



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC PETITION NO. 4 OF 2019

IN THE MATTER OF ARTICLES 10, 22, 23, 35, 40, 47, 50 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF PART VIII OF THE LAND ACT SECTIONS 107-131 OF THE LAND ACT

LIMURU BIDII JUA KALI ASSOCIATION (*suing through Officials:*

Chairman - FRANCIS CHARAGU MUGAI

Secretary - JOHN MUKUNA WANYEKI

Treasurer - ALICE WANGUI MBURU).....PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

KIAMBU COUNTY GOVERNMENT.....2ND RESPONDENT

JUDGMENT

By a Petition dated **26th May 2019**, the Petitioner herein sought for Judgment against the Respondents jointly and severally for the following orders:-

- 1. Revocation of the Gazette Notice number 1995 in Vol.CXXI-NO.27 ref; HLI/506/507/508/2018 dated 1st March 2019.***
- 2. A Declaration that the Petitioners are the bonafide registered owners of land parcel No. I.R No. 4819/L.R 15473 in Jua Kali area Limuru and are entitled to exclusive and unimpeded right of possession and occupation of the land.***
- 3. A permanent injunction restraining the Respondents whether by themselves, their servants, agents or anybody else or entity claiming under or through them from laying claim, harassing or in any other way interfering with the quiet enjoyment of the land by the Petitioner's members.***
- 4. Cost of this suit together with interest thereon at such rates and for such period of time as this Honourable Court may deem fit to grant.***
- 5. Any such other or further relief that this Honourable Court may deem appropriate and just to grant I the circumstances of the case.***

The Petitioner, had averred that it is the registered and beneficial owner of the suit property and has been lawfully and rightfully in possession of the suit property. Further that the Petitioner was allocated the suit Property by the Government of Kenya in **1991**, and was issued with a title deed. Since then, the Petitioner and its members continues to be in possession of the suit land while carrying out its business.

It was further averred that that the Petitioner has since allocation of the land, been paying rates to the 2nd Respondent. However, the 1st Respondent unprocedurally, illegally and without following due process, through **Gazette Notice** Number **1995**, dated **1st March 2019**, revoked the Petitioner's title to the suit land. It was the Petitioner's contention that the Respondents did not adhere to the Constitutional

provisions of **Article 40(3)**, on Compulsory Acquisition in respect to private land. That the 1st Respondent never invited the Petitioner to a public meeting or hearings to render its evidence and support its claim over the suit property as enshrined in **Article 47** and **50** of the Constitution.

Further that the 1st Respondent's actions and subsequent gazettelement is **illegal** and **unconstitutional**, as the same were never subjected to the procedure as provided in **Articles 10, 40 (3)** of the **Constitution** as read with part **VIII of the Land Act 2012**.

That the 1st Respondent working in cohorts with the 2nd Respondent are making every efforts to illegally strip off the Petitioner of its ownership of the suit land and that the 2nd Respondent has threatened to evict the Petitioner from the suit property. The Petitioner further contended that the suit property is a commercial area whereon over **200** of its **members** and other members of the public are making a living through small scale business and also small run enterprises and the land has been extensively developed. It was the Petitioner's further contention that the 2nd Respondent has issued a 14 days' Notice dated **15th May 2019**, to Petitioner to vacate the suit property.

Further that the 2nd Respondent's **Compulsory Acquisition Notice** is **unconstitutional, illegal** and **unprocedural**, since the **Land Acquisition Act** has been repealed. That despite demand to the 2nd Respondent to avail minutes of their meetings culminating to the application of the said revocation of the title, the 2nd Respondent has refused, neglected and or otherwise failed to make full disclosure contrary to **Article 35 of the Constitution**. Further that the 1st Respondent failed to provide a platform for the Petitioner's to defend itself.

The Petition is contested and the 1st Respondent through **Edmond Gichuru** swore a Replying Affidavit on **6th November 2019**. **Edmond Gichuru** is the Deputy Director Legal affairs and a member of the **Secretariat** to the Committee on Historical Land Injustices. It was his contention that section **15(3)** of **National Land Commission Act** provides the criteria in which an historical land claim may be registered and processed by the 1st Respondent. He further contended that the claim is not capable of being addressed through the ordinary Court System on the basis that the claim contradicts a law that was in force at the time when the injustice began or the claim is debarred under **section 7 of the Limitations of Actions Act**.

