



**REPUBLIC OF KENYA**

**IN THE LAND AND ENVIRONMENT COURT AT NAIROBI**

**ELC NUMBER 979 OF 2014**

**IN THE MATTER OF: Enforcement of fundamnetal rights and freedoms under Articles 22(1) and (4), 23 and 165 of the Constitution of Kenya**

**AND**

**IN THE MATTER OF: Alleged contravention of fundamental rights and freedoms under Articles 27, 40, 47 and 50(1) of the Constitution**

**REVEREND HARUN KOMONI MENYWA**

**(for and on behalf**

**of the Pentecostal Assemblies of God,**

**Kabete Assembly).....PETITIONER**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**J U D G M E N T**

The Petitioner avers that he is the pastor in charge Pentecostal Assemblies of God (Kenya) Kabete Assembly (hereinafter referred to as the church). He avers that on 28<sup>th</sup> March 2014, he received a letter from the 1<sup>st</sup> Respondent informing him that the church's title to Land Reference No. 21721(hereinafter referred to as the suit property) had been cancelled by the 2<sup>nd</sup> Respondent vide gazette Notice number 16531 of 24<sup>th</sup> December 2010. The Petitioner contends that the Respondents' decision caught him and the members of his congregation by surprise since they were not aware of the revocation and were never called upon to defend the authenticity of their title.

According to the Petitioner, the Respondents action is arbitrary, unconstitutional and a violation of the sanctity of the title to land held by the church. It is the Petitioner's case that the Respondents have no legal mandate, power or authority to cancel any title since the same is a preserve of the High Court. The

Petitioner avers that unless safeguarded by the Court, the suit property and the developments thereon which include a church building, Sunday school classes and offices are threatened and that his members are bound to suffer damages in millions in addition to being deprived of a place of worship.

The Petitioner contends that their fundamental rights under Articles 27, 40, 47 and 50(1) of the Constitution have been and are likely to continue being threatened. The Petitioner avers that the Respondents have contravened Article 27 of the Constitution by arbitrarily and without due regard to the law and the principles of natural justice revoking title to the suit property without giving any explanation or affording them the benefit of the law. The Petitioner further alleges that the Respondents have contravened Article 50(1) by denying them the right to have a dispute resolved before a court of law or an independent and impartial tribunal.

The Petitioner also contends that by arbitrarily revoking title to the suit property, the Respondents have contravened and are likely to contravene Article 40 of the Constitution by infringing on their right to own and hold property and protection of their property. Further, the Petitioner alleges that their right to a fair administrative action under Article 47 of the Constitution has been infringed. The Petitioners have sought the following prayers against the Respondents:

- a. A declaration that the revocation of the title to the suit property is illegal and in contravention of fundamental rights and freedoms of the individual under Articles 27, 28, 31, 40 and 47 of the Constitution.
- b. A declaration that the church is the legal and rightful owner and holds an indefeasible title to the suit property until the contrary is ordered by the High Court.
- c. An order of mandamus to compel the Respondents to rescind and reverse the order revoking title to the suit property as published in Vol CXII- No. 133 Nairobi of 24<sup>th</sup> December 2010.
- d. A declaration that there be restitution of the Petitioner's property and title to the suit property.
- e. Compensation for damages to the Petitioner as a result of infringement of their fundamental rights and freedoms.
- f. Costs of the Petition
- g. Any other or further orders, writs and directions the Court considers appropriate and just to grant for the purposed of the enforcement of the Petitioner's fundamental rights and freedoms.

Through a supporting affidavit sworn on 4<sup>th</sup> April 2014, the Petitioner avers that in 1993, the church did not have a permanent place of worship and it approached the Department of Veterinary Services which offered them a temporary place of worship in which they were not allowed to put up permanent structures. The Petitioner has annexed a copy of a letter dated 4<sup>th</sup> February 1993 from the Director of Veterinary Services to this effect and contends that in a bid to secure a place of worship, the church made several applications to various government departments to be allocated a plot.

