



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC. JR APPLICATION NO. 74 OF 2013

**IN THE MATTER OF: AN APPLICATION BY FULSON COMPANY LIMITED FOR
LEAVE TO APPLY FOR JUDICIAL REVIEW AND FOR ORDERS OF CERTIORARI AND
PROHIBITION**

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010, THE NATIONAL LAND
COMMISSION ACT NO. 5 OF 2012, THE LAW REFORM ACT, CAP 26 OF THE LAWS OF
KENYA AND THE CIVIL PPROCEDURE RULES**

AND

IN THE MATTER OF: THE NATIONAL LAND COMMISSION

THE CHIEF LAND REGISTRAR

THE SENIOR REGISTRAR OF TITLES, MSA

REPUBLIC.....APPLICANT

VERSUS

1. THE NATIONAL LAND COMMISSION

2. THE CHIEF LAND REGISTRAR

3. THE SENIOR REGISTRAR OF TITLES MOMBASA.....RESPONDENTS

AND

1. SHAH SESE

2. EDWARD MZEE KAREZI.....INTERESTED PARTIES

FULSON COMPANY LIMITED.....EX PARTE

CONSOLIDATED WITH:

MISCELLANEOUS CASE NO.75 OF 2013 (JR)

1. THE NATIONAL LAND COMMISSION

2. THE CHIEF LAND REGISTRAR

3. THE SENIOR REGISTRAR OF TITLES, MOMBASA.....RESPONDENTS

AND

1. SHAH SESE

2. EDWARD MZEE KAREZI INTERESTED PARTIES

KILIFI BEACH PROPERTIES LIMITED.....EX PARTE

RULING

BACKGROUND

1. The subject matter of this suit is the decision of the National Land Commission contained in an Internal Memo dated 25th September 2013 directing the Chief Land Registrar to revoke the title for Plot LR. No. 17835 and re-allocate the land to Mr. Shali Sese. A brief background of this case is that some time in the 1980s or 1990s, Mr. Shali Sese sought to have the land identified as Plot LR. No.17835 allocated to him. His version of events is that owing to his illiteracy, he entrusted Edward Mzee Karezi to pursue the allocation on his behalf. He claims to have been defrauded by the said Edward Mzee Karezi who falsified Sese's application and obtained the title in his own name.

2. In the meantime, Edward Mzee Karezi, who claims to be the legitimate registered owner of the land, was involved in a legal tussle with one Mr. Piero Canobblo of Brawny Properties Limited over the land. Piero Canobblo claimed that Brawny Properties Limited was the legitimate registered owner of the property, having acquired it from Ramada Limited. Brawny Limited and Edward Mzee Karezi each had a Certificate of Title over the same property in support of their respective claims. The legitimacy of the two titles was/is the subject of more than one court case between 2008 - 2010 in the Court of Appeal, the High Court and the Chief Magistrate's Criminal Court, some of which are pending determination/ appeal. While this was raging on, Edward Mzee Karezi had sub-divided the property into seven portions renamed Plot LR. No. 17835/ 1 – 7, which he sold. The applicants in this cause each purchased one of these seven plots some time in 2010 (Plot LR. No.17835/1 and Plot LR. No.17835/3 respectively), and in time also got involved in the various suits.

3. Come May 2013, the National Land Commission received a complaint over the said property and consequently issued a public notice in the Daily Nation of 9th July 2013 to the effect that Plot LR. No. 17835 – Kilifi had an illegal title, and all persons with interest in the said land were invited to appear before the Commission in the following 14 days to make representations to the Commission before it made any determination. The Commission thereafter states that it undertook thorough investigations including the examination into authenticity of the transactional records kept by the registry together with the written representations of the parties, as the case was, and arrived at the decision to revoke the title. When the decision was made known to the applicants in November 2013, they filed these causes.

