



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

PETITION NO. 5 OF 2017

IN THE MATTER OF INFRINGEMENT OF RIGHTS AND FUNDAMENTAL FREEDOMS

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 40, 46, 47, 48, 64 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED VIOLATION OF THE FAIR ADMINISTRATIVE ACTION ACT 2015

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND

FREEDOMS UNDER ARTICLES 2(1) (2), 3(1), 10(1), (C), 10(2) (B) AND (C), 12(1) (A), 20(1), (2),

22(1), (2), 23, 27(1), 40, 46, 47, 48 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

SAMWEL MAYENDA OPENDA.....PETITIONER

VERSUS

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

J U D G M E N T

1. The Petitioner filed the Petition dated 8th day of September 2017 alleging his fundamental rights and freedoms under Articles 2(1) (2), 3(1), 10(1) (2), 12(1) (2), 40, 46, 47 and 48 of the Constitution were contravened. The Petitioner prayed for the following orders:-

1. A declaration order declaring that the Petitioner owns and is entitled to the entire parcel of land known as Kisii Municipality/Block III/496.

2. An order of judicial review do issue to call to this Court for review of the proceedings of the National Land Commission in which the subject matter relating to revocation of Kisii Municipality/Block III/496 and quash the said proceedings and decision thereof.

3. An order of a permanent injunction do issue restraining the Respondents either by themselves or through their agents, servants, surrogates and/or officers working under them from interfering with the Petitioners peaceful and quiet enjoyment of his land rights over Kisii Municipality/Block III/496.

4. Costs.

2. The Petition is premised on the grounds set out in the Petition and the supporting affidavit sworn by Samwel Mayenga Openda, the Petitioner herein.

3. The brief facts of the Petition are that the 1st Respondent in purported exercise of its mandate conferred upon it Article 68(c) (v) of the Constitution and Section 14 of the National Land Commission Act No. 5 of 2012 to review all grants or dispositions of public land to establish their propriety or legality caused to be public the Gazette Notice No. 6862 in the Kenya Gazette of 17th July 2017 revoking the petitioner's title to land parcel **Kisii Town/Block III/496**. The Petitioner avers that he was not given any notice and/or a fair hearing prior to the action revoking his title was taken. He avers that his right to fair administrative action was violated and that the 1st Respondent's action was in breach of Articles 47 and 50(1) of the Constitution. The Petitioner further contends that the 1st Respondent had no authority and/or mandate under the Constitution to investigate title to private land legally acquired through purchase and not grant. The Petitioner stated that the 1st Respondent did not use due process in reaching its determination to revoke the Petitioner's title as it never gave the Petitioner a chance of being heard yet the decision affected and was prejudicial to the Petitioner's interests. The Petitioner contended the decision by the 1st Respondent was *ultra vires* and was therefore null and void.

4. The Petitioner for his part averred that he regularly purchased the suit property and is presently the registered proprietor as is evidenced by the copy of the Certificate of Lease in his name. The Petitioner contended that he followed due process in the purchase of the suit property and that as the registered owner of the property he was entitled to protection under Article 40 of the Constitution against deprivation of his property.

5. The Petitioner further contended that the 1st Respondent's action to revoke his title was carried out arbitrarily without following due process and therefore violated his fundamental right to fair administrative action. The Petitioner contended the 1st Respondent's action was *ultra vires* and made without jurisdiction and was accordingly null and void and this court ought to quash the decision calling of the revocation of his title.

6. The 1st Respondent was served but did not enter any appearance and/or file any response to the Petition. The 2nd Respondent filed a Memorandum of Appearance dated 13th September 2017 on 19th June 2018 but did not file any response to the Petition. In essence therefore, the Petition was not opposed and the Petitioner's averments stood unchallenged.

7. The Court directed that the petition be canvassed by way of written submissions. The Petitioner filed his submissions on 24th October 2018. Though the Respondents were served with the submissions, they did not file any responses. The Petitioner in the filed submissions reiterated the facts as set out in the petition and the affidavit sworn in support. The Petitioner submitted that he had innocently purchased the suit property in 2002 for value and after due process he was registered as proprietor and hence he acquired an indefeasible title over the property. He submitted that under Article 40(3) of the Constitution his property was protected against deprivation unless the land was required for public purpose in which case prompt compensation would be made for the property. Article 40(3) of the Constitution provides:-

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

8. The Petitioner submitted that he was not afforded the opportunity of being heard before the 1st Respondent reached the decision under challenge. This, the Petitioner argued was in contravention of Article 50(1) of the Constitution which provides:-

50(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.

