



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**PETITION NO. 5 OF 2018**

**IN THE MATTER OF ARTICLES 2(2), 10(2), 19, 20(2), 21(1), 22(1) & 2, 23(1), 40(2), 47(2), 50(1) AND 165 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT ON THE PROPERTY RIGHTS OF THE PETITIONER**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATION ACTION ACT, 2016**

**AND**

**IN THE MATTER OF LR NO. KISII MUNICIPALITY/BLOCK I/153**

**AND**

**IN THE MATTER OF GAZETTE NOTICE PUBLISHED ON 17/7/2017**

**AND**

**IN THE MATTER OF REVOCATION OF TITLE OF LR NO. KISII MUNICIPALITY/BLOCK I/153**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS & FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE RULES 2013**

**BETWEEN**

**GEORGE RIOGI MOCHAMA.....PETITIONER**

**AND**

**NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**CHIEF LANDS REGISTRAR.....2<sup>ND</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**J U D G M E N T**

**Introduction**

1. The Petitioner, George Riogi Mochama, being the registered proprietor of **LR No. Kisii Municipality/Block I/153** (“the suit property”) filed the Petition dated 3<sup>rd</sup> April, 2018 challenging the decision to revoke and nullify his title in respect to the suit property by the 1<sup>st</sup> respondent, the National Land Commission (NLC).

2. The Petitioner contended that he had been deprived of the exclusive and absolute entitlement over the suit property and his fundamental rights to ownership and protection of property under the Constitution of Kenya and in particular Articles 10, 27, 28, 40, 47 and 50(1) of the Constitution of Kenya, 2010 had been violated. The petitioner prayed for the following orders in the petition:-

**a) A declaration that the decision of the 1<sup>st</sup> respondent and in particular, the Kenya Gazette Notice published on the 17<sup>th</sup> day of July 2017, touching on and/or pertaining to LR No. Kisii Municipality/Block I/153, was irregular, illegal, unlawful and void.**

**b) Declaration that the revocation of the petitioner’s title in respect of LR No. Kisii Municipality/Block I/153 was/is ultra vires the provisions of the National Land Commission Act, 2012 and hence invalid and unconstitutional.**

**c) The honourable court be pleased to grant an order of judicial review in the nature of certiorari to quash the gazette notice published on 17<sup>th</sup> day of July 2017 touching and/or concerning the revocation of the title in respect to LR No. Kisii Municipality/Block I/153;**

**d) Permanent injunction restraining and/or prohibiting the 1<sup>st</sup> respondent herein either by herself, agents, servants and/or anyone acting on her instructions from conducting and carrying out further proceedings touching and/or concerning the review of the lease over and in respect of LR No. Kisii Municipality/Block I/153 and/or making any interfering with the petitioner’s developments on the suit property in contravention of the National Land Commission Act, 2012.**

**e) Costs of the Petition be borne by the Respondents jointly and/or severally.**

**f) The Honourable Court be pleased to issue such orders and/or writs as the Court may deem fit and/or expedient.**

#### **Brief Background to the Petition:**

3. The Petitioner averred that from 1971 he had occupied the suit premises located within Nyanchwa, Kisii Municipality with the permission of the Municipal Council of Gusii and that in 1996 he applied to the Municipal Council to be allocated the plot that he had been in occupation of. The Town Planning and Housing and Works Committee in a meeting held on 13<sup>th</sup> June 1997 vide Min/14 of 1997 approved the Petitioner’s application to be allocated **Plot No. Kisii Municipality/Block I/153**. The Petitioner was issued a Letter of Allotment dated 15<sup>th</sup> August 1997 for the said Plot No. **Kisii Municipality/Block I/153** and upon meeting all the terms of the allotment and effecting payment of the requisite charges the Petitioner was registered as the owner of the suit property and issued with a Certificate of Lease on 19<sup>th</sup> July 1999.

4. On 16<sup>th</sup> March 2016, the 1<sup>st</sup> Respondent published a public notice in the newspaper in which it claimed that the suit property had been unlawfully and/or irregularly allocated to the Petitioner. The Petitioner pursuant to the said advertisement made representations to the 1<sup>st</sup> respondent and tendered documents in regard to the transaction leading to the acquisition of the suit property by himself. The Petitioner contended that the 1<sup>st</sup> Respondent ignored the substance of his representation relating to the Petitioner’s acquisition of the suit property and proceeded to issue a gazette notice dated 17<sup>th</sup> July 2017 giving notice of the revocation of the Petitioner’s title to the suit property.

