

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC MISC. CIVIL APPLICATION NO. 38 OF 2017

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI & PROHIBITION BY:

1. VINODKUMAR RAMDATTMAL PAL

2. ASHISH CHANDRAKANT RAVAT

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010, THE NATIONAL LAND COMMISSION ACT, 2012 AND THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF A LETTER DATED 4TH NOVEMBER 2016 REFERENCE NLC/REVIEW/RST/KSM/1/16 BY THE NATIONAL LAND COMMISSION TO THE ACTING CHIEF LAND REGISTRAR

REPUBLIC.....APPLICANT

VERSUS

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

CHIEF LAND REGISTRAR.....2ND RESPONDENT

VINODKUMAR RAMDATTMAL PAL.....1ST EX-PARTE APPLICANT

ASHISH CHANDRAKANT RAVAT.....2ND EX-PARTE APPLICANT

THE BOARD OF MANAGEMENT KISUMU GIRLS HIGH SCHOOL.....INTERESTED PARTY

JUDGEMENT

1. Vinodkumar Ramdattmal Pal and Ashish Chandrakant Ravat, the Exparte Applicants, filed the notice of motion dated 15th February 2017 against the National Land Commission and Chief Land Registrar; Respondents; and The Board of Management Kisumu Girls High School, the Interested Party, seeking for the following orders;

1. "An order of certiorari do issue to remove into the Environment & Land Court the decision of the National Land Commission (the 1st Respondent) contained in its letter dated 4th November 2016 Ref: NLC/REVIEW/RST/KSM/1/16 by which the National Land Commission found and directed that the Applicants' titles to all those properties described as Land Reference Nos. Kisumu Municipality/Block 6/608, 609, 610, 6011, 612 and 613 were illegal and should be revoked and vested in Kisumu Girls High School (the interested Party herein) and on such removal the findings, decision and directive be quashed.

2. An order of prohibition do issue restraining the Chief Land Registrar (the 2nd Respondent) from acting on the findings, decision and directives of the National Land Commission contained in its letter dated 4th November 2016 Ref: NLC/REVIEW/RST/KSM/1/16 by which the National Land Commission (the 1st Respondent) found and directed that the Ex parte Applicants titles to all those properties described as Land Reference Nos. Kisumu Municipality/Block 6/608, 609, 610, 6011, 612 and 613 were illegal and should be revoked and vested in the interested party.

3. Costs of these proceedings be provided for."

2. The application is supported by the verifying affidavit of Vinodkumar Ramdattmal Pal and the statement, both filed with the summons for leave, summarized as follows;

a) That the Applicants are the registered proprietors in common of the leasehold interest in Kisumu Municipality/Block 6/610 to 613 while the 2nd Applicant is the registered proprietor of Kisumu Municipality/block 6/608 and 609, all referred as the suit properties.

b) That they acquired Kisumu Municipality/Block 6/610 and 611 from M/s Riya Developments Ltd, and Kisumu Municipality/Block 612 and 613 from Cornelius Ogema and Kisumu Municipality/Block 6/608 and 609 from M/s Omkareshavar Enterprises Ltd. That the said M/s Riya Developments Ltd and Cornelius Ogema had acquired the parcels they sold to the Applicants from M/s Omkareshavar Enterprises Ltd.

c) That in the process of conducting due diligence, the Applicants had established that the suit properties were originally part of Kisumu Municipality/Block 6/548 and 549, the original properties, registered with Richard Shiraho and Elizabeth Khadushi respectively on the 2nd December 2001, that were later sold to M/s Omkareshavar Enterprises Ltd on the 9th October 2007. That M/s Omkareshavar Enterprises Ltd amalgamated the two parcels and subdivided the amalgamated parcel into Kisumu Municipality/Block 6/603 to 618 after obtaining the requisite authorizations and approvals.

d) That in the year 2004 the District Land Registrar Kisumu had written to the proprietors of the original properties, Kisumu Municipality/Block 6/548 and 549, to surrender their leases but they protested and filed Kisumu H.C. Misc Application No. 285 of 2004 against the District Land Registrar Kisumu, the Commissioner of Lands and the Chief Land Registrar seeking for certiorari, mandamus and prohibition orders. That the court granted the orders on the 23rd May 2005. That when they obtained certificates of official searches on the 15th September 2005, they discovered the Land Registrar had registered restrictions against the original properties titles. That they applied for execution proceedings against the District Land Registrar and an order issued on the 5th June 2007 directed the restrictions be removed.

e) That some of the parcels subdivided after the amalgamation of the original properties like Kisumu Municipality/Block 6/604 are still in the name of M/s Omkareshavar Enterprises Ltd.

