



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC PETITION NO. 20 OF 2019

KENEXIM SERVICE LIMITED.....PETITIONER

VERSUS

THE NATIONAL LAND COMMISSION.....RESPONDENT

JUDGEMENT

1. Kenexim Services Limited filed this petition on 16/4/2019 seeking a declaration that its fundamental rights and in particular the right to be heard and access justice and freedom of the individual under Articles 47, 48 and 50 of the Constitution had been contravened and violated by the Respondent. The Petitioner also sought an order of certiorari to quash the proceedings and decision made by the Respondent which led to the recommendation published in gazette notice number 97 of 17/7/2017 which was contained in its letter dated 31/1/2019 and gazette notice number XXXX revoking the title over land reference number (L.R. No.) 209/11804 (“the Suit Property). In addition, the Petitioner sought an order of prohibition to prevent the Respondent by itself or through any other body from commencing proceedings, discussing issues relating to the Suit Property or recommending revocation of the title over the Suit Property. The Petitioner also prayed for any other order or writ the court may deem fit, just and appropriate to grant.

2. The petition was filed on the grounds that the Petitioner applied for allocation of a plot in Industrial Area, Nairobi on 26/7/1991 following which the Commissioner of Lands issued a letter of allotment to the Petitioner on 16/9/1992 for an unsurveyed piece of land situated in Industrial Area measuring 2 hectares for a term of 99 years from 1/10/1992. The Petitioner was required to accept allotment and pay Kshs. 557,600 as stand premium and other fees. The Petitioner claimed that it accepted the offer and made payment and was subsequently issued a title on 1/10/1992 by the Ministry of Lands over L.R. No. Nairobi Block 72/2256. The Petitioner claimed that it had duly paid the rent and rates demanded by the government.

3. The Petitioner claimed that it entered into an agreement with FBP Limited vide which it agreed to sell L.R. No. 209/11804 to this company on 24/11/2014. It claimed that the Commissioner of Lands gave consent for the sale and transfer of Suit Property on 21/11/2014. The Petitioner averred that FBP Limited had always been proprietor of the Suit Property.

4. The Petitioner claimed that through a letter dated 31/1/2019 addressed to the County Secretary, County Government of Nairobi, the Respondent informed the County Government of Nairobi that it arrived at a decision pursuant to the complaint made by the County Government. The decision dealt with among other things, the recommendation that the title over L.R. No. 209/11804 should be revoked and the title held by FBP Limited ought to vest in the Nairobi County Government. The reasons for the recommendations were that there was no evidence of approval by the Commissioner of Lands in respect of the part development plans which informed the allocations and that they could not be authenticated; there was no record of planning to support the allocations; the letters of allotment of 1997 and 1999 were based on controversial part development plans; some of the allotments did not have deed plans or had had their deed plans cancelled; and a number of allocations were outside the area claimed by Dupopo Settlement Scheme. These reasons were based on the report of the Director of Physical Planning and the Director of Land Administration.

5. The Respondent adopted that report and recommended that the Land Registrar revoke L.R. No. 209/11804. The Petitioner maintained that L.R. No. 209/11804 was not among the properties forwarded to the Respondent by the Nairobi City County through its letter dated 21/6/2018. The Petitioner contended that the Respondent relying on the report of the Director of Land Administration proceeded to recommend revocation of the title in the name of FBP Limited knowing very well that that land had a deed plan which had not been cancelled or, if it had been canceled, the Petitioner was not informed about the cancellation. It averred that the report was not supplied to parties and in any event the Petitioner contended that it was too general and that the Respondent should not have relied on it as the basis for revoking the title over L.R. No. 209/11804. He further contended that the Respondent did not subject the letter of allotment relied on by the Nairobi City County to thorough scrutiny to confirm its authenticity. The Petitioner faulted the Respondent for not summoning it to appear before it so that it could give an account on how the letter of allotment was issued to it.

6. The Petitioner relied on Article 68(c) (v) of the Constitution and Section 14 of the National Land Commission Act on the review of grants of public land to establish their legality. The Petitioner adverted to Article 47 of the Constitution on the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. It contended that upon reviewing grants and dispositions in the Petitioners absence, the Respondent made a determination and directed the Land Registrar to revoke the title issued to the Petitioner citing the reason that it was public utility land. Further, that according to the County Government of Nairobi the suit land formed part of Darfur Dupopo

Settlement.

7. The Petitioner maintained that it acquired the Suit Property regularly having been allocated the land by virtue of the orders of President Daniel Moi who had a discretion and power to allocate land to individuals. The Petitioner contended that its right to fair hearing, right to access justice and the right to fair administrative action under Articles 50, 48 and 47 of the constitution had been infringed.