He further averred that the 1st Respondent received and admitted a complaint from **County Government of Kiambu**, as Historical Injustice **Ref Nos NLC/HLI/506/2018, NLC/HLI/507/2018**, and that the 2nd Respondent alleged that the suit property **L.R Nos 25484/2-22,13121 & 15473**, including other several public utility lands in the area had been illegally/irregularly been acquired by members of the public. He further contended that the subject property was initially reserved for public use, but later was illegally acquired by private individuals without requisite approvals by the then Local Government. That there was no subsequent council minutes to that effect and also there was no allotment by the defunct office of the Commissioner of Lands.

That the Complainant wanted investigations and recommendations accordingly. That the complaint was duly admitted and processed, and the 2nd Respondent and Applicant were invited to the investigative hearings which were held on **27th September 2019** and **28th September 2019** at Thika Social Hall. That the parties were adequately notified via a Notice appearing in the Daily Nation of **26th September 2019**.

It was his further contention that by their own admission, the Petitioner admitted that the 1st Respondent visited the area on **18th March 2019**, and thus the allegations of being unaware of the proceeding before the 1st Respondent cannot stand. That the 1st Respondent duly participated in the said proceedings, whereby oral and written submissions were made on the said date and venue. That the Petitioner squandered its opportunity to be heard, despite being aware of the investigation on the particular parcels of land before the 1st Respondent. Further that the 1st Respondent through its Secretariat of the **Historical Land Justice Committee**, further conducted its own independent investigation which entailed research and analysing the complaint, reports and ownership documents with a view of establishing whether an injustice had been occasioned upon the complainant and the 1st Respondent produced a well-informed determination dated **7th February 2019** and subsequently gazetted the same.

He further contended that the 1st Respondent complied with both the provisions of **Article 40, 47,50, 60, 64 & 232** of the Constitution, the **Fair Administrative Actions Act**, and **Section 15 of the National Land Commission Act**, and all the parties were given adequate opportunity to be heard. That he has been advised by the Advocates on record that the 1st Respondent made its recommendation in consideration of the parameters set in the Act. He denied the allegations of corrupt officials within the 1st Respondent and averred that the said allegations are unfounded.

He contended that the instant suit is a sham, baseless and frivolous. That the Petitioner has not exhausted the internal mechanisms in resolving the issue before this Honourable Court and that the recommendation dated **7th February 2019**, made by the 1st Respondent provided for an appeal/ review window accordingly and thus the orders sought herein cannot issue. It was his contention that the proceedings before the 1st Respondent are investigative and not adversarial as alluded by the Petitioner.

He further contended that only the 1st Respondent has jurisdiction to investigate all historical land injustices complaints and recommend appropriate redress and therefore its actions in exercising its constitutional, mandate cannot be said to be in breach of the Applicant's rights under **Article 40** of the Constitution. That the right to protection of property conferred under **Article 40** of the Constitution is not an absolute right in itself as its protection does not extend to property that is found to have been acquired illegally. That the Petitioner has not demonstrated any omission by the 1st Respondent as it acted judiciously and with due regard to the applicable law.

The suit is further opposed by the 2nd Respondent who filed a Replying Affidavit sworn on **22nd October 2019** by **Dr. Martin Njogu Mbugua**, the County Secretary and Head of Public Service at the 2nd Respondent. He denied signing the letter dated **15th May 2019**, annexed to the Petitioner's affidavit or issuing the same. It was his contention that the alleged letter referenced **Compulsory Land Acquisition**, is a forgery and the said document did not emanate from his office.

He contended that the issue in dispute relates to the investigative hearing by the **National Land Commission**, on complaints relating to Historical Land Injustices lodged by the County Government of Kiambu. That the suit property does not belong to the Petitioner and the title documents were illegally and irregularly acquired. It was his contention that the issuance of rates clearance certificate does not authenticate ownership of the property and that a disclaimer is provided on the face of the clearance certificate. That he has been informed by his Advocate which information he believes to be true that the **National Land Commission** is mandated to review grants and dispositions of public land with the aim of establishing their legality and that where land has been registered as private land this can only be done by investigating the process by which public land was converted to private land. He further averred that the **National Land Commission** is mandated to initiate investigations on its own initiative or on a complaint into present or historical land injustices and recommend appropriate redress. That the 2nd Respondent made a complaint to the 1st Respondent relating to land injustice on public land and the Commission invited all the complainants, respondents and the interested parties to appear before it after which the Commission undertook its own investigations and made recommendations and allowed the claim by the 1st Respondent and recommended that the suit property revert back to the 2nd Respondent and directed that the suit property is not available for allocation.

