



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC JUDICIAL REVIEW CAUSE NO.13 OF 2017

IN THE MATTER OF: AN APPLICATION BY EASTERN BYPASS DEVELOPERS LIMITED FOR ORDERS OF CERTIORARI AND MANADAMUS

AND

IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT 2012

AND

IN THE MATTER OF: THE DECISION OF THE NATIONAL LAND COMMISSION IN REGARD TO DAGORETTI/KINOO/279 DANIEL NJUGUNA MURATHE AND EASTERN BYPASS DEVELOPERS LIMITED DELIVERED ON 28TH APRIL 2017

BETWEEN

EASTERN BYPASS DEVELOPERS LIMITED.....EXPARTE APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE COUNTY LAND REGISTRAR,

KIAMBU COUNTY.....2ND RESPONDENT

HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

DANIEL NJUGUNA MURATHE.....4TH RESPONDENT

JUDGMENT

This is a **Judicial Review** determination wherein the Exparte Applicant, **Eastern Bypass Developers Ltd** has sought for the following orders:-

- a) That the Court be pleased to issue Orders of Certiorari to remove into this court for purpose of being quashed the decision of National Land Commission to revoke the Applicant's title to Dagoreti/Kinoo/279 delivered on 28th April 2017.***
- b) That the Court do issue an Order of Mandamus directing the 2nd Respondent not to revoke the title to Dagoreti/Kinoo/279 and not to reinstate the same in favour of the 4th Respondent.***
- c) That costs of this application be provided for.***

The above prayers are grounded on the following:-

- a) That the suit land Dagoreti/Kinoo/279 is a private land and therefore the 1st Respondent has no jurisdiction or mandate to hear and make determination in matters relating to private land.***
- b) That Articles 67 of the Constitution and Section 5(1) of the National Land Commission Act 2012 spell out the mandate and***

functions of the 1st Respondent and therefore by hearing and determining the issues and reaching at the decision already reached, the 1st Respondent usurped the jurisdiction of the court and further the decision made by the 1st Respondent directing the revocation of title to Dagoretti/

Kinoo/279 is unconstitutional and invalid.

c) Further that the 1st Respondent did not avail the Applicant a fair hearing and hence its rights to natural justice were violated and therefore the Applicant will suffer immense loss of the subject matter if the decision is made to stand as it is unlawful.

d) That the Court is the only forum mandated under the law and the Constitution to hear and determine matters relating to disputes over private land.

e) Further that the 1st Respondent has already written to 2nd Respondent directing it to revoke the title deed.

The application is also supported by the **Verifying Affidavit** of **Moses Ndegwa**, the Director of the Exparte Applicant, who averred that the 1st Respondent invited them to a hearing in regard to the suit land **Dagoretti/Kinoo/279**, together with the 4th Respondent. He contended that the Exparte Applicant had earlier obtained the land parcel pursuant to a **Sale Agreement** upon which they paid a consideration and were issued with a title deed marked **MN-2**. He further averred that the 1st Respondent proceeded to hear a dispute allegedly on the veracity of the sale and on **28th April 2017**, proceeded to give a determination and ordered that the title the subject matter of this application be revoked as letter marked

MN-3. Further that on **5th October 2017**, the 1st Respondent wrote to the 2nd Respondent instructing the said Respondent to effect the gazette notice and revoke the title to **Dagoretti/Kinoo/279**, as per letter marked **MN-4**. It is his contention that the issue between the Applicant and 4th Respondent was purely on the sale of private land and the 1st Respondent had no business to hear it. Further that his advocate has informed him that only this court can hear and determine matters relating to private land and therefore the 1st Respondent exceeded its powers. It was his contention that he stand to unfairly lose the land in issue unless the court intervenes. He urged the Court to allow the orders sought.

The application is opposed and 1st Respondent through **Brian Ikol**, the **Director Legal Affairs and Enforcement** at the **National Land Commission** swore a **Replying Affidavit** and averred that the 1st Respondent deals with overall management of land administration. Further that the 1st Respondent received a complaint from the 4th Respondent **Daniel Njuguna Murathe**, who alleged that the subject land parcel **Dagoretti/Kinoo/279** which was registered in his name was fraudulently transferred to the Exparte Applicant without his knowledge. Further that the 1st Respondent duly notified the Exparte Applicant as required by law vide a letter dated **18th July 2016**, that the 4th Respondent had lodged a complaint as per **annexture BI-1**.

That all the parties were invited to review hearings which hearings were held on **19th August 2016**, **9th September 2016**, **30th September 2016** and **28th October 2016**. He also averred that during the hearing, the 1st Respondent gave the Exparte Applicant and 4th Respondent a hearing in respect of the suit property. Further that the parties were granted an opportunity to submit their documents to the Review Committee in support of their claims. It was his contention that the Exparte Applicant duly submitted to the Review Committee and did not at any time raise any objection to the case being heard before the Commission.

