



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.311 OF 2014

BETWEEN

COMPAR INVESTMENTS LTD.....PETITIONER

AND

NATIONAL LAND COMMISSION..... 1ST RESPONDENT

CHIEF LANDS REGISTRAR.....2ND RESPONDENT

KENYA URBAN ROADS AUTHORITY3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, Compar Investments Ltd, is a limited liability company incorporated under the **Companies Act (Cap 486 Laws of Kenya)**. It is the registered owner and occupant of all that parcel of land known as LR No.209/12686 Grant Number I. R 66946/1 (“the suit property”). The grant was issued on 11th September, 1995 and the suit property is situated within Nairobi City County.
2. In its Petition dated 8th July, 2014, it challenges the decision of the 1st Respondent, the National Land Commission (NLC), to review its grant and title to the suit property with a view to revoking it. The Petitioner contends in that regard that the 1st Respondent has acted carelessly and maliciously since it allowed itself to be manipulated by the 3rd Respondent and in particular it contends that the 1st Respondent has violated its fundamental rights under **Articles 40, 47 and 60** of the **Constitution**.

The Factual Background

3. The factual background to this Petition can be summarized as hereunder.

4. That the Petitioner acquired the suit property by way of a purchase in 2001 through a sale agreement dated 24th December, 2000 and instrument of transfer dated 19th March, 2001 from M/s Hypermart Ltd, the initial grantee of the suit property for a consideration of Kshs.70,000,000.00. The transfer was registered on 26th June, 2001 and it was issued with a certificate of title. It has at all times paid rates to the 2nd Respondent and rent to the Nairobi City County. It has also allegedly invested substantially on the suit property by putting up showrooms and godowns on which it has a business of importation and supply of bulk household electrical appliances and related merchandise whose stock is valued in the region of Kshs.650 - 700 million as valued by M/s Lloyd Masika Valuers.
5. The suit property is situated next to the junction of Airport North Road and Nairobi-Mombasa Road where there is an ongoing construction of an interchange on the Eastern By-Pass being undertaken by the 3rd Respondent.
6. In the last four years, it is averred that the Petitioner has approached the High Court on two occasions seeking reliefs to secure its property. Firstly, it instituted **Constitutional Petition No.167 of 2011** where Majanja J held that the action of the 2nd Respondent in revoking the Petitioner's title to the suit property was invalid for it had been undertaken in excess of its mandate. The second case was **Constitutional Petition No.302 of 2013** where I held that the 2nd and 3rd Respondents had to follow the right procedure in acquiring the Petitioner's property for a public purpose.
7. Following my judgment in **Petition No.302 of 2013**, on 14th April, 2014, the 1st Respondent published a Public Notice in local newspapers of its intention to review the Petitioner's grant. The Public Notice had also called for written representations from the affected parties to be made on or before 17th April, 2014.
8. Following the Public Notice, the Petitioner wrote to the 1st Respondent and requested for more time to enable it make representations which was allowed. Subsequently, it made its representations in writing and the hearing of the review was scheduled for 28th April, 2014 when it attended through its advocates. It claims that on the day of the hearing, the 3rd and 4th Respondents' Advocates were ushered into a closed door meeting with the 1st Respondent between 10.00 am and 12.30pm to the exclusion of the Petitioner's Advocates. When the Petitioner's Advocates protested at the conduct of the review proceeding, they were allegedly informed that the 1st Respondent did not allow for adversarial proceedings but the Petitioner's Advocates were in any event later on ushered in at around 12.30p.m. and heard. On 4th July, 2014, the 1st Respondent published its determination in the Friday edition of "**The People**" Newspaper as well as "**The East African Standard**" Newspaper and also on 7th July, 2014 in the Monday edition of the "**The Nation**" newspaper. In its determination as published in the local dailies, it directed that the Petitioner's title to the suit property be revoked.
9. It is therefore the Petitioner's contention that the said determination was undertaken without a proper or fair hearing and was unfair to it hence the present Petition.

The Petitioner's case

10. The Petitioner's case is as contained in its Petition, affidavit in support thereof sworn by its director, Minaxi Karia, on 8th July, 2014 and a further affidavit sworn on 9th January, 2015. It also filed written submissions dated 26th May, 2015.
11. Mr. Mwangi, learned Counsel, for the Petitioner submitted that in the absence of rules and regulations to guide the process of reviewing Grants the whole process leading to the review of the Petitioner's Grant is null and void. That the 1st Respondent should not therefore have embarked