That the proper procedures were followed by the Commission and it would defeat the purpose of the Constitution to imagine that unlawfully and irregularly acquired land once allegedly registered as private property is no longer within the reach of the **National Land Commission**. It was contended that the Petitioner is not deserving of the orders sought.

The Petitioner further filed a Supplementary Affidavit sworn by **John Mukuna Wanyeki**, sworn on **3rd February 2020** and averred that the confirmation by the 2nd Respondent that the letters do not emanate from their offices is a testament that the 2nd Respondent through its corrupt officials are deliberately violating the Petitioner's rights. He further averred that the Respondents overlooked the laid down procedures and that whereas it is the 1st Respondents Constitutional mandate to look into the historical injustices, the same must be conducted in a transparent and professional manner that does not infringe on Kenyans rights. It was his contention that the Petitioner was never informed of any hearings and the Respondents have failed to annex any document in support of their allegation. That the Respondents have failed to conclusively state what complaint was raised and what documents were relied upon in their final determination. That it is clear from the 1st Respondent's determination dated **7th February 2019**, that appearance on behalf of the 2nd Respondent was just the Governor and in allowing the Governor to singularly represent the County Government without any backing of the County Executive Committee, the 1st Respondent was in violation of **Article 183 of the Constitution** as well as **section 36 of the County Government's Act**.

The Petition was canvassed by way of written submission which the Court has carefully read and considered. The issue for determination is ***whether the Petitioner is entitled to the orders sought.***

It is the Petitioner's contention that the Respondents sought to **compulsorily** acquired the suit property which is owned by the Petitioner without following the due process. That the Petitioner was never invited for a hearing and though the Petitioner has the requisite title deed which shows that it is the owner of the suit property, the 1st Respondent went ahead and made unilateral decisions without the Petitioner's participation.

However, the 1st Respondent has averred that it is mandated to look into historical justices whether the same is commenced by way of a complaint or through their own initiative. That in this case, it received a complaint from the 2nd Respondent to which it did its own investigation and found that the suit property which is public land had irregularly been acquired by the members of the public.

The 2nd Respondent on the other hand has denied that it **compulsorily acquired** the suit property and that the suit property was found to be irregularly acquired through the 1st Respondent's investigations. That the said title was impeached since there were no documentations to back the said acquisition by the Petitioner.

It is the Respondent's contention that the Petitioner had been given a chance to be heard since an advertisement was put up on the **Daily Nation** dated **26th September 2018**, inviting all the parties to the said hearing. Further the Respondents allege that the complaint by the 2nd Respondent was made on **29th December 2017**. The Court has perused the determination by the 1st Respondent dated **7th February 2019**, and notes that the hearing took place on **27th & 28th of September 2018**. Further the Court notes that the National Land Commission stated that it had invited all parties for review and invited all the members.

It is worrying that the **National Land Commission**, would allegedly invite parties on **26th September 2018** for a hearing set for the **27th September 2018**. In the Court's considered view, that this would not in way be sufficient time for any party to adequately prepare for the said hearing.

Further the Petitioner has denied that it ever received the said **notice** and given that anyone who alleges must prove, the 1st Respondent had the **onus** to prove that it invited the Petitioner herein. However, it failed to produce in evidence, the said copy of the **Daily Nation Newspaper** of **26th September 2018**, inviting parties for hearing. It is further not in doubt that while the 1st Respondent contends that it received a complaint from the 2nd Respondent on **29th December 2017**, there is no evidence of any such complaint that was received. In its own determination, the 1st Respondent acknowledged that it received a complaint from the Governor of Kiambu County on **27th September 2018**, at Thika Social Hall. That brings into question whether the parties were ever invited for the hearing on the **26th September 2018**, while the complaint was allegedly received on **27th September 2018**. **Article 47 of the Constitution** provides that:-

“(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 a right to be given written reasons for the action.”

