



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC JUDICIAL REVIEW NO. 1 OF 2019**

**REPUBLIC.....APPLICANT**

**VERSUS**

**NATIONAL LAND COMMISSION.....RESPONDENT**

***EX-PARTE:***

**LESMAT LIMITED**

**JUDGMENT**

1. The notice of motion dated **26/2/2019** was filed on **4/3/2019**. The ex-parte applicant seeks an order of certiorari to quash the decision of the respondent to conduct a review of title in respect of the applicant's property known as **LR. Nos. 22930** or **22353** measuring approximately **123.3 Ha**, an order of certiorari to remove into this court and quash the decision of the respondent which was gazetted in Kenya Gazette dated **9/11/2018** as **Gazette Notice No. 11714** and all other previous gazette notices and proceedings relating to the review herein and revocation of the title to the applicant's said property. It also seeks an order of prohibition to prohibit the respondent from conducting any hearing, review or revocation of title of the applicant's property and a further prohibition to prohibit the respondent from implementing its decision to revoke the applicant's title and ownership of the said property. Finally it seeks a declaration that the respondent has no jurisdiction to review and hear or adjudicate and determine any proceedings touching on the applicant's property in the manner it proceeded with in the past or at all.

2. The motion is supported by a statutory statement and a verifying affidavit of **Maureen Cheptoo Leting**, a director of the applicant's company and a host of annexures which include copies of correspondence with the Agricultural Finance Corporation Ltd (AFC), a charge to Agriculture Finance Corporation, statement of account, deed of guarantee, AFC official loan receipts, correspondence with Ministry of Lands and Housing and the impugned gazette notices.

3. According to the statement of facts the grounds upon which the reliefs are sought are that the respondent lacks jurisdiction that the respondent is in breach rules of natural justice.

4. The history of this dispute in so far as it can be deduced from the pleading is as follows: via a gazette notice dated **9/11/2018 Gazette Notice No. 11714** the respondent made an advertisement as follows:

**“The Constitution of Kenya**

**The National Land Commission**

**Determination of Review of Grants and Dispositions of public land**

**IN EXERCISE of the powers by Article 68 (c) (V) of the Constitution of Kenya and Section 14 (4) (5) (6) (7) and (8) of the National Land Commission Act 2012, the chairman of the National Land Commission informs the general public that the National Land commission upon receipt of complaints from the National government, County governments and members of the public undertook review of grants and dispositions (titles) of public land to establish their legality or otherwise. The Commission via a public notice in the national dailies invited all interested parties to appear before it inspect documents and make written representations and submissions. Consequently the Commission has made determination in respect of the following grants and orders.**

**Where the determination or order calls for revocation of a title the Chief Land Registrar is directed to effect the revocation.”**

5. Under the above notice was a table which gave property description, location, interested parties and the determination/ Land Registrar directed to.

6. Under a section titled “*Corrigenda*” the said notice stated as follows:

**“Gazette Notice No. 6862 of 2017 - determination for review of grants and disposition of public land appearing from page 1 to 77 of the Kenya Gazette the Gazette Notice is amended as follows:**

**In the schedule thereto under table 14 Nairobi and various counties public utility plots and other plots delete the words below...”**

7. The words deleted, in so far as they relate to the instant proceedings, were as follows:

**“Property description .....LR. No.22930**

**Reserved user.....Public utility land**

**Parties involved.....Lesmat Limited**

**Decision of the Commission...Revoke all titles and vest the land in the National Fund for the Disabled of Kenya and issue allotments**

**Reasons ..... land was vested and planned for the National Fund for Disabled of Kenya (NFDK).**

8. The above words were to be substituted with the following words:

**Property description .....LR. No.22353**

**Reserved user.....Public utility land**

**Parties involved.....Lesmat Limited**

**Decision of the Commission...revoke all titles and vest the land in the Ministry of East Africa Community, Labour and Social Protection, State Department of Gender and Affairs and issue letters of allotments.**

**Reasons ..... land was vested and planned for the Ministry of East African Community, Labour and Social Protection, State Department of Gender and Affairs.**

9. In her verifying affidavit, **Maureen Cheptoo Leting** avers that the suit property is private property and that prior to the alleged revocation, the applicant was not aware of any complaint in respect of the ownership of the property nor had it ever been served with any notice in respect of such a complaint. She depones that if the respondent had ever published any notices in respect of the review of the title, the applicant never saw them nor was its attention drawn to the same. She depones that even if such notices had been issued such publication would not have satisfied the requirement of the law which provides that personal service is mandatory. Upon her advocate’s advice she also depones that she believes the respondent has no jurisdiction to undertake any hearings or reviews over the land as it is private land.