- on the review process without first fulfilling its mandate of prescribing rules and regulations. On that submission, he relied on the decision of **Kenya Country Bus Owners Association vs Cabinet Secretary for Transport & Infrastructure & 5 others (2014) e KLR** where the High Court held that failure to table regulations before the National Assembly as provided for under the **Statutory Instruments Act** rendered them null and void.
12. Mr. Mwangi further contended that the decision to nullify the Petitioner's Grant was null and void as NLC did not follow due process and denied the Petitioner a fair hearing which fact rendered its decision invalid. He further contended that to date, no written reasons or formal decision has been afforded to the Petitioner for it to understand the decision that led to the revocation of its grant. The Petitioner's Counsel therefore contended that the 1st Respondent has misconceived its obligations under **Section 14** of the **National Land Commission Act** and that in making its decision, it was engaging in a quasi-judicial process and it was obligated to give the Petitioner a fair hearing and write a decision detailing its reasons for such a decision. It was therefore his submission that the 1st Respondent acted *ultra-vires* its establishing statute and its decision to revoke the Petitioner's title ought to be nullified.
13. It was his further position that the 1st Respondent was biased in making its decision and that it was specifically influenced by the 3rd and 4th Respondents who extensively briefed the 1st Respondent even before the High Court had made its determination in **Petition No.302 of 2013**. On that submission reliance was placed on the decision of **Republic vs Public Procurement Complaints Review and Appeals Board Ex Parte Invesco Insurance Co Ltd (2004) e KLR** and **Republic vs Chief Justice of Kenya & Another ex parte Moiwo Mataiya Ole Keiwua Nairobi HCC No.1298 of 2004** where it was held that the procedure and process leading to any decision ought to be fair in all circumstances.
14. He also submitted that the 3rd Respondent, the Kenya Urban Roads Authority (KURA), does not have the *locus standi* to challenge its title as the mandate of KURA is clear and it cannot determine the existence or otherwise of a power line on the suit premises without any evidence from Kenya Power and Lighting Company (KPLC). That KPLC was in any event not a party to the review proceedings and did not produce evidence that the suit property was subject to a power way leave agreement.
15. It was also Mr. Mwangi's contention that the suit property was not irregularly acquired or illegally allocated as alleged by the 3rd Respondent and that the Petitioner is a *bona fide* purchaser for value without notice of any defect or irregularity in the title to the suit property as provided for under **Section 14(7)** of the **NLC Act**. It was therefore its case that it is a victim of a conspiracy by the Respondents to arbitrarily take over its property without compensation and relied on the Ugandan Court of Appeal case of **Katende vs Haridas & Co Ltd (2008) 2 EA 173** where the Court defined a *bona fide* purchaser. It also relied on the decision of **Kuria Greens Ltd vs Registrar of Titles & Another (2011) e KLR** where it was held that due process of law must be followed in revoking title to land.
16. The Petitioner for the above reasons urged the Court to grant it the following orders;

“(a) An injunction restraining the 1st, 2nd and 3rd Respondents from entering, demolishing, destroying or varying in any way [altering] the state, condition or form of the Petitioner's property or in any way interfering with the peaceful occupation, smooth and peaceful possession, use and enjoyment of the Petitioner's property LR. No.209/12686 Nairobi for being in breach of the Constitution and the Laws of Kenya and especially Articles 40, 47, 50 and 73 of the Constitution and further for being ultra vires the provisions of Section 14 of the National Land Act, 2012.

(b) An order of prohibition bringing into the High Court for purposes of prohibition the 1st, 2nd 3rd and 4th Respondents' decisions, proceedings, meetings and actions and

activities and any further or attendant actions, including but not limited to procuring the Gazettement, de-registration, cancellation and re-allocation of the Petitioner's suit property LR. No.209/12686 Nairobi for being in breach of the Constitution and the law and in particular Articles 40, 47, 50 and 73 of the Constitution and further for being ultra vires the provisions of Section 14 of the National Land Act, 2012.

(c) An order of mandamus to compel the Respondents to cancel any entries made on the Petitioner's title over L.R. No.209/12686 as a consequence of or in furtherance of determination made by the 1st Respondent and published on 4th July 2014 in "The People" and "Standard" Newspapers for being in breach of the Constitution and the laws of Kenya and especially Articles 40, 47 and 73 of the Constitution and also for being ultra vires Section 14 of the National Land Act, 2012.

(d) An order of Certiorari bringing into High Court for purposes of quashing the 1st Respondent's determination made on 1st July 2014 or on such other date and published on 4th July 2014 in the Friday editions of "the People" and "Standard" Newspapers revoking the Petitioner's title over LR. No.209/12686 Nairobi for being in breach of the Constitution and the law and in particular Articles 40, 47, 50 and 73 of the Constitution and further for being ultra vires the Provisions of Section 14 of the National Land Act, 2012.

(e) A declaration and direction ordering or commanding or compelling the 1st and 3rd Respondents to compulsorily acquire the Petitioner's property LR. No.209/12686 Nairobi subject to payment of such lawful compensation to the Petitioner not being less than the market value of the Petitioner's property, LR. No.209/12686 Nairobi as at the date of the compensation.

(f) A declaration that the Government of Kenya and all its agencies and assignees or officers are not entitled to enter, demolish, interfere with or affect the title to the Petitioner's property, LR. No.209/12686 Nairobi or in any way interfering with its land usage and possession unless and until compensation is settled or agreed upon in accordance with the Land Act, 2012 and any other laws of Kenya.

(g) Exemplary damages against the Respondents herein for the conspiracy, connivance and for actions which are in violation of the Constitution and the National Land Commission Act, 2012 and other statutory laws.

(h) Special damages equivalent to the value of the property, LR. No.209/12686 Nairobi lastly valued for Kshs.1,200,000,000/-.

(i) Costs of and incidental to these proceedings.

(j) Any other or further relief that the court may be pleased to grant."

The 1st Respondent's case

17.The 1st Respondent, NLC, is a constitutional commission established under **Article 67** of the **Constitution** and whose mandate is to *inter alia* manage public land on behalf of the National and County Governments. It also has the responsibilities of monitoring and exercising oversight over land use planning throughout the Country. It opposes the Petition through the Affidavit of Mr. Brian Ikol, the 1st Respondent's Assistant Director for Legal Affairs and Enforcement sworn on 27th November 2014. It also filed written submissions dated 6th March, 2015 and 6th July, 2015.

18.According to Mr. Ikol, the 1st Respondent received a complaint from KURA in respect of the

Grant of the suit property on 5th June, 2013 and it subsequently published a newspaper advertisement *inter alia* giving notice of its intention to review the said Grant. That NLC subsequently supplied to the Petitioner a number of documents relevant to the review proceedings as requested by the Petitioner.