THE APPLICATION

4. The Notice of Motion in Miscellaneous Case No.75 of 2013 as well as the Notice of Motion in Miscellaneous Case No. 74 of 2013 both dated 20th December 2013, seek similar orders in the following terms:

1. That an Order of Certiorari to bring to this Honourable Court the decision of the National Land

Commission revoking the title for the Plot LR. No.17835 and/or directing the Chief Land Registrar to re-allocate the title to Plot LR. No.17835 in favor of Mr. Shah Sese vide the Internal Memo dated the 25th day of September, 2013 for purposes of quashing both decision for the revocation of title and the direction to re-allocate the title for the Plot LR. No.17835.

2. That an Order of Prohibition to issue directed to the Chief Land Registrar and/or the Registrars of Title at the Mombasa Land Registry from cancelling and/or in any manner interfering with the Applicant's title to the Plot LR. No.17835/3 (Original No.17835). [Miscellaneous Case No.74 of 2013]. ...the Plot LR. No.17835/1 (Original No.17835). [Miscellaneous Case No.75 of 2013]

3. That an Order of Prohibition to issue directed to the National Land Commission from in any manner whatsoever investigating and adjudicating on claims arising out of the initial allocation of title to the Plot LR. No.17835 as relates to bona fide purchasers of the sub-divisions thereof for valuable consideration without notice of any defect in the title.

4. That the costs of this application be costs in the cause.

5. The application in Miscellaneous Case No.74 of 2013 is supported by the Verifying Affidavit of Sangeeta Jiwan sworn on 18th December 2013, while the application in Miscellaneous Case No.75 of 2013 is supported by the Verifying Affidavit of Ishak Mohamed Kassim Haji Ibrahim sworn on 17th December 2013.

6. Sangeeta Jiwan, a director of Fulson Company Limited, described how on 4th October 2010, Edward Mzee Karezi offered the Plot LR. No.17835/1 (“1st Suit Plot”) for sale at Kshs.18Million. Following due process and due diligence, the Transfer of Lease for the 1st Suit Plot was duly registered in favor of the Fulson Company Limited on 18th November 2010. All the relevant documentation was annexed to the affidavit.

7. Ishak Mohamed Kassim Haji Ibrahim is a director of Kilifi Beach Properties Limited. He swore an affidavit in support of the applicant in Miscellaneous Case No. 75 of 2013 stating that sometime in September 2010, the company bought Plot LR. No.17835/3 (“2nd Suit Plot”) from Edward Mzee Karezi for Kshs.8.5Milion. Following due diligence and due process, the Transfer of Lease was duly registered in its favor on 16th November 2010. All the relevant documents were annexed to the affidavit.

8. Subsequently in April 2011 both applicants were served with pleadings and court process in Mombasa High Court Constitutional Petition No. 24 of 2011 filed by the third parties claiming ownership of the whole plot from which the two suit plots had been subdivided, Plot LR. No.17835. This Petition was put on hold by the parties to await the outcome of the decision of the court in a civil appeal prior to taking directions. Later on by letter dated 22nd November 2013, the Registrar of Titles at Mombasa wrote to the applicants advising them to surrender the titles for their respective Suit Plots for cancellation. The letter was written pursuant to an internal memo from the Chairman of the National Land Commission to the Chief Land Registrar dated 25th September 2013. The Memo stated that the plot allocations for Plot LR. No.17835 Kilifi Bofa had involved massive fraud, and in order to streamline due processes, the fake titles for the plot ought to be revoked as per Section 14(5) of the National Land Commission Act. In the meantime, the Commission directed that allocation be made to Mr. Shah Sese, who was said to be the rightful owner.

APPLICANTS' CASE

9. The grounds for these applications are that the applicants are each bona fide purchasers for value without notice, and the revocation of their titles should not have been done in any event without availing them opportunity to explain their acquisition of the titles. The decision of the National Land Commission was faulted as having breached Articles 40, 47, and 67 of the Constitution of Kenya, 2010 as well as Section 14 of the National Land Commission Act. It was pleaded that the Commission arrived at its

decision on the revocation of the title without due regard to the principles of natural justice. Also, the subject parcel being the subject matter of litigation in both the High Court of Kenya and the Court of Appeal, it was untenable that the Commission would purport to investigate and review the title for the said parcel of land without due regard to the ongoing court proceedings. Finally, it was pleaded that the re-allocation of the title to a completely strange third party was unreasonable, biased and prejudicial to the applicant's property rights.