The Petitioner claims that on 4<sup>th</sup> July 1996, the church was vide a letter of allotment annexed and marked "HKM 4" offered a grant of the suit property. The Petitioner avers that survey was carried out in 1996 and the deed plan as well as payment receipts for survey fees were exhibited. The Petitioner further avers that a revised letter of allotment whose copy was annexed was issued to the church on 29<sup>th</sup> April 2007 and that after fulfilling all the requirements of the letter of allotment, the church was issued with a certificate of title over the suit property on 3<sup>rd</sup> July 1997.

The Petitioner contends that since 1997, the church has been on the suit property and has been paying annual rent to the government. It is the Petitioner's contention that the land was developed with the full knowledge of the government, the Nairobi City Council and the Department of Veterinary Services who never issued any letter or notice to protest their occupation or development. The Petitioner avers that the Respondents decision and action to revoke their title lacks any legal basis and amounts to impunity and is geared toward compulsory acquisition of suit property owned by the church.

The Respondents opposed the application through a replying affidavit sworn by **Silas Kiogora Mburugu** on 16<sup>th</sup> September 2014 who stated that he was a Principal Land Administrative Officer with the 1<sup>st</sup>

Respondent. The Respondents contend that they did not violate the Petitioner's rights in any way and that title to the suit property was revoked pursuant to Articles 67(2)(e), 68(c),(v) of the Constitution and section 14 of the National Land Commission Act. The Respondents aver that the suit property is public land which had at all material times been reserved for the Ministry of Livestock Development which was utilizing the land prior to the irregular allocation.

The Respondents contend that the Petitioner has not been discriminated in the revocation since several titles on the same public land were revoked as evidenced by a copy of the gazette notice attached to the Petition. It is the Respondents case that they acted in public interest in revoking the title deed to the suit property.

According to the Respondents, the Petitioner had admitted in his supporting affidavit that the church was given a temporary place of worship and were aware that the suit property was public land which they could be asked to vacate any time. The Respondents aver that there is no provision of law that has allowed public land to be converted into a place of worship and further, that they acted within the law in discharging their mandate under the Constitution. The Respondent contends that the Petitioners have not demonstrated the prejudice they will suffer if the land reverts back to the Veterinary Department.

According to the Respondents, the Petitioner was not legally allocated any land since the allocation was irregular and unconstitutional and that they were therefore mandated under the law to revoke titles issued irregularly.

The Petition was canvassed by way of written submissions. The Petitioner in submissions dated 12<sup>th</sup> February 2015 reiterated the facts as pleaded and made reference to section 21(1) of the Land Registration Act and section 23(1) of the repealed Registration of Titles Act. Counsel submitted that in his supporting affidavit, the Petitioner had outlined the process and procedure that was used in acquiring the suit property in accordance with sections 21 and 22 of the repealed Registration of Titles Act.

The Petitioner submitted that for the Respondents to invoke the powers donated under Article 67, 68 and section 14 of the National Land Commission Act, the Respondents should first prove that the land in question is public land. Counsel argued that it was not sufficient for the Respondents to merely state in their replying affidavit that the suit property was public land without placing sufficient evidence before the Court to prove that the suit property was public land and that at the time the grant was made to the Petitioner, the land had already been alienated for public use.

It is the Petitioner's submission that in the absence of evidence to show that the suit property had been alienated to the Ministry of Livestock Development or at all, the President, the Commissioner of Lands and the Registrar of Land legally and regularly made a disposition of the suit property since it had not been earmarked for any public purpose as at 3<sup>rd</sup> July 1997. Counsel made reference to the case of **Adan Abdirahani Hassan & 2 others vs. The Registrar of titles and 2 others (2013) eKLR** where the court stated that it was the duty of the respondents to place before the court evidence showing the public purpose for which the suit property was reserved to warrant revocation of the petitioners title by the respondents.

The petitioner submitted that the Respondent could not fault the title held by the Petitioner by alleging that it was irregularly obtained, Counsel argued that the Petitioners had placed before the Court all the material they used to acquire the suit property and that due process was properly followed before a certificate of lease was issued to the Petitioner. It is the Petitioner's submission that the Respondent had not faulted the process followed by the Petitioner.

