



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CONST. PET. NO. 8 OF 2018

BIRMINGHAM HOLDINGS LIMITED.....PETITIONER

VERSUS

THE NATIONAL YOUTH SERVICE.....1ST RESPONDENT

MINISTRY OF PUBLIC SERVICE, YOUTH AND

GENDER AFFAIRS.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

THE DIRECTOR OF SURVEYS.....4TH RESPONDENT

THE REGISTRAR OF TITLES,

NAIROBI COUNTY.....5TH RESPONDENT

THE CHIEF LAND REGISTRAR.....6TH RESPONDENT

AND

NATIONAL LAND COMMISSION.....INTERESTED PARTY

JUDGMENT

1. In its Petition dated 27th February, 2018, the Petitioner averred that in the Daily Nation Newspaper of 13th February, 2018, the 1st and 2nd Respondents issued a public notice giving notice and demand that the Petitioner to deliver up possession and title documents in respect of the Petitioner's land, L.R. No. 22336, within fourteen (14) days.

2. The Petitioner has averred that the notice that was published in the Daily Nation Newspaper by the 1st and 2nd Respondents was in breach of its fundamental rights as enshrined in the Constitution; that the Petitioner is the rightful owner of L.R. No. 22336 having purchased the said land from the previous owner for Kshs. 15 million and that during the acquisition of the said land, the Petitioner conducted all due diligence and sought consent from the Land Control Board, which consent was granted.

3. The Petitioner is seeking for several reliefs, including a declaration that it is an innocent purchaser for value without notice of L.R. No. 22336; a declaration that the Respondents are bound by and are enjoined to heed and respect the rights of holders of titles as guaranteed under Section 24 and 25 of the Land Registration Act and a declaration that the 1st and 2nd Respondents have no jurisdiction to negate a Certificate or Deed of Title issued under the law.

4. The Petitioner has further sought for a Declaration that a decision to negate a registered interest in land and to divest such registration in land affects the registered party, and accordingly such a decision must be subject to natural justice; a declaration that the decision of the 1st and 2nd Respondents conveyed in a Public Notice of 13th February, 2018 purporting to negate and divest the Petitioner's land violates the Petitioner's fundamental rights to protection of property and an order for general damages for violation of the fundamental rights of the Petitioner.

5. The Respondents filed Grounds of Opposition in which they averred that the Petitioner has not annexed a Resolution of the Company to institute the Petition; that the suit land is a public utility; that a public utility is not capable of alienation and that the Grant to the Petitioner

was issued illegally.

6. The Respondents further averred that the protection offered to the Petitioner under Article 40 of the Constitution does not extend to property that has been illegally acquired; that the grant of the orders sought in the Petition would be perpetuating an illegality and that a declaration of ownership of land cannot be made through a Constitutional Petition because Article 67 of the Constitution has mandated the Interested Party (*the National Land Commission*) to deal with the management of public land.

7. The Petition proceeded for hearing by way of written submissions. The Petitioner's advocate submitted that before the Petitioner purchased the suit land from one Patrick Mutia Kula, it conducted all due diligence and sought consent from the Land Control Board which was granted; that having been registered as the proprietor of the land by the Grant dated 8th April, 2011, the Petitioner is entitled to protection under Section 23(1) of the Registration of Titles Act (*repealed*) and that the said Grant constitutes the Petitioner's absolute and indefeasible proprietorship.

8. The Petitioner's counsel submitted that by issuing a notice in the manner of the impugned notice, the 1st Respondent failed to recognize the Petitioner's rights to property and that the said notice was a violation of the right of a fair administrative action. Counsel relied on numerous authorities which I have considered.

9. The Respondents' counsel submitted that the suit property was the property of the National Youth Service (*the 1st Respondent*); that the Petitioner had an obligation to prove the process of alienation of the suit land and that the Commissioner of Lands had no powers to alienate land that was reserved for public purpose.

10. The Respondents' counsel submitted that the Petitioner's land was unlawfully acquired and cannot afford the protection under Article 40 of the Constitution and that the Petition should be dismissed. Counsel relied on numerous authorities which I have considered.

11. The Petitioner's case is that a parcel of land known as L.R. No. 22336 located in Machakos County (*the suit land*) was initially allocated to Patrick Mutia Kula vide a letter of allotment dated 24th July, 1997 whereafter a freehold Grant was issued in his favour. According to the Petitioner, the said Patrick Mutia transferred the suit land to it vide a Transfer dated 14th June, 2012.

