REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC JR. NO. 41 OF 2017

BETWEEN

REPUBLIC.....APPLICANT

AND

NATIONAL LAND COMMISSION.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

NAIROBI CITY COUNTY.....INTERESTED PARTY

EX-PARTE: SIMON KIMONDO MUBEA

JUDGMENT

Pursuant to the leave that was granted herein on 9th November, 2017, the ex-parte applicant, Simon Kimondo Mubea ("the applicant") filed a Notice of Motion application dated 23rd November, 2017 seeking the following orders;

1) An order of certiorari to remove into this court for the purposes of being quashed the 1st respondent's decision/recommendation/order gazetted in the Kenya Gazette Notice No. 6863 of 17th July, 2017 recommending and/or ordering the revocation of the applicant's title to the premises known as Land Reference No. 209/13539/20 registered as I.R 80461/1.

2) An order of Mandamus compelling the 1st respondent to issue a fresh Gazette Notice revoking the said Gazette Notice No. 6863 of 17th July, 2017 in respect to the suit premises.

3) An order of prohibition prohibiting and preventing the 2nd respondent or his/her servants, agents and/or any other person acting on his/her behalf from enforcing the said decision/recommendation/order of the 1st respondent published in the Kenya Gazette Notice No. 6863 of 17th July, 2017 aforesaid in total as regards the applicants title, Land Reference No. 209/13539/20 registered as I.R 80461/1.

4) An order of prohibition preventing the respondents, their servants, agents or any other person, body or authority from physically taking over L.R No. 209/13539/20 and/or interfering with the applicant's title in respect thereof.

5) The costs of the application.

6) Any other order or relief be granted as the court may deem fit and expedient to grant.

The application was brought on the grounds set out on the face thereof and on the verifying affidavit of the applicant sworn on 19th October, 2017 and a statutory statement of the same date that were filed in support of the application for leave. The applicant's case is that he is the leasehold proprietor of all that parcel of land known as Land Reference No. 209/13539/20 registered as I.R 80461/1 ("the suit property"). The applicant has averred that the suit property that was formerly known as House No. 93(58/3) off Suna Road, Woodley Estate, Nairobi was allocated to him on 24th August, 1992 by the interested party's predecessor, Nairobi City Council ("the council") at a consideration of Kshs. 1,100,000/-. The applicant has averred that he accepted the allocation, paid the said sum of Kshs. 1,100,000/- and was issued with a lease by the council dated 16th April, 1999. The applicant has averred that the said lease was registered on 25th May, 1999 under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed). The applicant has averred that his registration as the leasehold proprietor of the suit property conferred upon him indefeasible title over the property which cannot be impeached by the 1st respondent save as provided by law.

The applicant has contended that he acquired the suit property legally for valuable consideration without notice of any irregularity if any on the title that was held by the council. The applicant has averred that on 28th October, 2016, the 1st respondent published a notice in the daily newspapers inviting the people whose titles to properties were being reviewed to appear before it and make representations. The applicant has averred that he was among those who were invited to make representations on 15th November, 2016 in relation to the suit property. The applicant has averred that there was an earlier attempt by the Commissioner of Lands, the predecessor of the 1st respondent to revoke the applicant's title to the suit property in 2011. The applicant has averred that he successfully challenged that attempt through ELC JR. MISC. CIVIL APPLICATION NO. 30 OF 2011. The applicant has averred further that he had also filed a suit namely, HCCC No. 2012 OF 1999 against a former tenant of the council who was occupying the suit property for possession and judgment was made in his favour. The applicant has averred that in response to the 1st respondent's invitation to him to make representations during the review of the suit property's title, he drew the attention of the 1st respondent to the two cases mentioned above in a letter addressed to the 1st respondent on 10th November, 2016. The applicant has averred that on 15th November, 2016, his advocate once again appeared before the 1st respondent and drew the attention of the 1st respondent's chairperson to the orders that had been issued in the above cases. The applicant has averred that the 1st respondent ignored the decisions in the above cases and proceeded to conduct a public hearing concerning the suit property on alleged complaint by the council.

