



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC APPLICATION NO. 2 OF 2018

KENYA AIRPORTS AUTHORITY.....EX-PARTE APPLICANT

-VERSUS-

THE NATIONAL LAND COMMISSION.....RESPONDENT

AND

THE EAST AFRICAN GAS COMPANY LIMITED.....1ST INTERESTED PARTY

ETHICS & ANTI-CORRUPTION COMM.....2ND INTERESTED PARTY

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD INTERESTED PARTY

JUDGEMENT

1. Pursuant to leave given by this Court on 16th January 2018, the exparte applicant filed the substantive notice of motion on 22nd January 2018. The application is premised under the provisions of article 47 of the Constitution and section 7, 8, 9 and 11 of the FAA Act 2015 as well as section 1A & B of the Civil Procedure Act and Order 53 of the Rules. The exparte applicant (herein after referred to as the (“applicant”) sought the following reliefs:

1. An order of certiorari to issue to remove to this honourable Court for purposes of quashing the entire decision of the National Land Commission sued as the Respondent as communicated in gazette notice No. 6862 dated 17th July, 2017 purporting to uphold the Title No. MN/VI/4114 (Formerly MN/VI/3853-62) in favour of East African Gas Company Limited, the 1st Interested Party.

2. An order of prohibition to issue restraining the National Land Commission the Respondent and or its agents from interfering with the Exparte Applicant’s ownership, possession and or occupation of Plot No. MN/VI/4114 (Formerly MN/VI/3853-62).

3. Costs of the proceedings.

2. The motion is supported by several grounds listed on its face inter alia:

(a) That the Respondent does not have power to hear and determine land disputes between parties pursuant to the provisions of article 162 (2) of the Constitution.

(b) That the applicant is the owner of L. R No MN/VI/4114 (formerly MN/VI/3853-62) which houses the Moi International Airport as per vesting order of 1994.

(c) That there is a dispute over land between the Applicant and the 1st Interested Party over properties known as LR MN/VI/3854-62 and MN/VI/3904 – 3906 which are within the perimeter fence of the Moi Airport.

(d) The Respondent’s decision is unreasonable in so far as it considered issues that ought not to be considered and failed to consider issues that ought to have been considered.

(e) That the Respondent failed to invite the applicant by publishing the land number that was unknown to the applicant.

3. The application is further supported by the statement of facts dated 15th January 2018; verifying affidavit of Katherine Kisila and documents annexed thereto marked as **KAA 1 – KAA 15**.
4. The application is also supported by the 3rd Interested Party through the replying affidavit sworn by Laura Spira on 7th June 2018. Ms Spira deposed that the ODPP is currently prosecuting **Anti-Corruption Case No 5 of 2010; Republic vs Joshua Kulei & 8 others** which relates over the same parcels of land as in this suit. That the decision of the Respondent sought to be purged was made on 11th December 2015 and gazetted on 17th July 2017. That the 3rd Interested Party was not notified of the proceedings undertaken before the Respondent on the subject parcels.
5. The 3rd Interested Party deposes further that the decision of the Respondent has negatively impacted on the criminal case. This made them write to the Respondent on 14th November 2017 asking the Respondent to revise its decision. That in response, by a letter dated 7th December 2017, the Respondent stated that it was under no obligation to revoke the grants contained in the gazette notice. That the decision of the Respondent goes against the tenets of fair administrative action enshrined under article 47 of the Constitution. The 3rd Interested Party therefore urges the Court to grant the orders of certiorari and prohibition sought in the motion.
6. The 2nd Interested Party further supported the issuance of the orders via a replying affidavit of Sylvester Mango sworn on 23rd April 2018. The 2nd Interested Party deposed that the Respondent acted outside its statutory mandate provided under section 5 of the National Land Commission Act 2012 and article 67 (2) of the Constitution. The 2nd Interested Party confirmed that it conducted investigations into the irregular allocation of the suit titles and forwarded the files to ODPP with recommendation to charge persons named and charges were subsequently filed vide criminal case No 5 of 2010.
7. The 2nd Interested Party deposes that on 27th November 2014, it filed Environment and Land Court case **No 298 of 2014, Ethics & Anti-Corruption Commission vs Peter Kipyegon & 5 others** challenging the irregular alienation of property LR No MN/VI/3854 which suit is still active. Further that on 23rd March 2015, it also filed Environment and Land Court No 50 of 2015 also challenging the alienation of Plot No MN/VI/3860 and which case the 2nd Interested Party states are still active. It proceeded to annex the complaints in the two suits as annexure **'SM 1' & 'SM 2'** respectively.
8. That the decision by the Respondent to uphold titles Nos 3854 & 3860 in favour of the 1st Interested Party when the two suits were still pending was an incurable illegality. Secondly that the Respondent considered unsurveyed residential plot No **'N'** and **'O'** Nyali Mombasa referenced as MN/VI/3854 and 3855 vide letters of allotment dated 20.12.1996 and 20.3.1996 that were purported to be located at Moi International Airport (MIA). That they were not informed or invited to make presentation on the subject properties. That the orders sought herein if granted will facilitate the administration of procedural and substantive justice to Environment and Land Court cases Nos 298 of 2014 and 50 of 2015.
9. The application is however opposed by the Respondent and the 1st Interested Party vide a replying affidavit of Abigail Mbagaya and Trophimus Kiplimo sworn on 20th July 2018 and 11.6.2018. Ms Mbagaya deposed that the Respondent under section 14 of the National Land Commission Act has mandate to review all grants and dispositions of public land either on its own motion or on receipt of a complaint. That it is under this mandate that the Respondent sought to review the titles listed in this suit following a complaint made by County Government of Mombasa. She annexed a copy of the complaint letter as **B1 – 1** which stated that the grants were acquired in unlawful manner.
10. The Respondent denied reviewing the legality of the grant known as MN/VI/4114 (formerly MN/VI/3853-62) and that the applicant failed to establish the nexus between the suit properties and MN/VI/4114. She deposed further that the Respondent caused to be published a notice appearing on 27th July 2015 in various dailies informing members of the public of the Respondent's intention to review the grants. That the notices also required parties to make representations to the Respondent on the dates scheduled for hearing i.e. on 3rd & 6th August 2015 at the Kenya School of Government Mombasa.
11. That pursuant to these notices, all parties who appeared were accorded a fair hearing. That the applicant, the 2nd Interested Party and 3rd Interested Party neither made appearance at the hearing in person or through their appointed representatives. That having undertaken the investigations and reviewed the documents held by the ministry of lands and the Respondent made a finding upholding the legality of the grants in question on 11th December 2015 and later the decision gazetted on 17th July 2017.
12. That the suit properties were subject to compulsory acquisition alongside the applicant's parcel of land No MN/VI/3888. That the applicant did not raise any claims for compensation or issues of propriety regarding any of the suit properties at the inquiry stage. Further, that the notice of taking possession and vesting of land in the government refers to land "Ref No 350/2/VI Kwa Jomvu". That judicial review process is not concerned with private rights or merits of the decision being challenged but with the decision making process. That the Respondent having clearly complied with the procedure for undertaking review of grants as they have demonstrated, its proceedings are not amenable to judicial review. Lastly that the application was made outside the 6 months period provided for in order 53 Rule 2 of the Civil Procedure Rules. She urged the Court to dismiss the application with costs.
13. The 1st Interested Party through the replying affidavit sworn by Trophimus Kiplimo on 11th June 2018 divided her grounds of objection to the application into three sub headings i.e. jurisdiction, proceedings by the Respondent and ownership of the suit property. On jurisdiction, she deposed that provisions of articles 67 & 68 of the Constitution and several sections of the National Land Commission Act 2012 which provisions she contends granted the Respondent powers to review grants and shows that this Court is not vested with exclusive jurisdiction to hear and determine land disputes.

