



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MILIMANI

JUDICIAL REVIEW APPLICATION NO. 21 OF 2018

NELSON MWANZIA KIVUVANI.....APPLICANT

VERSUS

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

THE CHIEF LAND REGISTRAR.....2ND RESPONDENT

AND

NAIROBI COUNTY GOVERNMENT.....INTERESTED PARTY

JUDGMENT

INTRODUCTION

1. The Ex-parte Applicant (Applicant) is the registered owner of LR No. 209/13539/211 (suit property). On the suit property lies a house which formerly belonged to Nairobi City Council the predecessor of Nairobi County Government in the estate known as Woodley Estate Nairobi. In or around 2016, the Nairobi County Government (Interested Party) complained to the National Land Commission (1st Respondent) about the manner in which the houses in the suit property were allocated to the various beneficiaries including the Applicant.

2. The 1st Respondent commenced an inquiry in accordance with its Constitutional mandate and found out that the suit property among many others had been illegally allocated. The 1st Respondent then recommended that the title to the suit property be revoked by the Chief Land Registrar (2nd Respondent). It is this decision by the 1st Respondent which prompted the Applicant to file an application for leave to commence judicial review proceeding seeking orders of certiorari and prohibition.

3. Following the grant of leave to commence judicial review proceedings on 17th April 2018, the Applicant filed the substantive motion on 11th May, 2018 in which he sought the following reliefs:-

- 1. An order of Certiorari to bring into this Honourable Court the decision of the Commission and quash it;**
- 2. An order of Certiorari to bring into this Honourable Court the decision of the Commission to investigate the title for suit property, Land reference Number 209/13539/211;**
- 3. An order of Prohibition prohibiting the Chief Land Registrar from revoking the title to Land reference Number 209/13539/211;**
- 4. An order of prohibition prohibiting the Chief Land Registrar from reverting the title to Land reference Number 209/13539/211 to the interested party.**
- 5. Costs for this application are provided for.**

Applicant's Contention

4. The Applicant contends that the process leading to the decision by the 1st Respondent was unlawful, unconstitutional and procedurally flawed. The Applicant further contends that he was not afforded an opportunity to be heard and that his title should not have been recommended for revocation as he was an innocent purchaser for value without notice of any defect in the title. The Applicant further argues that the 1st Respondent's decision was based on an undisclosed law.

Response by the 1st Respondent

5. The 1st Respondent opposed the Applicant's application through a replying affidavit sworn by Brian Ikol on 1st March, 2019. The 1st Respondent contends that its mandate stems from Article 67(1) of the Constitution and that its operations are governed by Section 14 of the National Land Commission Act. Pursuant to its mandate the 1st Respondent received a complaint from the interested party asking it to investigate the propriety of titles in respect of houses in Woodley Estate Nairobi.

6. The 1st Respondent then invited all parties affected through advertisement in the dailies and called upon them to appear for a hearing on the 15th and 16th November, 2016 at its offices. The Applicant never participated in the process of hearings despite all affected persons being informed of the hearings.

7. The 1st Respondent states that after hearing the presentations of the affected parties, it found out that the titles to the suit property and many others within Woodley Estate were unprocedurally acquired. It then published a Gazette Notice on 17th July, 2017 recommending revocation of title held by the Applicant among others. The 1st Responder further argues that protection to right to property under Article 40 of the Constitution does not extend to property which is found to have been illegally acquired.

Response by 2nd Respondent

8. The 2nd Respondent opposed the Applicant's application based on grounds of opposition filed on 13th September, 2018. The 2nd Respondent contends that the application by the Applicant was brought outside the six months statutory period provided by Order 53 of the Civil Procedure Rules. The 2nd Respondent further contends that the application by the Applicant lacks merit, is an abuse of the process of the Court and that the Applicant has no right capable of being protected as the subject matter of these proceedings is public land and private interests are subservient to public interest.

Response by the Interested Party

9. The interested party contends that the house comprised in the suit property among others were constructed by the predecessor of the interested party for purposes of renting out and was not meant to be sold out to private individuals or entities. When it was noticed that the houses at Woodley Estate had been allocated unprocedurally, the City Council passed a resolution on 14th September, 1999 revoking all the disposal of the houses at the Estate. This action was taken because there were no minutes of the Council Committee sanctioning the sale.