The applicant has averred that through Gazette Notice No. 6863 published on 17th July, 2017, the 1st respondent made an order for the revocation of the applicant's title to the suit property and directed the 2nd respondent to revoke the same pursuant to section 14(5) of the National Land Commission Act, 2012. The applicant has contended that in recommending the revocation of the applicant's title, the 1st respondent violated the applicant's constitutional right to own property and also failed to follow the laid down procedure. The applicant has contended further that the 1st respondent acted ultra vires its powers since the suit property was not public land but private land acquired for valuable consideration. The applicant contended that the 1st respondent had no mandate to review titles for private land. The applicant has averred that the 1st respondent's decision to revoke his title was not only illegal but was also in total disregard of the presentation that had been made to it by the applicant's advocates orally and through a letter dated 10th November, 2016. The applicant has contended that the 1st respondent's said decision was illegal, made without jurisdiction and in contempt of the orders that had been made by the court in ELC JR. MISC. CIVIL APPLICATION NO. 30 OF 2011. The applicant has contended that the decision of the 1st respondent if allowed to stand would occasion him grave injustice and irreparable loss.

The respondents and the interested party appointed advocates to act for them in the application before the court but only the 2nd respondent responded to the application. The 2nd respondent filed grounds of opposition dated 15th February, 2018 in which he contended that he was wrongly joined as a party to the application. The 2nd respondent contended that the applicant had no cause of action against it and that the application was frivolous, vexatious and an abuse of the process of the court.

The application was heard by way of written submissions. The applicant filed his submissions on 4th June, 2019. None of the respondents filed submissions even after time was extended for them to do so on several occasions. The applicant framed three(3) issues that he submitted on namely; whether the Registrar of titles , Nairobi had authority or jurisdiction to revoke or cancel the title for the suit property issued under the Registration of Titles Act, Chapter 281 Laws of Kenya(now repealed), whether the rules of natural justice were observed before the decision to revoke the applicant's title was arrived, and whether the respondents acted in contempt of the court order made on 6th March, 2013 when it published its decision to revoke the applicant's title in the Kenya Gazette No. 6863 published on 17th July, 2017.

On the first issue, the applicant cited sections 23(1) of the Registration of Titles Act, Chapter 281 Laws of Kenya, section 26(1) of the Land Registration Act, 2012 and the case of Dr. Joseph N.K. Arap Ng'ok *v* Justice Moijo Ole Keiwua & 4 others, Civil Application No. 60 of 1997 and submitted that his registration as the leasehold proprietor of the suit property conferred upon him absolute and indefeasible title that could only be challenged on account of fraud or misrepresentation. The applicant submitted that he acquired the suit property lawfully for valuable consideration and that no allegation of fraud had been made against him by the respondents that could warrant the cancellation or revocation of his title. The applicant submitted further that the actions by the respondents violated Article 40(3) of the Constitution that prohibits arbitrary deprivation of property. The applicant submitted that even if the suit property was reserved for public use as had been claimed by the respondents, the applicant should have been offered compensation before its title was revoked. The applicant submitted that the respondents contravened the law and did not follow the procedures laid down in law and as such acted in excess of their powers and without jurisdiction in purporting to revoke the applicant's title.

On whether the rules of natural justice were observed by the respondents in their impugned decision, the applicant submitted that in arriving at the decision to revoke the applicant's title, the respondents did not take into account factors that they out to have considered. While admitting that he was given a hearing, the applicant submitted that the whole process was flawed due to the 1st respondent's failure to consider the evidence and submissions that was placed before it by the applicant before making the impugned decision. The applicant submitted further that the 1st respondent did not give any reason whatsoever for its decision to revoke the applicant's title to the suit property. The applicant submitted that the decision of the 1st respondent violated Article 47 of the Constitution and section 4(1), (2) and (3) of the Fair Administrative Action Act, 2015 which guarantees a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The applicant submitted that he did not receive a fair treatment from the respondents as the respondents did not observe the rules of natural justice. In support of this submission, the applicant relied on Republic *v* National Police Service Commission, Exparte Daniel Chacha Chacha[2016]eKLR, Judicial Service Commission *v* Mbalu Mutava & Another [2015]eKLR, Republic *v* Truth, Justice and Reconciliation Commission & another, Exparte Beth Wambui Mugo[2016]eKLR and Fahim Yasin Twaha & Yasin Twaha Abdalla *v* District Land Registrar, Lamu,[2011]eKLR.

