



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**PETITION NO. 6 OF 2018**

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

**AND**

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

**AND**

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

**AND**

**IN THE MATTER OF NATIONAL LAND COMMISSION ACT, 2012**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACT, 2016**

**AND**

**IN THE MATTER OF LR NO. KISII MUNICIPALITY/BLOCK II/258 AND 260**

**AND**

**IN THE MATTER OF LR NO. KISII MUNICIPALITY/BLOCK III/418**

**AND**

**IN THE MATTER OF LR NO. GAZETTE NOTICE PUBLISHED ON 17/07/2017**

**AND**

**IN THE MATTER OF REVOCATION OF TITLE OF LR NO. KISII MUNICIPALITY/BLOCK II/258 AND 260**

**AND**

**IN THE MATTER OF REVOCATION OF TITLE OF LR NO. KISII MUNICIPALITY/BLOCK III/418**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS**

**AND FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

ASHWIN RAMJI GUDKA.....1<sup>ST</sup> PETITIONER

AAREM LIMITED.....2<sup>ND</sup> PETITIONER

AND

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

THE CHIEF LAND REGISTRAR.....2<sup>ND</sup> RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT

### J U D G M E N T

1. The Petitioners filed the instant Petition dated 23<sup>rd</sup> May 2018 on 29<sup>th</sup> May 2018 seeking inter alia the following orders against the Respondents:-

**(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 II/258 and 260 and LR No. Kisii Municipality /Block III/418 was irregular, illegal, unlawful and void.**

**(b) Declaration that the revocation of the Petitioner's titles in respect of LR No. Kisii Municipality/Block II/258 and 260 and LR No. Kisii Municipality /Block III/418 was/is ultra vires the provisions of the National Land Commission Act, 2012 and hence the same is 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 the 17<sup>th</sup> day of July 2017 touching and/or concerning the revocation of the titles in respect of LR No. Kisii Municipality/Block II/258 and 260 and LR No. Kisii Municipality /Block III/418.**

**(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/or carrying out any further proceedings touching and/or concerning the review of the lease over and in respect of LR No. Kisii Municipality/Block II/258 and 260 and LR No. Kisii Municipality /Block III/418 and/or making any adverse recommendations thereon and/or in any other manner 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 severally.**

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

2. Simultaneously with the Petition the Petitioners filed a Notice of Motion seeking conservatory orders pending the hearing and determination of the Petition. The Court on 31<sup>st</sup> May 2018 fixed the matter for interpartes hearing on 26<sup>th</sup> June 2018. At the interpartes hearing, there was no appearance for the Respondents. The Court directed that the main Petition be argued by way of written submissions and the Petitioners were to file and serve their submissions within 30 days upon the Respondents with liberty to the Respondents to file their responses to the Petition and response submissions within 30 days of being served. The court fixed the matter for mention on 1<sup>st</sup> October 2018 for further directions and in the meantime granted a conservatory order to last until the determination of the Petition.

3. On 1<sup>st</sup> October 2018, the Petitioners had not filed their submissions and sought for more time to do so. There was no appearance for the Respondents. When the matter came up for mention on 15<sup>th</sup> November 2018, the 1<sup>st</sup> Respondent was represented and sought leave and was granted leave of 45 days to file their response and submissions to the Petition and the Petitioner was granted liberty to reply within 15 days of being served. The Respondents were served with the Petitioners submissions but neither filed any response to the Petition and/or submissions. The court on 13<sup>th</sup> March 2019 reserved judgment on the Petition.

#### The Petitioners' Case:

4. It is the Petitioners case that they are the duly registered legal owners of land parcel **LR No. Kisii Municipality /Block III/418** and **LR Nos. Kisii Municipality/Block II/258 and 260** ("the suit properties") and that they have been so registered from 1997 and 1999 respectively following lawful purchase of the same from the previous registered owners, **Joshua Obegi** and **Domnic Ombongi Gechuki, Francis Obae Machoka** as per the payment voucher and sale agreements dated 2<sup>nd</sup> May 2000 and 22<sup>nd</sup> October 2014, annexed as **ARG4, ARG8 and ARG12**" respectively. The Petitioners aver that before purchasing the subject land they carried out the appropriate due diligence and that searches at the land registry revealed the properties were registered in the names of the vendors and had no encumbrances as per the abstracts of title annexed as **ARG5c and ARG13b**". The Petitioners stated that upon satisfying themselves the properties were clean they agreed to proceed with the sale transaction. The 1<sup>st</sup> Petitioner paid the agreed consideration of kshs.350,000/= for **LR No. Kisii Municipality/ Block III/418** and the 2<sup>nd</sup> Petitioner paid for **LR Nos. Kisii Municipality/ Block II/258 and 260** kshs.900,000/= each and the properties were consequently transferred to them resulting with them being issued with the Certificates of Lease.