8. It added that due to the Respondent's action, FBP Limited terminated the agreement that it had entered into with the Petitioner which would lead the Petitioner to suffer irreparable damage. The Petitioner also relied on Articles 2, 10, 19, 20, 21, 23, 24 and 27 of the Constitution.

9. The petition was supported by the affidavit of Nainesh K Shah who attached a specific power of attorney dated 20/3/2019 donated by FBP Limited to the Petitioner empowering the Petitioner to apply for judicial review against the Respondent's determination regarding the title over the suit land. He annexed a copy of the letter dated 26/7/1991 seeking allocation of an industrial plot in Nairobi. The letter of allotment that he produced was issued to the Petitioner on 18/9/1992 and was in respect of an unsurveyed plot numbers P and Q in Embakasi. Only one page of that letter was annexed. The letter required the Petitioner to pay Kshs. 557,600/=. It did not provide evidence of acceptance of the offer or payment of the stand premium and other dues.

10. The Petitioner annexed a copy of a grant issued to it on 14/9/1995 which is endorsed at the bottom of page 4 that it was transferred to DIPKIT Limited of Nairobi on 23/7/2002. He annexed a copy of a sketch plan showing that the land lies between Mombasa Road and Nairobi National Park. He produced a copy of the rates clearance certificate issued to the Petitioner on 19/9/2014. The letter dated 28/3/1995 addressed to the Petitioner made reference to L.R. No. 209/11804 (formerly unsurveyed plot numbers P & Q) Embakasi Nairobi which demanded payment of Kshs. 211,250/= as the contribution towards rates for the land.

11. Mr. Shah annexed a copy of the sale agreement dated 2014 between the Petitioner and Fairdeal Holdings Limited. The court notes that the agreement was only executed on the part of the Petitioner. The letter dated 21/6/2018 from the Nairobi City County inviting the Respondent to investigate the titles created out of L.R. No. 2935/R previously known as Embakasi Township did not include the Petitioner's Suit Property. The letter of allotment dated 6/5/1958 issued to the City Council of Nairobi which the Petitioner produced was illegible even though the plot number shows 2935/R which presumably was the remainder land after subdivision. It is not clear whether the Suit Property was created from 2935/R or what the connection is between the two plot numbers.

12. The letter from the Respondent dated 31/1/2019 addressed to the County Government of Nairobi which forms the basis of this petition listed the Suit Property at number 28 with the recommendation that the Chief Land Registrar was to revoke the title held by FBP Limited and vest the land in the County Government of Nairobi. The Petitioner annexed a copy of the deed of termination of the agreement for sale dated 21/7/2014 over the suit land. The court notes that deed of termination of the sale agreement was not executed by Fairdeal Holdings Limited which purported to terminate the sale agreement.

13. The issue for determination is whether the court should grant the orders sought by the Petitioner. The Petitioner's advocate informed the court on 16/7/2020 that he had not been served with any response and added that he did not wish to file submissions in the case. He stated that he would rely on the petition as filed. There is no evidence of service of the petition on the Respondent on the court record. The court notes that an advocate previously appeared for the Respondent in this matter when the matter came up on 19/2/2020 and sought time to file a response to the petition but never did.

14. Even though the Petitioner produced a specific power of attorney donated to it by FBP Limited to commence judicial review proceedings in respect of L.R. No. 209/11804, there is no evidence to show what interest FBP has in the Suit Property. The copy of grant which the Petitioner produced shows that the title was issued to the Petitioner in September 1995 and that it transferred the land to DIPKIT Limited on 23/7/2002. There is no evidence to show that the land was ever transferred to FBP Limited. The sale agreement over the Suit Property dated 2014 which was not executed by the purchaser was between the Petitioner and Fairdeal Holdings Limited and not FBP Limited. The deed of termination which is dated 2016 between the Petitioner and Fairdeal Holdings Limited mentions FBP Limited as the vendor's nominee and indicates that the Suit Property had been transferred to FBP Limited. However, it was not executed by Fairdeal Holdings Limited which was supposedly terminating the sale agreement it had entered into with the Petitioner. In the court's view the Petitioner failed to prove that FBP Limited had any rights in the Suit Property. From the copy of title the Petitioner produced, the Suit Property is registered in the name of DIPKIT Limited and not FBP Limited and therefore it is only DIPKIT which can seek to enforce its rights over the Suit Property.

15. The Petitioner has failed to demonstrate that its fundamental rights under Articles 47, 48 and 50 of the Constitution were contravened and violated. The court declines to grant the orders sought in the petition. The Petitioner will bear its own costs since the petition was not defended.

Dated and delivered virtually at Nairobi this 28th day of July 2020

K.BOR

JUDGE

In the presence of:-

Mr. C. Onindo for the Petitioner

Mr. V. Owuor- Court Assistant

No appearance for the Respondent