



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**CONSTITUTIONAL PETITION 14 OF 2019**

**GIO-FO LIMITED.....PETITIONER**

**VERSUS**

**1. THE NATIONAL LAND COMMISSION**

**THE CHIEF LAND REGISTRAR-KILIFI,**

**THE COUNTY LAND REGISTRAR-KILIFI,**

**THE HONOURABLE ATTORNEY GENERAL**

**5. THE COUNTY GOVERNMENT OF KILIFI.....RESPONDENTS**

**JUDGMENT**

**Background**

1. By this Petition dated 30<sup>th</sup> April 2019 as filed herein on 2<sup>nd</sup> May 2019 Gio-Fo Ltd (the Petitioner) prays for: -

*i) A declaration that the Petitioner is the legal proprietor of Title No. Chembe/Kibabamshe/439;*

*ii) An order of permanent injunction to restrain the Respondents, their servants and/or agents from interfering with the Petitioner's use, ownership and utility of Title No. Chembe/Kibabamshe/439;*

*iii) An order of Certiorari to being to this Honourable Court for the purposes of being quashed, the determination by the 1<sup>st</sup> Respondent on Title No. Chembe/Kibabamshe/439 as contained in the Gazette Notice No. 6866 contained in the Special Issue Vol. CXIX-No. 97 and published on the 17<sup>th</sup> day of July 2017 by the Chairman, National Land Commission;*

*iv) An order of Prohibition to prohibit the Respondents by themselves, servants, agents or whosoever authorized on their behalf from giving effect or implementing in any manner whatsoever the determination by the 1<sup>st</sup> Respondent on Title No. Chembe/Kibabamshe/439 as contained in the Gazette Notice No. 6866 contained in the Special Issue Vol. CXIX-No. 97 and published on the 17<sup>th</sup> day of July 2017 by the Chairman, National Land Commission;*

*v) An order of mandamus to issue compelling the 3<sup>rd</sup> Respondent to restore the register in respect of Title No. Chembe/Kibabamshe/439 and issue the Petitioner with a Certificate of Search on payment of the requisite fees;*

*vi) Costs of the Petition; and*

*vii) Any such other orders(s) as this Honourable Court shall deem just.*

2. Those prayers arise from the Petitioner's contention that it is the registered proprietor of a freehold interest in Plot No. Chembe/Kibabamshe/439 measuring approximately 1.6 Ha (the suit property), having purchased the same on 11<sup>th</sup> September 2009 from one George Mungu Kutandaza at a consideration of Kshs 3,600,000/-. The Petitioner asserts that prior to the said purchase, it did carry out the necessary due diligence including conducting a search on the property prior to and after the purchase thereof.

3. The Petitioner avers that prior to its registration as the proprietor of the suit property, the original title was in the name of the previous proprietor, the said George Mungu Kutandaza and that the transfer documents as was required by law were produced by the County Land Registrar Kilifi (the 3<sup>rd</sup> Respondent). Ever since, the Petitioner has been in quiet occupation and possession of the suit property without interference from the Respondents herein or any other person and has been meeting all the requisite outgoings such as land rates to the County Government of Kilifi (the 5<sup>th</sup> Respondent).

4. It is the Petitioner's case that on 17<sup>th</sup> July 2017, the National Land Commission (the 1<sup>st</sup> Respondent) caused to be published Kenya Gazette Notice No. 6866 contained in Vol. CXIX-No. 97 wherein it purported to make a determination that the suit property is a public plot reserved under the name of the 5<sup>th</sup> Respondent. The Petitioner avers that to this date and in contravention of Article 47 of the Constitution and Section 4 of the Fair Administrative Action Act, 2015, it has never been made aware of the nature of complaint, if any, against itself by the 1<sup>st</sup> Respondent.

5. The Petitioner further asserts that the 1<sup>st</sup> Respondent neither notified it of any allegations against itself nor gave it an opportunity to be heard as provided under Articles 25(c) and 50 (1) of the Constitution and that the said determination is ultra vires as the 1<sup>st</sup> Respondent could in law only make a recommendation on the matters before it.

6. The Petitioner further asserts that the said decision is tainted with illegality, made without jurisdiction and in abuse of its powers. Consequent upon the said acts of the 1<sup>st</sup> Respondent, the Petitioner avers that the Chief Land Registrar (the 2<sup>nd</sup> Respondent) and the County Land Registrar (the 3<sup>rd</sup> Respondent) are now about to revoke its title to the suit property, an act which shall infringe on the Petitioner's right to own property as guaranteed under Article 40 of the Constitution.

7. As it were the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents neither entered appearance nor filed a response to the Petition. The Honourable the Attorney General (the 4<sup>th</sup> Respondent) appearing for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents however supported the position taken by the 5<sup>th</sup> Respondent in these proceedings.