5. The Petitioners further aver that they took occupation and possession of the suit properties including fencing the said property to protect

the same from third party encroachment and/or interference. The Petitioners aver and contend they were bona fide purchasers for value without any notice of any defect in the title held by their predecessors, if indeed there was any such defect. The Petitioners assert that they validly purchased the suit properties and all the legal and procedural processes were observed in getting the properties transferred to them and therefore their titles are indefeasible and ought to be afforded protection under the law.

6. The Petitioners however state that on or about the 16<sup>th</sup> day of March 2016 the National Land Commission, the 1<sup>st</sup> Respondent herein, published a newspaper advertisement purporting that the titles to the suit properties were unlawfully acquired and/or formed and/or comprised of Riparian Reserve. The Petitioners in response to the newspaper advertisement made written representations to the 1<sup>st</sup> Respondent explaining and setting out how they acquired the suit properties and how they got to be registered as the owners thereof. The Petitioners aver further that despite the clear explicit representations that they made to the 1<sup>st</sup> Respondent, the 1<sup>st</sup> Respondent proceeded to issue a gazette notice published on 17<sup>th</sup> July 2017 where it was indicated that the Petitioners land parcels **LR No. Kisii Municipality /Block III/418** and **LR No. Kisii Municipality/Block II/258** and **260** among others were revoked and no reasons and/or basis were given for the alleged revocation.

7. The Petitioners contend that the 1<sup>st</sup> Respondent acted *ultra vires* and against the rules of natural justice as the 1<sup>st</sup> Respondent constituted themselves the complainants, the prosecutor and the judge in their own cause. The Petitioners aver that their constitutional rights to fair administrative action were infringed to their detriment as the 1<sup>st</sup> Respondent's decision as carried out in the gazette notice had the potential effect of depriving them of their properties without due process of the law being adhered to. The Petitioners thus avers that the 1<sup>st</sup> Respondent's decision was irregular and outside the scope of the 1<sup>st</sup> Respondent's statutory and constitutional mandate and hence the same ought to be annulled and/or quashed.

8. As observed at the commencement of this judgment the Respondents never filed any responses to the Petition inspite of being served and being afforded the opportunity to do so. The Petitioners averments therefore are virtually uncontroverted and/or challenged. The 1<sup>st</sup> Respondent entered an appearance on 15<sup>th</sup> November 2018 and on the same date Mr. Bosire Gichana Advocate holding brief for Ms. Njuguna Advocate for the 1<sup>st</sup> Respondent appeared on their behalf and sought leave of the court to be granted time to file a response on behalf of the 1<sup>st</sup> Respondent. The court granted the 1<sup>st</sup> Respondent 45 days leave within which to file a response and submissions to the Petition but failed to do so up to the time judgment was reserved.

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

9. On the evidence and material placed before the court by the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners it is evident that the subject property was allocated to **Joshua Obegi, Dominic Ombongi Gechuki** and **Francis Obae Machoka** vide a letters of allotment dated 21<sup>st</sup> February 1997 and 15<sup>th</sup> August 1999 respectively and issued by the Commissioner of Lands ("**ARG2, ARG6** and **ARG10**"). The searches tendered in evidence by the Petitioners show that the said **Joshua Obegi, Dominic Ombongi Gechuki** and **Francis Obae Machoka** were registered as owners of the suit properties. The Petitioners pursuant to payment voucher and sale agreements dated 2<sup>nd</sup> May 2000 and 22<sup>nd</sup> October 2014, annexed as ("**ARG4, ARG8** and **ARG12**") respectively purchased the suit properties for the considerations of kshs.350,000/=, kshs.900,000/= and kshs.900,000/= and the properties were transferred to them and they were issued Certificates of Lease dated 28<sup>th</sup> April 2000 and 27<sup>th</sup> October 2014 respectively. The Petitioners as per the copies of the Certificates of Official search dated 16<sup>th</sup> May 2014 and 18<sup>th</sup> June 2015 ("**ARG5c** and **ARG13b**") are presently the registered proprietors of the suit properties. The Court in the premises is satisfied the Petitioners are validly registered as the proprietors of land parcels **LR No. Kisii Municipality/Block III/418** and **LR Nos. Kisii Municipality/Block II/258** and **260**.

10. The National Land Commission under Article 67(e) of the Constitution and Section 14 of the National Land Commission Act No. 5 of 2012 has mandate and power to investigate and review grants and dispositions of land. Under Article 67(e) of the Constitution the National Land Commission has power:-

**“to initiate investigations on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.”**

Section 14 of the National Land Commission Act 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 county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.**

**(2) Subject to Article 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).**

Section 14(7) of the Act provides that no revocation of title shall be effected against a bonafide purchaser for value without notice of a defect in the title.

11. In the instant matter there is no evidence to show there was a defect in the titles in regard to the suit properties or that if there was any defect, the Petitioners had any notice of it. The Court on the basis of the evidence adduced by the Petitioners is satisfied the Petitioners were bona fide purchasers and that if there was any defect in the title they had no notice. There is no evidence to demonstrate that the 1<sup>st</sup> Respondent before making the recommendation to have the Petitioners titles revoked complied with the provisions of Articles 47, 48 and 50 of the Constitution on fair administrative action, access to justice and fair hearing. The recommendation by the 1<sup>st</sup> Respondent is not supported and/or backed by any reasons and it is therefore not possible to determine on what basis the decision to revoke the Petitioners' titles was reached. The procedures and the processes are not shown to have been transparent. In a situation where a party's rights and interests stand to be affected as in the instant matter, the process must be transparent and not opaque. The Court cannot presume that the process and the procedure followed was fair. It has to be demonstrated to have been transparent and fair. This is not the case in the present matter and the Court cannot find that the Petitioners were subjected to fair administrative action as envisaged under Article 47 of the Constitution and Section 4(3) of the Fair Administrative Action Act of 2015.

12. While it is not clear why the 1<sup>st</sup> Respondent made a recommendation for the revocation of the Petitioners titles, from the evidence tendered by the Petitioners, the allegation made by the 1<sup>st</sup> Respondent was that the suit properties were unlawfully and/or irregularly alienated and/or allocated to the Petitioners. No further particulars have been furnished as to what constituted the unlawfulness and/or the irregularities. This court sitting in Nairobi in the case of **Veronica Waithira Trustee of Inter-Christian Churches & 3 Others -vs- Kenya National Highways Authority [2014] eKLR** had occasion to consider a case with similarities to the present case where there was a claim of unlawful and irregular allocation of a parcel of land alleged to be on the road reserve. In the case, I observed thus:-

**“The defendant has argued and asserted that the plaintiffs title was illegally and unlawfully procured and therefore cannot be deserving of protection under the law. However, there is no evidence that the government has recalled and/or revoked the title. Both the Land Registration Act Section 26(1) that provide for the indefeasibility and Article 40(6) of the Constitution envisage that where a registered title is impugned on the grounds set out in the provisions that due process would be followed to have such title revoked, cancelled and/or annulled. The courts have in a series of cases in the recent past held that due process has to be followed before a registered title can be revoked on the grounds of having been fraudulently or irregularly issued.”**

13. The Court again considered what constitutes an unlawfully and/or irregularly acquired title in the case of **Eunice Grace Njambi Kamau & Another -vs- The Attorney General & 5 Others [2013] eKLR** and it rendered itself thus:

**33. Whereas various land commissions such as the Njonjo Land Commission have in their reports documented what they referred to as land grabbing and/or the acquisition of title to land illegally and unlawfully there is no definite definition of who a land grabber is and what constitutes an illegal and/or an unlawful title. In my view, the determination whether or not a title is illegal or unlawful has to take into account the circumstances and the process through which the title was obtained and/or acquired and provided the title is regularly issued by duly authorized officers entitled to do so by the government, it is my opinion that such title can only be impugned under Article 40(6) of the Constitution by it being established that the title was unlawfully obtained or acquired by the person shown to be registered as the owner. The doctrine of sanctity of title is anchored on the premise that a registered owner of land who holds a certificate of title that is duly registered is prima facie the owner of that property and the title he holds is indefeasible unless the title is shown to have been unlawfully acquired and/or procured. My understanding is that for the title of a registered owner to be impugned on account of fraud such an owner must have had knowledge that the title was fraudulently obtained or procured and/or the owner was party to the fraud.”**

14. I have no reason to depart from my above holding in the above case as I still hold the view it was an apt exposition of the legal position. In the instant case, I would use a similar test and hold that it was not demonstrated that the Petitioners were holding a title to the suit properties that were unlawfully and/or irregularly procured. To that extent therefore, no basis existed for the 1<sup>st</sup> Respondent to recommend its revocation. The Gazette Notice to the extent that it affected the Petitioners land parcels **LR No. Kisii Municipality/Block III/418 and LR Nos. Kisii Municipality/Block II/258 and 260** was unwarranted and must be quashed in that respect.

15. For all the above reasons, I find merit in the Petition and I grant the same in terms of prayers (a), (b) and (c). The costs of the Petition shall be borne by the 1<sup>st</sup> Respondent.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KISII THIS 24<sup>TH</sup> DAY OF MAY 2019.**

**J. M. MUTUNGI**

**JUDGE**