10. The history of acquisition of the land, at least as narrated by the deponent, is that the applicant purchased the suit land for the sum of **Kshs.7,200,000/=** from one **William Morogo Saina** for valuable consideration in **1989** after subdivision of **LR No. 2217**; that in order to pay the purchase price, it applied for and obtained a loan of **Kshs.9,000,000/=** from Agricultural Finance Corporation (AFC) upon charging its property known as **LR. No. 22930** to the Corporation; that the charge documents were satisfactorily registered and the Corporation authorized the transfer of the property to the applicant; that subsequently the applicant fully repaid the corporation the money it owed it and the property was discharged; that on **1/4/1997** the applicant wrote the corporation seeking release and subsequently obtained such release of the title documents to the suit land.

11. That is the general background against which the **Notice No. 11714** was issued by the respondent.

12. This court ordered that parties do file submissions in the matter. The applicant filed written submissions on the **17/6/2019** but the respondent never filed any submissions.

13. I have considered the motion and the supporting documents. Though this motion is unopposed, this court must examine the filed documents to establish if the applicant has established a proper case against the respondent.

14. There is some confusion in the gazette notices as regards the land reference number involved, but it is clear that a property belonging to the applicant was the subject of proceedings before the respondent. The grant Number 76761 which the applicant exhibits in the supporting affidavit shows that the land is known as Land Reference Number 22930. That number also appears in the gazette notice. It is clear that by whichever number it was described, the applicant’s land was the subject of deliberations held by the respondent which led to the impugned decision.

15. The respondent determined that the title should be revoked and the land vested in the Ministry of East African Community, Labour and Social Protection, State Department of Gender Affairs and letters of allotments be issued presumably in favour of that Ministry for the reason that the land was vested and planned for it.

16. The applicant averred that it was never made aware of such proceedings before the respondent involving the applicant's land and that the applicant was not heard.

17. In support of the claim that the land was purchased from an individual and that it is private land, the applicant exhibits a copy of the title to **Land Reference No 2217**, a copy of the Land Control Board's consent to subdivide it and a copy of the consent to transfer a portion of 300 acres to the applicant. The consent to transfer intimates that it was issued on 26<sup>th</sup> May 1989. A copy of a letter dated 19<sup>th</sup> July 1989 suggests that the AFC had, subject to some conditions which included the agreed at the applicant's request to advance the applicant a loan of Kshs. 9,000,000/- for the purpose of land purchase and development. **Clause 3** of that letter shows that the applicant was to execute a debenture over all its assets in favour of AFC and also execute a charge over part of LR No. 2217 in favour of the same corporation. **Clause 5** stated that the applicant shall repay the loan within a period of "20&7" (sic) from the date of acceptance of the offer with interest at the rate of 12% per annum. The letter was apparently executed by the managing director of the Agricultural Finance Corporation and the certificate of acceptance is signed by two persons said to be directors of the applicant, that is, Joseph Arap Leting and Cecilia Leting. The charge that was subsequently entered into between AFC and the applicant is exhibited as "**MCH6**" and is dated 5/9/1989. A deed of guarantee in favour of AFC, which is apparently undated, was also executed by the applicant's directors in their individual capacities. A letter dated 13/11/1989 from AFC to the applicant notified it that all the security documents had been executed and it was at liberty to incur expenditure for which the loan was issued in accordance with the loan agreement. Official loan receipts of various dates were also exhibited. A letter dated 1/7/1993 from AFC to the applicant acknowledges receipt of a cheque of Kshs.2,000,000/-. A letter dated 1/4/1997 seeks for a release of the leasehold title for LR No. 2217/1 by AFC to enable the Commissioner of Lands issue a freehold title. The AFC appears to have released that title as requested vide a letter dated 14/4/1997. Copies of schedules of payment from the applicant's advocate to the seller Mr. William M. Saina are also exhibited as well as a copy of a cheque dated 14/11/1999 being the 10% initial deposit for the sale of 300 acres. Correspondence with the Survey Department has been also exhibited showing that excision of 300 acres from LR. No. 2271 Trans-Nzoia had been completed and a survey plan, F/R 194/166 approved. The land reference number to the portion measuring 123.3 hectares is, according to the Survey of Kenya letter dated 21/6/1999 LR. No. 2217/1. A letter dated 27/6/1989 seeks that AFC do release the title deed to LR. No. 2217 for the purpose of preparing a discharge of charge.