f) That the Applicants have incorporated a firm known as Gokul Dham Residency through which they have carried out substantial developments on the suit properties. That by letter dated 4th November 2016, the 1st Respondent wrote to the 2nd Respondent and copied to Gokul Dham Residency among others stating that after reviewing the Interested Party's complaint, the following should be effected;

i. "L.R. No. Kisumu Municipality/Block 6/244 was originally L. R. No. Kisumu Municipality/Block 6/608, 609, 610, 611, 612 and 613 and is public land that vests in the school vide a title issued by the Registrar and is being illegally occupied by Gokul Dham Residency.

ii. The title issued to Gokul Dham Residency in respect of the property is revoked and the grant reverted and vested in the school.

iii. L.R. No. Kisumu Municipality/Block 6/244 should be restricted to prevent further interference by Gokul Dham Residency."

g) That the issue of the validity of the original properties titles had been decided in the previous legal proceedings in which the Commissioner of Lands, who was the predecessor to the 1st Respondent, was a party and no appeal has been filed on the decision made on the 23rd May 2005 by a court of competent Jurisdiction.

h) That the action by the Respondents to create Kisumu Municipality/Block 6/244 for the suit properties, and then allocating it to the Interested Party, is plainly illegal for reasons that the Respondents know the suit properties were registered with the Applicants and other third parties, and the decision to divest them was made without affording the Applicants a hearing, and amounts to a disregard of the order issued in Kisumu H. C. Misc. Civil Cause No. 285 of 2005.

3. The Respondents and Interested Party did not file any replies to the notice of motion dated the 15th February 2017 and filed on the 16th February 2017 though served. That however the Interested Party had filed five (5) Grounds of Opposition dated the 28th February 2017 to the Chamber Summons for leave and conservatory order dated the 13th February 2017, which has been dealt with through the orders of the 14th February 2017 and 31st May 2017. That in view of the Interested Party's submissions dated 6th March 2019, the court will take the said Grounds of Opposition to be the Interested Party's response to the notice of motion dated the 15th February 2017. The said grounds are as follows;

1. "The decision of the National Land Commission contained in the letter dated 4th November 2016 is a constitutional mandate which has been exercised diligently and after parties were given a chance to be heard and to stay the decision will amount to the court usurping the functions of the commission.

2. The applicants having failed to attend the public hearing of the National Land Commission lost the opportunity to challenge the decision of the commission.

3. The National Land Commission has acted within the law and specifically the Constitution of Kenya 2010 and the National Land Commission Act, 2012 and the decision made is within its mandate and therefore not subject to review.

4. The Interested Party was not a party to the provisions suit filed being Kisumu Misc. Application No. 285 of 2004.

5. The National Land Commission was established after promulgation of the Constitution of Kenya 2010 and its mandate included investigation of historical land injustices and recommend appropriate redress under Article 67 (e) of The Constitution of Kenya 2010."

4. The Interested Party then filed the notice of motion dated 19th June 2017 seeking for the Applicants' motion to be heard through written submission among others. The application was settled through the consent order of 20th November 2017 and timelines for filing and exchanging written submissions given. The learned Counsel for the Exparte Applicants and Interested Party then filed their written submissions dated the 29th October 2018 and 6th March 2019 respectively which are as summarized herein below;

A: EXPARTE APPLICANTS' SUBMISSIONS:

