



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 244A OF 2018

REPUBLIC.....APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

AND

LAKE NAIVASHA RIPARIAN ASSOCIATION.....INTERESTED PARTY

DUNCAN KABETHI WACHIRA..... EX PARTE APPLICANT

JUDGMENT

1. By Notice of Motion dated 30th September 2016, the ex parte applicant seeks the following orders:

1. An order of certiorari do issue to bring into this Honourable Court for the purpose of being quashed the respondent's decision dated 22nd August 2016 revoking the applicant's title to all that parcel of land known as LR. No. 22957/1.

2. An order of prohibition do issue to prohibit the respondent by itself, servants, agents, employees or whomsoever from reviewing, revoking or alienating the applicant's title to all that parcel of land known as LR. No. 22957/1 or from interfering with the applicant's ownership and quiet possession of all that parcel of land known as LR. No. 22957/1 or having any other dealing whatsoever in relation to all that parcel of land known as LR. No. 22957/1 or taking any further proceedings or action in relation thereto.

3. Costs of this application be provided for.

2. The application is supported by statutory statement dated 21st September 2016 and verifying affidavit sworn by the ex parte applicant. The ex parte applicant states that he is the registered proprietor of the parcel of land known as LR. No. 22957/1 (hereinafter "the suit property"), which he purchased from one Geoffrey Muhoro who had been allocated the property by the government through letter of allotment dated 4th April 1997. He further states that subsequent to the purchase, a certificate of title was issued to him on 13th May 1998. On 16th September 2015, the ex parte applicant was shocked to see a notice published in the Daily Nation Newspaper to the effect that the respondent would conduct a hearing on 2nd October 2015 by way of review of grant in regard to the propriety or legality of the ex parte applicant's title to the suit property. That although the notice invited him to collect a copy of the complaint giving rise to proceedings from the respondent's office and even though he presented himself to the office to collect the complaint, no complaint was availed to him. That he personally made a presentation to respondent dated 21st September 2015 followed by another presentation by his advocates dated 1st October 2015. Additionally, he and his advocate attended the hearing on 2nd October 2015. In the presentations and during oral submissions, he made it known to the respondent that the suit property herein together with other parcels known as LR. No. 22957/2, LR. No. 22957/3 and LR. No. 22957/4 had been the subject of proceedings and determinations in **Judicial Review Case No. 1238 of 1998 Republic v The Commissioner of Lands Ex Parte Jemimah Mbugua, John Richard Githere, Sally Gachonjo Githere, Mary Waceke Muiga (Administrators Ad Colligenda Bona of the Estate of Samuel Mbugua** wherein the High Court dismissed an application challenging the legality of the said titles, and in **Nakuru HCCC No. 97 of 2009 Geoffrey Muhoro v Lake Flowers Ltd, Court of Appeal Civil Application No. Nai. 114 of 2011 Lake Flowers Ltd v Geoffrey Muhoro**. He further stated that despite his request, the respondent did not avail to him a copy of the complainant's submissions and that at the end of the hearing of 2nd October 2015, the respondent indicated that notice of a further hearing date would be sent to the parties by the end of that month. That instead of sending the notice of further hearing, the respondent forwarded to him a determination dated 22nd August 2016 through a letter dated 19th August 2016.

3. The respondent opposed the application through a replying affidavit sworn by Brian Ikol, its Deputy Director, Legal Affairs and Enforcement. He deposed that while discharging its mandate to review grants and dispositions, the respondent operates as a quasi-judicial body under **Article 169 (1)** of the Constitution and that its proceedings are inquisitorial as opposed to adversarial. That the respondent

received a complaint from Lake Naivasha Riparian Association, the Interested Party herein and one John Githere alleging that the riparian land around Lake Naivasha had been allocated to certain individuals including the ex parte applicant herein. He added that after conducting investigations and satisfying itself that the issues raised warranted commencement of proceedings to review the grants and dispositions, the respondent placed an advertisement in the Daily Nation of 16th September 2016 notifying interested parties that it would carry out the review in respect of the suit property herein among other properties. That the respondent uses advertisement in the dailies as a standard operating procedure since budgetary limitations make it impractical and imprudent to serve individual notices on every party that is to appear before it.