9. The Petitioner further submitted that in exercising its mandate under Section 14(3) of the National Land Commission Act, the 1st Respondent failed to give him notice and/or an opportunity to access and inspect any relevant information or documents it intended to use against the Petitioner. Section 14(3) of the National Land Commission Act provides:-

14(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 to inspect any relevant documents.

10. The Petitioner further submitted there was no adherence by the 1st Respondent to the dictates of article 47(1) and (2) of the Constitution and the Fair Administrative Action Act of 2015 which requires that where an affected persons rights or interests are likely to be adversely affected he must be subjected to fair administrative action before any decision affecting his interest is made. Article 47(1) and (2) of the Constitution provide:-

47(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 the administrative action, the person has the right to be given written reasons for the action.

11. The Fair Administrative Action Act Section 4(3) provides as follows:-

(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.

12. In the present Petition, the Petitioner's complaint is that he was not given notice and neither was he afforded an opportunity to be heard. There is no evidence that indeed the Petitioner was given any notice and/or served with any particulars of the allegations which were leveled against him. To the extent that the allegations related to property in regard to which he was the registered owner and held a title, I am satisfied that any decision that the 1st Respondent would have made was likely to affect his rights and interest in the property adversely. He therefore under Article 47(2) of the Constitution and Section 4(4) of the Fair Administrative Action Act ought to have been given notice and afforded the opportunity to be heard before the decision revoking his title was made.

13. Justice G. V. Odunga in the case of **Republic -vs- Registrar of Titles & Another, Ex parte David Gachina Muriithi & Another [2014]eKLR** stated as follows in a situation where a party was not given an opportunity of being heard:-

“...it is clear that the right to property is constitutionally protected and a person can only be deprived of that right as provided under the Constitution. Both under the Constitution and the 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.”

14. In the Petition before the Court, the Petitioner has sought a declaratory order that he is the owner of the suit property and an order of judicial review to quash the proceeding of the National Land Commission that resulted in the decision to revoke the Petitioner's title to land parcel **Kisii Municipality/Block III/496**. As observed earlier in this judgment no evidence was adduced to demonstrate that the petitioner was given any notice by the 1st Respondent of the hearing of the matter respecting the validity of the title of the suit property registered in his name. The decision made by the 1st Respondent to revoke the Petitioner's title was made against the rules of natural justice which is to the effect no person should be condemned without being given an opportunity of being heard the 1st Respondent appears to have done exactly that and hence their decision cannot stand and is amenable to judicial review.

15. It has repeatedly been held and stated that judicial review is not concerned with private rights or the merits of the decision being challenged but rather with whether or not due process was followed in reaching the decision. In other words, the concern is whether the person was accorded fair treatment by the authority to which he has been subjected. In the case of **Sanghani Investments Ltd -vs- Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 E.A 354** the Court stated thus:-

“...A declaration does not fall under the purview of judicial review for the simple reason that the court could require viva voce evidence to be adduced for determination of the case on the merits before declaring who the owner of the land is. Judicial Review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application... Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not...”

In the same case the Court went further to state:-

“Even if the notice under challenge is quashed, the issue over ownership of the land still stands and it will require determination by way of filing pleadings and viva voce evidence at another forum preferably the civil Courts.”

16. In the present Petition, the National Land Commission had mandate under Article 67 of the Constitution and Section 14 of the National Land Commission Act to review and investigate dispositions relating to title and/or grants of public land. Where the land was initially public land and was subsequently disposed and became private land, the National Land Commission can properly investigate the propriety of the

dispositions. Although the Petitioner has submitted the National Land Commission lacked jurisdiction and/or mandate to review the title to the subject property since it was private land, I respectively do not agree. The National Land Commission in my view had jurisdiction to review the title as long as it was initially public land to establish and determine whether its disposition so that it became private property was lawfully done. Thus, other than for failing to follow due process in the decision making process, the National Land Commission could properly review and investigate the propriety of the title to the suit property. If the mandate of the National Land Commission is reviewed, it could still properly investigate and review the validity of the title held by the Petitioner.

17. However, since the 1st Respondent failed to follow due process, it is my determination there was breach of Articles 47 and 50(1) of the Constitution. I accordingly issue an order of judicial review quashing the proceeding and the decision of the National Land Commission revoking title **Kisii Municipality/Block III/496** and specifically **Kenya Gazette Notice No. 6862** of 17th July 2018 to the extent that it refers to title **Kisii Municipality/Block III/496** is hereby quashed.

18. The costs of the Petition are awarded to the Petitioner.

JUDGMENT DATED, SIGNED AND DELIVERED AT KISII THIS 24TH DAY OF MAY 2019.

J. M. MUTUNGI

JUDGE