The Petitioner referred the Court to section 60 of the repealed Registration of Titles Act and submitted that the procedure stated therein should have been followed since their title was revoked in 2010 when the Act was still in force. It was submitted that there was no proof from the Respondents that the Applicants were summoned to deliver the title as required under the said provision.

The Petitioners relied on the case of **Republic vs. Commissioner of Lands & another Ex parte**

**Carolizanne Gathoni Kuria (2013) eKLR** where the court stated that the strict provisions of sections 60 and 61 of the repealed Registration of Titles Act recognize that before a person is deprived of his title, due process which includes opportunity to be heard must be followed. Counsel submitted that the revocation of the Petitioner's title was therefore premature, unprocedural and illegal for failure to observe due process.

While submitting that the main guideline to be adopted by the Respondents while looking into historical land irregularities is found in section 14 of the National Land Commission Act, the Petitioner argued that any decision made by the Respondents affecting any proprietary interests should be subject to articles 40, 47 and 60 of the Constitution. Counsel cited Article 47 of the Constitution and submitted that by waking up one morning and gazetting the revocation of their title, the Respondent cannot be said to have acted reasonably, lawfully, procedurally and fairly towards the Petitioner.

In further submission, the Petitioner contended that no notice of the intended action was given and that no summons were issued upon them to appear before the Commission to show cause why their title should not be revoked. The Petitioner relied on the case of **Kuria Greens Ltd vs. Registrar of Titles and another (2011) eKLR** where the court held that without either compulsorily acquiring the suit property accompanied by full compensation to the petitioner or filing a suit challenging the petitioner's title, the respondent's actions of revoking the title was unlawful and an affront to private proprietary rights.

Further reliance was placed on the case of **Satima Enterprises Ltd vs. Registrar of Titles and 2 others (2012) eKLR** where the court held that the Registrar of Titles had no authority under the Registration of Titles Act to revoke a title by way of a Gazette notice and that such revocation was in breach of Article 40 and 41(1) of the Constitution since the petitioner was not given a hearing to contest the allegations subject of the revocation. Lastly, it was submitted that no allegation of fraud had been made against the Petitioner in acquisition of the property and the Court was referred to the case of **Eunice Grace Njambi Kamau & another vs. Attorney General & 5 others (2013)eKLR** where the court held that it was incumbent upon the respondent to demonstrate and establish the acts by the petitioners that would constitute illegality in the acquisition of the property.

The Respondent did not file submissions despite having been given an opportunity by the court to do so on 13<sup>th</sup> February 2015, 23<sup>rd</sup> March 2015 and 14<sup>th</sup> April 2015. When the suit came up for mention to confirm the filing of submissions on 14<sup>th</sup> May 2015, the Court directed that since the Respondents had failed to file their submissions, a determination would be made on the basis of the pleadings on record.

### **Determination**

The issue for determination is whether the Petitioner has established that there had been a violation of its rights under Articles 27, 28, 31, 40 and 47 of the Constitution.

The Petitioner is challenging the process by which title to the suit property was revoked by the Respondents on grounds that the allocation was irregular since the suit property was public land. The Petitioner demonstrated how they acquired the suit property and annexed copies of correspondences making applications for allocation, allotment letters issued to them as well as receipts for payments allegedly made in compliance with the conditions set out in the allotment letters.

Save for stating that the suit property was public land, the Respondents did not tender any evidence to substantiate the allegation. In the absence of such evidence, the Court is being invited to act in speculation to make a finding that title to the suit property was properly revoked since the land in question was public land reserved for the Ministry of Livestock Development. This Court rejects such an invitation and makes a finding that the title should be left as it is. In making this finding, the Court is persuaded by decision in the case of **Adan Abdirahani Hassan & 2 others vs. The Registrar of titles and 2 others (2013) eKLR** where the court, confronted with similar circumstances as the present case rendered itself as follows:-

**"Indeed it was the Respondents duty to place before the court evidence showing the public purpose that the suit property was reserved for to warrant the revocation of the Petitioners**