4. He further deposed that parties appearing before the respondent exchange documents and submissions among themselves. Regarding the suit property, he stated that the respondent found that the ex parte applicant was allocated a temporary occupation licence in 1967 for 4.6 acres for 9 months and that he continued to stay on the land while paying rates until 1997 when he was allocated the land but the circumstances under which the temporary occupation licence was converted a lease and how the 4.6 acres was increased to 113.67 acres are unclear. He further stated that the respondent established that the suit property falls within the Lake Naivasha Riparian land reserve and that it is a corridor that wildlife may use to access the lake and therefore public land which was not available for allocation. He added that at the close of the hearing of 2nd October 2015 the respondent directed parties to produce at the next hearing, all documents that they wished to rely on. Subsequently, the respondent informed parties through phone calls that the second hearing would be on 4th December 2015 but come that day, only one party appeared with their documents. The respondent therefore decided to make a final determination based on the documents and submissions before it.

5. The interested party responded through a replying affidavit sworn by Mark Kariuki, its Acting Chairman. He stated that the interested party is a charity organization that was founded in 1929 by land owners bordering Lake Naivasha with the vision of enhancing the ecological integrity of the wetland by supporting sustainable development. Its main objective is to ensure sound environmental management of the lake's resources and in that regard it has among other initiatives, opposed illegal alienation of riparian land. He added that owing to climate change and insufficient conservation efforts, the lake has been receding over the years with the result that the land between the high and low water marks has been growing thus attracting influential land grabbers who acquire title to what is essentially public land. Such persons then put up permanent structures on the riparian land in total disregard of adverse environmental effects on the lake's flora and fauna as well as disruption of the wildlife corridor traversing the riparian land. Mr Kariuki further deposed that the ex parte applicant was aware of the scope of the complaint, responded to it in detail through counsel and was duly heard by the respondent.

6. The application was canvassed through written submissions. It is argued on behalf of the ex parte applicant that the respondent's decision to revoke his title to the suit property is tainted with illegality, irrationality and procedural impropriety since the respondent has no power under **Section 14 of the National Land Commission Act** to revoke titles. In the absence of power to revoke titles, it is argued that the decision was *ultra vires*. The cases of **Robert Mutiso Lelli and Cabin Crew Investments Ltd v National Land Commission & 3 others [2017] eKLR** and **Mwangi Stephen Muriithi v National Land Commission & 3 others [2018] eKLR** are cited in support of those contentions.

7. It is further argued for the ex parte applicant that the notice issued by the respondent fell short of procedural fairness as required under **Article 47 of the Constitution** and **Section 4 of the Fair Administrative Action Act** since it did not adequately describe the relevant facts and allegation so that the ex parte applicant could prepare an adequate response to them, if failed to disclose the nature of complaint and what the hearing would entail, since the respondent failed to serve the ex parte applicant with a hearing notice on the purported further hearings. Reliance is placed on the decisions in **Republic v Kenya National Highways Authority Ex parte John Mwaniki Kiarie [2016] eKLR** and **Sceneries Limited v National Land Commission [2017] eKLR**. Additionally, the ex parte applicant contends that his legitimate expectation was breached since the respondent made a determination without conducting a further hearing as it had indicated on 2nd October 2015 that it would do. Concluding that the whole process was so flawed as to become a sham, the ex parte applicant urges the court to grant the orders sought.

8. For the respondent, it is argued that although the ex parte applicant contends that a competent court has already made a judgment in his favour regarding the ownership of the suit land, the issue of ownership is not what was being explored before the respondent. Instead, the proceedings before the respondent were conducted with the aim of ascertaining if the title to the suit property was obtained in a lawful manner. According to the respondent, that entails reviewing the whole process from alienation to issuance of the title. It is further argued that the right to protection of property that is conferred under **Article 40 (1) of the Constitution** is not an absolute since the protection does not extend to property that is found to have been unlawfully acquired. The case of **Isaac Gathungu Wanjohi & Another v. Attorney General & 6 Others [2012] eKLR** is cited in support of the argument.

9. The respondent further argues that it acted well within its statutory mandate and did not "step on the court's toes" since ownership and legality are different things. Further, that it commenced its inquiries after a complaint was lodged by the interested party and that it followed the rules of natural justice in the course of executing its mandate. That since the complaint alleged that riparian land had been allocated to individuals, it was obliged to investigate considering that riparian land falls under public land as defined under **Article 62(1) of the Constitution** and further taking into account that the Constitution also mandates the respondent to manage public land on behalf of the national and county governments. It is further argued that ample opportunity was afforded to all parties to present their submissions and supporting documents before the respondent made a final determination. It is also argued that in the determination the respondent only directed that the registrar revokes the title to the suit property but did not itself purport to revoke the title since it lacks the authority to do so.

