



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI, MILINMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 530 OF 2016**

**IN THE MATTER OF THE INVESTIGATIONS BY THE NATIONAL LAND COMMISSION  
OVER THE PARCELS OF LAND L.R. NO. 15868/1 & 2 (ORIGINALLY L.R. NO. 15868)**

**AND**

**IN THE MATTER OF ARTICLES 2, 10, 22, 40, 62, 64, 67 & 249 OF THE CONSTITUTION AND  
SECTIONS 5, 14 (7) OF THE NATIONAL LAND COMMISSION ACT, NO. 5 OF 2012**

**AND**

**IN THE MATTER OF SECTION 23 OF THE REGISTRATION OF TITLES ACT, CAP 281,  
LAWS OF KENYA (REPEALED)**

**AND**

**IN THE MATTER OF THE LAND ACT, NO. 6 OF 2012**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT, NO. 3 OF 2012**

**AND**

**IN THE MATTER OF VIOLATION OF CONSTITUTIONAL RIGHTS OF JOSEPH MUNGAI  
GICHURU AND LUCY WAIRIMU MUNGAI**

**BETWEEN**

**JOSEPH MUNGAI GICHURU.....1<sup>ST</sup> PETITIONER**

**LUCY WAIRIMU MUNGAI.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**MATHAARA MWANGI (CHAIRMAN, MUTHAIGA NORTH**

**RESIDENTS' ASSOCIATION).....1<sup>ST</sup> RESPONDENT**

MUTHAIGA NORTH RESIDENTS' ASSOCIATION.....2<sup>ND</sup> RESPONDENT

NATIONAL LAND COMMISSION.....3<sup>RD</sup> RESPONDENT

CHIEF LAND REGISTRAR.....4<sup>TH</sup> RESPONDENT

THE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT

## JUDGEMENT

### **Introduction**

The key issue for determination in these proceedings is the constitutional and statutory mandate of the National Land Commission to investigate the legality, validity or propriety of title to Public land that has been converted to private use. From the Grant exhibited by the petitioners, the land, the subject matter of these proceedings, namely **L.R. No. 15868/1 & 2 (Original number 15868)** was originally public land and was originally granted by the then President to **John Kamau Muigai** and **Richard Kamau Muigai** as administrators of the estate of **Peter Muigai Kenyatta** as Grantees for a term of 99 years from the first day of February 1992 to hold the same subject however to the payment of the annual rent stated therein and also to the Special conditions stipulated in the Grant dated 6<sup>th</sup> March 1992. It is also not disputed that the land subsequently changed hands culminating with a transfer to the petitioners herein on 27<sup>th</sup> August 2007.

### **The petitioners case**

The petitioners state that on 15<sup>th</sup> September 2004 they lawfully purchased the said land at a price of Ksh. 3,300,000/= and since then they have peacefully and quietly occupied the land and developed the same and that prior to purchasing it, they conducted due diligence and obtained the requisite consents/clearances and even obtained change of user from nursery School to Residential and that the Director of Physical Planning vide a letter dated 26<sup>th</sup> November 2004 stated that he had no objection to the change of user and subsequently, they sought approval of development of the said property which approval was granted vide a letter dated 21<sup>st</sup> February 2013. The sub-division of the land was approved as required thereby creating **L.R. No. 15868/1 & 2** and deed plans numbers **359728** and **359729** were issued and that processing title deeds is in progress.

Vide a news paper notice in the Standard of Friday 28<sup>th</sup> October 2016, the third Respondent summoned them to appear before it regarding the said property and that the investigations in question offend articles 40, 67 and 2 (4) of the constitution, hence the petitioners seek inter alia a declaration that they are the bona fide owners of the said land, and an injunction and prohibition and also certiorari to quash the proceedings in question.

### **First and Second Respondents Submissions**

On behalf of the first and second Respondents is the Replying affidavit of Mathaara Mwangi sworn on 28<sup>th</sup> February 2017 deposing inter alia that the two properties the subject of this petition were reserved as public land for use by residents as a Nursery School, that the said property is undeveloped, that the residents have never been consulted nor did they give consent to any sub-division and that the land in question is not and has never been private land and that the National Land Commission has jurisdiction and constitutional duty to investigate the land hence the investigations in question are lawful and in public interest since that the land in question was public land.

### **Petitioners' Advocates submissions**

The crux of the petitioners' counsels submissions is that the land in question is private land, hence the

*National Land Commission has no jurisdiction over the matter.*

### ***First and second Respondents' Advocates submissions***

*Counsel for the first and second Respondents submitted that this petition is premature since the third Respondent is only carrying out investigations pursuant to its constitutional mandate under Article 67 of the constitution and that no determinations has been made, and that the petitioners have the option of challenging the outcome of the investigations, and that from the petitioners own exhibit, it is clear that the land in question is public land.*

### ***Third, Fourth and Fifth Respondents Responses***

*The third, fourth and fifth Respondents did not file any Response to the petition nor did they file any submissions.*

### **Jurisdiction of this court**

**Article 165(1)** of the Constitution vests vast powers in the High Court 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 (1) provides that 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.