He further averred that after the successful conduct of the review process, the 1st Respondent gave a well reasoned determination on **28th April 2017** as is evident from **annexture BI-3**. Thereafter the said decision was published in the **Gazette Notice No.6862** of **17th July 2017** and recommended to the **Chief Land Registrar** to revoke the title held by the Exparte Applicant and the same be reinstated and registered back to the 4th Respondent as is evident from **annexture BI-4**. It was his contention that the said revocation and reinstatement has been effected as is evident from the **Official Search** marked **annexture BI-6**. The 1st Respondent averred that it had mandate under the law to deal with the matter as filed by the 4th Respondent. The Court was urged to dismiss the Exparte Applicant's application.

The 2nd & 3rd Respondents filed **Grounds of Opposition** dated **13th March 2018** and averred that:-

1) That the revocation of the Grant was done in accordance with Section 14(1) and 14(5) of the National Land Commission Act, 2012.

2) That the National Land Commission has the power to direct the revocation of all dispositions that were acquired unlawfully.

3) That the right to own property provided for under Article 40 of the Constitution is not absolute and the title may be revoked if it is found to have been acquired illegally or through fraudulent means.

4) That the Judicial Review application as filed offends the mandatory provisions of Order 53 Rule 2 as it was made after the Statutory period of six (6) months has lapsed.

5) That the application does not disclose any reasonable cause of action as against the 2nd & 3rd Respondents.

The 4th Respondent to **Daniel Njuguna Murathe** also filed his response to the instant Judicial Review application and averred that he is the rightful owner of the suit property and that he never sold it to the Exparte Applicant nor any other person.

Further that there is a Criminal Case in Kiambu Court over the fraudulent transfer of the suit property being **Criminal Case No.1839 of 2017**. He contended that the National Land Commission, 1st Respondent carried out a review of the matter and came up with a determination and therefore the Exparte Applicant should seek a refund of their money from the fraudsters who sold to them land that was not theirs. He urged the Court to disallow the instant application as it does not fit any review or any prerogative orders at all.

The Judicial Review application was canvassed by way of written submissions which this Court has carefully read and considered. The Court too has considered the pleadings in general, the annexures thereto and the relevant provisions of law and renders itself as follows:-

There is no doubt that the land parcel **No.Dagoretti/Kinoo/279**, was registered in the name of **Daniel Njuguna Murathe** on **16th June 1994**, as per the Certificate of Official Search dated **10th November 2017**. Further a title deed was issued in favour of **Daniel Njuguna Murathe**, the 4th Defendant on **23rd June 1994**. From the said Certificate of Search, a caution was placed on **16th July 2010**, and later restriction on **27th June 2016**, vide National Land Commission letter dated **23rd June 2010**.

There is also no doubt that the suit land **Dagoretti/Kinoo/279**, was registered in favour of **Eastern Bypass Developers Ltd**, the Exparte Applicant on **5th July 2010**. There is a title deed to that effect marked **MN-2**. It is also evident that the 4th Respondent did report a complaint to the 1st Respondent, National Land Commission and proceedings over the said parcels of land were conducted on various dates.

From the proceedings annexed to the **Replying Affidavit** filed by the 1st Respondent, it is evident that the Exparte Applicant was represented by one **Mr. Ndegwa**. The 4th Respondent was also present. In the course of the hearing, the said **Mr. Ndegwa** did not object to the hearing of the matter before the National Land Commission but submitted to its jurisdiction. It is also clear that after deliberation of the matter, the **National Land Commission** made a determination on **28th April 2017** and held that:-

“The title to Eastern By-pass Co. Ltd is revoked and land reverted to the Complainant, Daniel Njuguna Murathe. The Registrar was directed to expunge the fraudulent transfer from the register.”

Further after the said determination, the 1st Respondent published in the **Kenya Gazette, Notice No.6862** on **No.6** being property **No.Dagoretti/Kinoo/279**, parties involved being **Eastern Bypass Developers Ltd** and **Daniel Njuguna Murathe** and the decision was **‘Revoke title to Eastern By-pass Ltd and revert to Daniel Njuguna Murathe. The reasons for such decision was that the land was acquired illegally’**.

It is from the above decision that the 1st Respondent wrote a letter dated **5th October 2017** to 2nd Respondent and urged the 2nd Respondent to implement the decision of the 1st Respondent by revoking the title in favour of the Exparte Applicant, **Eastern By-pass Developers Ltd** and reinstate it to **Daniel Njuguna Murathe**, who is allegedly the *bona fide* owner of the suit property.

It is from the above determination and process by the 1st Respondent and request to 2nd Respondent by the 1st Respondent that the Exparte applicant has come to court seeking the two prerogative orders.

Given that this is a **Judicial Review** application, the Court will not be concerned with the merit of the decision but the process that led to the arrival of the decision. See the case of **Municipal Council of Mombasa..Vs.. R & Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2001 (2002)eKLR**, where the Court of Appeal held that:-

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power i.e jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision did the decision maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of Judicial Review is concerned with and such court is not entitled to act as a Court of Appeal over the decider; acting as an Appeal Court over the decider would involve going into the merits of the decision itself, such as whether there was or there was no sufficient evidence to support the decision and that is we have said is not the province of Judicial Review”.