12. The Petitioner annexed on its Affidavit the letter of allotment dated 24th July, 1997. According to the said letter of allotment, Patrick Mutia Kula was allocated L.R. No. 22336-Machakos District, measuring 150.2 Ha on condition that he pays to the government Kshs. 2,814,880. The copy of the freehold Grant which has been exhibited shows that the said Patrick Mutia paid the requisite amount and was duly registered as the proprietor of the suit land on 9th May, 2011.

13. After the suit land was registered in the name of Patrick Mutia, the documents produced by the Petitioner shows that he transferred the same to the Petitioner on 5th June, 2012 for Kshs. 15,000,000. The said Transfer was completed after the Plaintiff obtained the consent of the Yatta Land Control Board which held its meeting on 26th June, 2012.

14. Although the Respondents have averred in their Grounds of Opposition that the suit land was reserved for the 1st Respondent, and that being public land, the same was not available for alienation, they did not place before the court evidence to show that the suit land was reserved for the 1st Respondent.

15. Indeed, and as correctly submitted by the Respondents' counsel, any land which is reserved for public purpose cannot be available for alienation to a private entity, and if such alienation occurs, the holder of such a title cannot seek refuge in the provision of Article 40(1) of the Constitution. However, there must be concrete evidence either by way of a title, a map or an approved part development plan to show that by the time the allocation of the land was done, the same was reserved for public purpose. That evidence was not placed before the court.

16. In any event, the 1st and 2nd Respondents did not hear the Petitioner before they issued the "public notice" in the Daily Nation Newspaper of 13th February, 2018 purporting to cancel the Petitioner's title. It is trite that the rule of natural justice, which is the corner stone of the right to a fair hearing, dictates that any person whose rights or interests are to be affected by a decision ought to be heard before the decision is made. In *Dickson Ngigi vs. Commissioner of Lands (1998) eKLR*, the Court of Appeal held as follows:

"The right to a hearing before a decision is made is a basic right which cannot be taken away by the hopelessness of one's case."

17. Having not given the Petitioner a hearing, the public notice of 13th February, 2018 by the 1st and 2nd Respondents is not only unconstitutional but also a nullity.

18. The Petitioner is still in possession of the suit land and cannot therefore claim for general damages. However, the rest of the Petitioner's claim succeeds in the following terms:

a. An order of permanent injunction be and is hereby issued restraining the 1st Respondent either by itself, agents, servants or by any other person whomsoever from interfering with the proprietorship of the Petitioner by evicting, trespassing on, remaining on, interrupting with activities on, or by howsoever interfering with the rights of the Petitioner's possession and/or ownership of the property.

b. A permanent injunction be and is hereby issued restraining the 4th, 5th and the 6th Respondents from revoking the Petitioner's title, registering any interest or encumbrances in the nature of caveats and/or in any other manner effecting registrations against the Petitioner's property known as L.R. No. 22336 without the consent of the Petitioner.

c. A declaration be and is hereby issued that the 1st and 2nd Respondents are bound by and are enjoined to heed and respect the rights of holders of titles as guaranteed under Section 24 and 25 of the Land Registration Act, 2012, which rights were transitioned from Section 23(1) of the Registration of Titles Act (Chapter 281 of the Laws of Kenya) under Section 162 of the Land Act, 2012 and Section 105 and 107 of the Land Registration Act, 2012, until and unless such rights of title holders are lawfully set aside by a court of law.

d. A declaration be and is hereby issued that the decision of the 1st and 2nd Respondents conveyed in a Public Notice published in the Daily Nation Newspaper dated 13th February, 2018 purporting to negate and divest the property of the Petitioner herein being L.R. No. 22336 threatens and violates the Petitioner's fundamental rights to protection of property guaranteed by Article 40 read with 260 of the Constitution, to protection against discrimination guaranteed by Article 27 of the Constitution, to life and livelihood and to protection of dignity and respect guaranteed by Articles 25 and 28 respectively, and to fair administrative action guaranteed by Article 47(1) of the Constitution.

e. A declaration be and is hereby issued that issuance of letters of allotment over un-alienated government land under Section 7 of the Government Land Act (Chapter 280 of the Laws of Kenya) now repealed, and subsequent processing and issuance of Grants conferred legitimate interests in the properties in issue that are protected by law and guaranteed by the Constitution and which interests can only be upset by an order of court after due process.

f. The 1st and 2nd Respondents to pay the costs of the Petition.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18TH DAY OF JANUARY, 2019.

O.A. ANGOTE

JUDGE