



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC PETITION NO. 63 OF 2018**

**IN THE MATTER OF SECTIONS 3, 4 AND 11 OF THE FAIR ADMINISTRATIVE ACTIONS ACT**

**AND**

**IN THE MATTER OF SECTIONS 3,4 AND 11 OF THE FAIR ADMINISTRATIVE ACTION ACT**

**AND**

**IN THE MATTER OF SECTIONS 13(1) OF THE ENVIRONMENT AND LAND COURT**

**AND**

**IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT**

**BETWEEN**

**MOHAMMED KASIM MOHAMUD.....1<sup>ST</sup> PETITIONER**

**DURAN HUSSEIN MADORE.....2<sup>ND</sup> PETITIONER**

**AND**

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

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

**ESTATE OF THE LATE MWATHI KITHEKA.....3<sup>RD</sup> RESPONDENT**

**JANE WAMBUI KARWENJU.....4<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

1. The Petitioners are the registered owners of LR No.36/VII/436 Nairobi on which they have erected a seven storey building called Alhidaya Apartments . This property was purchased from its previous owner a Mr Ndirangu Karanja at Kshs.17,000,000/= . The property had an old building which they demolished before putting up the seven storey building.

2. The property was previously registered in the name of M/s Mwathi Kitheka. In 1994, M/s Mwathi Kitheka asked her son in-law Mr Peter Chania Magere to sell the property for Kshs.5,000,000/= . Magere in turn contacted John Njuguna Nduati to sell the property and deposit the proceeds in the account of the Advocate of M/s Mwathi Kitheka.

3. It is alleged that John Njuguna Nduati transferred the property into his name before he could remit the full purchase price to the Advocates of M/s Mwathi Kitheka. M/s Mwathi Kitheka then gave a power of attorney to Mr Magere who filed a case in the High Court seeking to recover the property from John Njuguna Nduati. When M/s Mwathi Kitheka died, Magere took letters of administration in respect of the Estate of Mwathi Kitheka.

4. At some stage, in the proceedings in the High Court, Mr Magere obtained an ex-parte judgement in his favour which he used to change the

ownership of the property into his name. This was however later overturned and the ownership reverted to Ndirangu Karanja to whom John Njuguna Nduati had transferred ownership. The suit before the High Court was later dismissed for want of prosecution after Mr Magere who was the Plaintiff failed to prosecute it. Attempts by the 4<sup>th</sup> Respondent herein who had a power of attorney from Mr Magere to set aside the dismissal of the suit were unsuccessful.

5. The 4<sup>th</sup> Respondent made a complaint to the 1<sup>st</sup> Respondent that the petitioners had obtained title to the property in a fraudulent manner. The 1<sup>st</sup> Respondent reviewed the grant held by the petitioners and recommended the revocation of the grant held by the petitioner and held that the same be registered in favour of the Estate of Mwathi Kitheka. It is this decision by the 1<sup>st</sup> Respondent which prompted the Petitioners to file the present petition.

6. The Petitioners contend that the 1<sup>st</sup> Respondent had no jurisdiction to review a grant in respect of a private property; that they were innocent purchasers for value without notice of any defect in the title; that the decision of the 1<sup>st</sup> Respondent was res judicata and that the decision by the 1<sup>st</sup> Respondent was arrived at without affording the petitioners an opportunity to be heard.

7. The petitioners therefore contend that the actions of the 1<sup>st</sup> Respondent has infringed on their constitutional rights under Articles 40 and 47 of the Constitution. This is the basis upon which the Petitioners seek the numerous reliefs in the petition.

8. The 1<sup>st</sup> Respondent opposed the petition based on grounds of opposition filed in court on 16<sup>th</sup> January 2019. The 1<sup>st</sup> Respondent contends that the Gazette Notice through which it communicated its verdict is incapable of being challenged through a Petition ; that the petition goes contrary to Rule 30 of the National Land Commission (Review of Grants and Dispositions of Public Land) Regulations , 2017 which require that any person aggrieved with the decision of the commission should appeal to the Environment & Land Court within 14 days ; that it lawfully discharged its mandate under Article 68 of the constitution and section 14 of the National Land Commission Act and that this petition is an abuse of the process of the court which should not be ventilated through a petition .