14. On proceedings, the 1st Interested Party referred to the notices published in the local dailies of 27th July 2015 and deposed that she also did not personally receive notices from the Respondent other than the newspaper publications. That they attended the hearing which was done in public. That the suit parcels were listed in the numbers similar to those contained in the anti-corruption case No 5 of 2010. Further that annexure “**KAA 19**” shows that the Respondent did robust investigations as to the legalities and regularity of the titles in question.

15. The 1st Interested Party deposed further that when the applicant objected to her entry on to the land, the Respondent wrote to the Applicant on 31.5.2016 asking to be provided with the applicant’s ownership documents (“**annex RAE 4**”). That the applicant replied to the said letter on 6th June 2016 but failed to enclose any ownership documents. That the Respondent wrote again on 2.12.17 giving the narration of how the proceedings had been done and their findings indicating their willing to revise their decision if new evidence was presented. That inspite of all this, the applicant failed to establish his claim over the properties in dispute.

16. On ownership, the 1st Interested Party deposed further that the suit property has never belonged to the applicant. That the parcel number on *Notice of Taking Possession & Vesting of land in the Government* is not given. The 1st Interested Party instead accused the applicant of encroaching on her property and to deal with the issue of encroachment she lodged a boundary dispute with the survey office. The 1st Interested Party relied on all the documents annexed and urged the Court to dismiss the motion with costs.

17. The parties filed their respective submissions. On jurisdiction to determine the dispute, the Applicant concedes in its submission that section 14 of the National Land Commission Act does give the Respondent powers to review grants and dispositions of land subject to the provisions of article 40, 47 and 60 of the Constitution. Section 14 (1) of National Land Commission Act provides thus: “*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*”. The question I am left to deal with is whether the applicant was entitled to personal services of the notice before the hearing or if the publication in the local dailies of 27th July 2015 constituted sufficient notice.

18. From the documents annexed by parties to this suit particularly the Respondent, the 1st and the 3rd Interested Parties, L R No 4114 is not in dispute perse but it is the numbers/parcels from which it was created through amalgamation. The plots are referred to as MN/VI/3853 – 3862 and MN/VI/3904 – 3907. I note the applicant has added more parcel numbers in its submissions which were not contained in the application. I will not make reference to those parcels as parties are bound by their pleadings.

19. The right to a hearing is indeed an accepted and practiced principle of law that must be observed by all. The applicant contends that it was not notified of the hearing date set by the Respondent yet the Respondent knew it was in possession of the suit parcels. To demonstrate the Respondent’s knowledge of their possession, the Applicant referred the Court to the proceedings that were pending in the criminal case No 5 of 2010 as well as Environment and Land Court case No 298 of 2014. The applicant also relied on further documents annexed to their affidavit in support.

20. I have looked at annex **KAA 14** at page 28 of the Chamber Summons application. The land mentioned at page 27 refers to an area at Port Reitz measuring 231 acres. No particular number is given other than making reference to a Boundary Plan No 454. **KAA 5** refers to plot at Kwa Jomvu area and again no number is given. **KAA 6** also just refers only to airport land. Page 31 – 36 of the documents make no reference to the plot numbers in dispute. The 1st Interested Party’s letter dated 24th January 2017 at page 37 – 39 is equally not copied to the Respondent. The 1st Interested Party’s letter dated 9th October 2017 was however copied to the Respondent but this was after the decision complained of.

21. In the criminal proceedings in case No 5 of 2010, the Respondent is not a party. In Environment and Land Court case No 298 of 2014, I note that the Respondent was joined in April 2018. This came after the impugned decision was already gazetted. The analysis of the documents presented to Court does show that none of the individual titles was in the name of the Applicant. The complaint that resulted into the impugned decision had been lodged by the County Government of Mombasa. The most reasonable thing to do in my view and which the 1st Respondent did was to cause to be published the notices in the daily newspapers for anyone having an interest in any of the land parcels to come forward and present their case. Unfortunately the Applicant did not come forward.