10. Grounds of Opposition were filed for the 2nd interested party, Edward Mzee Karezi in support of the applications claiming that the Commission had acted *ultra vires*, its decision was in breach of the Constitution and was reached without due process. The said decision was also said to have been sub judice Civil Appeal No. 161 of 2009 in which the issue of the suit land is awaiting the determination of the Court of Appeal.

11. Pietro Canobblo, a director of Brawny Properties Limited, also swore an affidavit in reply to this application. Brawny Properties Limited's interest is that the property in issue, Plot LR. No.17385 was registered to Brawny Properties Limited as CR. No. 35336, upon an order of Mandamus issued in Mombasa Miscellaneous Application No.2 of 2008. Edward Mzee Karezi was an interested party in that cause, holding a title over the same property under CR. No.37185. Brawny Properties Limited responded to the notice published by the Commission in the newspapers by delivering copies of relevant documents to the Commission's Nairobi office. Mr. Canobblo delivered the documents personally but did not receive a response despite follow-up. He therefore claims that the Commission's decision to re-allocate the property to Mohamed Shally Sese was made without giving them a hearing. It was for that reason termed a nullity and a violation of Article 40 of the Constitution. Further, he claimed that it was not true that Mohamed Shally Sese or his late father ever occupied or cultivated the property. Their claim was said also to have been time-barred since allocations of Government Land under the Government Land Act (now repealed) made in 1989 as they claimed had specific time lines for compliance and so far the Shally Sese's had not complied.

THE RESPONSE

12. Mr. Mohammed Swazuri, the Chairman of the National Land Commission on 28th February 2014 swore an affidavit in opposition to the applications. He deposed that the Commission employed procedural fairness in the course of its investigations leading to its decision to revoke and re-allocate the titles. The Commission got conduct of the matter when it received a complaint alleging fraudulent acquisition of the suit property. It then published a notice in the Daily Nation Newspaper of 9th July 2013 that the Plot LR. No.17835 had an illegal title and all persons with interest in the said land were invited to appear before the Commission. Mr. Chiera Waithaka through his counsel M/s Cootow & Company responded by giving a detailed 38 page document on the title. The Commission then undertook thorough investigations and arrived at the decision to revoke the title.

13. Mohamed Shally Sese swore an affidavit dated 5th May 2014 on behalf of the estate of Mzee Sese Shali. He claimed that his family had been in actual use and occupation of the Plot LR. No.17835 since 1954 and only applied for allocation in 1989. One Edward Mzee Karezi was entrusted by the late Mzee Sese Shali who was illiterate, to pursue the acquisition of title. The said Edward Mzee Karezi fraudulently altered the application and obtained a grant to the land. He then purported to subdivide and sell the same to various parties. A complaint was eventually made to the National Land Commission when this fraud was detected and consequently the Commission rectified the situation by revoking the title and re-allocating the title to the correct owner.

SUBMISSIONS

14. The Applicants, Fulson Company Limited and Kilifi Beach Properties Limited submitted joint submission stating that the Commission is only mandated to review the grants and dispositions of public land and not private land. The Commission acted **ultra vires**. The Commission breached the rules of natural justice by not allowing the applicants a chance to be heard. The Registrar of Titles on the other hand may only rectify a title as provided under Section 79 of the Land Act, and so also acted **ultra vires**.

15. The First Interested Party, Shah Sese submitted that the Commission had jurisdiction to act as it did. Sufficient notice was issued to all parties vide the publication in the newspaper. The applicants and the other interested parties failed to appear to express their concerns,, and thus the Commission was entitled to presume that no such objection existed.