19. He further claimed that the law does not demand that a party ought to establish a *prima facie* case before the 1st Respondent can decide to review any grant or disposition of public land. He therefore stated that the allegation by the Petitioner that the 1st Respondent acted carelessly and maliciously in deciding to review the Petitioner's title based on the documents supplied by the 3rd Respondent is unfounded. That in any event, the 1st Respondent is required by law to review all grants and dispositions of public land to establish their propriety and legality and that the 1st Respondent, in deciding to review the Petitioner's Grant, acted in utmost good faith and well within its constitutional mandate and cannot have acted on account of any conspiracy between itself as well as the 3rd and 4th Respondents as alleged by the Petitioner.
20. He further claimed that pursuant to the provisions of **Section 6(3)** of the **NLC Act**, the 1st Respondent may receive written or oral statements from a party as a basis of its decision and it is not bound by strict rules of evidence. Further, it is also empowered by the law to gather evidence by such means as it considers appropriate and may also gather any relevant information from any source prior to its decision.
21. He added that at the hearing of the review matter, the 1st Respondent deemed it appropriate to initially interview representatives of the 3rd Respondent so as to shed light on its complaint and in so doing it did not lose its independence and impartiality to execute its constitutional and statutory mandate. He nevertheless deponed that in the end, the 1st Respondent afforded both the 3rd Respondent and the Petitioner an opportunity to make oral representations and considered those representations before making a determination directing the 2nd Respondent to revoke the title to the suit property.
22. Mr. Ikol further averred that the proper proceedings to determine the legality or regularity of a grant of public land can only be undertaken by the 1st Respondent and that an examination of the legality of a title requires the 1st Respondent to examine all the processes and procedures preceding the issuance of title, and in essence interrogating the indefeasible nature of title as per its mandate.
23. It was also his position that the 1st Respondent did not breach the Petitioner's rights under **Article 47** of the **Constitution** and that it acted at all times within the Constitution and the **NLC Act**. In any event, he reiterated that the Petitioner was given an opportunity to respond to the complaint and it prepared an appropriate response by way of written representations and its advocates were given an opportunity to make oral presentations before the 1st Respondent's Commissioners. He therefore claimed that the Petitioner was afforded a reasonable opportunity to be heard by NLC.
24. He further claimed that the fact that the 1st Respondent had not published any procedural rules for the conduct of reviews of grants does not invalidate its decision to revoke the Petitioner's title to the suit property. That the 1st Respondent has in any event prepared guidelines to provide direction during the review proceedings pending the enactment of procedural rules and that the 1st Respondent has indeed prepared rules of procedure which have been tabled before the National Assembly for enactment.
25. He further deponed that NLC investigations had revealed that the Petitioner's Grant was illegally acquired and does not merit protection under **Article 40(6)** of the **Constitution**. In that regard he stated that NLC established that the suit property had been set aside and subject to an electric powerline way-leave and therefore was not available for allocation to private developers. That the

lack of an approved plan giving the user of the land as “**commercial**” was a fundamental defect in the title to the extent that a registered owner would not pass a good title to an innocent purchaser for value without notice. He therefore claimed that it would be unjustifiable for the 3rd Respondent to pay compensation for land that was at all times reserved for public use.

26. Mr. Saluni, learned Counsel, presented the 1st Respondent’s case and submitted that the law mandates the 1st Respondent to review grants or disposition of public land with a view to establishing their propriety and legality. Indeed, he claimed that **Section 14(1)** of the **NLC Act** is couched in mandatory terms and makes it an obligation on the part of NLC to review all grants and dispositions of public land and that under the Constitution and the **NLC Act**, it had been clearly contemplated that the 1st Respondent has an exclusive mandate to review all grants or dispositions of public land in order to establish their legality.
27. According to Mr. Saluni therefore, the Petitioner has invited this Court to make a determination on the regularity of its title to the suit property and in so doing, it is asking the Court to undertake the review process which is the exclusive mandate of the 1st Respondent; and that such an action would be in violation of the doctrine of separation of powers and institutional independence of the 1st Respondent guaranteed under **Article 249** of the **Constitution**. On that submission he relied on the case of **Diana Kethi Kilonzo and Another vs The Independent Electoral and Boundaries Commission and 10 others (2013) e KLR** where it was held that the Court would only intervene if the Respondents had failed to do that which is demanded of them by the Constitution. He therefore submitted that if this Court were to make a determination on the legality of the Petitioner’s title to the suit property, the same would be tantamount to usurping the 1st Respondent’s powers to review grants or dispositions of public land to determine their propriety or legality.
28. It was Mr. Saluni’s other submission that the 1st Respondent had not occasioned a breach of the Petitioner’s rights under **Article 47** of the **Constitution** through its actions and decision to revoke the Petitioner’s title to the suit property and that the 1st Respondent’s actions were well within the Constitution and the **NLC Act**. That it ensured that the review proceedings were procedurally fair by following the procedures/guidelines laid down under the **NLC Act**. On that submission he relied on the case of **Kenya Revenue Authority vs Menginya Salim Murgani (2010) e KLR** where it was held that decision making bodies are masters of their own procedures and are only required to achieve some degree of fairness appropriate to their task.
29. Further to the above submission, Counsel submitted that under **Section 6(3)** of the **NLC Act**, the 1st Respondent is not bound by strict rules of evidence. He however stated that notwithstanding that fact, the 1st Respondent had published, in local newspapers, its intention to review the Petitioner’s grant and directed every person who had an interest in the Grant to attend the intended review. That the Petitioner, through its letter of 14th April, 2014, requested for documents relevant to the review proceedings which the 1st Respondent supplied to it. That on 28th April, 2014, the 1st Respondent then afforded both the complainant (3rd Respondent) and the Petitioner an opportunity to make oral representations. That NLC thereafter considered the representations by all parties before directing the 2nd Respondent (Chief Lands Registrar) to revoke the Petitioner’s title to the suit property.
30. It was Counsel’s contention therefore that the review proceedings over the suit property were lawful, reasonable, procedurally fair and generally within the dictates of **Article 47** of the **Constitution**. In that regard, he referred the Court to the decision of **Russel vs Duke of Norfolk (1949) 1 ALL ER** where it was held that one essential dictate of natural justice was that the person concerned by any proceedings would have had a reasonable opportunity of presenting his case. It was his position therefore that the right to fair administrative action and by extension, the right to be heard, should not be interpreted to mean a full adversarial hearing. On that submission, he relied on the case of **Simon Gakuo vs Kenyatta University and 2 Others Misc Civil Applic**

