



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW SUIT NO.42 OF 2017

IN THE MATTER OF: AN APPLICATION BY DAKANE ABDULAHI ALI FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

AND

NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE REGISTRAR OF TITLES.....2ND RESPONDENT

BERNARD K. NJAU (Sued on his own behalf and on behalf of

Kimathi Estate Welfare Association).....3RD RESPONDENT

AND

DAKANE ABDULAHI ALI.....EX PARTE APPLICANT

JUDGEMENT

1. What is for determination before this court is the judicial review application filed by the Ex-parte Applicant pursuant to leave granted on 07/02/2018 seeking an order of certiorari to remove into this court and quash the decision of the 1st Respondent made on 12/04/2017 published in the Gazette Notice dated 17/07/2017 revoking the grant over title number L.R No. 209/19822 (“the Suit Property”). The Applicant also seeks an order to prohibit the Respondents, their officers or any other authority acting on their instructions from reviewing, revoking, evicting or from taking any action on the Suit Property in any manner that interferes with the Ex-parte Applicant’s quiet possession of the Suit Property, as well as costs of the suit.

2. The application was based on the grounds set out in the statutory statement dated 30/10/2017. The Ex-parte Applicant is aggrieved by the decision of the 1st Respondent to revoke his title over the Suit Property, and claims the decision has manifestly infringed against his constitutional rights. He also urged that the 1st Respondent had no jurisdiction to adjudicate and determine the private dispute relating to the Suit Property.

3. The application was also supported by the Ex-parte Applicant’s verifying affidavit sworn on 30/10/2017. He deponed that he is the registered owner of the Suit Property, having leased it from the City Council of Nairobi on 22/09/2005. Prior to being registered as lessee, he was granted a temporary occupation license over the Suit Property by the Nairobi City Council on 25/10/2000. He annexed a copy of the temporary occupation license. He further deponed that he has been in occupation of the Suit Property from 2005 without any interference and has been paying ground rent and rates for the land until around 17/07/2017 when he saw a Kenya Gazette Notice showing that the title to the Suit Property had been revoked. He annexed a copy of the Gazette Notice and copies of rates payment receipts. He deponed that he was never notified of any complaint in relation to his property.

4. The 1st Respondent opposed the Ex Parte Applicant’s application through the replying affidavit of Brian Ikol, its Acting Director, Legal Affairs and Enforcement sworn on 12/10/2018. Mr. Ikol deponed that the 1st Respondent received a complaint from Kimathi Welfare Association that 15 parcels of land falling within Kimathi Estate Housing Scheme which had been reserved for public purposes had been

allocated to private individuals in unclear circumstances including L.R No. 209/19822 allocated to the Ex-parte Applicant.

5. He deponed that upon receipt of the complaint, the National Land Commission (NLC) invoked its jurisdiction in line with Section 14(1) of the National Land Commission Act admitted the complaint for review of the legality of the grant of the suit land.

6. He stated that NLC invited all interested parties to a hearing on 27/11/2014 through a public notice appearing in all daily newspapers with nationwide circulation. He annexed a copy of the newspaper advertisement. He averred that the Ex-parte Applicant disregarded the notice and failed to appear for hearing. The 1st Respondent proceeded with the hearing and made a determination on 12/04/2017, a copy of which he annexed. He urged the court to dismiss the application.

7. The 2nd Respondent also opposed the Ex Parte Applicant's application and filed grounds of opposition dated 10/07/2018. The 2nd Respondent stated that the 1st Respondent's impugned decision of 12/04/2017 was made within the statutory period prescribed by statute for the review of all grants in Kenya. Additionally, that the Suit Property was reserved for public purpose which outweighs the Applicant's interest in the land, and that the Applicant did not attribute any wrongdoing to the 2nd Respondent.

8. The 3rd Respondent opposed the Ex-parte Applicants application through the affidavit of Bernard K. Njau, the Chairman of the 3rd Respondent sworn on 19/02/2019. He deponed that the Suit Property is located at Kimathi Estate which was developed by the City Council of Nairobi, in 1969/70 on land formerly known L.R No. 209/7383, which is now known as Nairobi/Block 51. He further deponed that the City Council of Nairobi did not have absolute ownership of the land which was leased from the National Government for a term of 99 years from 01/04/1954, and the issuing of titles or leases for public utility spaces to beneficiaries amounted to defrauding them since all the open spaces were to be held by the Government in trust for Kimathi residents and the public in general and were not available for allocation. He deponed that the Court of Appeal reiterated that open spaces in Kimathi estate were not open for allocation in **Civil Appeal No. 8 of 2004 - Kimathi Residents v Nairobi City Council and Another**.

9. Parties filed submissions which the court has considered. The Ex-parte Applicant submitted that the 1st Respondent's decision was unreasonable as it disregarded his right to a fair hearing and his right to property guaranteed under Article 40 of the Constitution. He further submitted that there was no evidence to show that he was served with the notice and that since the Suit Property is private land, title could only be challenged through the courts since the 1st Respondent lacked jurisdiction to handle the matter.

