



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CONST. PETITION NO. 8 OF 2018**

**SHAZMEER ENTERPRISES LIMITED.....PETITIONER**

**VERSUS**

**THE NATIONAL LAND COMMISSIONER.....RESPONDENT**

**JUDGMENT**

1. This petition was filed on 23<sup>rd</sup> April 2018. The Petitioner seeks the following Orders:

**a. A declaration that the notice published in the Star Newspaper of 23<sup>rd</sup> January, 2018 by the Respondent to require the Petitioners to vacate the properties being MOMBASA/MAINLAND SOUTH/BLOCK I/1829 and MOMBASA/MS/BLOCK I/1674 is invalid, null and void *ab initio*, unlawful and/or *ultra vires* the powers of the Respondent and therefore is of no purpose or effect.**

**b. A declaration that the determination by the Respondent that the Petitioner is in illegal and/or unlawful occupation of the properties namely: MOMBASA/MAINLAND SOUTH/BLOCK I/1829 and MOMBASA/MS/BLOCK I/1674 as contained in the notice published in the Star Newspaper of 23<sup>rd</sup> January, 2018 by the Respondent to require the Petitioner to vacate the properties being MOMBASA/MAINLAND SOUTH/BLOCK I/1829 and MOMBASA/MS/BLOCK I/1674 is null and void *ab initio*, unlawful and/or *ultra vires* the powers of the Respondent and therefore of no purpose or effect.**

**c. An order of Certiorari to remove into the Environment & Land Court for the purposes of quashing the notice published in the Star Newspaper of 23<sup>rd</sup> January, 2018 by the Respondent to require the Petitioners to vacate the properties being MOMBASA/MAINLAND SOUTH/BLOCK I/1829 and MOMBASA/MS/BLOCK I/1674.**

**d. A permanent injunction to restrain the Respondent whether by itself or through its agents, employees, servants or otherwise howsoever from evicting the Petitioner from or otherwise interfering with the Petitioner's ownership, possession and quiet enjoyment of the properties, namely, MOMBASA/MAINLAND SOUTH/BLOCK I/1829 and MOMBASA/MS/BLOCK I/1674.**

**e. Compensatory damages for the breach of the Petitioner's constitutional and statutory rights.**

**f. Costs.**

2. The Petition was supported by the facts set out in the petition and the affidavit of Benjamin Kingori sworn on 23<sup>rd</sup> April 2018. The Petitioner's case in a nutshell is that at all material times to this suit, the Petitioner was and is still the registered leasehold owner of all that parcels of land known MOMBASA/MAINLAND SOUTH/BLOCK I/1829 and MOMBASA/MS/BLOCK I/1674 (hereinafter referred to as the "suit properties") and that it is entitled to possession and occupation thereof. The Petitioner avers that by a Notice of published in the Star Newspaper of 23<sup>rd</sup> January, 2018 the Respondent notified the public in general and the Petitioner in particular that they required the Petitioner as owner and/or occupier of the suit properties to vacate the same within 90 days failing which the Petitioner shall be evicted in accordance with relevant laws. The Petitioner further avers that the demand contained in the said notice was made on the purported basis that the Petitioner's occupation of the suit properties is "illegal" and is interfering with the safe navigation of Kenyan waters by vessels thereby threatening marine safety and operations because the Respondent has confirmed that the suit properties are occupying and interfering with ship navigation aids leading in and out of the port of Kilindini, Mombasa. That the notice further discloses that the Respondent came to the aforesaid conclusion after it toured and inspected the properties upon receipt of complaints allegedly received from the Kenya Maritime Authority.

3. The Petitioner avers that prior to the date of publication of the Notice, the Petitioner had received no communication, whether from the

Respondent or from the Kenya Maritime Authority with regard to its ownership and occupation of the suit properties. That neither the Respondent nor the Kenya Maritime Authority have revealed to the Petitioner the nature and substance of the complaint made in respect of the properties. The Petitioner avers that the Respondent did not give the Petitioner any prior notice of its intention to visit, tour and inspect the properties as stated in the notice nor did the Respondent give the Petitioner the option or opportunity to have a representative present during such tours and inspection, nor did the Respondent give the Petitioner any or any reasonable opportunity to be heard before the Respondent arrived at the determination that the Petitioner is in illegal and/or unlawful occupation of the properties. The Petitioner states that the Respondent has not provided to the Petitioner, in writing, the basis or reasoning on which it has arrived at the determination that the Petitioner is in illegal and/or unlawful occupation of the suit properties.