No.34 of 2009.

- 31.It was also his position therefore that the 1st Respondent did not commit an error of law in making its determination to direct revocation of the Petitioner's title to the suit property and that it acted within the law during the review proceedings and rendered a reasonable decision.
- 32.On the issue as to whether the suit property is public land, Mr. Saluni submitted that the investigations by the 1st Respondent had revealed that the Petitioner's grant was illegally acquired because it had been set aside for purposes of an electric power way leave, and is therefore public land that is not available for allocation as it should only be used for a public purpose. That the right to property under **Article 40** of the **Constitution** does not in the circumstances extend to any property that has been unlawfully acquired. Further, that the fact that the Development Plan for the land indicated that it was set aside for purposes of an electric power way leave and the lack of an approved plan changing the use of the suit property connotes a defect in the Petitioner's title as the same was not available for allocation *ab initio*. He relied on the case of **Evelyn College of Design Ltd vs Director of Children's Department & Another (2013) e KLR** for that proposition and where it was held that the Commissioner of Lands did not have powers to alienate land which had been reserved for a public purpose. He also relied on the case of **Adan Abdirahani Hassan & 2 Others vs Registrar of Titles and 2 Others (2013) e KLR** for the proposition that any alienation of land reserved for a public purpose and issuance of a title for the same was a nullity.
- 33.Mr. Saluni further contended that the suit property having been unlawfully acquired then the rights under **Article 40** of the **Constitution** were not open for enjoyment by the Petitioner. That the Petitioner also cannot seek orders to compel the Government to compulsorily acquire the suit property and pay compensation for the same.
- 34.In response to the Petitioner's claim that it is a *bona fide* purchaser of the suit property, Mr. Saluni submitted that a registered owner cannot pass a good title to a purchaser if the title is void *ab initio*. In that regard he relied on the decision in **James Joram Nyaga vs Attorney General & 2 Others (2007) e KLR** where it was held that parties cannot claim compensation for compulsory acquisition of their land if they do not have a good title to the same.
- 35.For the above reason, the 1st Respondent urged the Court to dismiss the Petition with costs to the Respondents.

2nd, 3rd and 4th Respondents' case

- 36.In response to the Petition, the 2nd Respondent, the Chief Land Registrar, the 3rd Respondent, KURA and the 4th Respondent, the Attorney General, in response to the Petition filed an affidavit sworn by Abdulkadir Ibrahim Jatani, the Chief Surveyor with the 3rd Respondent, which was sworn on 4th July, 2014.
- 37.In his affidavit, Mr. Jatani gave an account of the genesis of the present dispute and that the suit property lies at the interchange of Mombasa Road and the Eastern Bypass at the City Cabanas junction. That the concept of the bypass had been initially worked out in the 1960s and it stalled due to lack of funds until 2010 when funds were raised.
- 38.He further deponed that there were challenges during the actual construction as a result of encroachments on the road's reserve but eventually the project took off and proceeded without a glitch until the interchange phase. That at that stage several properties were identified as having encroached on public utility lands along Mombasa Road including the suit property.
- 39.That both prior suits involving the suit property i.e. **Petition No.302 of 2013** and **Petition No.178 of 2011** did not determine the legality of the Petitioner's title as neither Court in the aforesaid Petitions delved into the issue of ownership of the suit property. For example In **Petition No.302**

of 2013, the Court referred the dispute to either NLC or the Environment and Land Court established under **Article 162(2)** of the **Constitution**.

40. That subsequent to the judgment in **Petition No.302 of 2013**, the 3rd Respondent referred the dispute to NLC for final determination vide a letter dated 5th June, 2013. The 1st Respondent thereafter invited all parties with an interest in the suit property to make representation in an oral hearing. On 28th April, 2013, the Representatives of the 2nd, 3rd and 4th Respondent attended the inquiry; and they were informed that the review process was not adversarial but inquisitorial and as such there was no need to have all the parties present at the same time neither was there going to be any examination in chief or cross-examination. He stated that the technical team from KURA which comprised of the Project Engineer, the Chief Surveyor and Way-leave Officer from Kenya Power and Lightning Company (KPLC) made presentations on the road infrastructure and road corridors, the physical planning regime which led to the preparation of the Part Development Plan that reserved the area as a road buffer zone and a way leave was granted to KPLC. That after the presentations, the panelists from the 1st Respondent posed questions to individual participants based on their area of expertise and they were thereafter excused and the Petitioner's representatives ushered in. The 1st Respondent thereafter directed that the Petitioner's title be revoked upon consideration of all the evidence presented to it.

41. Miss Wambui, learned Counsel for the above Respondents added that the 1st Respondent had the powers to call for an inquiry into the Petitioner's title to the suit property and was also acting within its powers to call for a review of the said title. That under **Section 6(3)** of the **NLC Act**, it additionally had the powers to conduct the inquiry in the manner it did and even if there were no rules promulgated by the Commission to aid its hearings, **Section 14(8)** of the **NLC Act** allows the Commission the right to conduct a review in any lawful manner and there was not procedural unfairness as alleged by the Petitioner.

42. In regard to the claim that NLC violated the Petitioner's right to fair administrative action under **Article 47** of the **Constitution**, she submitted that NLC afforded the Petitioner a reasonable time to prepare for the hearing and accorded it a hearing before it reached its decision to revoke the title. She relied on the case of **Judicial Service Commission vs Gladys Boss Shollei (2014) e KLR** on the point that the right to a fair hearing includes the right to be informed of the hearing or trial, an opportunity for any party to present his or her case or challenge the case against him. That the said test was passed in the proceedings at NLC that the Petitioner's right to a fair hearing was neither violated nor infringed by NLC.

43. It was also her contention that the Petitioner is not entitled to the orders sought as NLC is the lawful body mandated to determine the legality of the Petitioner's title and or grant and there does not exist any lawful framework that would provide for the compensation of the Petitioner at will as public funds cannot be used to compensate the revocation of an illegally acquired title.

44. Miss Wambui in conclusion urged the Court to dismiss the Petition with costs.

Determination

45. From the pleadings and the Parties' submissions, I am of the view that there are three issues for determination in this Petition and they are as follows;

- a. Whether the 1st Respondent has the mandate to determine the legality of the Petitioner's Grant over the suit property.
- b. Whether the 1st Respondent violated the Petitioner's rights under **Article 47** of the **Constitution** or any other Article of the Constitution.
- c. Whether the 1st Respondent is a *bonafide* purchaser for value of the suit property without notice.

d. Whether the Prayers sought can be granted.

Whether the 1st Respondent has the mandate to determine the legality Petitioner's Grant over the suit property

46. The mandate of the 1st Respondent to review the Grant over the suit property was questioned by the Petitioner on two fronts. Firstly, the Petitioner contends that in the absence of rules and regulations to guide the process of reviewing Grants, the 1st Respondent should not have embarked on the process of reviewing the Grant over the suit property. On its part the 1st Respondent does not deny that it had not formulated such rules but submitted that it had drafted the rules and the same had been tabled in Parliament for scrutiny as provided for under the **Statutory Instruments Act No.23 of 2013**. That nonetheless, it still had the lawful mandate to review any Grant subject to the application of the rules of natural justice which were duly applied in the present case.

47. In that regard, I note that the 1st Respondent is a constitutional commission established under **Article 67** of the **Constitution** and whose functions are set out under the said **Article** as well as the **NLC Act**. These functions *inter alia* are; to manage public land on behalf of the National and County Governments and to monitor and have oversight responsibilities over land use and planning throughout the country. The Commission under **Section 5(2)** of the **NLC Act** also bears other responsibilities including power to alienate public land on behalf of, and with the consent of the National and County Governments, monitoring the registration of all rights and interests in land and ensuring that public land and land under the management of designated state agencies are sustainably managed for their intended purpose and for future generations.

48. Under **Article 68 (c) (v)** of the **Constitution**, Parliament has been granted the mandate to enact a legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality. Pursuant to that provision, Parliament enacted **Section 14 (1)** of the **National Land Commission Act**. For avoidance of doubt, this Section provides thus;

“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.”

49. **Section 14(2)** of the **NLC Act** then obliges the 1st Respondent to make rules for the better carrying out of its functions in relation to review of grants or dispositions of public land.

50. It is not in dispute that the 1st Respondent at the time of carrying out the review of the Petitioner's Grant had not promulgated the rules envisaged under **Section 14(2)** of the **Act**. Did the 1st Respondent therefore act unlawfully by doing so in the absence of rules? I do not think so.

51. I say so because the lack of the envisioned rules under **Section 14(2)** of the **NLC Act** cannot divest the 1st Respondent of its constitutional mandate to review grants or dispositions of public land and that mandate cannot be defeated or ousted by lack of rules envisaged under **Section 14(2)** of the **NLC Act**. It is therefore not true that the 1st Respondent has, by choice, elected to dishonor and disobey its own Statute as alleged by the Petitioner.

52. I also note that the Petitioner did not claim that it was prejudiced in any way during the review hearing without the aforesaid rules such that it was completely unable to present its case. I only heard the Petitioner to claim that the undertaking of the review of the Grant was done to its detriment. The question that must then arise is; how was the review conducted to the detriment of the Petitioner especially given that the 1st Respondent was exercising its constitutional mandate? The Petitioner failed to plead with some degree of precision how the failure of application of the

aforesaid rules was detrimental to it and I shall not belabour the point further.

53. The Petitioner also complained that the 1st Respondent did not have a *prima facie* case before proceeding to review its Grant as it acted on a complaint made by the 3rd Respondent, KURA, which does not have the *locus* to challenge its title.

54. In that regard, **Section 14(1)** of the **NLC Act** mandates the 1st Respondent within five years of the commencement of the **NLC Act**, to review grants or dispositions of public land so as to establish their legality.

55. **Article 62** of the **Constitution** defines “**public land**” while **Article 64** defines “**private land**” as follows;

“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.”**

56. Despite the fact that the Petitioner’s land is currently classified as private land because it holds a 99 years’ leasehold tenure over the same, I do not think that fact alone bars the 1st Respondent from inquiring into its propriety. I say so because, all land in Kenya belongs to the Republic hence the leasehold title held by the Petitioner. The suit property has a history which history tells the procedure of its alienation and hence its legality or otherwise. The Government has powers to alienate its land and grant it to private individuals in forms of grants or leases. **Section 2** of the **Land Act** defines “**a lease**” as follows;

““lease” means the grant, with or without consideration, by the proprietor of land of the right to the exclusive possession of his or her land, and includes the right so granted and the instrument granting it, and also includes a sublease but does not include an agreement for lease.”

57. I have in that regard seen Annexure ‘**MK 5**’ attached to the affidavit of Mr. Minax Karia in support of the Petition stating that the Government had initially offered the Petitioner a Grant over the suit property and It is therefore obvious that the suit property at one time was in the possession of the Government and hence was public land. That being so, the 1st Respondent has the mandate to determine the legality or otherwise of the said Grant, despite the fact that the suit property is currently registered as private land.

58. But suppose I am wrong in making that finding, I would still arrive at the same conclusion given the provisions of **Section 14(1)** of **NLC Act** which allows the 1st Respondent, on its own motion or through a complaint lodged by an individual or a community, to review a grant. KURA in its letter dated 5th June, 2013 lodged a complaint to the 1st Respondent over the suit property and requested it to investigate the title of the Petitioner over the suit property and that was a sufficient reason for NLC to act under the law.

59. As for the *locus standi* of KURA, KURA is established under the **Kenya Roads Act**. Under **Section 10(1)** of that **Act**, It is a State corporation responsible for the management, development, rehabilitation and maintenance of all public roads in the cities and municipalities within the Republic. In his affidavit Mr. Jatani deponed that in fulfilling its mandate, KURA has been overseeing the implementation of the Eastern by-pass road project and it has commissioned survey works for the planned interchange at the City Cabanas Junction along Mombasa Road. That the overpass awaits three planned loops to complete the interchange but the construction has stalled

due to encroachment on an area reserved for a power line where the suit property is situated. In that context therefore it can hardly be denied that KURA has the *locus standi* to complain to the 1st Respondent and the 1st Respondent has the mandate to review the Grant based on that complaint. The other complaint of the Petitioner that the 1st Respondent shall establish a *prima facie* case before reviewing any grant or disposition of public land is also unfounded and is dismissed.

60. In any event, the 1st Respondent, under **Section 14(1)** of **NLC Act** has been mandated by law to review all grants and dispositions of public land within five years and the Petitioner's Grant would have been reviewed anyway at some point with or without a complaint by KURA. In concluding this issue, it is my finding that the 1st Respondent has the mandate to review the Petitioner's Grant over the suit property contrary to the allegations by the Petitioner.

Whether the 1st Respondent violated the Petitioner's rights under Article 47 of the Constitution of any other Article of the Constitution

61. The Petitioner contended that the 1st Respondent, during the review proceedings, violated its (the Petitioner's) rights to fair administrative action as stipulated under **Article 47** of the **Constitution**. Its complaints in that regard were firstly, that during the hearing on 28th April 2014, the Petitioner's Advocates were denied the right to cross-examine the Respondents' witnesses and or ask questions that the Petitioner could have had regarding the suit property. It therefore claimed that it was denied a fair hearing or the right to have a decision made by a tribunal after listening to both or all affected parties. It also claimed that the 1st Respondent did not follow due process in conducting the review process and therefore violated its right to fair administrative action.

62. On their part, the 2nd and 4th Respondents have submitted that the 1st Respondent did not violate any of the Petitioner's right as it was accorded a hearing before a decision was made affecting it. It also claimed that it followed due process before the decision to direct the revocation of Petitioner's title was made.

63. In that context, the right to a hearing in a quasi-judicial context is contained in **Article 50** of the **Constitution** which provides that;

“every person has the right to have any dispute that can be resolved by application of the law decided in a fair and public hearing before a Court or if appropriate another independent and impartial tribunal or body”.

It is not contested that the 1st Respondent was exercising a quasi-judicial function during the review process and was required to give the Petitioner a fair hearing before making a decision affecting it. Was **Article 50** thereby violated? I shall return to the issue shortly.

64. On the other hand, **Article 47** of the **Constitution** provides for the right to a procedurally fair administrative process as follows;

“(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.”

Article 47 above is clear that when an administrative action is being undertaken, the person affected by the decision, ought to be given a hearing or written reasons for the decision - See **Independent Police Oversight Authority & Others vs The National Police Service Commission and Others (2014)** e

KLR and also Ahmed Hassan Issack vs Auditor General (2015) e KLR.

