



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC JR 5 OF 2019

IN THE MATTER OF THE CONTRAVENTION OF ARTICLE

2,10,19,20,24,25,27,28,40,47,64,67, AND 259 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT NO.5 OF 2012

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION NO.4 OF 2015

=BETWEEN=

REPUBLIC.....APPLICANT

=VS=

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

JOSEPH MUNGAI GICHURU.....1ST EX-PARTE APPLICANT

LUCY WAIRIMU.....2ND EX-PARTE APPLICANT

JUDGEMENT

Background

1. The Ex-parte Applicants are a couple who are jointly registered as owners of LR Nos 15868/1 and 2 (original No.14906/30). The two plots were originally one plot measuring one acre. After the Ex-parte Applicants purchased the plot, they applied for sub-division which was approved after which they were registered as owners of the two plots.
2. In or around 2016, the National Land Commission (1st Respondent) commenced the process of reviewing the grants held by the Ex-Parte Applicants following complaints by Muthaiga North Residents Association (interested party) on grounds that the plot had been reserved for a public nursery school before the Ex-parte Applicants purchased the same and applied for change of user from nursery school into residential plots.
3. Upon conclusion of the inquiry by the 1st Respondent, a recommendation was made that the grants held by the Ex-parte Applicants had been acquired illegally as the plot in issue had been reserved for construction of a nursery school. The 1st Respondent directed the Chief Land Registrar (2nd Respondent) to revoke the grants held by the Ex-Parte Applicants.
4. It is the recommendation by the 1st Respondent to the 2nd Respondent which prompted the Ex-Parte Applicants to file constitutional petition No. 530 of 2016 against Muthaiga North Residents Association, the National Land Commission, the Chief Land Registrar and the

Attorney General in which they contended that the decision by National Land Commission was in excess of its powers and thus a violation of the rights of the Ex-Parte Applicants. This petition was dismissed by Justice Mativo in a Judgement delivered on 12th may 2017.

5. The Ex-Parte Applicants then moved to court on 18th February 2019 and sought leave to bring judicial review application seeking to quash the decision by the 1st Respondent and prohibiting the 2nd Respondent from acting on the recommendation of the 1st Respondent. The Ex-Parte Applicants were granted leave on 17th April 2019. Pursuant to the leave granted, the Ex-Parte Applicants filed a notice of motion dated 26th April 2019 in which they sought the following reliefs: -

1) An order of certiorari quashing the decision of the 1st Respondent made vide Gazette Notice Number VOL CXX-No 138 page 3980 dated 9th November ,2018 revoking the Applicant's title LR No.15868/1 and 2(Original No.14906/30).

2) An Order of prohibition prohibiting the 2nd Respondent from effecting the decision of the 1st Respondent made vide Gazette Notice Number VOL CXX-No.138 page 3980 dated 9th November 2018 revoking the Applicant' title LR No.15868/ 1 and 2 (original No.14906/30).

3) Costs of this application be provided for.

6. The 1st and 2nd Respondents did not file any response to the Notice of Motion by the Ex-Parte Applicants. It is only the interested party which filed grounds of opposition and replying affidavit in opposition to the Notice of Motion.

The Ex-Parte Applicants' contention.

7. The Ex-Parte Applicants contend that the 1st Respondent had no jurisdiction to entertain review of their grants which resulted from private property. They further contend that the review was carried out without affording them an opportunity to be heard and that the 1st Respondent should not have recommended their titles for revocation as they were innocent purchasers for value without notice of any defect on the title.

8. The Ex-Parte Applicants further argue that they did all due diligence and confirmed that the title was clean and that they proceeded to make applications for change of user and even obtained development approval before a chairman of the interested party started bringing issues that the members of the interested party had complained that the land was public land. The chairman allegedly demanded to have one plot in return for a drop of the complaint but that they declined to accede to the demands.

Interested Party's Contention

9. The Interested party contends that the application by the Ex-Parte Applicants is an abuse of the process of the court. The Ex-Parte Applicants had filed constitutional Petition No.530 of 2016 which they lost after which they moved and filed the present application. The interested party contends that the Ex-parte Applicants were afforded an opportunity and were heard during the review of the grants. The Ex-parte Applicants were present during those hearings and their counsel made written submissions.

10. On the Ex-Parte Applicants' claim that they were innocent purchasers, the interested party states that the Ex-Parte Applicants knew that the land in issue had been reserved for a nursery school and that they proceeded to have it converted into private use for residential purposes. They cannot therefore claim that they were innocent purchasers. The interested party further contends that as at 2004 when the Ex-Parte Applicants purchased the land in issue, its value was more than 10 million shillings but they paid Kshs.3.3 million shillings which was highly undervalued.