22. On receipt of the decision in December 2015, the 1st Interested Party made a move to take possession. Pursuant to this action, the Ethics & Anti-Corruption Commission wrote to the Respondent and in a detailed letter dated 16th March 2016, the Respondent replied and expressed their willingness to revise their decision of December 2015 upon being given new evidence. The Respondent deposed that no new evidence was presented to them either by the applicant or the 2nd & 3rd Interested Parties. Consequently they proceeded to gazette their decision in July 2017. In my opinion, agreeing to give the 2nd Interested Party opportunity to present their case was equivalent to affording a party who had not been heard or who was not aware of the process an opportunity to present its case under article 47 of the Constitution. Since judicial review is concerned with decision making process and nothing having been shown to require the Respondent to issue personal notice to the Exparte applicant I find nothing wrong in the manner followed by the Respondent in serving the notice under section 14 (3) of the National Land Commission Act. Act No 5 of 2012.

23. The applicant is seeking to quash the decision of the Respondent because it upheld the title No MN/VI/4114 (formerly MN/VI/3852 – 62) in favour of the 1st Interested Party. In the grounds in support of the application, at paragraph 3, the applicant pleaded that the Respondent purported to exercise jurisdiction to hear and determine a dispute over land ownership between the Applicant and the 1st Interested Party.

24. The decisions of the Respondent on the various titles in question ranging between MN/VI/3853 – 3862 and dated 11th December 2015 is headed thus “*Determination for review of grants and disposition of public land L. R No ...*” In the entire body of the document, there is no reference made about the applicant. Under the sub-heading “issues for determination,” the Respondent listed the following:

(i) *The legality and propriety of the grants and dispositions of public land that one subject to these proceedings.*

(ii) Whether the 1st Interested Party claiming Ownership was an innocent purchaser for valuer of a defect of the title.

25. There is no mention made of an existing dispute over ownership between the Applicant and the 1st Interested Party. The applicant did not satisfy this Court that the Respondent exercised jurisdiction to determine such a dispute when it lacked jurisdiction to do so. Further the illegalities done by the Applicant's former managing director Mr P. K. Lagat was also not dealt with in the proceedings before the Respondent. In my view if the Applicant wishes to challenge those illegalities then the process of judicial review which they have opted for herein is not the appropriate forum to bring up the issues of those illegalities. The same applies to their claim of ownership over the land set out in paragraphs 4 – 7 and 15 of the grounds in support of the motion.

26. On submission of the doctrine of lis pendens, I have already said above that no notice of the existence of the suits was demonstrated to be within the Respondent's knowledge before the decision was arrived at. This Court cannot review a decision of the Respondent in a situation where no such application has been presented to it and it failed to so act. In my opinion and I so hold, the doctrine of lis pendens can only be invoked if this Court was moved by way of appeal that the Respondent in spite of an application being made to it acted contrary to the law. The facts of the case laws cited by the applicant in support of this submission are distinguishable from the present case.

27. In conclusion, I reach a similar finding as the holding in the decision of **Republic vs National Transport & Safety Authority & 10 others exparte James Maina Mugo (2015) eKLR** thus, *“That where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not suitable for judicial review and where an applicant brings judicial review proceedings with a view to determine the contested facts, the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits”*.

28. In light of the reasons given in the preceding paragraphs, I find that the present application has failed to prove that the Respondent acted ultra vires its powers and/or failed to comply with the provisions of article 47 of the Constitution in serving appropriate notices to accord all necessary parties an opportunity to be heard. The dispute put forth by the exparte applicant on who owns the suit parcels cannot be determined by way of judicial review. Consequently I hold that it is lacking in merit and dismiss it with costs to the Respondent and the 1st Interested Party.

Dated, signed & delivered at Mombasa this 22nd February 2019

A. OMOLLO

JUDGE