Further **Article 50** of the Constitution provides that:-

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

It is not in doubt that the suit property was registered in the name of the Petitioner herein. Whether the same was irregularly acquired was the question that was to be determined upon following of a due process since the registered owner of a property is prima facie the absolute and indefeasible owner of the said registered property.

Therefore, the Petitioner needed to be invited for the public hearing and included on its own and failure to do so was fatal. The Complainant and the **National Land Commission** had a legal duty to carry out due diligence and establish the owners of the suit property before commencing the hearing. The duty to carry out the due diligence settled on their shoulders, and the Court finds and holds that the Petitioner was not given a chance to be heard. The suit land which is registered in its name was subject of the proceedings in issue, and therefore it follows that it was affected by the outcome of the said proceedings and was entitled to be heard.

Failure to abide by principles of Natural Justice renders the decision by the **National Land Commission** invalid and the court has no option but to proceed and quash it. See the case of **Republic...Vs...National Land Commission & 2 Others, Ex Parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West) [2018] eKLR**, where the Court held that;

“In my finding, a process by which an administrative body makes findings and proceeds to make recommendations before affording persons affected thereby cannot by any stretch of imagination be termed as fair in order to meet the provisions of Article 50 of the Constitution. For a hearing to be said to be fair not only should the case that the respondent is called upon to be met be sufficiently brought home to him and adequate or reasonable notice to enable him deal with it given, but also the authority concerned ought to approach the issue with an unbiased disposition. In other words the authority ought not to be seen to be seeking representations from the respondent simply for the purposes of meeting the legal criteria. The fair hearing must be meaningful for it to meet the constitutional threshold.”

Section 7 of the **National Land Commission Act** provides;

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

Further **Section 8** of the **National Land Commission Act** provides

“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.”

It is clear herein that the **Petitioner** was condemned unheard and that goes against the doctrine of Natural Justice as was outlined in the **Halsbury Laws of England Volume 1(1) page 218**, which states as follows:-

“Natural justice comprises two basic rules; first that no man is to be a judge in his own cause (nemo iudex in causa sua), and second that no man is to be condemned unheard (audi alteram partem). These rules are concerned with the manner in which the decision is taken rather than with whether or not the decision is correct”.

Therefore, the Court finds that the Petitioner’s right to fair administrative actions were indeed infringed upon and the decision by the National Land Commission is therefore not proper for failing to follow the due process.

The Petitioner’s herein sought for the revocation of the Gazette Notice. It is not in doubt that the said Gazette Notice was a culmination of the decision by the 1st Respondent dated 7th February 2019, which the Court has already held and found that it did not follow the due process and therefore not valid. Consequently the Court finds the said Gazette Notice emanating from the decision of National Land Commission is void. For the above reasons, the Court arrives at a finding that the prayers sought are merited and thus allowed.

The Petitioner had also sought to be declared the bonafide registered proprietor of the suit property. The Court acknowledges that there are allegations of fraudulent acquisition of the suit property. However, whether or not the acquisition was fraudulent, the same must be put to test through a proper legal process in which the Petitioner’s are allowed to give their side of the case. As it is, the Petitioner are the registered owners of the suit property and unless the same is impugned through a proper legal process, the Court finds that the said prayer is merited.

Further the Petitioner being the registered owner and prima facie, are entitled to all the rights and privileges that appertain to the suit property as per the provisions of Section 24 and 25 of the Land Registration Act, the Court finds and holds the Petitioner is entitled to the orders of permanent injunction.

Having carefully read and considered the Petition in its entirety, the annexures thereto, the responses to the said Petition by the Respondents and the written submissions, the Court finds and holds that the Petitioner has proved its case on the required standard of balance of probabilities. Therefore, the Court finds and holds that the Petition herein is merited and consequently the Petition herein dated 26th May 2019, is allowed entirely in terms of prayers no. 1 2 3 and 4.

It is so ordered

Dated, signed and Delivered at Thika this 12th day of November 2020

L. GACHERU

JUDGE

12/11/2020

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Chandianya for the Petitioner

No appearance for the 1st Respondent

No appearance for the 2nd Respondent

L. GACHERU

JUDGE

12/11/2020