The applicant submitted that since the respondents disregarded the rules of natural justice in their decision making process, their decision was null and void. The applicant submitted that he was entitled to an order of certiorari to quash the said decision which was a nullity and an order of mandamus to compel the 1st respondent to issue a fresh Gazette Notice revoking the earlier notice that was issued ultra vires and without observing the principles of natural justice. The applicant submitted that he was also entitled to an order of prohibition to prevent the respondents from meting out a similar injustice to him in future.

On the last issue, the applicant submitted that on 6th March, 2013, the High Court made an order in his favour in a similar application relating to the suit property in which the court had restrained the Registrar of Titles from doing anything that could be construed as being inconsistent with the legality of the applicant's title to the suit property. The applicant contended that the recommendation by the 1st respondent contained in the Gazette Notice No. 6863 of 17th July, 2017 concerning the suit property was contemptuous of the said court order. The applicant cited Kenya Tea Growers Association *v* Francis Atwoli & 5 others [2012]eKLR and submitted that an act done in disobedience of a court order is illegal and invalid.

In conclusion, the applicant submitted that he had demonstrated that he deserves the remedies sought against the respondents in his Notice of Motion application dated 23rd November, 2017.

I have considered the applicant's application together with the affidavits and statutory statement filed in support thereof. I have also considered the grounds of opposition filed by the 2nd respondent and the submissions by the applicant. The issue that this court has been called upon to determine is whether the applicant is entitled to the reliefs sought in his application. In OJSC Power Machines Limited, Trans Century Limited, and Civicon Limited (Consortium) *v.* Public Procurement Administrative Review Board Kenya & 2 others [2017] eKLR, the Court of Appeal stated as follows:

> **"The law on the jurisdiction of the High Court to entertain judicial review proceedings are encapsulated in several decisions, some of which were cited before us while the learned Judge applied others in his judgment. The law, from these decisions is to the following effect;**
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> **That the purpose of judicial review is to ensure that a party receives fair treatment in the hands of public bodies; that it is the purpose of judicial review to ensure that the public body, after according fair treatment to a party, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court in a judicial review proceeding. Put another way, judicial review is concerned with the decision making process, not with the merits of the decision itself. In that regard, the court will concern itself with such issues as to whether the public body in making the decision being challenged had the jurisdiction, whether the persons affected by the decision were heard before the decision was made and whether in making the decision, the public body took into account irrelevant matters or did not take into account relevant matters".**
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> The applicant has sought an order of certiorari, mandamus and prohibition. Certiorari, mandamus and prohibition are public law remedies which are available to persons whose legally recognized interests have been infringed by public bodies or officers exercising statutory powers. In Halsbury's Laws of England, 4th Edition at paragraph 46, the authors have stated as follows:
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> **"the courts have inherent jurisdiction to review the exercise by public bodies or officers of statutory powers impinging on legally recognized interests. Powers must not be exceeded or abused".**
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> In the book, H.W.R Wade & C.F. Forsyth, Administrative Law, 10th Edition the authors have stated as follows at page 509 on the remedies of Certiorari and Prohibition:
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> **"the quashing order and prohibiting order are complementary remedies, based upon common principles…….A quashing order issues to quash a decision which is ultra vires. A prohibiting order issues to forbid some act or decision which will be ultra vires. A quashing order looks to the past, a prohibiting order to the future."**
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> In Kenya National Examination council *v* Republic, Exparte Geoffrey Gathenji Njoroge & 9 others [1997]eKLR that was cited by the applicant in his submissions, the court set out the scope and efficacy of the remedies of certiorari, mandamus and prohibition. In that case the court described the remedies of prohibition and certiorari as follows:
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> **"…….prohibition is an order from the High Court directed to an inferior tribunal or body which prohibits that tribunal or body to continue proceedings in excess of its jurisdiction or in contravention of the laws of the land……Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons…."**

It is not disputed that the 1st respondent had power to review grants or dispositions of public land to establish their propriety or legality and that where it found that any title to such land was acquired in unlawful manner it had power to direct the 2nd respondent to revoke the title. Those powers are contained in section 14 of the National Land Commission Act, 2012 which provides as follows:

> **"14. (1) 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.**
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> **(2) Subject to Articles 40, 47 and 60 of the Constitution, the Commission shall make rules for the better carrying out of its functions under subsection (1).**
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> **(3) 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.**

(4) After hearing the parties in accordance with subsection (3), the Commission shall make a determination.

(5) Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.

(6) Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.

(7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.

(8) 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."

