



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MILIMANI

ELC PETITION NO. 28 OF 2017

IN THE MATTER OF INFRINGEMENT & THE CONTRAVENTION OF FUNDAMENTAL RIGHTS & FREEDOM UNDER ARTICLE 22,23,24,27(1) & (2), 40,47,(1) & (2),50,62,64,67(2) & 259 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE REGISTRATION OF TITLES ACT, CAP 281 (NOW REPEALED) SECTION 23

AND

IN THE MATTER OF LAND REGISTRATION ACT, 2010, SECTION 26 & 80

AND

THE IRREGULAR GAZETTE NOTICE PUBLISHED AS KENYA GAZETTE NOTICE NO 9742 BY THE NATIONAL LAND COMMISSION ON 25TH NOVEMBER, 2016

AND

IN THE MATTER OF TITLE FOR LAND REGISTRATION NO.122/7 IN THE NAME OF SIMON KOMONDO THEURI

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE RULES,

2010

BETWEEN

SAMUEL KIMONDO THEURI.....PETITIONER

AND

DR. MOHAMMED SWAZURI.....1ST RESPONDENT

THE NATIONAL LAND COMMISSION.....2ND RESPONDENT

RUIRU SPORTS CLUB.....INTERSTED PARTY

JUDGMENT

Background

1. The Petitioner filed a Constitutional Petition on 9th June, 2017 in which he sought the following reliefs:-

1. A Declaration that the Gazette Notice No. 9742 relating to Land Reference 122/7 was in breach of Articles 40 (3) and 47 (1) & (2) of the Kenya Constitution thus unconstitutional and null and void ab initio.

2. An order of judicial review in the nature of certiorari to bring into this Honourable Court the decision by the Respondents dated 22nd August, 2016 in the matter of LR No. 122/4 and LR No. 122/7 Ruiru Sports Club and Samuel Kimondo Theuri for the purposes of being quashed.

3. An order of judicial review in the nature of certiorari to bring into this Honourable Court for purposes of quashing the 1st Respondent's Gazette Notice Number 9742 made on 23rd August, 2016 or on such other date and published on 25th November, 2016 in the Kenya Gazette, purporting to make corrections to Kenya Gazette Notices Numbers 6034 and 6035 of 2008 and effectively revoking the Petitioner's right to compensation for land compulsorily acquired by the Government for the construction of the Nairobi-Thika Highway over title LR. No. 122/7, Ruiru in the Republic of Kenya for being in breach of the Constitution and the law and in particular Articles 24, 40, 47, 50 and 67 (2) of the Constitution and further for being ultra vires the powers of the National Land Commission the decision by the Respondents dated 22nd August, 2016 in the matter of LR No. 122/4 and LR No. 122/7 Ruiru Sports Club and Samuel Kimondo Theuri for the purposes of being quashed.

4. A permanent order be and are hereby issued by way of an injunction restraining the Respondents by themselves, or anyone of them, their agents, servants or otherwise howsoever from processing payment to the Interested Party to account of compensation or other consideration of any kind whatsoever from the Government of Kenya for any land acquired out of the said LR No. 122/7 or any part thereof for the Nairobi-Thika Road project.

5. A permanent order be and are hereby issued by way of an injunction restraining the Interested Party by themselves, or anyone of them, their agents, servants or otherwise howsoever from receiving compensation or other consideration of any kind whatsoever from the Government of Kenya for any land acquired out of the said LR No. 122/7 or any part thereof for the Nairobi-Thika Road project.

6. This Honourable Court be pleased to issue any such further orders it may deem fit and convenient to grant in the circumstances of this case.

7. The Petitioners be at liberty to apply for any further orders and/or directions as this Honourable Court may deem just and fit to grant.

8. Costs of this petition and interest thereon be awarded to the Petitioner.

9. Any other/further order or relief that this Honourable Court may deem fits to grant.

2. Prior to the revocation of LR No. 122/7 (suit property) by the National Land Commission (NLC) the Petitioner was the registered owner of the same having purchased the same from Isaac Karuri Nyong'o and Peter Miringu Kiburi who have since died. The suit property comprised about 30 acres. During the construction of Thika Super Highway, fifteen (15) acres of the suit property were compulsorily acquired for the expansion of the Thika Super Highway.

3. The Petitioner had subdivided the suit property into several plots which he had sold to third parties some of whom had constructed on their respective portions. The total compensation award for the acquired portion was Kshs.71,486,990/=. Before the compensation amount could be paid to the Petitioner, the interested party Ruiru Sports Club (the club) filed Nairobi HCCC No. 2127 of 2007 in which it named the Petitioner as the 3rd Defendant and those who had sold him the suit property as 1st and 2nd Defendants. The club contended that the suit property had been unlawfully excised from their land known as LR 122/4 which comprised about 245.5 acres. The club obtained an injunction restraining the payment of compensation to the Petitioner.