10. The interested party further contends that the illegal sale became a subject of criminal investigations and later was taken up by the Ethics and Anti-Corruption Commission. Some beneficiaries of the Woodley Estate Houses surrendered their titles but some did not. Those who did not surrender their titles had their titles recommended for revocation by the 2nd Respondent. The interested party therefore contends that the Applicant cannot keep title to the property which was illegally sold out.

Analysis

11. I have considered the application by the Applicant and the opposition thereto by the Respondents as well as the interested party. I have also considered the submissions filed by the parties herein. The only issues which emerge for determination are whether the 1st Respondent followed the required procedure in recommending revocation of title to the suit property and if the Applicant herein was an innocent purchaser for value without notice.

12. The position in law is that judicial review proceedings are concerned about the process leading to the decision being impugned. It is never concerned with the merits of the decision. In the instant case, the 1st Respondent is mandated under Section 14 of the National Land Commission Act to review all grants to establish how public land was converted into private land. It is not contested that Woodley Estate where the suit property lies belonged to the Nairobi City Council the predecessor of the 2nd Respondent. Those houses were built for rental purposes.

13. The houses were allocated to individuals and entities in the 1990's. One of the beneficiaries of the houses was the Applicant. Later in the 1990's the City Council revoked the sale which was carried out by the town clerk and mayor. The sale became a subject of criminal investigations and later the Ethics and Anti-Corruption Commission took up the matter and filed civil proceedings for the recovery. When a complaint was made by the County Government of Nairobi to the 1st Respondent, the 1st Respondent published in the dailies calling affected persons to go for hearings at its offices.

14. The hearings were conducted on 15th and 16th November, 2016. The Applicant did not attend those hearings. The 1st Respondent made a determination in which it resolved that the houses including the suit property were unprocedurally acquired. The 1st Respondent directed the 2nd Respondent to revoke the titles to the affected properties including the suit property. The determination by 1st Respondent was published in the Gazette Notice of 17th July, 2017. The Applicant had been given opportunity to go and present his documents during the hearing of 15th and 16th November, 2016. If the Applicant chose not to attend, he cannot blame the 1st Respondent for not affording him an opportunity to be heard.

15. The 1st Respondent followed all the procedures provided for in the law in arriving at the decision it reached. The process leading to the decision was procedurally fair. The process was based on the law which governs the operations of the 1st Respondent. The 1st Respondent never exceeded its jurisdiction. The Applicant cannot therefore argue that he was not afforded an opportunity to be heard and that the process leading to the decision was based on an undisclosed law and was procedurally unfair.

16. What an Applicant needs to do to succeed in application for judicial review was succinctly stated in the case of Pastoli Vs Kabale District Local Government Council & Others [2008] 2EA 300, where it was held as follows:-

“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety... Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards”.

17. Section 14(7) of the National Land Commission Act provides that no title of a registered owner can be revoked where it is shown that the title holder was a bonafide purchaser for value without notice of any defect in title. In the instant case, the Applicant was aware or ought to have known that Woodley Estate Houses belonged to the City Council of Nairobi and were not available for sale to individuals or companies. The grant in favour of the Applicant was presented to the Lands office for registration on 14th September, 1999. This is the very day there was a publication in the local dailies communicating the cancellation of the sale of the Woodley Estate Houses. There was a public uproar against the sale of the Woodley Houses. The Applicant cannot claim that he was not aware of this fact.

18. The then Minister for Local Government had ordered commencement of recovery of the houses which had been sold out. There was no resolution by the City Council to sell the houses. The issue of sale was subject of criminal investigations and later a subject of investigation by Ethics and Anti-corruption Commission. The Applicant cannot therefore claim to be an innocent purchaser for value as to come under the protection of Section 14(7) of the National Land Commission Act.

Conclusion

19. It is clear that the Applicant was given an opportunity to present his case before the 1st Respondent but he did not do so. I have demonstrated that the Applicant was not an innocent purchaser without notice of defect in the title. This being the case, the Applicant cannot shelter under the provisions of Section 14 (7) of the National Land Commission Act. I therefore find that the Applicant's notice of motion dated 11th May, 2018 lacks merit. The same is hereby dismissed with costs to the Respondents and the interested party.

Dated, Signed and delivered at Nairobi on this 18th day of June, 2019.

E.O.OBAGA

JUDGE

In the presence of Mr. Kamau for 2nd Respondent and Mr. Kuloba for M/s Wambua for Applicant

Court Assistant Hilda