The applicant has contended that although the 1st respondent had power to review grants and dispositions of public land, the power was limited to public land. The applicant has contended further that in any event, the period within which the power was exercisable by the 1st respondent had lapsed as at the time the decision being challenged was made. The applicant has contended further that even if the power could still be exercisable, the 1st respondent failed to observe the rules of natural justice before making the decision complained of. On whether the 1st respondent had jurisdiction to review grants and dispositions in respect of private land, my view is that so long as the land in issue was public land before it was alienated for private use, it was within the purview of the 1st respondent's review jurisdiction. It is common ground that once public land is alienated to a private entity or person, it becomes private land. See, section 9(2) of the Land Act, 2012.

I am of the view that the powers conferred upon the 1st respondent by section 14 of the National Land Commission Act, 2012("the Act") were intended to enable it examine the propriety and legality of alienation of public land for private use. It follows therefore that the 1st respondent could only review titles for public land that had already been alienated and as such converted to private land. On this issue, I am in agreement with the observation that was made by W.Korir J. in Republic *v* National Land Commission & another, Exparte Muktar Saman Olow[2015] eKLR in which he stated that:

"47. Under Section 14 of the National Land Commission Act, 2012 the Respondent is given jurisdiction to enforce Article 68(c)(v) of the Constitution and review all grants or dispositions of public land to establish their propriety or legality. In my view, the Respondent can only fulfil this mandate by probing the process under which public land was converted to private land. It would defeat the purpose of the Constitution to imagine that unlawfully and irregularly acquired land once registered as private property is no longer within the reach of the Respondent."

It is common ground that the suit property was owned by the City Council of Nairobi ("the council") before the same was allocated to the applicant by the council on 24th August, 1992. The suit property was therefore public land reserved for public purposes. According to the evidence placed before the court by the applicant, the 1st respondent received a complaint from the council that the suit property that was reserved for use by the council for staff housing had been illegally allocated to the applicant. It is my finding that it was within the power of the 1st respondent to investigate how the suit property that was reserved for public use was allocated to the applicant and to make a determination on the propriety of that allocation.

On whether the 1st respondent still had power to review grants and dispositions of public land when it reviewed the title in respect of the suit property, the issue was not raised either in the statutory statement or the verifying affidavit filed in support of the application. The issue was raised for the first time by the applicant in the grounds set out on the face of its judicial review application. It is settled that in judicial review, an applicant cannot seek a review on the grounds other than those set out in his statutory statement on the basis of which leave was granted unless the statement is amended to introduce new grounds. See, Order 53 rule 4(1) of the Civil Procedure Rules. No such amendment was made in this case to introduce the issue of the expiry of the 1st respondent's review powers. Due to the foregoing, the issue is not properly before the court. I have noted that the applicant did not also submit on it in his submissions. Even if I am wrong in my finding that the issue is not properly before the court, I would still have overruled the argument on merit. Under section 14 of the National Land Commission Act, 2012, the 1st respondent's power to review grants and dispositions of public land was exercisable within a period of 5 years with effect from 2nd May, 2012 when the said Act commenced. This means that the 1st respondent ceased to have power to review grants and dispositions of public land on 2nd May, 2017. The applicant has contended that since the Gazette Notice No. 6863 containing the recommendation by the 1st respondent for the revocation of the applicant's title was published on 17th July, 2017, the same was outside the period allowed by law for the review of grants and dispositions of public land. I have noted from the verifying affidavit of the applicant that the 1st respondent gave a notice of its intention to review the title of the suit property on 28th October, 2016 and that it conducted a public hearing in which the applicant was represented on 15th November, 2016. What is not clear from the evidence before the court is when the decision complained of by the applicant was made. What the applicant placed before the court was a Gazette Notice No. 6863 published on 17th July, 2017 through which the 1st respondent notified the public of its decision on among others the review of the title of the suit property. In my view, the said Gazette Notice was not the decision of the 1st respondent. It cannot be said therefore that the 1st respondent made its decision on 17th July, 2017. I have noted that the applicant did not furnish the court with a complete copy of the Special Issue of the Kenya Gazette Vol. CXIX – No. 97 published on 17th July, 2017 in which the Gazette Notice No. 6863 was published. I managed to get a complete copy of the said Special Issue of the Kenya Gazette. Upon perusal, I noted the following words on the last page of the Kenya Gazette in question: **"The full determination may be collected from the Legal Directorate Registry, 4th Floor Wing C from Monday to Friday, 8.00am to5.00pm."** The foregoing means that what was contained in the Kenya Gazette was not the full determination by the 1st respondent and that the determination was available for collection at the 1st respondent's offices. In my view, it is from the full determination of the 1st respondent that the court can determine as to when the determination was made to be able to ascertain whether the determination was made within the 5