4. The Petitioner contends that the Respondent's functions and powers under the constitution and the National Land Commission Act are clearly limited to public land as defined in Article 62 of the Constitution and do not extend to the properties which fall within the category of private land as defined in Article 64 of the Constitution. The Petitioner further contended that the Respondent's powers under Section 14 of the National Land Commission Act to review grants and dispositions of public land, which were granted pursuant to Article 68 (c)(v) of the Constitution, were only available to be exercised by the Respondent for a period of 5 years from the commencement of the National Land Commission Act, which period has expired since 2<sup>nd</sup> May 2017. The Petitioner averred that the Respondent has failed to comply with the procedure set out in Section 14 of the National Land Commission Act before determining that the Petitioner's occupation of the properties is illegal and/or unlawful. The Petitioner also averred that in the notice, the Respondent has referred to Section 11 and 12 (2) of the Land Act, 2012, which are not applicable in respect of the properties and do not, in any manner, confer on the Respondent any right or power to evict the Respondent from the properties. It was also the Petitioner's contention that being a registered proprietor of the suit properties and such proprietorship or registration not having been challenged or revoked by or pursuant to any lawful authority, the Respondent has not right or power, whether under Section 155 of the Land Act or otherwise, to determine that the Petitioner is illegally or unlawfully in occupation of the properties or to evict the Petitioner therefrom.

5. The Petitioner contended that the Respondent has no authority, power or jurisdiction either under the constitution of Kenya or the National Land Commission Act and/or any other law to evict the Petitioners from the suit properties without affording it an opportunity to be heard in the manner threatened in the notice. The petition also contended that the eviction of the Petitioner from the suit properties will be denying the Petitioner the right to occupy the properties of which it is the registered owner and will thereby constitute a violation of the Petitioner's right to own property as guaranteed by Article 40(1) of the Constitution and the Petitioner's right to be free from arbitrary deprivation of property without compensation or recourse to the law pursuant to Article 40(3) of the Constitution. It was also the Petitioner's contention that the Respondent's failure to disclose the nature and substance of the complaints, to give prior notice to the Petitioner before making inspections to give the Petitioner a reasonable opportunity to be heard and to provide written reasons for arriving at its determination are a violation of the Petitioner's right to fair administrative action under Article 47 and a violation of the Petitioner's right to a fair hearing under Article 50 of the Constitution.

6. In opposing the petition, the Respondent filed Grounds of Opposition dated 11<sup>th</sup> July 2018 on the following grounds:

- 1. The Petitioner has omitted to frame its case with reasonable precision as required under the High Court's pronouncement in the case of Anarita Karimi Njeru –v- The Republic (1976 – 1980) KLR 1272. The petition fails the requirement as it does not state the alleged constitutional provisions violated by the 3<sup>rd</sup> (sic) Respondent and the acts or omissions complained of with reasonable precision.**
- 2. That the petition is scandalous, frivolous, and vexatious and abuse of the court's process.**
- 3. That the Respondent has jurisdiction to issue notice to vacate unlawfully occupied public land.**
- 4. That the right to ownership of property does not extend to property found to have been unlawfully acquired.**
- 5. That public interest, good government, maritime and public safety, sway in favour of the notice issued by the Respondent.**

7. In their submissions filed on 10/1/18, the Petitioner submitted that the notice issued by the Respondent is null and void *ab initio* on the grounds that the Respondent does not have the jurisdiction or powers, whether under the constitution or under any statute, to make the decision contained in the notice and specifically the determination that the Petitioner's occupation of the properties is illegal or unlawful; that even if the Respondent does have such powers, they have not exercised the powers in accordance with the procedure laid down in the constitution or by statute or in accordance with a fair procedure; and that the decision made by the Respondent violates the Petitioner's fundamental rights and freedoms protected by Articles 40, 47 and 50 of the Constitution.

8. While relying on the case of **Krystalline Salt Limited –v- The National Land Commission (2016)eKLR**, the Petitioner submitted that the Respondent, which is established by Article 67 of the constitution and whose functions are set out in Article 67(2), does not have any authority or power in respect of private land as defined by the constitution and which category the properties fall under. That under Section 6 of the National Land Commission Act, the Respondent does not have any power to decide, determine or declare that the ownership and/or occupation of a specific parcel of land by a registered proprietor is illegal or unlawful nor any powers to arbitrarily restrict or deny a registered proprietor from using or otherwise developing its land. While admitting that Section 14 of the NLC Act gave the Respondent the power to review grants and dispositions subject to Section 68 (c)(v) of the constitution, the Petitioner submitted that this power was only available to be exercised by the Respondent within five years of the commencement of the NLC Act which was assented to on 27<sup>th</sup> April, 2012. It was submitted that the Respondent has not shown that any such review was completed before 2<sup>nd</sup> May 2017 since no prior notices were issued to the Petitioner. It was the Petitioner's submission that the Respondent's decision is made without jurisdiction and is *ultra vires* and that it should be quashed.