### **Jurisdiction of the National Land Commission**

The functions of the National Land Commission 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<sup>[1]</sup> (herein after referred to as the 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 third 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. Section 14 of the 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 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 (as in this case) that the land was once public land.

The title exhibited by the petitioners is a Grant, a confirmation that it was once public land which was granted by the President to the persons named therein. Special condition number 5 of the Grant shows that it was to be used for Nursery school purposes only. There is evidence that the petitioners obtained change of user thereby converting the land from Public to private use, that is Residential.

*In my view, the National Land Commission has jurisdiction under Article 68 (c) (v) of the constitution to investigate the process under which public land was converted to private land. Further, the right to property under article 40 (1) of the constitution is not an absolute right nor does it extend to illegally acquired property[2]as was held in Republic vs National Land Commission Ex parte Krystalline Salt.[3]*

The issue in this case is whether the petitioners can lawfully stop the National Land Commission from legally investigating how they acquired their title. The process initiated by the third Respondent is aimed at investigating the manner in which their title was acquired. The first and second respondents' position is that the suit property was originally public land.

This court cannot at this stage give a seal of approval to the petitioners title by shutting the door to lawful investigations. This proposition is supported by several cases from our courts such as *Milan Kumarn Shah & Others vs City Council of Nairobi & Others*[4] and *James Joram Nyagah & Another vs The Honourable Attorney General and Another*. [5]

**Article 40** which protects the right to property must be read to exclude property found to have been unlawfully acquired under **Article 40(6)**. This requirement is an extension of the fact that the Constitution protects higher values which are to be found in the preamble to the Constitution and **Article 10**. Values such as human rights and social justice cannot countenance a situation where the Constitution is used to rubberstamp what is in effect unlawful. For this reason, this court cannot use the shield of the title held by the petitioners to close the door for lawful investigations aimed at establishing the propriety and legality of the process leading to the acquisition of the title in question.[6]

In my view the process of determining how the petitioners title was acquired must be through a process recognized by the law, hence the process provided under the constitutional provisions cited above and also by the Act. **Article 40(6)** is clear that rights acquired under this Article do not extend to any property that is found to have been unlawfully acquired. Such "finding" cannot be by any other means other than due process. **Article 47(1)** guarantees every person fair administrative action which includes due process. I see no valid reason for the court to bar a due process recognized under the law under the various provisions cited above.

## **Conclusion**

Having found that there is evidence that the land in question was originally public land and guided by the provisions of the law cited above, I find that the National Land Commission is lawfully exercising its mandate and there is no basis at all for this court to interfere with the statutory and constitutional mandate of the National Land Commission.

Secondly, the petitioners moved to court pre-maturely to stop what to me is a lawful process. The petitioner moved to court "too early" to stop the process and as at the time of filing this petition, there was nothing to show that the steps hitherto taken by the third Respondent were contrary to the constitutional and statutory mandate of the third Respondent nor has the petitioners proved infringement of any fundamental rights or threat to the infringement to warrant this courts intervention. I also find that that the third Respondents' functions were authorized by the relevant statute and the constitution.

The petitioners have not demonstrated any reasonable apprehension of bias or imminent breach of their rights if the investigations continue nor did they demonstrate that the investigations were illegal. Reasonable apprehension of bias is a legal standard for disqualifying decision-makers for [bias](#). Bias of the decision-maker can be real or merely perceived. The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. [The] test is "what would an informed person, viewing the matter realistically and

practically and having thought the matter through conclude.<sup>[7]</sup> A reasonable apprehension of bias may be raised where an informed person, viewing the matter realistically and practically and having thought the matter through, would think it more likely than not that the decision maker would unconsciously or consciously decide the issue unfairly. In my opinion the simple question which requires an answer in each case is this: Is there a real possibility that a reasonable person, properly informed and viewing the circumstances realistically and practically, could conclude that the decision-maker might well be prone to bias?

As stated above, I find that the petitioner moved to court rather too early acting on apprehension, but as at that point in time, I find that the steps already taken by the third Respondent are in conformity with the law and no breach of fundamental rights or threat had taken place or has been sufficiently proved.

The upshot is that I find this petition has no merits at all. The third Respondent has the legal mandate to investigate the legality or propriety of title number **L.R. No. 15868/1 & 2 (Originally 15868)**.

Consequently, I dismiss this petition with costs to the first and second Respondents.

Orders accordingly.

Signed, Delivered, Dated at Nairobi this **12<sup>th</sup>** day of **May** 2017

**John M. Mativo**

**Judge**

---

<sup>[1]</sup> Act No. 5 of 2012

<sup>[2]</sup> Section 26 of Land Registration Act and R vs NLC {2016}eKLR

<sup>[3]</sup> Pet No 334 of 2014

<sup>[4]</sup> Nairobi HCCC No. 1024 of 2005 (OS)(Unreported)

<sup>[5]</sup> Nairobi HC Misc. 1732 of 2004

<sup>[6]</sup> See *Chemei Investments Limited v The Attorney General & Others* Nairobi Petition No. 94 of 2005 (Unreported).

<sup>[7]</sup> The test was first stated in *Committee for Justice and Liberty v. Canada (National Energy Board)*, <sup>[1978]</sup> 1 S.C.R. 369, at page 394