4. As the aforementioned suit was pending, the club made a complaint to NLC which prompted NLC to undertake a review of how the Petitioner obtained title to the suit property. The NLC convened an inquiry whereby it was established that those who sold the land to the Petitioner had acquired it unlawfully from part of the club's land. The NLC directed the Kenya National Highways Authority (KENHA) to degazette the acquisition which had been done in favour of the Petitioner and in place thereof gazette acquisition in favour of the club. The NLC also directed that the title held by the Petitioner in respect of the suit property together with any resultant subdivisions be cancelled and revoked.

5. The acquisition of the suit property had been gazetted Vide Gazette Notice Nos 6034 and 6035 of 11th July, 2008. After the suit property was found to have been unlawfully excised from the club's land, the NLC published Gazette Notice No. 9742 of 25th November, 2016 in which the Petitioner's name was deleted from the notice and in place thereof that of the club was published as the land owner. This effectively meant that compensation was to be paid to the club in respect of LR 122/4 from which the said property had been unlawfully excised.

Petitioner's Case

6. The Petitioner contends that the NLC's action of recommending revocation of his title to the suit property and the deletion of his name as the one entitled to compensation and substitution of the same with that of the club was contrary to his rights under Article 40(b) and 47 (1) and (2) of the Constitution. The Petitioner further contends that he was not afforded an opportunity to be heard before the drastic step was taken and that the decision was made hastily to favour the club.

7. The Petitioner argues that Nairobi HCCC No. 2127 of 2007 has remained unprosecuted by the club and that he only came to learn in 2017 that the NLC had purported to publish Gazette notice which deleted his name and replaced it with that of the club. He argues that this was a conspiracy between the club and NLC to deprive him of his due compensation.

First and Second Respondents Case

8. The first and the second Interested Parties opposed the petition through grounds of opposition filed on 30th October 2017, in which they contend that NLC has jurisdiction to review the legality of grants and dispositions of public lands; that the issues raised in the petition fall within the exclusive jurisdiction of the Environment and Land Court; that the power of the state to exercise eminent domain is only subject to Article 40 of the Constitution and the provisions of the Land Act; that the provisions of the Land Act give power to NLC to gazette property for compulsory acquisition and can also degazette the same; that the proceedings by the Petitioner were filed outside the statutory period and that the petition is scandalous, frivolous, vexatious and abuse of the process of the Court.

The Interested Party's Case

9. The club opposed the Petitioner's petition through a Replying Affidavit sworn by Gabriel Muthwale on 15th October, 2018. The club contends that the Petitioner is not the registered owner of the suit property the same having been found to have been unlawfully acquired out of its land and the title held by the Petitioner revoked. The club states that contrary to the Petitioner's allegations that Nairobi HCCC No.2127 of 2007 was filed after he had applied for compensation, the truth of the matter is that the suit was filed in 2007 before the issue of compensation arose; that the Petitioner had deliberately annexed an amended plaint without disclosing that there was an original plaint which had been filed where he was not a party and that he was only brought in when it turned out that the original defendants had sold the suit property to him and that he was about to be compensated for the acquired land.

10. The club further argues that the Petitioner was represented during the inquiry into how title to the suit property was acquired and he cannot therefore argue that he was condemned unheard.

Analysis and Issues for Determination

11. I have carefully considered the Petitioner's case as well as the opposition thereto by the club and the first and second Interested Parties. I have also considered the submissions filed by the Petitioner, the club as well as the first and second Interested Parties. The issues which emerge for determination in this petition are firstly whether the NLC had jurisdiction to undertake a review of the grant in respect of the suit property. Secondly whether the constitutional rights of the Petitioner were violated. Thirdly whether the decision by the NLC which culminated in the Gazette Notice No. 9742 of 25th November, 2016 should be brought to this Court for quashing. Fourthly whether the Petitioner is entitled to injunctive orders and lastly what order should be made on costs.

Whether NLC had jurisdiction to review grant in respect of the suit property.

12. The review of grant in respect of the suit property and LR No. 122/4 was undertaken in February, 2016. This was after advertisements in the local press calling upon the parties interested to attend the hearings. As at this time of review, the suit property had already been acquired and Thika Super Highway had already been completed. The suit property had therefore become public land and the NLC was within its mandate to inquire as to the rightful owner for purposes of processing compensation. Even if the issue of ownership of the suit property had arisen before the acquisition, still NLC had jurisdiction to inquire into how the land which was initially public land before being allocated to the club ended up being registered in the names of the two deceased persons who finally transferred it to the Petitioner. In this regard I agree with the finding of the Court in **Republic –Vs- National Land Commission Ex-parte Holbron Properties Limited [2016]eKLR** where it was held as follows:-

“Although the Constitution has defined private land to consist land registered under any freehold or leasehold tenure, and whereas Section 14 (1) of the National Land Commission Act gives the Respondent the powers to review all grants or disposition of public land, it follows that such a review can only entail land that has been converted from public land to private land.