9. The 2<sup>nd</sup> Respondent did not participate in these proceedings. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents contend that the petitioners did not obtain a clean title; that the property was fraudulently transferred from the name of M/s Mwathi Kitheka into the name of John Njuguna Nduati who transferred the title to Ndirangu Karanja who finally transferred it to the Petitioners and that the petitioners did not have a good title from Ndirangu Karanja.

10. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents further contend that they were only aware of the stage in the High Court case where Magere had been registered as owner of the property and that they were shocked when they went to the lands office and were informed that the registration in favour of Magere had been reversed by an order of court to that of Ndirangu Karanja. They contend that the signature on the indenture between John Ndirangu Nduati and M/s Mwathi Kitheka is a forgery and that had the Petitioners carried out due diligence, they would have realized that there was no original of the indenture.

11. The parties were directed to file written submissions in respect of the petition. It is only the petitioners and the 3<sup>rd</sup> and 4<sup>th</sup> Respondents who filed their submissions. I have carefully considered the petitioners' petition as well as the opposition to the same by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents. I have also considered the submissions by the petitioners and those of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents. The issues which emerge for determination are firstly whether the 1<sup>st</sup> Respondent had jurisdiction to review the petitioners grant. Secondly, whether the 1<sup>st</sup> Respondent's verdict was res judicata, thirdly whether the petitioners constitutional rights were violated and lastly, whether the petitioners are entitled to the reliefs in the petition.

12. On the first issue, it is the petitioners' contention that the 1<sup>st</sup> Respondent had no jurisdiction to review the grant held by the petitioner because the dispute herein was not regarding public land. The petitioners contend that as the dispute was between the parties over private property, the 1<sup>st</sup> Respondent should have not entertained the complaint by the 4<sup>th</sup> Respondent. On the other hand, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents contend that the 1<sup>st</sup> Respondent invoked the provisions of Article 67 (2) , (e) of the Constitution and Section 15 of the National Land Commission Act, which deal with cases of historical injustices .

13. I have looked at the Gazette Notice No.Vol.CXIX- No 97 published on 17<sup>th</sup> July 2017. It is clear that the 1<sup>st</sup> Respondent invoked its jurisdiction under Article 68 (c) (v) of the Constitution and Section 14 of the National Land Commission Act. The 1<sup>st</sup> Respondent reviewed the grant held by the petitioners under Section 14 (1) of the National Land Commission which states as follows:-

***“ 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”.***

14. The above section is clear that the 1<sup>st</sup> Respondent's mandate is to investigate all grants or dispositions of public land to establish their propriety or legality. This section empowered the 1<sup>st</sup> Respondent to investigate on how land which was public land was converted to private land and establish whether the process was legal or not. In the instant case, there was no complaint that the property in issue was illegally converted from public to private. The dispute herein was between two parties who were fighting over the legality of title held by them. This being the case, the 1<sup>st</sup> Respondent had no jurisdiction to decide on which of the two grants was legal. The 1<sup>st</sup> Respondent therefore acted ultra vires its jurisdiction hence its decision is a nullity *ab initio*.

15. On the second issue, the petitioners argue that as the dispute over the title held by M/s Mwathi Kitheka which was later transferred to John Njuguna Nduati before being transferred to Ndirangu Karanja was sorted out through HCC No. 1130 of 1999 which later became ELC 925 of 2016, the proceedings before the 1<sup>st</sup> Respondent were res judicata. On the other hand, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents argue that the issue of res judicata does not arise as HCCC No.1130 of 1999 which later became ELC 925 of 2016 was not heard on its merits. In this regard, the

3<sup>rd</sup> and 4<sup>th</sup> Respondents relied on **MWK- Vs AMW (2016) e KLR**.

16. It is not disputed that HCCC No.1130 of 1999 which later became ELC 925 of 2016 was dismissed for want of prosecution. It was therefore not heard on merits and the issue of res judicata does not therefor arise.

