



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

MISC APPLICATION 71 OF 2018

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010,

THE LAW REFORM ACT CAP 26, THE LAWS OF KENYA, THE NATIONAL LAND

COMMISSION ACT, NO. 5 OF 2012, FAIR ADMINISTRATIVE ACT, NO. 4 OF 2015

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF SECTION 14 OF THE NATIONAL LAND COMMISSION ACT NO. 5 OF 2012

AND

IN THE MATTER OF REVIEW OF TITLES L.R. NUMBER NAIROBI/BLOCK/112/166

REPUBLIC.....APPLICANT

VERSUS

THE NATIONAL LAND COMMISSION.....RESPONDENT

GEORGE MISEDA.....1ST INTERESTED PARTY

ROSE MISEDA.....2ND INTERESTED PARTY

EX PARTE: BIREN AMRITAL SHAH

JUDGEMENT

1. Through the notice of motion dated 30/10/2018 brought under Sections 8 and 9 of the Law Reform Act, Sections 3 and 3A of the Civil Procedure Act, Order 53 Rule 3 of the Civil Procedure Rules 2010; the Fair Administrative Action Act and the National Land Commission Act, the *ex parte* Applicant seeks orders of certiorari to have the decision made by the Respondent on 9/10/2017 purporting to cancel the *ex parte* Applicant's lease quashed. He also seeks an order to prohibit the Respondent from compelling him to produce documents or make representations relating to the land known as Nairobi Block/ 112/166 ("the Suit Property") and from conducting a review or holding hearings or implementing any decision or resolution from the review relating to the Suit Property. In addition, he seeks an order of mandamus to compel the Chief Land Registrar to remove the caveat registered against the *ex parte* Applicant's title pursuant to the determination made by the Respondent on 9th October 2017. The *ex parte* Applicant also seeks an order of prohibition restraining the Respondent from acting in a manner that violates the *ex parte* Applicant's right to occupation of his land or in a manner that violates the *ex parte* Applicant's rights to ownership of property guaranteed under the Constitution and an order prohibiting the Respondent from acting in relation to the *ex parte* Applicant's land in a manner that contravenes the Constitution.

2. The grounds under which the application is made are set out in the notice of motion dated 29/10/2018 together with the supporting affidavit. The *ex parte* Applicant deponed that he is the registered owner of the Suit Property situated in Runda and has a certificate of lease issued by the Ministry of Lands and Physical Planning to confirm this. He averred that he bought the Suit Property from Gregory Ngatia

Njoroge and the transfer was registered and a certificate of lease issued to him on 31/07/2006. He added that since then, he has been in occupation of the Suit Property and duly paid all the rates and dues in relation to the land. In 2017 the *ex parte* Applicant received summons from the Respondent requiring his attendance before the National Land Commission where he was informed that a report of fraud in respect of the title over the Suit Property had been made and he was required to prove ownership of the land, which he claimed he did.

3. The *ex parte* Applicant further stated that the Respondent adjourned to consider the matter and delivered its determination on 9/10/2017 cancelling his title and directing the Chief Land Registrar to register a caveat against his title. The *ex parte* Applicant annexed copies of the sale agreement, certificate of lease, land rates receipt and the determination of the Respondent and a copy of an official search over the Suit Property.

4. The 1st interested Party swore the replying affidavit dated 19/3/2019 on his own behalf and that of the 2nd Interested Party. He deponed that he lodged a complaint with the Respondent asking it to resolve a dispute over the Suit Property. He further deponed that when the concerned parties appeared before the Respondent, the *ex parte* Applicant only tendered a certificate of lease and asked for more time to bring additional documents which he failed to submit to the Respondent.

5. The Respondent's Acting Director of Legal Affairs and Enforcement swore the replying affidavit on its behalf which is dated 16/1/2019. He deponed that the 1st and 2nd Interested Parties filed a complaint with the Respondent alleging that there had been fraudulent transfer of ownership of the Suit Property which warranted the Respondent to invoke its jurisdiction in line with Section 14(1) of the National Land Commission Act and admit the complaint for review.

6. He further deponed that the Respondent was well within its right in line with Section 14(3) of the National Land Commission Act, Article 50 of the Constitution and the Fair Administrative Actions Act in carrying out the exercise and that the Applicant has not provided evidence that the Respondent breached its mandate. The Respondent produced a copy of its determination.

7. The written submissions dated 15/3/2019 filed on behalf of the *ex parte* Applicant raise four issues for determination. These are the jurisdiction and the mandate of the National Land Commission; whether the subject land is private or public land; the basis for grant of orders of certiorari and prohibition sought and whether the Applicant will suffer any harm.