10. The 1st Respondent submitted that since the Suit Property is a grant of public land, which was converted from public land to private land, it fell within its jurisdiction for review to determine the legality of resultant title provided under Article 68(c) (v) and Section 14 of the National Land Commission Act. It also submitted that an order of prohibition cannot issue since NLC had jurisdiction to review the grant.

11. The 3rd Respondent submitted that the Ex-parte Applicant was aware of complaints regarding the suit land as the 3rd Respondent had lodged a complaint at the National Environment Tribunal, which found that the Ex parte Applicant was occupying a public open space which was not available for allocation.

12. In reply to submissions by the Respondents, the Ex-parte Applicant submitted that the decision of the National Environment Tribunal did not concern the acquisition of the title but only dealt with the licensed activities on the land. He further submitted that the application seeks quashing of gazette notice dated 17/7/2017 which was what notified the Ex-parte Applicant of the decision by NLC.

13. The court has considered the application, responses filed by the respondents, annexures and submissions filed by the parties. The issues for determination are firstly whether the 1st Respondent had jurisdiction to revoke the Ex-parte Applicant's title to the Suit Property and secondly, whether the court should grant the reliefs sought by the Applicant.

14. The 1st Respondent submitted that its decision was within the law and in consonance with Article 68(c) (v) of the Constitution and Section 14 of the National Land Commission Act. Article 68 (c) (v) of the Constitution empowered Parliament to enact legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality. Pursuant to this, Parliament enacted the National Land Commission Act No. 5 of 2012 (NLC Act). Section 14 of the NLC Act sets out the procedure for the review of grants and disposition of public land to establish their propriety and legality. Where under Section 15 of the Act NLC finds that the title in question was acquired in an unlawful manner, NLC directs the Registrar of Titles to revoke the title.

15. The 1st Respondent is established under Article 67 of the Constitution. Article 67 (2) (e) of the Constitution gives the functions of NLC and includes to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress. The Constitution as read together with the NLC Act only give NLC power to investigate the propriety of the acquisition of public land and recommend appropriate redress. It therefore follows that going further to make a determination to revoke title to the Suit Property as opposed to stopping at making a recommendation to the Registrar as the law mandates was beyond the 1st Respondent's ambit and is therefore illegal.

16. The orders sought by the Applicant are discretionary and the court may decline to grant the orders in appropriate cases. The 3rd Respondent relied on the Court of Appeal decision in **Civil Appeal No. 8 of 2004- Kephma Maobe & 365 Others v Benson I. Mwangi and City Council of Nairobi** which addressed the issue of the Council's allocation of the open spaces left after the development of Kimathi Estate. The 1st Respondent in the appeal had purchased one of the plots carved out of the special purposes plots from the person allotted the plot by the Council, and had moved in to fence and develop the land. The residents of Kimathi filed suit and on losing in the High Court, filed the appeal. The Court of Appeal observed that the entire parcel of land measuring 18.45 acres was given out to the Council by the Government as a grant subject to certain terms and conditions. The plan approved by the Commissioner of Lands was for the development of 365 residential units, public amenities such as a community centre, car park, shopping centre and two special purpose plots.

17. Further, the court observed as follows, “Public land is not a birthday cake for mere chopping up and distribution to favoured allottees. It is a rare commodity which is ring-fenced by Constitutional and statutory provisions and regulations to ensure environmental sustainability and inter-generational equity.” The court found that the Council did not have the *carte blanche* to use the land as it wished and that it could not alienate the special purpose plots for construction of a nuclear plant or a brewery or other environmentally untenable developments without recourse to the residents of Kimathi Estate.

18. The Applicant stated that prior to leasing the Suit Property from the City Council of Nairobi on 22/09/2005, he had been granted a temporary occupation license over the suit land by the City Council of Nairobi on 25/10/2000. Based on the finding of the Court of Appeal in **Civil Appeal No. 8 of 2004- Kepha Maobe & 365 Others v Benson I. Mwangi and City Council of Nairobi**, the Council lacked the authority to allocate the Suit Property comprising part of the open spaces in Kimathi Estate to the Applicant.

19. The 3rd Respondent contended that the Suit Property forms part of a riparian reserve and relied on the decision of the National Environmental Tribunal made in **Nairobi National Environment Tribunal Appeal No. NET/112/2013** in which the Applicant was the 3rd Respondent. The Tribunal was satisfied that the suit land formed part of the protected 30 metre riparian reserve and that the Applicant’s activities on the land were harmful to the environment.

20. In light of the contention that the suit land is the riparian reserve for Nairobi River, the court declines to grant the orders sought in the application dated 15/3/2018 whose effect would be to validate the Applicant’s title over the Suit Property which may well turn out to be public land. Each party will bear its own costs.

Dated and delivered at Nairobi this 30th day of October 2019

K.BOR

JUDGE

In the presence of: -

Charles Wambugu for the 1st Respondent

Ms. Fatma Ali for the 2nd Respondent

Mr. V. Owuor- Court Assistant

No appearance for the Applicant