16. In submitting for the Second Interested Party Edward Mzee Karesi, further to the Grounds of Opposition (filed in support of the application), it was stated that the suit land was duly registered to him. The Commission's purported revocation of title under Section 14(5) of the National Land Commission Act was termed as an error and an absurdity. It was submitted that the Commission's mandate for the review of grants and dispositions was made in relation to public land. This is clear from a wholesome reading of the entire Section 14 of the Act, as read together with Article 68(c) (v) of the Constitution. It was therefore erroneous for the Commission to purport to exert the same authority over private land. In addition, the Act requires that before any decision is made by the Commission, the affected person must be given an opportunity to be heard. The Commission acted in breach by revoking the title before giving him a chance to be heard. The Commission failed to follow the clear guidelines set out in the Act and its decision should be nullified. In any event, Mzee Karezi was the registered proprietor of the suit property holding absolute ownership subject only to the provisions of Section 25 and 26 of the Land Registration Act, and only the Environment and Land Court could revoke his title. The Commission was also faulted for acting in a vacuum, as no rules had been established to govern its deliberations as envisaged in Section 14 of the National Land Commission Act. Therefore, any proceedings conducted in the absence of the rules are **ultra vires**.

17. The Third Interested Party, Chiera Waithaka associated himself with the submissions of the applicants and Second Interested Party adding that the Respondent's action violated his right to administrative action that is procedurally fair under Article 47 of the Constitution.

18. The Fourth Interested Party, Brawny Properties Limited submitted that despite responding to the public notice, the Commission failed to correspond with it. It accused the Commission of failing to consider material facts and evidence when reaching its decision. Specifically, the Commission failed to consider or even acknowledge the documentary evidence provided to it in response to the public notice, and it failed to consider that there were court cases pending determination concerning the very suit property. The Commission's decision severely prejudiced the Fourth Interested Party without giving it the opportunity to be heard.

19. The First and Second Respondents' submissions filed by the Office of the Attorney General relied on the affidavit of the Chairman of the Commission sworn on 28th February 2014. It was submitted the fact that the suit property had been fraudulently acquired and had no legal title was clear. The Commission is mandated under Section 14(5) to revoke a title where it is found to have been acquired in an unlawful manner. Section 79 (2) of the Land Registration Act provides that the Registrar may rectify or direct the rectification of a register or document where the document in question has been obtained by fraud. It was posited also that the parties had ample opportunity to be heard, giving the example of the Third Interested Party who requested and was granted an extension to lodge his documents.

ISSUES

20. The two applications raise two issues:-

- (a) Whether the National Land Commission acted **ultra vires**, and
- (b) Whether the National Land Commission breached the rules of natural justice.

OF WHETHER THE NATIONAL LAND COMMISSION ACTED ULTRA VIRES

21. The National Land Commission is established and derives its authority from, Article 67 of the Constitution as read together with the National Land Commission Act 2012. Its mandate includes offering advice to the National Government on a comprehensive programme for the registration of title to

land throughout the Republic of Kenya, initiate investigations into present or historical land injustices and recommend appropriate redress. Section 14(1) of the National Land Commission Act provides as follows:-

“14(1) Subject to Article 68(C) (j) 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 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 sub-section (1).”

22. Section 14 aforesaid relates to public land, and not private

land. In any event review of dispositions of public land is under Article 68(1)(v) subject to enactment by Parliament of legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality.

23. In this case, the parties involved are all private entities and individuals claiming private ownership over what can only be described pursuant to Article 64 of the Constitution as private land, that is land which 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 by an Act of Parliament.

24. In this case, Kilifi Beach Properties Limited, the *ex parte*

Applicant is a private limited liability company, Shah Sese and Edward Mzee Karezi are all private individuals. There is no material from the National Land Commission to rebut the claim that the subject land is private land. How the *ex parte* Applicant acquired it from the Interested Parties is a matter of claims under private law between those parties. The National Land Commission has neither the legal authority to review and much less to revoke titles relating to private land. On this ground alone, the *ex parte* Applicant succeeds in its application for issue of an order of certiorari to quash the Commission's purported review and revocation of the *ex parte* Applicant title.