18. This mass of evidence was ripe for consideration and should have been reason enough for the respondent to inquire further of the applicant as to how it obtained title to the Land Reference 22930 before reaching the conclusion that the land was reserved for the purposes for Ministry of East African Community, Labour and Social Protection, State Department of Gender and Affairs. As it happened, the applicant was not availed an opportunity to present it before the respondent.

19. I have examined the various affidavits of service sworn by one Martin Njuguna Njau on **25/2/2019, 11/3/2019, 25/4/2019** and **2/7/2019** and I am satisfied that the notice of motion was served upon the respondent. As no response was filed on the respondent's behalf, this court has only the uncontroverted affidavit evidence of the applicant to rely on in its determination.

#### **Issues for Determination**

20. The issues arising from the judicial review notice of motion are whether the rules of natural justice were violated with regard to the applicant and whether the respondent had jurisdiction to hear and determine the complaint regarding the applicant's land, it being private land.

#### **Whether the Rules of Natural Justice Were Violated With Regard To the Applicant**

21. It is a cardinal principle of natural justice that no man should be condemned unheard. Natural justice inevitably integrates into itself the character of fairness. In **Sceneries Ltd -vs- National Land Commission [2017] eKLR** Mativo J observed as follows:

**"But what is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not."**

22. The element of fairness requires that the accused be granted a chance to present his case before a determination that affects his right in the matter is made.

23. A recommendation such as the one contained in the impugned gazette notice would undoubtedly affect the property rights of the applicant if the title to his land was revoked and the land vested in the Ministry of East African Community, Labour and Social Protection, State Department of Gender and Affairs.

24. Can the respondent be said to have accorded a fair hearing to the applicant before arriving at the determination that it promulgated vide **Gazette Notice No. 11714**.

25. The question as to whether the applicant was accorded a fair hearing before that determination lies in an examination the facts presented by both sides by way of an affidavit.

26. Whereas the applicant filed its affidavits to persuade this court that it was not accorded a hearing the respondent filed nothing in opposition to the motion. This court has nothing to go by from the respondent.

27. **Article 50** of the Constitution recognizes the need for natural justice in any situation involving any dispute. It provides as follows:

**“50. Fair hearing**

**(1) 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 or, if appropriate, another independent and impartial tribunal or body.”**

28. The evidence of the applicant is not controverted.

29. The applicant relied on **Article 47** of the Constitution and the **Sceneries Ltd -vs- National Land Commission case (supra)** for the argument that the respondent should have been guided to accord it fair treatment by giving it the opportunity to present its case before the Commission as it affected its rights.

30. Under **Article 47** every person is entitled to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

31. In this case the applicant avers that it was not served with any notice inviting it to defend its interest during the hearing of the complaint lodged against it which is in violation of **Section 14 (3)** of the **National Land Commission Act** which provides for notice.

32. In determining whether the rules of natural justice were observed, the question therefore arises for determination as to whether any or any sufficient notice was issued. The impugned gazette notice itself reads as follows:

**“The Commission via a public notice in the national dailies invited all interested parties to appear before it inspect documents and make written representations and submissions. Consequently the commission has made determination in respect of the following grants and orders.”**

33. It is not for the court to presume the truth of the statement that such notice was issued and that it included the particulars of the applicant’s property.

34. It was for the respondent to avail evidence of the press advertisements vide which it invited all interested parties to appear before it to inspect documents and make written representations and submissions before the determination was made.