I say so because the Respondent cannot review what is still, according to the records, public land. One must have acquired land that was initially public land and issued with a title document, either as a freehold or leasehold, for a review to be done.

It is therefore not true that once land falls under the purview of the definition of “private land”, the same cannot be reviewed. Indeed, it is only such parcels of land that can be reviewed by the Respondent with a view of recommending to the Registrar to revoke the title.”

The Petitioner cannot therefore argue that the NLC had no jurisdiction to deal with the suit property. I therefore find that NLC had jurisdiction to inquire into the ownership of the suit property and as to how the Petitioner became the registered owner.

Whether the Constitutional rights of the Petitioner were violated

13. The Petitioner alleges that his rights under Article 40 (3) and Article 47 (1) and (2) of the Constitution were violated. Article 40 (3) provides as follows:-

“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.”

14. The NLC is a creature of the Constitution which is governed by the National Land Commission Act as well as the provisions of the Constitution. The NLC under the Land Act is the commission mandated to undertake compulsory acquisition on behalf of the requesting entities. When it was brought to its attention that compensation was about to be given to a person whose title was questionable, it carried out an inquiry where it was found that the title to the suit property had been unlawfully excised from the land held by the club. The NLC recommended that the name of the Petitioner be deleted from the Gazette notice and in place thereof that of the club be put in place. The reasons for this action are clearly captured in the determination by NLC dated 22nd August, 2016. The Petitioner cannot therefore argue that his rights to compensation were violated. The suit property was found to have been unlawfully acquired by the persons who sold it to the Petitioner. The Petitioner could not be saved by Section 14(7) which provides that no revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title. This is because, the NLC found that the Petitioner was aware of the cases pending in Court touching on the validity to the claim of the land by the vendors but he decided to go ahead to purchase the same.

15. Article 47 (1) and (2) of the Constitution provides as follows:-

“(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 Constitution of Kenya, 2010 33 likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

16. The Petitioner claims that his rights under Article 47 (1) and (2) were violated. The Petitioner claims that he was not involved in the proceedings which resulted in the deletion of his name from the Gazette which had published his name as the one who was to benefit from compensation arising out of acquisition of the suit property. Contrary to the Petitioner’s claim, the determination by NLC shows that he was represented by an Advocate called Stephen Gachie. There is therefore no basis upon which the Petitioner can claim that he was not subjected to a process which was fair. I therefore find that there was no violation of the Petitioner’s rights under Article 47 (1) and (2) of the Constitution.

Whether the decision of the NLC which culminated in the Gazette notice No. 9742 of 25th November, 2016 should be quashed.

17. The Petitioner’s contention is that he was not involved in the process leading to the gazette notice of 25th November, 2016. As has been demonstrated hereinabove, the Petitioner was represented by his lawyer Mr. Stephen Gachie. There is no way he can therefore turn round and claim that he was not involved. The Petitioner was afforded a hearing. The decision which was arrived by the NLC was logical. The decision was never irrational as to call for its quashing. The Court in considering the issue being raised by the Petitioner is only concerned with the decision making process which in my view was fair. The decision was arrived at through logical reasoning. I therefore find that the decision by NLC to delete the name of the Petitioner and replacing it with that of the club cannot be quashed.

Whether the Petitioner is entitled to injunctive orders as prayed.

18. The Petitioner is seeking injunction to restrain the NLC and its chairman from processing compensation in favour of the club and for orders restraining the club from receiving compensation. It is clear from the analysis hereinabove that a finding has been made that the suit property had been unlawfully excised from the club’s land. The club has already been gazetted as the owner of the suit property. There is therefore no basis upon which the NLC and its chairman can be restrained from processing compensation or the club from receiving the compensation. It is clear from the verdict by NLC that the suit property was obtained by the vendors who sold it to the Petitioner in a fraudulent manner. The Petitioner was aware of the litigations which were pending in Court touching on the validity of title which he held. There is no injunction which can be issued in the circumstances.

CONCLUSION

19. It is now clear from the above analysis that the Petitioner’s petition has no merits. The same is hereby dismissed with costs to the Respondents and the Interested Party.

Dated, Signed and Delivered at **Nairobi** on this 26th day of **August, 2019.**

E.O.OBAGA

JUDGE

Judgement delivered in the absence of parties who were duly notified.

E.O.OBAGA

JUDGE

26/8/2019