8. The Petition is accordingly only opposed by the County Government of Kilifi (the 5<sup>th</sup> Respondent). In their Grounds of Opposition to the Petition dated 23<sup>rd</sup> September 2019 as filed herein on 24<sup>th</sup> September 2019, the 5<sup>th</sup> Respondent objects to the Petition on the grounds that: -

***1. The Petition is defective and cannot be salvaged for lack of particularity and precision, in complete contravention of Rule 10 (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 as well as established legal principles as set out in the Court of Appeal Case of Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR: -***

***2. The Petition does not disclose any or any reasonable cause of action against the 5<sup>th</sup> Respondents;***

***3. The claim for violation of the Petitioner's rights in the bill of rights is unsubstantiated and cannot stand. The Petition against the 5<sup>th</sup> Respondent is scandalous, frivolous and vexatious and cannot stand or be entertained by this Court;***

***4. The Petition as taken out drawn and filed is a non-starter, incurably defective and unsustainable;***

***5. Furthermore, the entire Petition as structured does not raise a single violation by the 5<sup>th</sup> Respondent of the Constitution or any established law;***

***6. The issues of law raised in the Petition were adequately addressed by Regulation 35(2) of the National Land Commission (Review of Grants and Dispositions of Public Land) Regulations, 2017;***

***7. The Petition seeks orders that can only be granted in a suit filed by way of a Plaint;***

***8. The actions by the 1<sup>st</sup> Respondent were anchored and were in fulfilment of its role and powers under Article 68(c)(V) of the Constitution of Kenya read together with Section 14 of the National Land Commission Act.***

9. The Petition was canvassed by way of affidavit evidence and written submissions. I have perused and considered the pleadings as filed herein by the Petitioner and the 5<sup>th</sup> Respondent. I have similarly taken into consideration the submissions and authorities placed before me by the Learned Advocates for the said parties.

10. The Petition was precipitated by the acts of the 1<sup>st</sup> Respondent in publishing Gazette Notice No. 6866 Volume CXIX-No. 97 on 17<sup>th</sup> July 2017. At page 4289 of the Gazette Notice which is attached to the Affidavit of Alfonso Forino a shareholder and Director of the Petitioner and sworn in support of the Petition and marked "AF6", the 1<sup>st</sup> Respondent Commission states as follows: -

**"Determination and Review of Grants and Disposition of Public Land in Respect of the following Grants and Orders**

***In Exercise of the powers conferred by Article 68 (c) (V) of the Constitution of Kenya and Section 14 of the National Land Commission Act, 2012, the Chairman of the National Land Commission informs the general public that the National Land Commission upon receipt of complaints from the National Government, County Governments and members of the public, undertook review of grants and dispositions(titles) of public land to establish their legality or otherwise. The Commission via public notices in the national dailies invited all interested parties to appear before it to inspect documents and make written***

**representations and submissions. Consequently, the Commission has made determinations in respect of the following grants/Titles and orders for revocation, regularization, upholding of the titles where applicable as indicated or give further orders. Where the order calls for revocation, the Chief Land Registrar is thereby directed to revoke as per Section 14(5) of the National Land Commission Act and attendant laws.”**

11. On the same page, the 1<sup>st</sup> Respondent gives some justification for the exercise it subsequently engaged in as follows: -

**“Justification.**

***The Commission after the public hearings to determine the legality and propriety of the allocation and registration concluded as follows: -***

***1. The government erred by applying three registration regimes in an area thus resulting in various types of allocations and registrations. The tenure system that the Chembe/Kibabamshe area falls is trust land and not government land and therefore the adjudication regime should be upheld;***

***2. It is on the basis of public interest that the Commission initiated the public hearings in a view of lifting the embargo; and***

***3. The historical injustices to the land owners.”***

12. Accordingly, the 1<sup>st</sup> Respondent then proceeds at page 4316 of the Notice to make a determination that the suit property –Plot No. 439 situated in Chembe/Kibabamshe adjudication section is a public plot reserved under Kilifi County (the 5<sup>th</sup> Respondent).

13. As it were, the Petitioner, a private limited liability company is aggrieved by the said determination. The Petitioner asserts that it is the registered proprietor of the said property having purchased the same on 11<sup>th</sup> September 2009 from one George Mungu Kutandaza at a consideration of Kshs 3,600,000/-. The Petitioner told the Court that prior to the purchase and its subsequent registration as the proprietor of the suit property, it carried out appropriate due diligence at the 3<sup>rd</sup> Respondent’s Registry at Kilifi from which it did establish that the property was duly registered in the name of the Vendor.

14. The Petitioner further told the Court that ever since it purchased the property, it has enjoyed quiet use and possession thereof without interference from any quarter. As the proprietor thereof, it has also been meeting all the requisite outgoings such as land rates which it has been remitting to the 5<sup>th</sup> Respondent.