OF WHETHER THE NATIONAL LAND COMMISSION BREACHED THE RULES OF NATURAL JUSTICE

25. Even though the land in question is private land, Section 14 under which the National Land Commission purported to act requires the Commission in exercise of the powers under sub-section (1) –

“...to 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 inspect any relevant documents.”

26. The Chairman of the National Land Commission in his Replying Affidavit made references to documents he received from only one of the Interested Parties, Edward Mzee Karezi. However, the Applicants while complaining that they were denied an opportunity to be heard, made no representations regarding whether they saw the notice published by the National Land Commission in July, 2013 or took any action or steps on it in an effort to be heard. The Fourth Interested Party has claimed to have given a response to the said publication, the Commission however makes no mention of it. The inevitable inference from the Commission's silence on the Fourth Interested Party's response is only one, that the submissions by the Fourth Interested Party to the Commission were not considered when deliberating on

the issue. As such the Commission not only breached a fundamental principle of constitutionalism in 47 (the right to fair administrative action) and as clearly stated in Article 50 of the Constitution, the right to fair hearing, but it also breached Section 14(3) of its own enabling statute, the National Land Commission Act 2012.

CONCLUSION AND FINAL ORDER

27. In conclusion therefore, I find and hold that the National Land Commission not only acted **ultra vires** the Constitution and its own establishing statute, but it also breached the rules of natural justice, and I dare add that in light of the very clear provisions of Article 64 of the Constitution (on the definition of private land) and Article 68(c)(v) (the power of review only relates to public land), the decision of the Commission was irrational. Illegality, irrationality and procedural impropriety (breach of the rules of natural justice), are all grounds for granting orders of certiorari.

28. The Applicants also sought orders of prohibition to prohibit the Chief Land Registrar and/or the Registrar of Titles at Mombasa Land Registry from cancelling and/or in any manner interfering with the Applicant's title to Plot No. LR 17835/1 (Original No. 17835). The Applicant further sought an order of prohibition to issue directed at the National Land Commission to prohibit it from in any manner whatsoever investigating and adjudicating on claims arising out of the initial allocation to plot No. 17835 as relates to bona fide purchasers of the sub-divisions thereof for valuable consideration without notice of any defect in the title.

29. Unlike the order of certiorari which is a claim or challenge against decisions already taken, the order of prohibition is said to look to the future. It is an order of the High court preventing or prohibiting a body from acting, and lies against an inferior tribunal or body in relation to decisions affecting an individual's rights.

30. As observed at the beginning of this Ruling, the land in question has been and is perhaps currently, the subject of more than one court case between 2008-2010, in the Court of Appeal, the High Court and the Chief Magistrate's Court. These cases are however not the concern of this court, except to the extent of the order of prohibition sought against the National Land Commission to inquire into the antecedent ownership of parcel of land known as 17835. Again the Commission led no material to show that the said parcel of land was public land. On the contrary, by its own direction, the Commission acknowledged, even if, wrongly, that the parcel of land was private land owned by Shah Sese, before he was allegedly fraudulently dispossessed by Edward Mzee Karezi. In the circumstances the Commission would not under Section 14 of the National Land Commission Act have jurisdiction to investigate what is under Article 64 of the Constitution, private land. It is thus proper to grant the orders of prohibition as sought in the Notice of Motion dated 20th December, 2013.

31. In the circumstances, there shall issue orders of certiorari and prohibition in terms of the said Notice of Motion.

32. The *ex parte* Applicants shall also have the costs of the Notices of Motion herein.

33. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 5th day of June, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mr. Nyongesa for the Applicant

Miss Lutta for the Respondents

Mr. Noor for First Interested Party

Mr. Buti for Second Interested Party

Mr. Silas Kaunda Court Assistant