5. It was the Petitioner’s contention that the actions of the 1<sup>st</sup> Respondent were *ultra vires* its mandate and constituted a violation and infringement of the Petitioner’s constitutional and fundamental rights as relates to the protection of his property rights. The Petitioner stated that he had lawfully, legally and procedurally been allocated the suit property and that he had procedurally acquired title to the land. The 1<sup>st</sup> respondent notwithstanding the representations and documents tendered in support of the Petitioner’s ownership of the suit property, on 17<sup>th</sup> July 2017 published a Gazette Notice revoking and/or nullifying the Petitioner’s title to the suit property.

6. The Petitioner contended that the 1<sup>st</sup> Respondent’s action to revoke and/or nullify his title was a violation of his constitutional rights to protection of his property and that the action was *ultra vires* the mandate of the National Land Commission and violated Article 40 and 47 of the Constitution and the provisions of the Fair Administrative Action Act, 2015. The Petitioner sought to be granted the prayers set out in the Petition.

#### **The Petitioner’s Case:**

7. The Petitioner’s case was set out in the Petition, the supporting affidavit and submissions filed in court by the Petitioner. The Petitioner asserted that he lawfully and validly acquired the suit property and after due process he was registered as the owner of the property and was issued with a title in regard to the suit property, **LR No. Kisii Municipality/Block I/153**. The Petitioner contended he acquired an absolute and indefeasible title upon being registered as owner of the said property and in that regard deserved the protection of the law against deprivation of his property.

8. The Petitioner averred that the notification by the National Land Commission vide the Newspaper advertisement on 16<sup>th</sup> day of March 2016 asserted and contended that the suit property was unlawfully and/or irregularly allocated to the Petitioner and therefore liable to be invalidated was without any basis and/or justification.

9. The following issues arise from the suit for determination.

- 1. Whether the petitioner acquired lawful and legitimate rights over the suit property?**
- 2. Whether the petitioner was accorded fair hearing before the inclusion of title of the suit property in the offensive list?**
- 3. Whether the decision of the 1<sup>st</sup> respondent herein accord with the doctrine of natural justice?**
- 4. Whether the recommendation by the National Land Commission to revoke title of the suit property was ultra vires?**

10. The Petitioner submitted that he was lawfully and regularly allocated the suit property and that he had furnished the 1<sup>st</sup> Respondent with all the documents including Municipal Council minutes approving the allocation, letter of allotment and receipts supporting payment and the lease and certificate of lease to support his bona fides as the owner of the property. He contended that the 1<sup>st</sup> Respondent failed to have any regard to this evidence in making their determination to revoke his title.

11. The Petitioner argued that he was not accorded a fair hearing by the 1<sup>st</sup> Respondent as the 1<sup>st</sup> Respondent failed to furnish him or avail to him the particulars of the allegations of fraud or unlawful acquisition leveled against him and further failed to supply him with any information and/or documents the 1<sup>st</sup> Respondent relied on to support their allegations against the Petitioner. He argued he was not afforded any opportunity to interrogate or cross examine any witness the 1<sup>st</sup> respondent had to testify against him. The Petitioner maintained as the registered owner of the suit property his title was indefeasible and could only be impugned as provided under the law. He submitted the decision by the 1<sup>st</sup> Respondent was *ultra vires* and it offended the Wednesbury principle of reasonableness.

#### **1<sup>st</sup> Respondent's Case:**

12. The 1<sup>st</sup> Respondent filed a replying affidavit sworn by Brian Ikol, Deputy Director Legal Affairs in response to the Petition. The 1<sup>st</sup> Respondent averred that it received a complaint from the County Government Kisii in 2016 that the suit property had been transferred to private ownership under unknown circumstances yet the property belonged to the County Government's Housing Department. The 1<sup>st</sup> Respondent stated that pursuant to the provisions of National Land Commission Act Section 14(3) they invited the Petitioner to appear before the Commission for review of the grant and disposition of **LR No. Kisii Municipality/Block I/153**. The Petitioner made a written submission and submitted documents in support of his submission before the Commission. The 1<sup>st</sup> Respondent averred that upon review and having considered the submission by the Petitioner, the Commission determined the Petitioner had unlawfully acquired the suit property and the Commission recommended revocation of the title.

13. The 1<sup>st</sup> Respondent contended that Section 14 (1) of the National Land Commission Act gives mandate to the 1<sup>st</sup> Respondent to review all grants and dispositions of public land in order to establish their propriety and legality. The 1<sup>st</sup> Respondent further argued that it had not occasioned a breach of the applicant's right under Article 47 of the Constitution of Kenya, 2010 through its action and decision to revoke the Petitioner's title to the suit property and maintained that the Petitioner had been subjected to fair administrative action as envisaged under the Fair Administrative Action Act, 2015.

#### **Analysis and Determination:**

14. The issues arising from this Petition are twofold. Firstly, the Petitioner has challenged the jurisdiction of the 1<sup>st</sup> Respondent to revoke its title contending that the 1<sup>st</sup> Respondent superseded its mandate; and secondly whether the actions of the 1<sup>st</sup> Respondent infringed the Petitioner's rights under Article 40 and 47 of the Constitution.

15. The functions of the National Land Commission are set out under Article 67 (2) of the constitution of Kenya and include:

- a) to manage public land on behalf of the National and County governments;**
- b) to recommend a national land policy to the National government;**
- c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;**
- d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;**
- e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;**
- f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;**
- g) to assess tax on land and premiums on immovable property in any area designated by law; and**
- h) to monitor and have oversight responsibilities over land use planning throughout the country.**

16. Section 14 of the *National Land Commission Act*, on the other hand outlines the mandate of the Commission and provides as follows:

*(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.*

*(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).*

*(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.*

*(9) The Commission may, where it considers it necessary, petition Parliament to extend the period for undertaking the review specified in subsection (1).*

17. Jurisdiction of National Land Commission was considered in the case of **Republic -vs- National Land Commission Ex parte Holborn Properties Ltd [2016] eKLR**, where the court held that the Commission had power to review titles that are privately held where such titles were initially public land and were converted to private holdings with a view of ascertaining whether the title was properly and legally acquired.

18. The question this Court is called upon to determine is whether the 1<sup>st</sup> Respondent in carrying out its mandate to investigate the title infringed the rights of the Petitioner. Article 47 of the Constitution of Kenya makes provision for the threshold to be met by any institution that exercises any administrative function that has the potential to impact or affect the interest of a person adversely. Article 47 provides:

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 the right to be given written reasons for the action.
3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-
  - a. provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
  - b. promote efficient administration.

19. The Court of Appeal in the case of **Judicial Service Commission -vs- Mbalu Mutava & Another [2015] eKLR** held as follows:

“In exercise of its powers under the Constitution or under legislation, public officers, state officers, state organs and independent bodies or tribunals may make decisions which may be characterized as judicial, quasi-judicial or administrative depending on the empowering provision of the Constitution or the law. The landmark decision of the House of Lords in *Ridge v. Baldwin* [1964] AC 40 clarified the law, that the rules of natural justice, in particular right to fair hearing, (*audi alteram partem* rule) applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties. In that case, Lord Hodson at page 132 identified three features of natural justice as:

- i. the right to be heard by an unbiased tribunal.
- ii. the right to have notice of charges of misconduct.
- iii. the right to be heard in answer to those charges.

20. The 1<sup>st</sup> Respondent gave evidence that on 16<sup>th</sup> March 2016, it published a public notice in the newspapers inviting interested parties to

appear before them, and that on 30<sup>th</sup> March 2016 the Petitioner was invited to a review hearing on 6<sup>th</sup> April 2016. The Petitioner submitted that the 1<sup>st</sup> Respondent did not avail him the opportunity to testify as the public hearing the 1<sup>st</sup> Respondent had stated would be held on 6<sup>th</sup> April 2016 at Kisii never took place. The Petitioner further submitted that the 1<sup>st</sup> Respondent failed to avail him any information and/or any documents on which they based their claim that the land was irregularly acquired. In the case of **Republic -vs- National Land Commission & Tropical Treasure Limited Ex-parte Krystaline Salt Limited (2015) eKLR** Korir J. held as follows:

**“[68.] The notice in the newspapers did not have the name of the complainant and neither did it disclose the complaint against the Applicant’s titles. In order for the Applicant to prepare its defence it ought to have been served with the particulars of the allegations by the Interested Party and informed of the manner in which it allegedly obtained grants to public land in an illegal or improper manner.**

**[69.] In a matter that eventually led to the revocation of the Applicant’s title, a notice in the newspapers without any useful information was not sufficient..”**

21. The 1<sup>st</sup> Respondent’s replying affidavit affirms that the Petitioner amongst other persons was served with the Notice of the Commission’s intention to review their grants and/or titles vide the Gazette Notice of 16<sup>th</sup> March 2016. The letter of 30<sup>th</sup> March 2016 by the 1<sup>st</sup> Respondent to the Petitioner apart from spelling out the mandate of the Commission did not contain any particulars of the allegations leveled against the Petitioner. The notice through the Newspaper was deficient to the extent that it did not set out any particulars of the facts constituting any alleged illegality, irregularity and/or fraud in the alienation and/or acquisition of the property. The notice did not afford the petitioner the opportunity to know the allegations and/or case he was required to answer. The notice in my view did not satisfy the provisions of Article 47(1) which provides that:

**Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”**

The 1<sup>st</sup> Respondent was in actual sense carrying out an administrative function as per its mandate yet it did not avail to the petitioner the relevant information and/or any documents to enable him to respond appropriately. The 1<sup>st</sup> Respondent’s actions and the process of review they adopted was more less in the nature of trial by ambush whereby the 1<sup>st</sup> Respondent furnished no information, documents and/or particulars of the allegations/charges and yet one was supposed to respond to the allegations. There could be no fairness in such circumstances.

22. The Fair Administrative Action Act 2015 Section 4(3) and (4) provides as follows:

**4(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;**
- (b) an opportunity to be heard and to make representations in that regard;**
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**
- (d) a statement of reasons pursuant to Section 6;**
- (e) notice of the right to legal representation, where applicable;**
- (f) notice of the right to cross-examine or where applicable; or**
- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

**(4)The administrator shall accord the person against whom administrative action is taken an opportunity to -**

- (a) attend proceedings, in person or in the company of an expert of his choice;**
- (b) be heard;**
- (c) cross-examine persons who give adverse evidence against him; and (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.**

In the instant matter the 1<sup>st</sup> Respondent was exercising an administrative duty and was bound to act in compliance with the provisions of Article 47 of the Constitution and the provisions of Section 4 of the Fair Administrative Action Act which gives effect and expression to Article 47 of the Constitution. I am not satisfied the 1<sup>st</sup> Respondent acted in conformity with these provisions when they subjected the Petitioner to administrative action. I am not able to find in the circumstances of this case, that the Petitioner was given a fair hearing before the recommendation to revoke his title was made.

23. Justice G. V. Odunga in the case of **Republic -vs- Registrar of Titles & Another Ex parte David Gachira & Another [2014]eKLR** stated as follows in a situation where a party had not been given an opportunity to be heard:

**“...It is clear that the right to property and a person can only be deprived of that right as provided under the Constitution. Both under the Constitution and relevant statutory provisions a registered proprietor’s title to land cannot be arbitrarily cancelled without the proprietor being afforded an opportunity of being heard. A decision by the Registrar to unilaterally cancel or revoke a title even if he had such powers would fly in the face of the express constitutional provisions.”**

24. The Petitioner in the present matter has maintained that he was lawfully and validly allocated the suit property by the authority who was mandated to allocate or alienate the land. There is a Municipal Council minute approving the allocation and there is evidence of payment of the allotment charges. Upon the registration of the lease, the Petitioner was issued with a Certificate of Lease. Article 40 of the Constitution 2010 provides that every person has the right, either individually or in association with others, to acquire and own property of any description and in any part of Kenya. However in the case of **Isaac Gathungu Wanjohi & Another -vs- Attorney General & 6 Others Petition 154 of 2011 [2012] eKLR**, Majanja, J. took the view that protection of property under Article 40 of the Constitution was only available where the property is shown not to have been unlawfully acquired. In the case he stated thus:

**“...Article 40 must be read as a whole so that protections afforded by Article 40 which protects the right to property must be read to exclude property found to be unlawfully acquired under Article 40(6). This requirement is an extension of the fact that the Constitution protects higher values which are to be found in the preamble to the Constitution and Article 10. Values such as human rights and social justice cannot countenance a situation where the Constitution is used to rubberstamp what is in effect unlawful...”**

Section 26, the Land Registration Act provides that:

***“26(1) The Certificate of Title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-***

***a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or***

***b) Where the certificate of title has been acquired illegally unprocedurally or through corrupt scheme.[Emphasis added]***

25. The Petitioner upon registration as the owner of the suit property acquired an absolute and indefeasible title which could only be challenged under the provisions of Section 26(1) (a) and (b) of the Land Registration Act aforesaid 2012. The 1<sup>st</sup> Respondent in their review of the Petitioner’s title did not satisfy any of the conditions under which the Petitioner’s title to the suit property could be impugned.

26. In the circumstances of this matter, I find and make a determination that the Petitioner’s constitutional rights under Articles 40, 47 and 50 of the Constitution were contravened. I accordingly allow the Petition dated 3<sup>rd</sup> April 2018 and quash the 1<sup>st</sup> Respondent’s decision to revoke the Petitioner’s title to the suit property. I grant prayers (a), (b) and (c) of the Petition and award the costs of the petition to the Petitioner as against the 1<sup>st</sup> Respondent.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KISII THIS 31<sup>ST</sup> DAY OF MAY 2019.**

**J. M. MUTUNGI**

**JUDGE**