9. The Petitioner submitted that the Respondent's jurisdiction under Section 14 of the NLC Act is limited to carrying out a review of the grant and disposition of public land i.e. the process by which the public land was allotted or granted to the registered proprietor and that the power has to be exercised in accordance with the express procedure laid down in section 14 of the NLC Act as well as the rules of natural

justice. The Petitioner further submitted that the failure on the part of the Respondent to issue a notice to the Petitioner of the intended exercise of its powers under Section 14 of the NLC Act and to give the Petitioner of the intended exercise of its powers under Section 14 of the NLC Act and to give the Petitioner an opportunity to be heard constitutes a flagrant breach of the principles of natural justice as well as the provisions of the NLC Act applicable to the exercise of the Respondent's power under Section 14. The Respondent relied on the case of **Sceneries Limited –v- The National Land Commission (2017) eKLR; Republic –v- National Land Commission and 3 Others ex-parte Vivo Energy Kenya Limited (Formerly B.P. Kenya Limited)(2015)eKLR; Republic –v- National Land Commission & Tropical Treasure Limited ex parte Krystalline Salt Limited (2015)eKLR; and Robert Mutiso Lelli and Cabin Crew Investments Ltd-v- National Land Commission & 3 Others (2017)eKLR.**

10. It was the Petitioner's submission that the Respondent's decision contained in the Notice infringes upon or violates the Petitioner's fundamental rights as protected by the constitution, specifically the rights under Articles 40, 47 and 50. The Petitioner relied on the case of **Japeth Asegele –v- Chief Land Registrar and 3 Others (2018) eKLR** where the court held that the burden of proof is on the Respondent's to show that the deprivation of property or any right or interest in property was carried out in accordance with the constitution or an Act of Parliament. The Petitioner also relied on the case of **Petrol Oil Kenya Limited –v- Kenya Urban Roads Authority (2018)eKLR; Kenya Re-insurance Corporation –v- National Land Commission (2018)eKLR; Isaiah Otiato & 6 Others –v- County Government of Vihiga (2018)eKLR and Isaac Fula Siaka –v- County Government of Kakamega & 2 Others (2018)eKLR.**

11. The Petitioner submitted that it has demonstrated that the Notice by the Respondent was issued without regard to the express provisions of the NLC Act and the rules of natural justice and is an infringement upon or violation of the Petitioner's rights guaranteed under the constitution, and that the impugned notice therefore cannot be allowed to stand and should be invalidated. On the prayer for an order of certiorari, the Petitioner relied on the case of **Sceneries Limited –v- The National Land Commission (supra)** and submitted that the decision was made without jurisdiction, in violation of express procedural requirements as well as the rules of natural justice and in violation of the Petitioner's fundamental rights protected by the constitution. Regarding the prayer for a permanent injunction, it was submitted that the Petitioner has overwhelmingly demonstrated that the Respondent has acted without jurisdiction and is in flagrant breach of the provisions of the Act, the rules of natural justice and the Petitioner's constitutional rights, and that without the power to make the decisions contained in the notice, the Respondent cannot purport to make the same decision all over again, even if it were to follow all the applicable procedures and requirements laid down by statute and the constitution. The Petitioner prayed that the petition herein be allowed with costs.

12. The Respondent filed its written submissions on 2<sup>nd</sup> May, 2019. The Respondent submitted that notice was given to the Petitioner to vacate the suit properties within 90 days since the occupation of the suit properties by the Petitioner was deemed to be illegal and interfering with the safe navigation of Kenya Waters by vessels, thereby threatening marine safety and operations. The Respondent further submitted that the notice in question was issued pursuant to the provisions of Section 152A, 152B and 152C of the Land Act and adhered to the mandatory period of three (3) months. That section 152A of the Land Act provides that no person shall unlawfully occupy private, community or public land, while Section 152B provides that unlawful occupants on private, community or public land shall be evicted in accordance with the provisions of the Act. Section 152C on the other hand provides that "the National Land Commission shall cause a decision relating to an eviction from public land to be notified to all affected persons, in writing, by notice in the Gazette and in one newspaper with nationwide circulation and by radio announcement, in a local language, where appropriate, at least three months before the eviction". The Respondent urged the court to find that it had jurisdiction to issue the said notice.