17. On the 3<sup>rd</sup> issue, the petitioners contend that their rights under Article 40 of the Constitution were violated. This article provides protection of property of individuals. Article 40 (6) provides that this protection does not extend to property which is found to have been unlawfully acquired. In the instant case, the facts are clear that the petitioners purchased the property from Ndirangu Karanja. When Magere had his name registered as owner of the property, Ndirangu Karanja moved to court and had the registration reverted to him. This is the position which remained until Ndirangu Karanja sold the property to the petitioners. There is no evidence or even suggestion that the petitioners were privy to the change of ownership from M/s Mwathi Kitheka to John Njuguna Nduati and finally to Ndirangu Karanja.

18. When ownership changed from M/s Mwathi Kitheka to John Njuguna Nduati, Nduati continued to collect rent from the property. One of the petitioners was residing on the property and therefore when the property was later transferred to Ndirangu Karanja, the petitioners had no doubt in purchasing the same as they knew the ownership of the same. The petitioners have not been found by any court or tribunal to have unlawfully acquired the property. They paid for it and title was transferred to them. This being the case, it was a violation of the petitioner's right to protection of property for the 1<sup>st</sup> Respondent who had no jurisdiction to deprive them of their property and ordering that their grant be revoked and registered in favour of the Estate of Mwathi Kitheka.

19. The Petitioners contend that they were not afforded an opportunity to be heard before their title was recommended for revocation. They therefore contend that their rights under Article 47 of the Constitution were violated. It is pursuant to Article 47 of the Constitution that The Fair Administrative Action Act was enacted. This Act provides that before any administrative action is taken, a party affected has to be given an opportunity to be heard and the reasons for the decision.

20. The petitioners contend that they were not aware of the decision by the 1<sup>st</sup> Respondent until they saw a publication of its decision in the Gazette Notice. The Petitioners' Advocate wrote a letter to the 1<sup>st</sup> Respondent on 9<sup>th</sup> December 2018 asking for proceedings and a reminder on 22<sup>nd</sup> October 2018. There was no response. This is contrary to the rules of natural justice which demand that any aggrieved person has a right to be afforded opportunity to defend himself or herself.

21. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents in their submissions stated that the decision of the 1<sup>st</sup> Respondent was communicated via a letter dated 17<sup>th</sup> June 2016. The alleged letter was not put in evidence through the affidavit filed by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents. This being the case, there is no basis upon which the court can make a finding that the petitioners were present during the review as alleged by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents in their submissions. I therefore find that the petitioners' right to a fair hearing under Article 47 of the constitution was violated by the 1<sup>st</sup> Respondent.

22. It is clear from the above analysis that the petitioners have proved that their constitutional rights were violated. I grant the following reliefs:

***a) A declaration that the petitioners are duly registered and bonafide proprietors of LR No.36/VII/436 Nairobi.***

***b) A declaration that under Section 14 (1) of the National Land Commission Act, the 1<sup>st</sup> Respondent can only review grants of public land and that mandate does not extend to private property where the disputes does not involve investigation on how the land was converted from public to private ownership.***

***c) An order of certiorari is hereby issued removing into this court and quashing of Gazette Notice No.6862 dated 17<sup>th</sup> July 2017 which upheld the indenture held by Mwathi Kitheka and which recommended revocation of the indenture held by the petitioners over LR No.36/VII/436 Nairobi.***

***d) An order of prohibition prohibiting the 2<sup>nd</sup> Respondent from revoking the petitioners' indenture of conveyance over LR No.36/VII/436 Nairobi.***

***e) An order of permanent injunction directed at the Respondents, their agents, officers, servants, assigns or any other person whomsoever or howsoever acting on their behalf from interfering in any way whatsoever with the petitioners' proprietorship and occupation of LR No.36/VII/436 Nairobi.***

***f) Costs of this petition to be paid by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents.***

**Dated, Signed and Delivered at Nairobi on this 29<sup>th</sup> day of October 2020.**

**E.O.OBAGA**

**JUDGE**

In the Virtual Presence of : -

M/s Mwashuruti for Gitonga for Petitioners

Mr Ingutya for 3<sup>rd</sup> and 4<sup>th</sup> Respondents

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**