land known as Chembe/Kibabamshe/396, 637, 638, 401, 423, 425, 428, 394 and 379.

f) An order of certiorari be and is hereby issued to bring to this Honourable Court for purposes of being quashed, Leases and Certificates of Lease that were issued in respect of the above suit properties.

g) An order of permanent injunction be and is hereby issued to prohibit the Respondents by themselves, servants, agents or whosoever authorized on their behalf from giving effect or implementing in any manner whatsoever the Report of the Task Force on Kilifi Jimba and Chembe Kibabamshe dated June 2010 or in any other manner interfering with the Petitioners possession and ownership of their respective suit properties.

h) An order of mandamus be and is hereby issued compelling the 4th Respondent to restore the register in respect of the above mentioned parcels of land and issue to the Petitioners with Certificate of Search on payment of the requisite fees.

17. Subsequent to the Judgment another suit filed by the 1st Ex-Parte Applicant herein being **Malindi ELC Case No. 150 of 2014; Denman Properties Ltd –vs- County Land Registrar Kilifi & 9 Others** which suit related to Plots Nos. 311, 317, 335, 337, 338, 340, 344 and 345 situated within the said Kilifi/Jimba was equally determined vide a consent order adopting the Judgment in **Malindi ELC Petition No. 11 of 2012 on 18th June 2015**.

18. In their response to this application the 2nd, 3rd and 4th Respondents aver that they did comply with the Court orders and restored the Ex-Parte Applicants as the registered owners of their respective properties. That fact is indeed confirmed by the Ex-Parte Applicants themselves in their Supporting documents herein.

19. The Ex-Parte Applicants however accuse the 1st Respondent of having taken over the proceedings that were being handled by the Ministerial Task Force and going ahead by their Gazette Notices published on 17th July 2017 to revoke the Ex-Parte Applicants titles and to re-allocate the ownership thereof to third parties.

20. The 1st Respondent does not deny that it published the said Gazette Notices by which it indicated that the suit properties be revoked and

regularized to various individuals. In their Grounds of Opposition dated and filed herein, the 1st Respondent states inter alia, that under Section 6 of the National Land Commission Act, it has the necessary powers to take any measures it considers necessary to ensure compliance with the principles of land policy as set out in Article 60(1) of the Constitution.

21. In addition, the 1st Respondent states that it afforded the Ex-Parte Applicants reasonable opportunity to be heard when it published its notice dated 18th September 2018.

22. As it were, it was not in dispute that no appeal or application for review has been preferred against the Judgment delivered in **Malindi ELC Petition No. 11 of 2012**. The 1st Respondent Commission was the 27th Interested Party in the said dispute. It is further not contested that neither an appeal nor review was preferred in **Malindi ELC Case No. 150 of 2014** which was determined by consent on 18th June 2015. The 1st Respondent was the 2nd Respondent in the said case.

23. The 1st Respondent is an establishment of the 2010 Constitution and the National Land Commission Act, No. 5 of 2012. Under Article 68(c) (V) of the Constitution, Parliament was mandated to enact legislation to enable the review of all grants or dispositions of public land to establish their proprietary or legality.

24. While the 1st Respondent has power under Section 14(1) of its constitutive Act to ensure such grants and dispositions comply with the Constitutional principles on land policy, it was a party to the proceedings in those two suits and was therefore aware of the determinations made in respect of the suit properties. That must be the reason that in the case of Holborn Properties Ltd who were the 4th Respondent in **Malindi ELC Petition No. 11 of 2012**, they correctly indicated in their determination that the suit properties were under Court injunction before clearing them. Why they chose to treat the suit properties belonging to the Ex-Parte Applicants who were the 1st, 2nd and 3rd Respondent in the very same Petition differently is but a matter of conjecture.

25. Whatever the case, it was clear and indeed ought to have been so clear to the 1st Respondent that once a dispute was filed in this Court relating to the use, occupation of and title to land, the 1st Respondent was obliged to participate in those proceedings where the issues raised fell within its mandate and thereafter to abide by the decision made.

26. At any rate it was not open for the 1st Respondent to re-open the issue of the propriety or legality of the suit properties in the manner that it purported to do herein. As Angote J observed in the related dispute of **Republic –vs- National Land Commission Ex-Parte Holborn Properties Ltd (2016eKLR:-**

‘The only recourse that the Respondent had was to appeal against the Judgment of this Court in Malindi Petition No. 11 of 2012 and not to second guess the decision of the Court by purporting to review the dispositions of the suit properties. It is this Court that is constitutionally and statutorily mandated to review the decisions of the Respondent and not the other way round.’

27. Arising from the foregoing, it was clear in my mind that in making the impugned determination as published in the Gazette Notices aforesaid, the 1st Respondent acted ultra vires its mandate. As it were, the 1st Respondent did not even pretend that it conducted a hearing in regard to the dispositions of the suit properties before it arrived at its decision.

28. Section 4 of the Fair Administrative Actions Act required that the Ex-Parte Applicants be supplied with adequate notice of the complaints made against them and further that they be accorded a reasonable opportunity to respond thereto. By failing to grant them such an opportunity, the 1st Respondent violated the Ex-Parte Applicants’ right to fair administrative action as stipulated under Article 47 of the Constitution.

29. In this respect it is trite law that Judicial Review Proceedings are concerned with the probity and integrity of the process leading up to the decision sought to be quashed as opposed to the merits of the decision. In the circumstances herein, the 1st Respondent had neither the legal authority to review nor to revoke titles relating to property whose ownership had been determined by this Court.

30. In the premises, I am persuaded that the Motion dated and filed herein on 12th March 2019 has merit. The same is allowed as prayed with costs against the 1st Respondent.

Dated, signed and delivered at Malindi this 17th day of June, 2020.

J.O. OLOLA

JUDGE