years that the 1st respondent was permitted to review grants and dispositions of public land. Order 53 rule 7(1) of the Civil Procedure Rules placed the burden upon the applicant to furnish the court with a copy of the decision that was being challenged and which the court has been called upon to quash. As I have stated earlier, the Gazette Notice No. 6863 only communicated the decision of the 1st respondent. The same was not the decision and did not contain the full decision of the 1st respondent. In the absence of the full decision of the 1st respondent, there is no basis upon which it can be said that the 1st respondent's decision was made outside the period set out in the National Land Commission Act, 2012.

On whether the 1st respondent observed the rules of natural justice before making the impugned decision, the following is my view. Sections 14(3) and (8) of the National Land Commission Act, 2012 provides as follows:

> **14(3) 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.**
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> **14(8) 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.**

Article 47 (1) and (2) of the Constitution provides that:

> **47. (1) Every person has the right to administrative action that is**
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> **expeditious, efficient, lawful, reasonable and procedurally fair.**
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> **(2) If a right or fundamental freedom of a person has been or is**
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> **likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

I am satisfied from the verifying affidavit of the applicant that the applicant was accorded a fair hearing and fair administrative action by the 1st respondent. Section 14 of the National Land Commission Act, 2012 reproduced above enjoins the 1st respondent 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 1 st respondent and to inspect any relevant documents. The evidence before the court shows that the applicant was given a notice of the complaints by the interested party and was accorded reasonable opportunity to respond to the same in writing and also to appear before the 1st respondent and give oral testimony if he wished to do. From the evidence on record, the applicant made use of the said opportunity. The applicant responded to the complaints in writing and also appeared before the 1st respondent through his advocates and made oral submissions. After hearing the parties, the 1st respondent made a decision in writing and gave reasons for its decision.

The applicant has contended that in its decision, the 1st respondent did not take into account the submissions that the applicant made in writing and orally before it. I am unable to determine if this was the case from the material before the court. As I have mentioned earlier, the applicant failed to place before the court the full decision of the 1st respondent that he is challenging. It is that decision that would contain not only the decision but also the reasons for the decision and what the 1st respondent considered and what it did not. In the absence of that decision that the applicant was obliged to place before the court under Order 53 rule 7(1) of the Civil Procedure Rules, there is no basis for the applicant's argument that his submissions and evidence placed before the 1st respondent were ignored and that the 1st respondent failed to take into account factors that it ought to have taken into account before making the impugned decision. Due to the foregoing, I am not in agreement with the applicant that he was not accorded an administrative action that was reasonable and procedurally fair.

On the applicant's contention that the 1st respondent's decision was made in violation of a court order that was made in JR. MISC. CIVIL APPLICATION NO. 30 OF 2011, I find no merit in the same. I have read the judgment that was made in that case. I have also perused the order extracted from the said judgement that was annexed to the verifying affidavit of the applicant. The issue that was before the court in JR. MISC. CIVIL APPLICATION NO. 30 OF 2011 was whether the Registrar of Tiles had power in law to revoke a title to land without following the due process. The issues in that case did not touch on the powers of the 1st respondent under section 14 of the National Land Commission Act, 2012. The fact that the court held that the Registrar of Titles did not have power to revoke the applicant's title did not shield the applicant's title from investigation by the 1st respondent under section 14 of the National Land Commission Act, 2012. In any event, in the case before me, the revocation of the applicant's title to the suit property has not been recommended by the Registrar of Tiles but by the 1st respondent. It is my finding that the decision of the 1st respondent complained of did not breach the orders that were made in JR. MISC. CIVIL APPLICATION NO. 30 OF 2011.

In the final analysis and for the foregoing reasons, I find no merit in the applicant's Notice of Motion application dated 23rd November, 2017. The application is dismissed accordingly. Each party shall bear its own costs.

Delivered and Dated at Nairobi this 26th day of November 2020

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. J.P. Machira for the Applicant

Mr. Mbuthia for the 1st Respondent

N/A for the 2nd Respondent

N/A for the Interested Party

Ms. C. Nyokabi-Court Assistant