- a) That the Respondents' decision is in excess of their Jurisdiction as they purport to override the Court's decision without going through the appeal process.
- b) That the Respondents did not hear the Applicants before making the offending decision hence abusing their authority.
- c) That the action of the Respondents to purport to supplement the original Kisumu Municipality/Block 6/538 and 539 with the strange Kisumu Municipality/Block 6/244 was an act of bad faith, aimed at taking the matter out of the purview of the lawsuit in which the legality of the two titles aforesated, which are the mother titles of the suit land, had been settled.
- d) That the failure by the Respondents to file any response to the application means the facts presented by the Applicants are unchallenged.
- e) That the fact that the Respondents and Interested Party have not availed to the Court copies of the proceedings leading to the decision being challenged shows that no hearing took place. That the right to be heard is a fundamental right constitutionally and has always been a ground for granting of writs of Judicial review. That right has expressly been legislated in Section 7 (2) (a) (v) of the Fair Administrative Act No. 4 of 2015 enacted pursuant to Article 47 of the Constitution which guarantees administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- f) That the Interested Party's contention that the 1st Respondent's decision cannot be queried by the court is misconceived, as the statute that creates it enjoins it to accord every party affected by proceedings for review of grant and dispositions of public land an opportunity to appear before , but did not accord the Applicants such a chance.
- g) That the 1st Respondent, in exercising its Jurisdiction under Article 47 of the Constitution as read with Section 14 of the National Land Commission Act exercises quasi-Judicial authority and as an inferior tribunal, its decisions are subject to the supervisory Jurisdiction under Article 22 of the Constitution, Part VI of the Laws Reform Act, Cap. 26 Laws of Kenya, Part III of Fair Administrative Act No. 4 of 2015 and Order 53 of Civil Procedure Rules. That as the original properties titles had been validated through legal proceedings, in which the Respondents were parties, by the High Court and no appeal has been preferred, the 1st Respondent acted beyond its Jurisdiction in making the impugned decision.
- h) That the letter by the 1st Respondent dated 4th November 2016 shows that the Interested Party's complaint was over Kisumu municipality/Block 6/244 which was not subject matter of the court case and the Interested Party has not shown that they had interest in the original properties.
- i) That the 1st Respondent acted dishonestly and in bad faith by creating Kisumu municipality/Block 6/244, juxtaposing it on the suit properties without hearing the Applicants who are persons bound to be affected by the decision. That the decision sought to be impugned in these proceedings is inconsistent with the Applicants' legitimate expectation who have extensively developed the suit properties which they acquired after the High Court validated the original properties.

B: INTERESTED PARTY'S SUBMISSIONS:

- a) That the 1st Respondent conducted an investigation as mandated by Article 67 (2) of the Constitution in respect of Kisumu municipality/Block 6/244 (Originally Kisumu municipality/Block 6/608 to 613) and found that the suit parcel is public land vested in the Interested Party and that the Applicants were in unlawful occupation without authority issued under customary or statutory laws. That the Applicants should therefore show cause why they should not vacate the suit property and remove the erected structures. The learned Counsel referred to the decision in Japheth Kipkimboi Magut vs National Land Commission & 2 Others [2017] eKLR, where it was found that the National Land Commission has mandate to carry out investigations on the land parcels that were affected by historical injustices and make recommendations.
- b) That the 1st Respondent acted in accordance with its Constitutional Mandate and Section 155 of the Land Act, No. 6 of 2012 in giving a public notice published in the national daily to show cause why they should not vacate the suit parcel and in addition, a public hearing to make presentations and inspect any documents they may have as evidence. That the hearing took place at the Tom Mboya Labour College and the Interested Party made their presentation and tendered their documents for consideration while the Applicants failed to appear.
- c) That the Interested Party was not a party in the H.C. Misc. App No. 285 of 2004 otherwise it would have objected or appealed the decision made thereof. That the 1st Respondent's decision on the Interested Party's complaint is meant to fight the Land menace in the Country and should not be taken as one meant to undermine the courts.
- d) That as the Applicants' failed to discharge the statutory duty placed upon them by Section 155 of the Land act No. 6 of 2012 to appear before the 1st Respondent and secure the right they purport to have over the suit properties, their notice of motion should be dismissed with costs.

5. The following are the issues for the Court's determinations;

- a) Whether the 1st Respondent acted within its Constitutional and statutory powers in arriving at the decision contained in the letter dated the 4th November 2016.
- b) Whether the Applicants have made a reasonable case for the Judicial review orders sought to be issued.
- c) Who pays the costs.

6. The Court has carefully considered the motion, grounds on the Applicant's statement, verifying affidavit, grounds of opposition by the Interested Party, written submissions by both Counsel and come to the following determinations;

a) That indeed the reading of **Article 67 (2) of the Constitution 2010**, and **Section 14 of the National Land Commission Act No. 5 of 2012** leaves no doubt that as of 4th November 2016, when the 1st Respondent made the decisions subject matter of these proceedings, it had the power, authority or jurisdiction to **"review all grants or dispositions of Public Land to establish their propriety and legality."** [See **Section 14 (1) of the National Land Commission Act**]. That in carrying out that mandate, the 1st Respondent is obligated by **Section 14 (8)** of the said Act to be guided by the principles set out under **Article 47 of the Constitution** which provide as follows:

"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 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."