65. In the above context, and as I have stated elsewhere above, the 1st Respondent received a complaint from the 3rd Respondent in respect to the suit property. On 14th April, 2014, it published a newspaper advertisement giving notice of its intention to review various grants including the one held by the Petitioner. **Section 14(3) of NLC Act** obliges the 1st Respondent to give every person who appears to have an interest in a grant or disposition set to be reviewed a notice of such intended review. I did not hear the Petitioner to claim that it was not given notice of, or sufficient notice of the intended review.
66. Upon getting due notice, the Petitioner in its letter of 14th April, 2014 requested to be supplied with documents relevant to the review proceedings. In compliance with **Section 14(3) of the NLC Act** that obligates the 1st Respondent to give an opportunity to any person who appears to have an interest in a grant an opportunity to inspect any relevant documents, supplied to the Petitioner the relevant documents to be relied on in the review proceedings. I also did not hear the Petitioner to have any complaint in that regard.
67. Its principal complaint is that the 1st Respondent on the hearing day violated the right to due process as it did not accord the Petitioner an opportunity to cross-examine witnesses and evaluate the evidence tabled by the Respondents.
68. In that regard, it has not been controverted that the 1st Respondent allowed all affected parties to make oral and written representations during the hearing. It is also not in dispute that the 1st Respondent did not hold adversarial proceedings during the hearing as each party was heard separately. Did the 1st Respondent's decision to do so violate the Petitioner's rights for fairness under **Articles 47 and 50 of the Constitution**?
69. According to the Respondents, the 1st Respondent was not required to conduct an adversarial hearing as does happen in litigation before the Courts. In that regard I understand the law to be as set out in the case of **Simon Gakuo vs Kenyatta University and 2 Others (supra)** where the Court stated that;
- “The audi alteram partem rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per Section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection of law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the Court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation”. (sic)***
70. I am in agreement with the Court as the rule applies particularly to proceedings under **Articles 47** and not necessarily **Article 50** aforesaid. Taking into account therefore the foregoing, and in the totality of the facts in this case, I am not convinced that the 1st Respondent violated the Petitioner's right to fair administrative action and fair hearing. I say so because the Petitioner was accorded an opportunity to be heard when it appeared before the 1st Respondent's panel and that was sufficient compliance with **Article 47**.
71. I say so well aware that I do not have the record of the proceedings before the 1st Respondent in regard to the review proceedings of the Petitioner's title and I am therefore unable to ascertain whether the Petitioner's advocates made any meaningful representations before the 1st Respondent. However, from the pleadings and what is on record, it is certain to me that the Petitioner was given an opportunity to respond to the complaint in regard to the suit property. In fact, it prepared an appropriate response by way of written representations and it was given an

opportunity to make oral representations before the 1st Respondent. To my mind therefore, there was a reasonable degree of fairness attained in the review proceedings.

72.The Petitioner further contended that the 1st Respondent allowed itself to be used as a tool to secure the Petitioner's land for the 3rd Respondent. That the 1st Respondent became biased and was not impartial in adjudicating and deciding on the suit property. However, where is the evidence of the alleged bias? I have already found that the 1st Respondent has the mandate to undertake a review of the Petitioner's Grant over the suit property. In the circumstances and in the absence of any evidence to substantiate the allegation of bias, I do not find that the 1st Respondent was so compromised to the extent that it was unable to act objectively.

73.I have also already stated that the proceedings before the 1st Respondent are not required to be akin to litigation proceedings before a Court of law. The nature and scope of the right to due process including the right to be heard must therefore be examined within the context of each case and all that a quasi-judicial body or even an administrative body is required to do is to ensure a reasonable degree of fairness. The Petitioner was given a chance to make both oral and written representations and therefore the 1st Respondent did not violate the Petitioner's rights to fair administrative action and fair hearing under **Articles 47 and 50 of the Constitution** and I so find. I should now turn to the allegation that the Petitioner's right to property has been violated because it was a *bona fide* purchaser without notice.

Whether the 1st Respondent is a bona fide purchaser of the suit property without notice

74.It was the Petitioner's contention that the decision to revoke its title to the suit property has violated its right to property as it is a *bona fide* purchaser for value without notice.

75.**Article 40** of the **Constitution** protects property rights. In order to enforce this right, a party must demonstrate that it is entitled to the property in issue and clearly show the proprietary interest sought to be protected. In **Joseph Ihugo Mwaura and 82 others vs Attorney General Petition No.498 of 2009** the Court stated as follows;

“Section 74 of the Constitution (equivalent of Article 40 of Constitution 2010) contemplates that the person whose property is the subject of compulsory acquisition has a proprietary interest as defined by law. The Constitution and more specifically Section 75 does not create proprietary interest nor does it allow the Court to create such rights by constitutional fiat. It protects proprietary interest acquired through the existing legal framework.”

76.For a party to enforce the rights in **Article 40** of the **Constitution**, it must also establish that it has an indefeasible title to property - See **Philma Farm Produce & Supplies & 4 others vs Attorney General & 6 Others Petition No. 194 of 2011**.

77.The issue as to whether the Petitioner has an indefeasible title over the suit property is indeed the substratum of this Petition. Sadly, as was held in **Petition No.302 of 2013**, this Court under **Article 162(2) (b)** of the **Constitution** does not have the jurisdiction to determine the legality of the Petitioner's title. In that case, I also stated that the right bodies to determine the legality of the Petitioner's title was NLC and the Environment and Land Court.

78.There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy or procedure to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. Such has been the gist of such cases like **The Speaker of the National Assembly vs Karume (2008) 1 KLR 426**. In **Narok County Council vs Trans Mara County Council and Another, Civil Appeal No.25 of 2000**, the Court of Appeal expressed itself as follows in that regard;

“Although Section 60 of the Constitution gives the High Court unlimited jurisdiction, it cannot be understood to mean that it can be used to clothe the High Court with jurisdiction to deal with matters which a statute has directed should be done by a Minister as part of his statutory duty; it is where the Statute is silent on what is to be done in the event of a disagreement...Where the Statute provides that in case of a dispute the Minister is to give direction, the jurisdiction of the Court can be invoked only if the Minister refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter, his decision can be challenged by an application to the High Court for a writ of certiorari because under the relevant Section the decision is to be made on a fair basis. But if the Minister simply refuses to discharge his statutory duty, his refusal can also be challenged in the High Court by way of mandamus to compel the Minister to perform his statutory duty but not by way of a suit ... If the Court acts without jurisdiction, the proceedings are a nullity ...”