In the instant case, the Exparte Applicant has sought for two remedies, being **Certiorari**, which is to quash and **Mandamus** being an Order to compel. The ground for Judicial Review were well set out in the case of **Pastoli...Vs...Kabale District Local Government Council & Others, (2008) 2 EA 300 at pages 303 to 304**, where the Court held that;

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union..Vs..Minister for the Civil Service [1985] AC 2; and also Francis Bahikirwe Muntu & Others..

Vs..Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.....”

Though the Applicant filed the instant application for Judicial Review, it did not file any submissions in support of the same even after been given sufficient time and numerous chances to file the same. The Court will only therefore rely on the submissions filed by the Respondents herein.

The Applicant had alleged that the 1st Respondent did not have jurisdiction or mandate to hear and make determinations in matters relating to private land. It is trite that jurisdiction is everything and a body without jurisdiction cannot arbitrate any matter brought before it and can only down its tool in such circumstances. See the case of *The owners of the Motor Vessel 'Lilian S'...Vs... Caltex oil (Kenya) Ltd 1989 KLR 1*, where the Court held that:-

“..Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The ***National Land Commission***, 1st Respondent herein is a creation of ***National Land Commission Act No.5 of 2012***. ***Article 67*** of the ***Constitution*** provides for establishment of National Land Commission. Further ***Article 67(2)*** provides for the functions of the ***National Land Commission*** and ***Article 67(3)*** provides that the ***National Land Commission*** may perform any other functions prescribed by the National Legislation.

It is evident from the available evidence that the 4th Respondent raised a complaint with the 1st Respondent and the 1st Respondent took up the said complaint and invited the Exparte Applicant and 4th Respondent. In inviting the two parties to review the complaint raised by the 4th Respondent over the suit property, then the 1st Respondent was performing any other function prescribed by the National Legislation. The court says so because under ***Section 5(1)(e)***, the ***National Land Commission*** has mandate to initiate investigations on its own initiative or a complaint into present or historical land injustice and recommend appropriate redress. The fraudulent registration of the 4th Respondent's parcel of land to another party that he did not alienate the land to is a present land injustice and therefore the 1st Respondent had a mandate to investigate the same and recommend appropriate redress. See the case of *Ledidi Ole Tauta & Others...Vs...Attorney General & 2 Others (2015)eKLR*, where the Court held that:-

“The Constitution acknowledged there could have been historical injustices in the manner land issues were handled by past regimes and hence among the functions and mandate of the National Land Commission established under Article 67(1) of the Constitution is to investigate historical injustices and to make recommendations for redress.

Article 67(2) (e) provides that among the functions of the National Land Commission is to:-

“(e) initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and historical land injustices, and recommend appropriate redress”.

In our view its the National Land Commission that has the mandate to investigate into historical land injustices and make appropriate recommendations for redress”.

This Court after a thorough consideration of the available evidence finds that the 1st Respondent had jurisdiction to hear the complaint placed before it by the 4th Respondent as it did and gave the determination as it did.

The Exparte Applicant has also alleged that it was never given a fair hearing and hence its rights to natural justice were violated. However, from the available evidence, it is evident that the 1st Respondent heard the matter on several dates and in each date, the Exparte Applicant was represented by one ***Ndegwa*** who is the deponent who has sworn the ***Verifying Affidavit***. ***Section 14(3)*** of the ***National Land Commission Act*** provides:-

“In the exercise of the powers 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”.

After complying with the provisions of ***Section 14(3)*** of the ***National Land Commission Act***, the 1st Respondent made a determination and made recommendations as provided by ***Section 14(5)*** of the ***National Land Commission Act*** which provides:-

“Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title”.

Accordingly the Court finds that the 1st Respondent acted as per its mandate provided by ***Section 5(1)(e)*** of the ***National Land Commission Act*** and also gave a determination as per the provisions of the law. There is no evidence that the 1st Respondent acted impropriety and no rules of natural justice were violated. The Court finds that there was procedural fairness and the 1st Respondent did not act illegally. The Exparte Applicant was not condemned unheard and was accorded the right to administrative action.

The Exparte Applicant sought for ***Orders of Mandamus*** and ***Certiorari*** which they did not support as they failed to file their written submissions.

However, the Court had found that the 1st Respondent acted within its mandate and there are no grounds to warrant this Court to question its decision and compel the 2nd Respondent to reinstate the title deed to the Exparte Applicant herein.

Consequently, the Court finds that the Exparte Applicant has failed to satisfy the threshold for grant of prerogative orders as was held in the

case of Pastoli...Vs... Kabale District Local Government Council (supra).

For the above reasons, the Court finds the **Notice of Motion** application dated **7th February 2018** is not merited and the said application is dismissed entirely with costs to the Respondents herein.

It is so ordered.

Dated, Signed and Delivered at Thika this 4th day of October 2019

L. GACHERU

JUDGE

4/10/2019

In the presence of

No appearance for Exparte Applicant

No appearance For 1st Respondent

No appearance For 2nd Respondent

No appearance For 3rd Respondent

No Daniel Njuguna Murathe, 4th Respondent present in person

Lucy - Court Assistant

Court - Judgment read in open court in the presence of the 4th Respondent.

L. GACHERU

JUDGE

4/10/2019