15. Arising from the foregoing, it was the Petitioner’s expectation that if there was any dispute or complaint in regard to the suit property, such would have been brought to its notice. The Petitioner asserts that upto and until the time it filed this Petition, it has never been made aware of the nature of the complaint, if any by the 1<sup>st</sup> Respondent and was thereby denied an opportunity to be heard.

16. As it turned out, the 1<sup>st</sup> Respondent Commission despite service neither entered appearance herein nor did it file a response to the Petitioner’s claims. While one would have expected the 5<sup>th</sup> Respondent as the intended beneficiary of the suit property to have given an explanation as to what complaint was made and how the determination came to be arrived at in its favour, it chose instead to give some generalized 8-point Grounds of Opposition which in themselves do not give any glimpse as to any accusation made against the Petitioner and whether or not it was heard.

17. As can be discerned from the previews of the Gazette Notice cited hereinabove, the review undertaken by the 1<sup>st</sup> Respondent on the suit property was not of its own motion but was purportedly made upon a complaint received from either the National Government, the 5<sup>th</sup> Respondent County Government itself or from members of the public. It cannot go without noting that Article 68 of the Constitution and Section 14 of the National Land Commission Act under which the 1<sup>st</sup> Respondent is established as a quasi-judicial body required that in the exercise of its functions, the 1<sup>st</sup> Respondent must adhere to the principles of natural justice.

18. Indeed, Section 14(3) of the said Act provides in mandatory terms that “*in the exercise of its 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, an opportunity to appear before it and to inspect any relevant documents.*” On the other hand, Section 14(8) of the Act requires the Commission in the exercise of its powers to be guided by the principles of fair administrative action as set out under Article 47 of the Constitution.

19. While indeed it is true from the material placed before me that the 1<sup>st</sup> Respondent published the notices of its hearings in the print media on 1<sup>st</sup> and 2<sup>nd</sup> September 2015, I take note that the notices only cited the Plot Numbers for the concerned parcels of land. Given that the hearings were scheduled to take place only some five (5) days away on 7<sup>th</sup> September 2015, one would have expected the Commission to spell out the names of the Interested Parties in the notices and to give a brief outline of the complaints against them to enable them to adequately take notice and respond.

20. As the Honourable Lady Justice Winfrida Okwany stated in ***Mwangi Stephen Muriithi –vs- National Land Commission & 3 Others (2018) eKLR: -***

***“.....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 in arriving at its decision. Section 14(3) of the (National Land Commission) Act is clear that such a person, apart from entitlement to notice, has the right to inspect any relevant documents."*

21. The right to property is constitutionally protected and a person can only be deprived of that right as provided under the Constitution. Accordingly, and in the absence of any evidence from both the 1<sup>st</sup> and 5<sup>th</sup> Respondents herein that the Petitioner was accorded natural justice as outlined herein, it goes without saying that the determination made by the 1<sup>st</sup> Respondent was unconstitutional and unlawful.

22. At any rate, from the material placed before me, the Petitioner herein was the registered proprietor of the suit property. That registration was procured under the now repealed Registration of Land Act, Cap 300 of the Laws of Kenya. Under Section 143(1) of the said Act, only a Court of law and not the 1<sup>st</sup> Respondent could order the rectification of title by directing that any registration be cancelled or amended. Even in such cases however, the Court can only make such an order where it was satisfied that any registration had been obtained, made or omitted by fraud or mistake.

23. In the matter before me, neither the 1<sup>st</sup> Respondent nor the 5<sup>th</sup> Respondent who was enjoined as the beneficiary of the determination by the 1<sup>st</sup> Respondent have made any allegation of fraud or misrepresentation on the part of the Petitioner in obtaining the title to the suit property. Infact in its Grounds of Opposition filed herein, the 5<sup>th</sup> Respondent does not make any claim whatsoever on the ownership or otherwise of the suit property.

24. In my considered view, Article 40 (6) of the Constitution reinforces the sanctity of title and envisages that where a registered title is impugned for any reason, due process would be followed to have the same revoked, cancelled and/or annulled. Otherwise, unprocedural interference with a registered title in itself goes against public interest and policy and puts in jeopardy the entire system of registration of titles, breeds uncertainty in land transactions and is indeed inimical to the economic interests of the Country.

25. As the Court of Appeal stated in ***Charles Karathe Kiarie & 2 Others –vs- Administrators of the Estate of John Wallace Mathare & 5 Others (2013) eKLR: -***

“.....The statutory presumption of indefeasibility and conclusiveness of title under the Torrens system can be rebutted only by proof of fraud or misrepresentation in which the buyer is himself involved. The object of this philosophy was summarized in the classic Privy Council decision in **Gibbs –vs- Messer (1891) AC 247 PC at page 254 as follows: -**

“The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer of mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title”.

26. Arising from the foregoing, this Court is satisfied that the Petition has merit. The same is allowed as prayed with costs.

**Dated, signed and delivered at Malindi this 2<sup>nd</sup> day of October, 2020.**

**J.O. OLOLA**

**JUDGE**