13. Relying on the case of **Anarita Karimi Njeru –v- The Republic (1976-1980) KLR 1272 and Mumo Matemu –v- Trusted Society of Human Rights Alliance and Others, Nairobi Civil Appeal No.990 of 2012**, the Respondent submitted that the Petitioner has not, with reasonable precision, established any illegality, irrationality or procedural impropriety in the procedure followed by the Respondent as was set out by the court. That the notice issued by the Respondent related to all those properties known as MSA/1674 AND MS/MSA/1829 which are separate and distinct from the suit properties herein being MOMBASA/MAINLAND SOUTH/BLOCK I/1829 AND MOMBASA/MAINLAND SOUTH/BLOCK I/1674. It was submitted that the Petitioner has not with any reasonable precision established how its rights are likely to be affected if the notice in relation to MSA/1674 and MS/MSA/1829 remains in force, and that the declaratory orders cannot therefore issue.

14. Based on the decisions in the case of **Peninah Nadako Kilishwa –v- Independent Electoral Boundaries Commission (IEBC) and 2 Others (2015)eKLR; Municipal Council of Mombasa –v- Republic & Umoja Consultants Ltd Civil Appeal No.185 of 2001; Pastoli –v- Kabali District Local Government Council & Other (2008)2 EA 300-301 and Kenya National Examination Council –v- Republic Ex Parte Geoffrey Gathenji Njoroge & 9 Others (1997)eKLR**, the Respondent submitted that in determining whether to grant the writ of certiorari, the court should take into consideration the following legal questions: whether the Respondent had jurisdiction to issue the notice as appearing on 23<sup>rd</sup> January 2018 and whether the Respondent followed due process in issuing the notice, and submitted that having established that the Respondent had jurisdiction to issue the notice in question and followed the law as set out under Section 152 of the Land Act, then the order cannot issue. It is the Respondent's contention that the petition is bad in law and aimed at dragging the Respondent through needless litigation on frivolous, vexatious and scandalous grounds. The Respondent therefore prayed that the petition be dismissed with costs.

15. Having analyzed the pleadings and the submission filed, I pose the following questions for my determination:

- i. **Whether the Respondent had jurisdiction to issue the notice as appearing on 23<sup>rd</sup> January 2018.**
- ii. **Whether the Respondent followed due process in issuing the Notice appearing on 23<sup>rd</sup> January 2018.**

16. According to Article 67 (2)(e) and (f) of the Constitution some of the functions of the National Land Commission, the Respondent herein are:

- e) **To initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;**

**f) To monitor and have oversight responsibilities over land use planning throughout the country.**

It therefore follows that the Respondent has power either on its own motion or pursuant to complaint to initiate investigations into present or historical land injustices and to recommend appropriate redress, and also has the power to monitor and have oversight responsibilities over land use planning throughout the country.

17. Article 67(3) also empowers the Respondent to perform the any other functions prescribed by national legislation. Article 68(c) (iv) and (v) empowers parliament to enact legislation to protect, conserve and provide access to all public land and to enable the review of all grants or dispositions of public land to establish their propriety or legality. Section 3(b) of the National Land Commission Act provides that one of the objects of the Act is to provide for the operations, powers, responsibilities and additional functions of the commission pursuant to Article 67 (3) of the constitution. No doubt therefore the National Land Commission Act is the legislation contemplated under Article 67(3) of the Constitution.

18. Section 14 of the National Land Commission Act provides that:

- 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 a 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 power 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).**

19. From the above, it is therefore clear that that the commission is empowered, on its own notion or upon a complaint by the national or a county government, a community or an individual, to review all grants or dispositions of public land to establish their proprietary or legality. In this case, the Respondent, in the notice of 23<sup>rd</sup> January, 2018 indicated that it received complaints from the Kenya Maritime Authority and toured and inspected the subject sites and confirmed that the suit properties among others, are occupying and interfering with ship navigational aids leading in and out of the port of Kilindini, Mombasa. It is therefore clear that the Respondent had jurisdiction to carry out investigation and issue the impugned notice. Whereas is clear that the Respondent is empowered to carry out such investigations, the next issue to determine is whether it complied with the constitution and the law.