10. It is further argued in conclusion that judicial review orders are discretionary and in exercising that discretion this court should take into account the critical role played by riparian land in preserving natural ecosystems and habitat. It is urged that in the event that the court finds that the respondent acted *ultra vires* or did not comply with rules of natural justice, the court should nevertheless decline to issue the orders sought. The cases of **Peninah Nadako Kilishwa -vs- Independent Electoral Boundaries Commission (IEBC) and 2 Others [2015] eKLR** and **Republic v Director of Immigration Services & 2 others Exparte Olamilekan Gbenga Fasuyi & 2 others [2018] eKLR** are cited in support of these submissions.

11. On the part of the interested party, it is argued that since there is no dispute that the respondent received a complaint was from it prior to embarking on the enquiry pursuant to its functions under **Article 67 (2) (e)**, it cannot be said that the respondent's determination was actuated by bad faith. It is also argued that the respondent's decision is not contrary to the rules of natural justice since the ex parte applicant

has admitted seeing the newspaper notice, responding to it and appearing before the respondent. Reliance is placed on the case of **Republic v Kenya Revenue Authority Commissioner of Custom Services Ex-Parte Europa Healthcare Limited [2014] eKLR**. Additionally, the interested party contends that pursuant to **Regulation 16** of the **National Land Commission (Review of Grants and Dispositions of Public Land) Regulations, 2017**, the respondent is the master of its own procedure and the ex parte applicant should not be allowed to import the rigidity of court procedures into such proceedings.

12. The interested party further contends that **Section 14** of the **National Land Commission Act** and **Regulation 28** of the **National Land Commission (Review of Grants and Dispositions of Public Land) Regulations, 2017** empower the respondent as a constitutional and statutory body to determine the lawfulness of a grant and where it finds the grant unlawful, to oversee and direct the revocation of the title by the registrar and to publish the revocation. That a publication by the respondent that a grant is unlawful or illegal and fit for revocation following its review or a publication of the outcome of a review cannot constitute an *ultra vires* act or an abuse of power. Accordingly, the interested party argues that the decision by the respondent was not *ultra vires*, an abuse of power or even in excess of jurisdiction.

13. The interested party equally argues that the ex parte applicant has not met the threshold for grant of orders of certiorari and prohibition since judicial review is not an appeal. Instead, it is about the decision making process and not the merit of the decision. Relying on the case of **Republic v National Land Commission & another; Kenya National Highways Authority (Interested Party) Ex Parte George Kimani Njuki t/a Capri Construction [2019] eKLR**, the interested party argues that the reliefs sought herein are aimed at fettering and muzzling the respondent in the discharge of its mandate. The interested party therefore urged that the application be dismissed with costs.

14. I have considered the application, the affidavits and the submissions. Two issues emerge for determination: firstly, whether the respondent's determination was *ultra vires* and secondly, whether the reliefs sought are available.

15. The applicant seeks the judicial review orders of *certiorari* and prohibition. The scope of the court's jurisdiction in judicial review proceedings is limited to the process of decision making and not its merits. In **Republic v Chairman Amagoro Land Disputes Tribunal & another Ex-parte Paul Mafwabi Wanyama [2014] eKLR** the Court of Appeal stated thus:

Judicial review applications do not deal with the merits of the case but only with the process. For instance judicial review applications do not determine ownership of a disputed property but only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were given an opportunity to be heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute, the Court would not have jurisdiction in such proceedings to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.

16. The respondent is a constitutional commission established under **Article 67** of the **Constitution** which also defines its functions as follows:

67. National Land Commission

(1) There is established the National Land Commission.

(2) The functions of the National Land Commission are –

(a) to manage public land on behalf of the national and county governments;

(b) to recommend a national land policy to the national government;

(c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;

(d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;

(e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;

(f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;

(g) to assess tax on land and premiums on immovable property in any area designated by law; and

(h) to monitor and have oversight responsibilities over land use planning throughout the country.

(3) The National Land Commission may perform any other functions prescribed by national legislation.

17. Further provisions on the respondent's functions are found at **Section 5** of the **National Land Commission Act**. As regards review of grants and dispositions, **Article 68 (c)** and **(v)** of the **Constitution** and **Section 14** of the **National Land Commission Act** are pertinent. **Article 68 (c)** and **(v)** provides:

Parliament shall—

...

(c) enact legislation—

...

(v) to enable the review of all grants or dispositions of public land to establish their propriety or legality;

18. On the other hand, **Section 14** of the **National Land Commission Act** provides:

14. Review of grants and dispositions

(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.

(2) Subject to Articles 40, 47 and 60 of the Constitution, the Commission shall make rules for the better carrying out of its functions under subsection (1).

(3) In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.

(4) After hearing the parties in accordance with subsection (3), the Commission shall make a determination.

(5) Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.

(6) Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.

(7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.

(8) In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the Constitution.

(9) The Commission may, where it considers it necessary, petition Parliament to extend the period for undertaking the review specified in subsection (1).

19. There is no dispute that the respondent published a notice in the Daily Nation Newspaper of 16th September 2015 to the effect that it would conduct a hearing on 2nd October 2015 by way of review of grant in regard to the propriety or legality of the ex parte applicant's title to the suit property. The review was conducted and ultimately the respondent made a determination dated 22nd August 2016 in the following terms:

The commission after hearing all the parties hereby directs as follows;

All allocations are illegal and are revoked;

- L.R No. 22957/1 to Duncan Wachira Kabithe is revoked.

- L.R No. 22957/2 to Margaret Wambui Kagwi is revoked.

- L.R No. 22957/3 to Lawrence Tony Kuria is revoked.

- L.R No. 22957/4 to Geoffrey Muhoro is revoked.

20. **Section 14 (5)** of the **National Land Commission Act** is couched in mandatory terms and makes it clear that where the respondent finds that a title was acquired in an unlawful manner, it shall direct the registrar to revoke the title. The respondent has no power to revoke any title in its determination. Indeed, the respondent's counsel herein admitted as much in his submissions. Where an allocation has resulted in issuance of a title, it is futile to claim to revoke the allocation. The respondent acknowledged in its replying affidavit that the ex parte applicant had a leasehold title in respect of the suit property. It was therefore aware that it was no longer dealing with a mere allocation but a title. Clearly, in purporting to revoke the ex parte applicant's title or allocation, the respondent acted in excess of jurisdiction and its determination was *ultra vires*. Its claim that it did not revoke the title but only directed that the registrar to revoke it is betrayed by the wording of the determination itself.

21. The ex parte applicant has sought orders of certiorari and prohibition. The scope of an order of certiorari was discussed by the Court of Appeal in the case of Kenya National Examination Council v Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR as follows:

... Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.

22. In Joseph Malakwen Lelei & another v Rift Valley Land Disputes Appeals Committee & 2 others [2014] eKLR the Court of Appeal stated:

... it is trite that where a court or tribunal takes upon itself to exercise a jurisdiction which it does not possess, its proceedings and decisions are null and void. It then follows that every other proceeding, decision, or award that results from such a process must be construed as a nullity.

23. The respondent having acted in excess of jurisdiction and considering that its determination was *ultra vires*, an order of certiorari is merited.

24. The ex parte applicant also seeks an order of prohibition to prohibit the respondent from among others reviewing or revoking the ex parte applicant's title to the suit property or from interfering with the ex parte applicant's ownership and quiet possession thereof. The Court of Appeal stated as follows in Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others (supra) regarding the scope of an order of prohibition and the circumstances in which it will issue:

... What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings ... The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition.

25. The determination which is the subject of the ex parte applicant's complaint was made on 22nd August 2016. It is a past event and an order prohibition is therefore powerless against it. No evidence has been tendered to show that the respondent is intent on taking any further proceedings or action in relation to the suit property. In the circumstances, an order of prohibition is not available to the ex parte applicant.

26. The respondent has urged that in the event that the court finds that that it acted *ultra vires*, the court should nevertheless decline to issue the orders sought. Although judicial review remedies are discretionary, discretion must always be exercised judiciously. I see no valid reason why not to grant the order of certiorari in the circumstances considering that the impugned determination threatens to irregularly deprive the ex parte applicant of a proprietary interest in the suit property.

27. Before concluding, I emphasize that this court makes no determination on the validity or otherwise of the ex parte applicant's title to the suit property since that is not an issue before the court. This being a judicial review matter, the focus is purely on the decision making process leading to the determination dated 22nd August 2016, made by the respondent.

28. In view of the foregoing, I find merit in the ex parte applicant's case for an order of certiorari. I make the following orders:

i) An order of certiorari is hereby issued, bringing into this court and quashing the respondent's decision dated 22nd August 2016 which purported to revoke the ex parte applicant's title to all that parcel of land known as LR. No. 22957/1.

ii) Costs are awarded to the ex parte applicant and shall be borne by the respondent.

29. This judgment is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 3rd day of July 2020.

D. O. OHUNGO

JUDGE