Analysis and determination.

11. I have considered the Ex-Parte Applicants' application as well as the opposition thereto by the interested party. I have also considered the submissions filed by the Ex-Parte Applicants and those of the interested party. The issues which emerge for determination are firstly, whether the 1st Respondent had jurisdiction to review the grants in issue. Secondly, whether the Ex-parte Applicants were afforded opportunity to be heard before a decision was arrived at by the 1st Respondent. Thirdly, whether the Ex-Parte Applicants were innocent purchasers for value without notice of any defect in the title.

Whether the 1st Respondent had jurisdiction to review the grants held by the Ex-Parte Applicants.

12. The Ex-Parte Applicants argue that the 1st Respondent had no jurisdiction to review grants in respect of private land. In support of this contention, they rely on the case of **Republic Vs National Land Commission Ex-Parte Cecilia Chepkoech Leting & 3 Others (2016) e KLR** and the case of **Republic Vs Chairman & Members of National Land Commission, Ex-parte Turf Developers Ltd (2016) e KLR.**

13. According to section 14(1) of the National Land Commission Act, the 1st Respondent had a mandate of five years to review all grants or dispositions of public land to establish their propriety or legality. This section is clear that the 1st Respondent was to investigate on how public land which was converted to private land was acquired. The 1st Respondent was not to investigate land which was already public land because that would not make sense. The Ex-Parte Applicant raised this same issue in Constitutional Petition No.530 of 2016 and Justice Mativo clearly stated that the 1st Respondent had jurisdiction to investigate the grants held by the Ex-Parte Applicants. The judge stated as follows:-

“In my view, the Respondent can only fulfill this responsibility by querying the process under which public land was converted to

private land, if there is evidence (as in this case) that the land was once public land”.

14. I entirely agree with Justice Mativo’s reasoning and that is the proper interpretation of the mandate of the 1st Respondent in discharging its mandate under Article 68 (c) (v) and Section 14 of the National Land Commission Act. The decision in **Republic Vs National Land Commission Ex-Parte Cecilia Chepkoech Leting & 3 Others (Supra)** is no longer good law as the proceedings which resulted in that decision were subsequently set aside and went down with the decision. I therefore find that the 1st Respondent had jurisdiction to review the grants held by the Ex-Parte Applicants.

Whether the Ex-parte Applicants were afforded opportunity to be heard before a decision was arrived at by the 1st Respondent.

15. The rules of natural justice require that a person be afforded an opportunity to be heard before a decision can be made. In the instant case, though the Ex-Parte Applicants claim that they were not afforded opportunity to be heard, evidence on record is that the inquiry as to the grants they held was advertised in the press. The Ex-Parte Applicants engaged services of a lawyer who appeared and made written submissions. The Ex-parte Applicants were known by the chairman of the interested party who used to see them at the offices of the 1st Respondent during the review proceedings.

16. The Ex-Parte Applicants went to court and tried to stop the proceedings but they were not successful. After their petition was dismissed, they fully participated in the review proceedings before the 1st Respondent. The Ex-Parte Applicants therefore have no basis to argue that they were not afforded an opportunity to be heard. I therefore find that the Ex-Parte Applicants were afforded an opportunity to be heard and they were subsequently given the decision by the 1st Respondent.

Whether the Ex-parte Applicants were innocent purchasers for value without any notice of the defect on the title.

17. It is true that the Ex-Parte Applicants were the fourth purchasers of the plot in issue. It is however clear, and they can admit in their affidavits that they were aware that the land had been reserved for a nursery school. They went on to say that as one the Ex-Parte Applicants was in business of running a school, they found this property as a perfect choice for purchase. They were given a copy of the grant and condition No.5 thereof was categorical that the land had been reserved for a nursery school. When they purchased the land, they embarked on the process of converting it to residential use. They very well knew this was illegal but they went ahead to do that. They cannot therefore turn around and claim that they did not know that it had been reserved for a nursery school. The Ex-parte Applicants cannot therefore take refuge in section 14(7) which prohibits the 1st Respondent from revoking title of a bona fide purchaser for a value without notice of a defect in title.

Disposition

18. Based on the above analysis, I find that the Ex-parte Applicants’ Notice of Motion lacks merit. The same is hereby dismissed with costs to the interested party.

Dated, Signed and Delivered at Nairobi on this 8th day of October 2020.

E.O.OBAGA

JUDGE

In the Virtual Presence of : -

Mr Kabaru for the interested party

Court Assistant: Hilda

E.O.OBAGA

JUDGE