20. Article 47 of the constitution provides:

- 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 it 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 (10) and that 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.**

21. Article 50(1) of the Constitution provides that ‘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 of law or, if appropriate, another independent and impartial tribunal or body; while Section 4 of Fair Administrative Act provides as follows:

1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
2. Every person has the right to be given written reasons for any administrative action that is taken against him.
3. Where an administrative action is likely to adversely affect the rights or fundamental freedom of any person, the administrator shall give the person affected by the decision –
  - a. Prior and adequate notice of the nature and reason for the proposed administrative action;
  - b. An opportunity to be heard and to make representations in that regard;
  - c. Notice of a right of review or internal appeal against an administrative decision, where applicable.
  - d. Statement for reasons pursuant to Section 6
  - e. .
  - f. .
  - g. Information, materials and evidence to be relied upon in making the decision or taking the administrative action.”

22. Section 14(8) of the National Land Commissions Act provides that in the exercise of its power under that section, the commission shall be guided by the principles set out under Article 47 of the Constitution while Sections 131 and 151 of the Land Act make provision on service upon persons that may be affected by the commission’s action. Further, Section 152A of the Land Act provides that no person shall unlawfully occupy private, community or public land while Section 152B of the Land Act provides that unlawful occupants on private, community or public land shall be evicted in accordance with the provisions of the Act. Section 152C on the other hand provides as follows:

**“The National Land Commission shall cause a decision relating to an eviction from public land to be notified to all affected person, in writing, by notice in the Gazette and in on newspaper with nationwide circulation and by radio announcement, in a local language, where appropriate, at least three months before the eviction.”**

23. That the issuance of the notice published in the Star Newspaper of 23<sup>rd</sup> January 2018 was an administrative action by the Respondent is not in dispute. The Respondent was therefore under a duty to ensure that its action was expeditious, efficient, lawful, reasonable and procedurally fair. Procedural fairness necessarily requires that person who are likely to be affected by the decision be afforded an opportunity of being heard before the decision is taken. Further, in my view, the law as stated above contemplates valid notification.

24. In this case, the notice published in the newspaper on 23<sup>rd</sup> January 2018 required the Petitioner to vacate the suit properties within 90 days failure to which they should be evicted. The Act required the Respondent to publish its decision in the Kenya Gazette and make an announcement by a radio. There was no evidence that such publication and announcement were done as required by Section 152C of the Land Act. Further and more importantly, Section 14 of the National Land Commission Act require the Respondent to give the Applicant an opportunity to appear before it before arriving at the decision to evict. In my view, the Respondent failed to follow the procedure laid down in Section 14 of the National Land Commission act before arriving at the impugned decision that the Petitioner was occupying and interfering with ship navigational aids leading in and out of the port of Kilindini Mombasa and that the occupation was illegal and interfering with the safe navigation of Kenya waters. The Respondent should have given the Petitioner notice that it was either investigating or reviewing its titles and occupation of the suit properties, and give the Petitioner an opportunity to explain itself before the impugned decision was arrived at. Additionally, the newspaper advertisement did not even give reasons or the findings or results of the investigation allegedly conducted by the Respondent. The Petitioner has stated that no such findings have been supplied to it. Of course none has been filed in this court as the Respondent did not file any replying affidavit.

25. The Respondent was obliged to afford the Petitioner a hearing before it made its decision which decision was, undoubtedly bound to adversely affected the rights and interests of the Petitioner over the suit properties.

26. In the case of **Onyango Oloo –v- Attorney General (19889) EA 456**, the Court of Appeal held that:

***“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly, and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard.... There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principles of natural justice.... A decision in breach of the rules of natural justice is not cured by the holding that the decision would otherwise have been right since if the principles of natural justice is violated, it matters not that the same decision would have been arrived at.... ”***

27. It is therefore clear that where a party has not been heard, a decision made in breach of the rules of natural justice are null and void *ab initio*. There is no doubt that the Petitioner is the registered proprietor of the suit properties. Article 40 of the constitution protects the proprietary rights of the Petitioner. There is no evidence so far before this court indicating that the said properties were unlawfully acquired. The Respondent’s decision asking the Petitioner to vacate from its properties was made without jurisdiction or legal backing and therefore illegal. Moreover, the rules of natural justice were floated and the decision made without jurisdiction and all action taken pursuant thereto were null and void. My conclusion therefore is that the Petitioner’s constitutional rights have been infringed as their constitutional right to

property has been violated.

28. I am satisfied that the Petitioner has made out a case to show that its constitutional rights have been infringed. It is therefore my finding that the petition has merit and hereby allow it in terms of prayers (a), (b), (c) and (f). The prayer for compensatory damages cannot issue as the intended eviction has not taken place and the Petitioner is still in possession and occupation. It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA this 31<sup>st</sup> day of October 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Kinuthia for petitioner

No appearance for Respondent

Yumna Court Assistant

**C.K. YANO**

**JUDGE**