That Parliament has since enacted the fair Administrative Action Act No. 4 of 2015 and Section 7 (2) (a) (v) thereof, Section 8 and 9 of the Law Reform Act Chapter 26 Laws of Kenya, Order 53 of Civil Procedure Rules plus Article 22 and 23 (3) (f) of the Constitution 2010 empowers this Court to exercise supervisory Jurisdiction over subordinate Courts, interior tribunals and other quasi –judicial authorities through examining their fidelity to the law in their decision making processes. The 1st Respondent, in its role under Section 14 of the National Land Commission Act, is that of a quasi-judicial authority and the decisions made thereof are subject to the court's supervisory jurisdiction through judicial review proceedings.

b) That the Applicants' deposition that they are the registered proprietors of Kisumu Municipality/Block 6/608 to 613 has not been rebutted and or challenged. The Applicants have annexed to the verifying affidavit copies of the certificates of leases for the said parcels showing that they were registered as proprietors of the said parcels on the dates shown herein below;

PARCLE NO.:	DATE OF REGISTRATION	DATE OF ISSUE
608	4 TH APRIL 2014	9 TH APRIL 2014
609	4 TH APRIL 2014	9 TH APRIL 2014
610	20 TH DECEMBER 2013	20 TH DEC 2013
611	20 TH DECEMBER 2013	20 TH DEC 2013
612	19 TH NOVEMBER 2013	19 TH NOV.2013
613	19 TH NOVEMBER 2013	19 TH NOV. 2013

That the failure by the Respondents to controvert the fact of registration of the said parcels, and their proprietorship leads the court to conclude that their assertion is indeed true. That accordingly, the 1st respondent was obligated by **Articles 47 and 50 of the Constitution, Section 14 (3) of the National Land Commission Act and Section 7 of the Fair Administrative** , to notify the Applicants, as the persons registered with the suit properties, of the Interested Party's claim and complaints, giving them notice of the date set for the hearing and to afford them an opportunity to present their documents and or be heard before making a decision that has the effect of divesting them of their interest over the said parcels. That the Applicants have deponed that they were not notified of the Interested Party's claim over the suit

properties. That further they were neither invited to the review hearing nor afforded an opportunity to be heard before the 1st Respondent made the decision conveyed to their development firm, Gokul Dham Residency, among others, vide the letter dated the 4th November 2016.

c) That these proceedings are not about the merit or otherwise of the decision made by the 1st Respondent vide the letter dated the 4th November 2016, but about whether the legal processes prescribed by the Constitution and statutes were followed in arriving at that findings. That the finding in (b) above clearly shows that the 1st Respondent failed to notify the Applicants, as the persons registered with the parcels claimed by the Interested Party, of the complaint and to give them an opportunity to present their case. The claim by the Interested Party's Counsel from the bar through their submission that the Applicants were notified and failed to attend the review hearing, is merely an allegation as no documentary evidence was availed. That further, the 1st Respondent did not file any affidavit or documents to dispute or rebut the Applicants' deposition that they were neither notified nor given an opportunity to be heard. That therefore the 1st respondent decision in respect of the suit properties contained in the letter dated 4th November 2016, having been arrived at in contravention of **Article 47, and 50 of the Constitution, and Sections 14 (3) of the National Land Commission** cannot be allowed to stand.

d) That the deposition by the Applicants that there was an earlier attempt by the 2nd Respondent to recall and cancel or revoke the allocation and registration of the land parcels Kisumu Municipality/Block 6/548 and 549, which are the original plots from where the suit properties emanated from, was quashed through Kisumu High Court Civil Application No. 285 of 2004, in which the 2nd Respondent and the Commissioner of Lands, who is the predecessor to the 1st respondent, has not been challenged by the Respondents. The Applicants contention and deposition that the decision made thereof has not been reviewed and or appealed against has also not been challenged. That while decisions made by the courts in the exercise of judicial review jurisdiction do not usually deal with the merit or lack of merit of the decisions thereof but the processes, the fact that a previous attempt by the 2nd Respondent to revoke or cancel the mother titles, from whence the suit properties traces their origins from was stopped in 2005 by the High Court, which then was the court with competent jurisdiction, as it was pre-2010 Constitution and the 1st respondent predecessor was a party to the proceedings, should have raised a red light to the Respondents so as consider approaching the matter in a different way, say an appeal out of time of the said High Court decision or a Constitutional Petition or Civil Suit through the court. That to do as the 1st Respondent did vide their letter dated 4th November 2016 would amount to a contravention of **Section 15 (3) (b) of the National Land Commission** and is ultra vires its powers.

e) That as the Interested Party is a Public Institution and the Respondents did not participate in the hearing, each party do bear their own costs.

7. That flowing from the foregoing, the court finds merit in the Applicants' notice of motion dated the 15th February 2017 and filed on the 16th February 2017. The said application is allowed in terms of prayers 1 and 2 with each party bearing their own costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 26TH OF JUNE 2019

In the presence of:

Ex-parte applicants	Absent
Respondents	Absent
Interested Party	Absent
Counsel	Mr. Ojuro for the Interested Party

Mr. Ogunda for Otieno D. for the\

Exparte Applicants.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE