



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. PETITION NO. 19 OF 2019

IN THE MATTER OF ARTICLES 22, 23, 163, 165, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 10, 21, 40, AND 69 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

ABDULKARIM SALEH MUHSIN

ABDULBASIT SALEH MUHSIN T/A

REGIONAL CONTAINER FREIGHTS.....PETITIONERS

AND

NATIONAL LAND COMMISSION.....1ST RESPONDENT

RAPHAEL MUSYOKI NDETI.....2ND RESPONDENT

ELIZABETH NZILI NDETI.....3RD RESPONDENT

(CONSOLIDATED WITH

JUDICIAL REVIEW MISC. APPLICATION NO. 7 OF 2019)

JUDGMENT

The Petition:

1. In the Petition dated 23rd September, 2019, the Petitioners are seeking for the following reliefs:

a) A declaration that the determination made by the 1st Respondent on 28th April, 2017 was null and void ab initio.

b) A declaration that the Petitioners are the rightful owners of all that land otherwise known as L.R No. 337/1884 situate within Mavoko Sub-county within Machakos County (the suit property).

c) A permanent injunction to be issued against the Respondents by themselves or any person claiming under them from interfering or dealing in any way with land parcel otherwise known as L.R. No. 337/1884.

d) Costs and interest of the suit.

2. The Petition is supported by the Affidavit of the 1st Petitioner who has deponed that the Petitioners are the *bona fide* registered owners of the suit property; that the Petitioners bought the suit property which had some squatters and that they sued the said squatters in Machakos CMCC No. 184 of 2012.

3. According to the Petitioners, as part of the resettlement plan, they provided the squatters with alternative land and facilitated their movement; that although they were made aware of the proceedings at the National Land Commission in respect to the suit property, they were not involved in the hearing that led to the determination that was made on 28th April, 2017.

4. The 1st Petitioner deponed that they were not informed of the next hearing date after the initial hearing was adjourned; that the proceedings by the 1st Respondent and the subsequent determination are in blatant disregard of the constitutional and statutory mandate of the 1st Respondent and that the 1st Respondent's Judgment is vague, devoid of substance and not grounded in law.

Response:

5. In response to the Petition, the 2nd Respondent deponed that the crux of this Petition is an alleged violation of the fundamental rights and freedoms of the Petitioners by the 1st Respondent, which action is not permissible in law; that in arriving at its decision, the 1st Respondent was acting as a quasi-judicial body in exercise of its constitutional and statutory mandate and that as such, it cannot be sued for violation of fundamental rights and freedoms as attempted by the Petitioners.

6. The 2nd Respondent deponed that if the Petitioners were aggrieved by the decision of the 1st Respondent, their cause of action would be to either lodge an Appeal or in the alternative to file Judicial Review proceedings and that in the present circumstances of this case, this court cannot find that a judicial body or a body exercising quasi-judicial authority has acted in violation of the fundamental rights and freedoms of the Petitioners.

7. The 2nd Respondent deponed that the National Land Commission, in a determination made sometime on the 28th April, 2017, found that land parcel L.R. No. 337/1884 was properly allocated to the late Peter Nzuki Ndeti and directed the Chief Land Registrar to revoke the registration of the title and enter a new entry in favour of the family of the deceased.

8. It was deponed by the 2nd Respondent that subsequent to the determination by the National Land Commission, the Commission through Kenya Gazette Vol. CXX- No. 138 of 9th November, 2018 determined and directed the Chief Land Registrar to revoke the title held by the Petitioners and uphold the allocation of the suit property to Peter Nzuki Ndeti.

9. The 2nd Respondent deponed that before arriving at the said determination, the National Lands Commission had through a formal advertisement in the newspapers publicized and invited all affected parties to appear before it on the question of the ownership of the title subject to these proceedings.

10. It was deponed that the Applicants had an opportunity to appear before the Commission and respond to the Petition that had been lodged over the property and to prove how they came into possession of the impugned parcels of land and that the Petitioners in paragraph 5 of the Petition admit to having participated in the proceedings before the 1st Respondent.

11. According to the 2nd Respondent, the Petitioners having participated in the proceedings before the Commission, it is not open to them to challenge the proceedings and determination therein through the filing of a Petition alleging violation of rights and freedoms in the manner that they have done. Their only remedy in the circumstances, it was deponed, should have been to file an Appeal against the decision if they were dissatisfied with the merits of that decision.

12. The 2nd Respondent finally deponed that the subject parcel of land was allocated to his late parents' way back in the 1960s; that he had been in occupation of the same ever since until the Petitioners illegally and irregularly caused themselves to be registered as the owners; that the Petitioners have not demonstrated under what authority the persons who assigned or sold to them the subject property assumed ownership of the same and that the indefeasibility of title is not absolute especially where the same was obtained through fraud and or misrepresentation.

13. The National Land Commission, the 1st Respondent, did not file a response to the Petition.

Judicial Review Application:

14. In Judicial Review Application number 7 of 2019, the 2nd Respondent herein, who is the Ex-parte Applicant in the Judicial Review Application, has sought for the following orders:

a) An order of mandamus to compel the respondent to revoke the title to L.R. No. 337/1884 registered in the name of Pauline Atandi and register the same in the name of the Ex parte Applicant in light of the directive of the National Land Commission contained in Kenya Gazette Vol. CXX-No. 138 of 9th November 2018.

15. The Application is supported by the Affidavit of the 2nd Respondent herein who has deponed that the National Land Commission in a determination made sometime on the 28th April, 2017 found that land parcel L.R. No. 337/1884 was properly allocated to the late Peter Nzuki Ndeti and that the Chief Land Registrar should proceed to recognize that allocation.

16. The 2nd Respondent deponed that subsequent to the determination by the National Land Commission, the Commission, through Kenya Gazette Vol. CXX- No. 138 of 9th November, 2018, determined and directed the Chief Land Registrar to revoke the title held by one Pauline Atandi and uphold the allocation to Peter Nzuki Ndeti and that he has made follow ups with the Chief Land Registrar to effect the registration of the said title in the name of the Estate of the late Peter Nzuki Ndeti but todate the Respondent has not acted upon the

directives by the Commission.

17. It was deponed by the 2nd Respondent that prior to the making of the determination, the National Land Commission had given sufficient notice to all parties including any third party purchasers and that the Chief Land Registrar (*the Respondent*) has acted in an unconstitutional manner in disregarding the fundamental rights and freedoms of the Estate of the late Peter Nzuki Ndeti to own property and to enjoy the benefits of the determination made by the National Land Commission.

18. The 2nd Respondent herein deponed that the failure by the Chief Land Registrar to act on the directive by the Commission is causing unnecessary inconvenience and inhibitory hardship to the Applicant and undermines his ability to enjoy his right to property and that he has a legitimate expectation that the Chief Land Registrar shall at all times be guided by the laws of the Republic in executing his mandate.

19. In the premises, it was deponed, it is just and proper that the Honourable Court do compel the Respondent to effect and actualize the decision of the National Land Commission as contained in Kenya Gazette Vol. CXX-No. 138 of 9th November 2018.

Response to the Judicial Review Application:

20. In response to the Judicial Review Application filed by the 2nd Respondent herein, the 1st Petitioner herein deponed that the Petitioners are the registered proprietors of L.R. No. 337/1884 (*the suit property*); that they were not informed of any hearing by the Respondent herein and that owing to the breach of their fundamental rights, they filed the current Petition.

21. The Petitioners deponed that the purported determination by the National Land Commission is irregular and a nullity and that they will be highly prejudiced if the Application is allowed. The National Land Commission did not file a response to the Notice of Motion.

Submissions:

22. The Petitioners' advocate submitted that the Petitioners are challenging the determination of the 1st Respondent made on 28th April, 2017; that the Petitioners were not involved in the proceedings leading to the said determination and that a quick look at the notices marked as annexure RMN3 to the Respondents' Affidavit clearly shows that the Petitioners were not listed as Petitioners in the matters.

23. It was submitted by counsel that in the determination dated 28th April, 2017, the heading states that it is a matter between *Peter Nzuki Ndeti and Elizabeth Nzili Ndeti vs. Josephine Gezare Atandi* and that the determination further reads as follows:

“The Commission hereby directs the Chief Land Registrar to revoke the title to Josephine Gesare Atandi and now registered in the name of Regional Container Freight Services. The Commission directs that the land be vested to Peter Nzuki Ndeti and Elizabeth Nzili Ndeti.”

24. It was submitted that it is evident that the Petitioners were not parties to the determination being sought to be enforced in the Judicial Review proceedings; that the Title Deed is in the names of Abdulkarim Saleh Muhsin and Abdulbasit Saleh Muhsin *t/a* Regional Container Freight Services and that it is evident that the National Land Commission and Elizabeth Nzili are not parties to the Judicial Review proceedings.

25. The Petitioners' counsel submitted that the functions of the Commission are set out in both in the Constitution and the National Land Commission Act 2012; that before making a finding on any claim, the Commission has a duty to ensure that all the parties are informed of the claim and allowed to participate and that the Notices in the Daily Newspapers and the one from the Commission's website exhibited by the 2nd Respondent does not in any way give notice to the Petitioners herein.

26. Counsel submitted that when the Petitioners requested for proceedings of the Commissions with regard to the subject parcel, the proceedings supplied did not show how the matter proceeded and how many witnesses were called and who they were.

27. Counsel placed reliance on Section 14 (3) of the National Commission Act which provides as follows:

“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.”

28. The Petitioners' counsel also relied on the provisions of Section 14 (8) of the National Land Commission Act which provides that:

“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.”

29. Article 47 of the Constitution provides:

“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.

3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-

- a. provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
- b. promote efficient administration.”

30. The Fair Administrative Action Act 2015 Section 4(3) and (4) provides as follows:

“4(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

- a. prior and adequate notice of the nature and reasons for the proposed administrative action;
- b. an opportunity to be heard and to make representations in that regard;
- c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
- d. a statement of reasons pursuant to Section 6;
- e. notice of the right to legal representation, where applicable;
- f. notice of the right to cross-examine or where applicable; or
- g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to -

- (a) attend proceedings, in person or in the company of an expert of his choice;
- (b) be heard;
- (c) cross-examine persons who give adverse evidence against him; and (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”

31. The Petitioners’ advocate relied on the case of *Mwangi Stephen Muriithi vs. National Land Commission & 3 others* [2018] eKLR, where it was held as follows:

“My finding is that the right to be heard transcends mere notice and extends to the person being given sufficient information to enable them prepare and/ or present their case. Such a person is entitled to be furnished, in good time, with information, including reports and documents in the body’s possession that may be prejudicial to his/her case and which would guide that body relied in arriving at its decision. Section 14(3) of the Act is clear that such a person, apart from entitlement to notice, has the right to inspect any relevant document.

Having perused the documents placed before this Court, I am convinced that the Petitioner was neither furnished with the details of the complaint before the 1st Respondent nor granted access to the critical documents before the 1st Respondent. I find that in the circumstances of this case, it would be unfair then to expect or conclude that in the absence of such critical information, the Petitioner was granted a fair hearing as envisaged under Article 50 of the Constitution. In this respect I agree with the finding of *Matavo, J* in the case of *Sceneries Limited vs. National Land Commission* [2017] eKLR.

In the absence of adequate notice, and access to the complaint as outlined herein, I am inclined to find that the Petitioner was not granted a fair hearing”

32. Counsel also relied on the case of *Robert Mutiso Lelli and Cabin Crew Investments Ltd vs. National Land Commission & 3 others* [2017] eKLR, where the court held as follows:

“In this case, in the absence of proceedings of National Land Commission showing how the decision to revoke the titles was arrived at, I have no option but to find and hold that there was no hearing and therefore the *ex parte* Respondent cannot be faulted in claiming that they were not accorded a fair hearing.

Under the Fourth Schedule to the National Land Commission Act, which schedule is established pursuant to Section 19(1) of the National Land Commission Act it stipulates that (1) the business and affairs of the commission shall be conducted in accordance with the Fourth Schedule. The Schedule provides for Rules of Procedure and minutes and stipulates at Section 5 thereof that:

- a) The Commission shall determine rules of procedure for the conduct of its business;

b) *Keep minutes of its proceedings and decisions.*

In the absence of any minutes of its proceedings leading to the determination (decision) to revoke the ex parte Respondent' titles to their respective parcels of land, this court cannot assume that there was any hearing or fair hearing accorded to the ex parte Respondent."

33. It was submitted that taking into account the foregoing, it is evident that the Petitioners were not parties to and were not involved in the proceedings, if any, which led to the purported determination. Submissions by the Respondents are not on record.

Analysis and findings:

34. The evidence before me shows that land known as L.R. No. 337/1884 (*the suit property*) was initially allocated to Josephine Gesare Atandi, who was registered as the owner on 4th February, 2009. The suit property was then transferred to the Petitioners on 27th May, 2009 before the same was charged to Gulf African Bank Limited for Kshs. 45,000,000 on 26th November, 2010.

35. The evidence produced in this court shows that vide a determination by the 1st Respondent dated 28th April, 2017, the 1st Respondent, pursuant to the mandate granted to it by Section 14 of the National Land Commission Act, made the following findings in respect to the suit property.

1. The property had been allocated to Elizabeth Nzuki Ndeti family and was not available for allocation to the Respondent.

2. There was a moratorium in place restricting disposal of land by any local authority and the National Government.

3. The Director of Physical Planning having reviewed the Part Development Plan attached to the letter of allotment observed that the same was not properly approved. There is no approved Part Development Plan. Note that approved PDP No. 85 Ref. PDP NRB/891/5 of 12th June, 1991 fails to correlate with the shape reflected on Deed Plan for L.R No. 337/1884.

4. All the area surveyed as L.R. No. 337/1884 measuring 2.0 Ha has no approved Part Development Plan as per the letter Ref. PPD/8/XXIII/ (44) dated 9th July, 2014 from the Director of Physical Planning, Ministry of Land, Housing and Urban Development.

5. The SPRO report in the file ascertained that the same had been earlier committed and not available for allocation.

6. The Commissioner issued authority to the Claimants to make late payment for the allotment letter to enable processing of the title. The Claimant has indicated that her failure to accept the offer and pay for the same was occasioned by the fact that the files went missing hence they were not able to process payment and the grant.

7. The title held by Regional Freight Services Limited should be revoked and the Claimants (the 2nd Respondent) be allowed to continue their quiet possession of their property without interference from the Respondents.

36. In the said determination, the 1st Respondent directed the Chief Land Registrar to "*revoke the title to Josephine Gesare Atandi and now registered to Regional Container Freight services*" and to have the same "*vested to Peter Nzuki Ndeti and Elizabeth Nzili Ndeti.*"

37. The Petitioners' case is that despite being the registered owners of the suit property, they were not given an opportunity to be heard before the determination of 28th April, 2017 contrary to the provisions of Section 14 of the National Land Commission Act and Article 47 of the Constitution.

38. Section 14 (3) of the National Land Commission Act provides as follows:

"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."

39. Section 14 (8) of the National Land Commission Act which provides that:

"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."

40. Article 47 of the Constitution provides 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.

3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-

- a. provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
- b. promote efficient administration.”

41. The Fair Administrative Action Act 2015 was enacted by Parliament to give effect to Article 47 of the Constitution. Section 4(3) and (4) of the Act provides as follows:

“4(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

- a. prior and adequate notice of the nature and reasons for the proposed administrative action;
- b. an opportunity to be heard and to make representations in that regard;
- c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
- d. a statement of reasons pursuant to Section 6;
- e. notice of the right to legal representation, where applicable;
- f. notice of the right to cross-examine or where applicable; or
- g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4)The administrator shall accord the person against whom administrative action is taken an opportunity to -

- (a) attend proceedings, in person or in the company of an expert of his choice;
- (b) be heard;
- (c) cross-examine persons who give adverse evidence against him; and (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”

42. From the above provisions of the law, it follows that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator or tribunal should give the person to be affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action and an opportunity to be heard and to make representations in that regard.

43. The right to be heard before any decision is made by a tribunal, quasi-judicial body or an administrator has been restated by the courts time without number.

44. In *Onyango vs. Attorney General (1986-1989) EA 456*, Nyarangi, JA asserted at page 459 as follows:

“I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly. A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.”

45. And in *Mbaki & Others vs. Macharia & Another (2005) 2 EA 206*, at page 210, the Court of Appeal stated as follows:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

46. In *Mwangi Stephen Muriithi vs. National Land Commission & 3 others [2018] eKLR*, it was held as follows:

“My finding is that the right to be heard transcends mere notice and extends to the person being given sufficient information to enable them prepare and/ or present their case. Such a person is entitled to be furnished, in good time, with information, including reports and documents in the body’s possession that may be prejudicial to his/her case and which would guide that body relied in arriving at its decision. Section 14(3) of the Act is clear that such a person, apart from entitlement to notice, has the right to inspect any relevant document.

Having perused the documents placed before this Court, I am convinced that the Petitioner was neither furnished with the details of the complaint before the 1st Respondent nor granted access to the critical documents before the 1st Respondent. I find that in the circumstances of this case, it would be unfair then to expect or conclude that in the absence of such critical information, the Petitioner was granted a fair hearing as envisaged under Article 50 of the Constitution. In this respect I agree with the finding of Mativo, J in the case of *Sceneries Limited vs. National Land Commission [2017] eKLR*. In the absence of adequate notice, and

access to the complaint as outlined herein, I am inclined to find that the Petitioner was not granted a fair hearing.”

47. Justice G. V. Odunga in *Republic vs. National Police Service Commission Exparte Daniel Chacha Chacha* [2016] eKLR quoted Halsbury’s *Laws of England Judicial Review (Volume 61 (2010) 5th Edition)* para 639 where it is stated as follows with respect to the right to notice and opportunity to be heard:

“the rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice in itself to attract a duty to comply with this rule. . . However, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected should be afforded an opportunity to put their case at that stage and it may be unfair not to require the inquiry to be conducted in judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. The circumstances in which the rule will apply cannot be exhaustively defined but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their interests or legitimate expectations.”

48. Although the 1st Respondent has been accused of making the decision of 28th April, 2017 which recommended for the nullification of the Petitioners’ title without hearing the Petitioners, the 1st Respondent did not respond to the allegations.

49. On his part, the 2nd Respondent deponed that the Petitioners were informed of the proceedings in respect to the suit property. However, no evidence was produced to show that the Petitioners were informed of the date that they were to appear before the 1st Respondent and make representations in respect to the suit property, or that they actually made any representation before the decision of 28th April, 2017 was made.

50. The assertion by the Petitioners that they were never afforded an opportunity of being heard by the 1st Respondent is captured in the proceedings of the 1st Respondent which have been annexed on the 2nd Respondent’s Affidavit. The title of the proceedings is stated as follows:

“*Determinations for review of grants and disposition of public land Peter Nzuki Ndeti and Elizabeth Nzili Ndeti vs. Joseph Gezare Atandi L.R. No. 337/1884.*”

51. The said proceedings do not mention the names of the Plaintiffs who were the registered proprietors of the suit land as the time the proceedings were being conducted. Indeed, it was expected that the Petitioners would be the key people to be invited, alongside Josephine Gezare Atandi, to plead their cases.

52. Although the 1st Respondent’s proceedings shows that the 2nd Respondent was represented, there is no indication that the Petitioners were represented during the hearing. Indeed, the said proceedings do not state if the Petitioners or their advocate were informed of the date of the hearing, which is indicated to have been on 29th August, 2014 and 13th February, 2015.

53. In the absence of evidence to show that the Petitioners were informed of the date of the hearing of the determination for review of the title for L.R. No. 337/1884, and given an opportunity to review all the documents in possession of the 1st Respondent before the date of the said hearing, it is my finding that the determination of 28th April, 2017 was arrived at without hearing the Petitioners.

54. The fact that the Petitioners were condemned unheard was in contravention of the Petitioners right to a fair hearing contemplated under Articles 47 and 50 of the Constitution.

55. Consequently, I allow the Petition on the basis that the determination of 28th April, 2017 was arrived at without hearing the Petitioners. That being the case, the Judicial Review Application filed by the 2nd Respondent cannot succeed because the decision of the 1st Respondent that he is seeking to enforce is a nullity.

56. For the reasons stated herein above, this court makes the following final orders:

a) A declaration be and is hereby issued that the Determination made by the 1st Respondent on 28th April 2017 in respect of land known as L.R. No. 337/1884 was null and void ab initio.

b) A declaration be and is hereby issued that the Petitioners are the lawful owners of land known as L.R. No. 337/1884.

c) A permanent injunction be and is hereby issued against the Respondents by themselves or any person claiming under them from interfering or dealing in any way with Land parcel otherwise known as L.R. No. 337/1884.

d) Machakos Judicial Review Application number 7 of 2019 is hereby dismissed.

e) The 1st Respondent (National Land Commission) to pay the costs of the two suits.

DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 30TH DAY OF OCTOBER, 2020.

O. A. ANGOTE

JUDGE