**title by the Respondents. In the absence of any response by the Respondent, the court cannot make a determination on whether the property was ever reserved for public purpose and consequently, the title should be left to stand as it is"**

The Petitioner submitted that the revocation of the title owned by the church contravened Article 40 of the Constitution. Article 40(6) provides that protection of the right to property does not extend to property found to have been unlawfully acquired. It has been held that before a property is found to have been unlawfully acquired, a legal process has to be followed and a court has to make a determination on whether a property has been unlawfully acquired. See **Republic vs. Land Registrar, Kakamega District & another Ex-Parte Kito Pharmaceutical Ltd & 2 Others(2013)eKLR** and **Kuria Greens Limited vs. Registrar of Titles & another (2011)eKLR**.

The Petitioner also averred that the revocation contravened their right to fair administrative action guaranteed by Article 47 of the Constitution. It is the Petitioner's case that they were not given notice of the revocation and were not afforded an opportunity to be heard before a decision to revoke their title was made. I am of the view that the Respondents cannot de-gazette a title on the basis that the allocation was illegal and unconstitutional as indicated in the gazette notice (HKM 15) without giving the Petitioner a hearing. Article 47 of the Constitution provides as follows:-

**47. (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.**

Similarly, section 14 of the National Land Commission Act under which the impugned Gazette Notice was purported to have been issued provides that the Commission's power to review grants or dispositions of public land to establish their propriety or legality is subject to Articles 40, 47 and 60 of the Constitution. Section 14(3) mandates the Commission to give every person who appears to have an interest in a grant or disposition under review, a notice of such review and an opportunity to appear before the Commission and to inspect any relevant documents.

There is no evidence that the Petitioner was afforded due process as provided under Article 47 of the Constitution and section 14 of the National Land Commission Act. The Court finds that the Respondents acts in purporting to revoke the Petitioner's title to the suit property by way of a Gazette Notice without according the Petitioner a hearing violated the Petitioner's right to fair administrative action guaranteed under Article 47 of the Constitution.

Courts have held in several decisions that the purported revocation of title to land in circumstances similar to those in the present suit amount to a violation of the right to a fair hearing and fair administrative action and that such revocation is therefore unconstitutional, null and void. See **Emange Se-Semata Investments Limited vs. Attorney General & 4 others(2012)eKLR**, **Power Technics Ltd vs. The Attorney General & 2 others Petition No. 178 of 2011**, **Kobian (Kenya) Limited vs. Attorney General (2012) eKLR**, **Isaac Gathungu Wanjohi & another vs. The Attorney General & others Petition No. 154 of 2011**, and **Electrical Options Limited vs. The Attorney General & another Petition No. 23 of 2011**.

The Petitioner did not demonstrate how the Respondents contravened their rights under Articles 27, 28 and 31 of the Constitution and a finding will therefore not be made in that regard. The Petitioner also sought damages arising from infringement of their rights. Since I have declared the offending Gazette Notice null and void and the Petitioner is still in possession of the suit property, I shall not award damages.

The findings of this court are however limited to the procedural aspects on revocation of the Petitioner's title and are in no way a finding on the legality or otherwise of the Petitioner's title. The 2nd Respondent or

any other constitutionally mandated body are therefore not inhibited from carrying out their mandate in establishing the propriety of the title herein through an established legal process.

In the result and arising from my findings in the determination of this petition I make the following consequential orders:-

Consequently, I make the following orders:-

1. A declaration is hereby made that Gazette Notice No. 16531 dated 24<sup>th</sup> December 2010 purporting to revoke the Petitioner's title to the suit property is contrary to Articles 40 and 47 of the Constitution and is therefore null and void.
2. The Registrar of Titles is hereby directed to rescind and reverse the revocation of title to LR 21721 as published in Gazette Notice No. 16531 dated 24<sup>th</sup> December 2010.
3. The Petitioner is hereby awarded costs of the Petition.

Judgment dated, signed and delivered this.....10<sup>TH</sup> .....day of.....JULY.....2015.

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... For the Petitioner

..... For the Respondents