8. Counsel for the *ex parte* Applicant submitted that the Respondent's mandate is set out in Article 67 of the Constitution and that this dispute being one relating to private land, it does not fall within the realm of the jurisdiction of the Respondent. He relied on the case of **Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd [1989] KLR 1**. Further, he submitted that the Respondent lacks the jurisdiction to determine a question on the validity of the two titles over the same piece of land and argued that such power is only vested in the Environment and Land Court.

9. The Applicant made reference to Articles 64 and 67 of the Constitution on the definition of private land and the establishment of the Respondent respectively. He submitted that the Respondent failed to follow clear guidelines and was in violation of its statute and thus it would be fair that this Court should issue an order prohibiting the Respondent's attempt at directing the cancellation of his title. He added that since the parties involved are private entities claiming private rights over land, the claim falls under private law and the Respondent has not produced any material to rebut the claim that the Suit Property is private. He relied on the case of **Republic v National Land Commission & 4 others, Ex parte Fulson Company Limited & another [2015] eKLR** on this point.

10. The Applicant contended that the Respondent had acted in excess of its jurisdiction and that an order of certiorari was therefore merited in this suit and cited the decision in on **Meixner & Another v Attorney General [2005] 2 KLR 189** on the concern of judicial review. Further, he submitted that the order of prohibition sought against the Respondent is in line with the natural rules of justice since the Respondent lacked the requisite authority.

11. The Applicant submitted that he would suffer harm since his rights under Article 40 of the Constitution had been violated by the irregular determination made by the Respondent and that the Respondent failed to observe the natural rules of justice in line with Article 50(b) of the Constitution. The *ex parte Applicant* submitted that by the Respondent's purported issuance of a determination in relation to private land it was acting in excess of its jurisdiction and its decision was therefore void. The *ex parte* Applicant urged the court to grant the orders sought and quash the determination published by the Respondent on 9/10/2017.

12. The Respondent submitted that it acted within its mandate conferred by Articles 62, 67 and 68 of the Constitution read with Section 14 of the National Land Commission Act ("NLC Act") when it received a complaint from the Interested Parties that their land had been fraudulently transferred. The Respondent submitted that it carried out a review hearing on the matter in the presence of both parties and arrived at its findings without the Ex parte Applicant raising any issue over its jurisdiction. The Respondent further argued that it had the mandate to review grants over land held under a lease from the Government. It relied on the decision of Tuiyott J. in **Republic v Land Registrar Mombasa and 2 Others, Ex parte Bhangra Limited [2012] eKLR** in which the Judge stated that the power to revoke titles rested with the courts and the Respondent.

13. The Interested Parties submitted that the Respondent had jurisdiction to review the grant over the Suit Property and that the Applicant was given a fair hearing by the Respondent. Further, that the Applicant did not object to the Respondent's jurisdiction and that he had acquiesced and cannot now be heard to say that his rights were violated.

14. The court has considered application, the affidavits and evidence tendered together with the submissions filed by the parties. The issues for determination are whether the Respondent had jurisdiction to deal with the matter and whether the court should issue the orders sought by the Applicant. Article 68 (c) (v) of the Constitution mandated 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 NLC Act and at Section 14 empowered the Respondent to review grants of public land within five years of the enactment of the NLC Act, which came into force on 2/5/2012.

15. Article 64 of the Constitution defines private land as registered land held by any person under any freehold or leasehold tenure or any other land declared to be private land under an Act of Parliament. The Suit Property is private land. The Respondent's mandate under Article 67 is to deal with public land and not private land.

16. The court notes that the Respondent's decision is dated 9/10/2017, by which time the period within which the Respondent was empowered to review grants of public land had lapsed. The Respondent therefore lacked the legal mandate to review grants of public land at the time it made its decision.

17. The Court grants an order of certiorari to quash the Respondent's decision delivered on 9/10/2017. The court grants the orders of prohibition and mandamus sought by the Applicant in the application dated 30/10/2018. For the avoidance of doubt, the court does not make any finding on the propriety or otherwise of the Applicant's title over the Suit Property. Each party will bear its own costs.

Dated and delivered at Nairobi this 16th day of October 2019.

K. BOR

JUDGE

In the presence of: -

Mr. D. Wachira holding brief for Mr. Wambugu for the Respondent

Mr. Hezron Mogire for the Interested Parties

Mr. V. Owuor – Court Assistant

No appearance for the *Ex parte* Applicant