35. The only conclusion that the court can arrive at in the absence of any replying affidavit from the respondent is that that there was no notice.

36. However the respondent’s gazette notice appears to refer to a public notice in the national dailies inviting all interested parties to appear before it, inspect documents and make written representations.

37. In the case of **Mwangi Stephen Mureithi -vs- National Land Commissioner & 3 Others [2018] eKLR** the court observed as follows:

**“Having perused the documents placed before this court, I am convinced that the petitioner was neither furnished with the details of the complaints before the 1<sup>st</sup> respondent nor granted access to the critical documents before the 1<sup>st</sup> respondent. I find that in the circumstances of this case it would be unfair then to expect or conclude that in the absence of such critical information the petitioner was granted a fair hearing as envisaged in Article 50 of the Constitution.”**

38. In the **Sceneries Limited case (supra)** the court observed as follows:

**“I have carefully analyzed the facts of this case. I note that no notice was served upon the applicant or the second interested party. Details of the complaint were not availed to them in advance, yet their rights were bound to be affected by the decision. The alleged publishing of Land Reference numbers in a local daily is in my view not proper notice. I find no difficulty in concluding that the Respondents violated the rules of natural justice by failing to serve the applicant with adequate notice and details of the complaint and on this ground alone, I am inclined to allow the originating summons before me.”**

39. In **Mwangi Stephen Muriithi case (supra)**, the court dealt with a notice issued in the print media and approving of the decision in the **Sceneries Limited case (supra)** stated as follows:

**“31. Having perused the documents placed before this Court, I am convinced that the Petitioner was neither furnished with the details of the complaint before the 1<sup>st</sup> Respondent nor granted access to the critical documents before the 1<sup>st</sup> Respondent. I find that in the circumstances of this case, it would be unfair then to expect or conclude that in the absence of such critical information, the Petitioner was granted a fair hearing as envisaged under Article 50 of the Constitution.”**

40. The above described situations are similar to that which the applicant herein found itself in.

41. I find no ground to deviate from the court’s holding in **Mwangi Stephen Muriithi case (supra)** and the **Sceneries Limited case (supra)** regarding service of notices by way of press advertisements in the instant case.

42. In the circumstances of this case I find that the applicant's rights to natural justice were violated by the respondent.

**Whether the Applicant was Possessed of Jurisdiction**

43. Next is the issue of whether the applicant was possessed of jurisdiction in the impugned exercise that it conducted.

44. The applicants' objection to the respondent's jurisdiction is premised on the ground that the land subject matter in these proceedings is private land and that as such, it is not subject to the jurisdiction of the respondent. The private land status of the suit land is evident from an analysis of the documentary evidence availed by the applicant and analysed in the earlier parts of this judgment.

45. The applicant avers that **Article 68(c) (v)** of the Constitution is clear that the respondent has no power to review title to private land in order to establish legality thereof and that the jurisdiction of the respondent is only limited to public land as defined in **Article 62** of the Constitution.

46. **Article 40 (1)** of the Constitution gives every person the right. Either individually or in association with others, to acquire and own property of any description in any part of Kenya.

47. **Article 40 (2)** provides that parliament shall not enact a law that permit the state of any person to arbitrarily deprive a person of any property of any description or of any interest in, or right over, any property of any description

48. The above provisions of the constitution are subject to the provisions of **Article 40 (6)** of the Constitution provides that:

**“The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”**

49. It is clear therefore that a person's right to property are protected by the Constitution and cannot be taken away arbitrarily. The Constitution provides for the enactment of a law vide which the inquiries relating to review of dispositions and grants of public land should be processed. That law is the **National Land Commission Act** which at **Section 14 (1)** provides as follows:

**“Subject to article 68 (c) (v) of the Constitution the Commission shall, within 5 years of the commencement of this Act, on its own motion or upon a complaint by the National or County Government, a community or an individual review all grants and dispositions of public land to establish their propriety or legality.”**

50. The applicant cites **Republic -vs- National Land Commission Ex-parte, Cecilia Chepkoech Leting & 3 Others [2016] eKLR** for the proposition that where the land in question has acquired the status of private land pursuant to **Article 62** as read with **Article 63** of the Constitution it is only the Environment and Land Court that has the jurisdiction to investigate and determine the legality of such title. It also cites **Section 14 (7)** of the **National Land Commission Act** which provides that no revocation of title shall be effected on a bona fide purchaser for value without notice of a defect in title.

51. In **Ex-parte Cecilia Chepkoech Leting & Others** case (supra) the court (Odunga J) stated as follows:

**“52. It is however my view and I so find that though land which was unlawfully acquired does not confer a good title and is not protected under Article 40 of the Constitution, where the land in question has acquired the status of private land pursuant to Article 62 as read with Article 64 of the Constitution, it is only the Environment and Land Court that has the jurisdiction to investigate and determine the legality of such title.**

**53. To permit the Commission to investigate all types of lands no matter their status would amount to clothing the Commission with jurisdiction it does not have, yet it is trite that a judicial or quasi-judicial tribunal, such as the Commission herein has no inherent powers. In *Choitram vs. Mystery Model Hair Salon [1972] EA 525*, Madan, J (as he then was) was of the view that powers must be expressly conferred; they cannot be a matter of implication. Similarly, in *Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734*, it was held that Rent Restriction Board is the creation of statute and neither the Board nor its chairman has any inherent powers but only those expressly conferred on them.”**

52. Later on in that judgment the court observed as follows:

**“I however do not agree that the Commission may arbitrarily decide to investigate a title unless it has credible reasons for believing that there is an impropriety in the title, and it is those grounds that ought to be furnished to the persons who are bound to be adversely affected by the investigations.”**

53. I have upon examination of the surfeit of documentary evidence exhibited in the verifying affidavit been sufficiently persuaded that some transactions occurred between AFC, William Morogo Saina and the applicant in respect of the suit land, and that occurred quite long ago which led to the land being registered in the applicant's name. Going by the evidence presented herein, the private status of the land did not begin with the registration of the applicant as proprietor thereof; for William Morogo Saina was already a registered proprietor of the mother parcel before that event.

54. I am in full agreement with the exposition of the law by the court in the cases of **Ex-parte Cecilia Leting and Mwangi Stephen Muriithi** (supra) regarding jurisdiction of the respondent and the import of **Article 68 (c) (v)** of the Constitution and **Section 14 (1)** of the

National Land Commission Act.

55. It is therefore clear from the foregoing that the Respondent lacked jurisdiction to deal with the suit land in the manner that it did.

56. On the issue of revocation of titles, the cases of **Robert Mutiso Lelli and Cabin Crew Investments Ltd -vs- National Land Commission & 3 Others [2017] eKLR** and **Republic -vs- National land Commission and 2 Others Ex-parte Magnate Ventures Ltd [2018] eKLR** are relied on for the proposition that the National Land Commission cannot revoke titles where an inquiry establishes that such titles are unlawfully or illegally acquired and that the power to revoke title is vested in the Registrar and not the Commission which can only recommend.

57. It must be noted however that the **Ex-Parte Magnate Ventures Limited case** (supra) related to a dispute between two private entities fighting over the same land which landed before the Commission which purported to cancel the title to one and to revert it to the other.

58. Notwithstanding the above decisions, it appears that the respondent's decision impugned in this case has passed this test in that the gazette notice only recommends, and does not effect with immediate finality, the revocation of the applicant's title. The notice reads in part as follows:-

**“Where the determination or order calls for revocation of a title the Chief Land Registrar is directed to effect the revocation.”**

59. Nevertheless, going from what this court has stated above with regard to breach of natural justice and want of jurisdiction on the part of the respondent, the application before me has merit.

60. I therefore grant the Notice of Motion dated **26/2/2019** in terms of prayers numbers **1, 2, 3** and **4**. However, prayer number **5**, being for a declaration for which leave was not in any event obtained, is declined.

61. The respondent shall also bear the costs of these proceedings.

**Dated, signed and delivered at Kitale on this 15<sup>th</sup> day of October, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**15/10/2019**

Coram:

Before - Mwangi Njoroge, Judge

Mr. Ongicho for Ex-Parte Applicant

N/A for the Respondent

**COURT**

Judgment read in open court at 12.55 p.m.

**MWANGI NJOROGE**

**JUDGE**

**15/10/2019**