As to the extent of the jurisdiction of the High Court, the Court stated that;

“The extent of the jurisdiction of the High Court may not only, be that which is conferred or limited by the Constitution but also, that which the Constitution or any other law, may by express provisions or by necessary implication, so confer or limit ... The jurisdiction of the High Court can be ousted by an Act of Parliament and in such cases all that the High Court can do is to enforce by judicial review proceedings, the implementation of the provisions of the Act; certainly not, to usurp the powers of the Minister... Even though resort to the judicial review process, may in appropriate cases not be a bar to other proceedings such as a plaint, this may not apply in peculiar circumstances such as this one, so as to entitle the Judge to do not only what he was not requested to do, but also, to do what he had no jurisdiction to embark upon.”

The Court concluded as follows as regards the jurisdiction of the High Court;

“Where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law as the Court would have no jurisdiction to entertain the dispute.”

79. That is the law as I understand it and in the present case, the 1st Respondent has already determined the legality of the title of the Petitioner. This Court can only exercise its review powers over NLC. Thus far, I have not found any wrong doing on its part in regard to its processes. That being so therefore I do not find a violation of the Petitioner’s rights to property.

80. On the issue whether the Petitioner is a *bona fide* purchaser for value without notice, it is true and in that regard I have seen the instruments of conveyance that would establish that the Petitioner is a *bona fide* purchaser of the suit property. But does he pass the test of a *bona fide* purchaser as was set out by the Court of Appeal in the case of **Samuel Kamere vs Lands Registrar, Kajiado Civil Appeal No.28 of 2005** held that;

“In order to be considered a bonafide purchaser for value, he must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title, and thirdly that he paid valuable consideration for the purchase of the suit property”.

From the facts before me, it is clear that the Petitioner paid a valuable consideration of the suit property. The issue therefore is whether he acquired a legitimate title thereafter. I reiterate in that regard that his Court is not clothed with jurisdiction to determine that question, but if it had such jurisdiction, I note that the 1st Respondent has found that the suit property had been set aside for a public purpose, that is for an electric power way leave. **Section 2** of the **Land Act** defines public purpose to mean; the purpose of public utilities for water, sewage, electricity, gas, communication, irrigation and drainage or any other

public purpose.

81. In the case of **Adan Andirahani Hassan & 2 Others vs the Registrar of Titles and 2 others (supra)** the Court stated that;

“Any alienation of land reserved for a public purpose and issuance of a title for the same, whether under the Registration of Titles Act or the Registered Land Act is null and void ab initio. Such a title does not exist in the first place because the land belonged to the public and was not available for alienation. The cancellation of such a title which is not a title known in law because it should not have been issued in the first place, would be an administrative exercise by the Commissioner of Lands or the Registrar of titles to rectify mistake or misrepresentation that was made by the same office.”

82. Can it then be said that by making its determination based on the facts and the law, the 1st Respondent violated the Petitioner’s rights under **Article 40** of the **Constitution**? To my mind the 1st Respondent could not have violated the Petitioner’s right to acquire and own the suit property because it found that the suit property had been unlawfully acquired by a process known to the **Constitution** and the **NLC Act**. In the case of **Evelyn College of Design Ltd vs Director of Children’s Department (supra)**, the Court held that a finding of unlawful acquisition as stipulated under **Article 40(6)** of the **Constitution** had to be established through a legally established process and not by forceful occupation of property by the State. In the instant case, I have found that there was a valid process that determined the legality or otherwise and propriety of the Petitioner’s property.

83. Having found that the process that determined the legality of the Petitioner’s suit was valid, the Petitioner cannot now claim to be a *bona fide* purchaser for value in the face of the illegalities established by the 1st Respondent which is the body mandated by law to review the legality or otherwise of all grants to land.

Whether the orders sought can be granted

84. I have elsewhere above addressed all relevant issues and I have shown that on the law and the facts, the Petitioner’s case is weak. Turning therefore back to the Prayers sought, Prayers (a), (b) (c), (d), (e) and (f) cannot be granted as they are premised on alleged unlawful conduct by the Respondents which I have said is not true as all of them, especially the 1st Respondent, at all times acted within their lawful mandates.

85. Prayers (g) and (h) are for damages consequent upon the above prayers and it is obvious why they cannot be granted.

86. On costs, while ordinarily costs follow the event, in this case and noting the history of the present litigation, it is best that each party bears its own costs.

Conclusion

87. It must be remembered that the substratum of the Petitioner’s case was that the 1st Respondent did not have the mandate to review its title and that it did not follow due process in its review proceedings therefore violating its rights to fair administrative action and fair hearing. I have found that the 1st Respondent has the mandate to review the Petitioner’s Grant if it has received any complaints of its illegality. I have also found that in its review proceedings, it followed due process and did not violate the Petitioner’s right to fair administrative action or fair hearing. I have also found that the Petitioner is not entitled to compensation.

88. In the circumstances, I shall dismiss the Petition with an order that each party shall bear its own costs.

89.Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 5TH DAY OF FEBRUARY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki -Court clerk

Miss Wambui for 2nd, 3rd and 4th Respondent

Miss Akung'a holding brief for Mr. Mwangi for Petitioner

Miss Omuko for 1st Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE

5/2/2016