



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 146 OF 2018

PINNACLE DEVELOPMENTS LTD.....PLAINTIFF

VERSUS

THE NATIONAL LAND COMMISSION.....1ST DEFENDANT

BEATRICE MBITHE MWANGANGI.....2ND DEFENDANT

CHIEF LAND REGISTRAR3RD DEFENDANT

RULING

1. In its Notice of Preliminary Objection dated 5th November, 2018, the 1st Defendant has averred as follows:

a. That this Honourable Court lacks original jurisdiction to hear and determine the issues canvassed in the suit herein, the same having directly and substantially been in issue between the Plaintiff and 2nd Defendant before the 1st Respondent, and having been conclusively determined by the 1st Defendant/Respondent under its Review of Grants and disposition of public land as prescribed under Section 14 of the 1st Respondent's Act.

b. That this Honourable Court's jurisdiction to hear and determine this suit is therefore ousted pursuant to Section 30 of the National Land Commission (Review of Grants and Dispositions of Public Land) Regulations, 2017.

c. That the said suit is incurably defective, misconceived, incompetent, bad in law and an abuse of the process of this Honourable Court as the same further contravenes Order 42 Rule 1 of the Civil Procedure Rules, 2010.

2. The Preliminary Objection proceeded by way of written submissions. The 1st Defendant's advocate submitted that the 1st Defendant is mandated under Article 68(v) of the Constitution as read with Section 14 of the National Land Commission Act, to review all Grants and dispositions of public land to establish their propriety; that the 1st Defendant made its position clear in regard to land known as L.R. No. 12715/195 (*the suit land*) as documented in its decision of 28th April, 2017 which was gazetted on 17th July, 2017 and that this suit was filed on 22nd November, 2018.

3. The 1st Defendant's advocate submitted that this court does not have the original jurisdiction to deal with this suit and that the 1st Defendant conclusively determined the issues in respect of the suit land as between the Plaintiff and the 2nd Defendant as prescribed under Section 14 of the National Land Commission Act.

4. The 1st Defendant's advocate submitted that from the reading of Section 30 of the National Land Commission (*Review of Grants and Dispositions of Public Land*) Regulation, 2017 and Order 42 Rule 1 of the Civil Procedure Rules, 2010, the current suit is incurably defective; that the law provides how Appeals should be filed in the Environment and Land Court and that the 1st Respondent having delivered a decision in respect of the suit land, the Plaintiff should have filed an Appeal and not a fresh suit.

5. On her part, the Plaintiff's advocate submitted that this suit is seeking for declaratory orders that the Plaintiff is the registered owner of the suit land; that the issues that were before the 1st Defendant were not conclusively heard and determined; that the 1st Defendant's decision was made without hearing the Plaintiff and that a decision cannot be termed as conclusively determined if not heard on merit. Counsel submitted that under Section 13(1) of the Environment and Land Court Act, the Environment and Land Court has the original and appellate jurisdiction to hear public and private land matters.

6. The Plaintiff's advocate submitted that the provisions of Sections 30 are not in mandatory terms; that the 1st Defendant made a decision to revoke the Plaintiff's title despite the fact that the Plaintiff was a *bona fide* purchaser for value without notice of a defect in the title and that

there was no finding that the Plaintiff had acquired the title illegally.

7. This suit was commenced by way of a Plaint dated 20th July, 2018. In the Plaint, the Plaintiff has averred that between 1997 and 1998, it purchased land known as L.R. No. 12715/195 from one Fredrick Malu for valuable consideration; that the said Fredrick Malu purchased the suit land from Syokimau Farm Limited and that the Plaintiff has had quiet possession of the suit land since then until on 17th July, 2017 when it saw the gazette notice by the 1st Defendant mandating the 3rd Defendant to revoke its title.

8. The Plaintiff has pleaded that it challenged the decision of the 1st Defendant in Nairobi Judicial Review Application Number 532 of 2017 and that the court ordered that the legality of title between the parties ought to be determined by the Environment and Land Court hence this suit.

9. In the Plaint, the Plaintiff is praying for a declaration that it is the legal owner of Land Reference No. 12715/195. The 1st Defendant has objected to the hearing of the suit by this court on the ground that having heard and determined the dispute, this court can only be moved by way of an Appeal and not by way of a Plaint. The 1st Defendant's objection is premised on the provisions of Rule 30 of the National Land Commission (*Review of Grants and Dispositions of Public Land*) Regulations, 2017, which provides as follows:

“A person aggrieved by the decision of the Commission may, within fourteen days of the Commission's decision, appeal to the Court.”

10. The Regulations have defined “a court” to mean the Environment and Land Court established under the Environment and Land Court Act, 2012. The provisions of Rule 30 of the Regulations that the 1st Defendant's Preliminary Objection is grounded upon has to be contextualized.

11. Under Article 68 (c) (v) of the Constitution, Parliament was mandated to enact legislation to enable the review of all Grants or dispositions of public and to establish their propriety or legality. In light of the said Article that Parliament enacted Section 14 of the National Land Commission Act which provides as follows:

“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 Articles 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 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.

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).”

12. The provisions of Section 14(8) of the National Land Commission Act clearly reminds the Commission that before arriving at a decision to review any Grant or disposition of public land, it must be guided by the Constitutional principles enumerated under Article 47 which provides as follows:

“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 is 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 (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.”

13. The right to a fair administrative action has been given effect by the National Land Commission Act and the Fair Administrative Act. Under Section 14(3) of the National Land Commission Act, the Commission is required to give every person who has 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. Section 14(4) of the Act provides that it is only after hearing the parties that the Commission shall make a determination.

14. If the Commission does not comply with the provisions requiring it to give adequate notice to every person with an interest in land to be heard, then an aggrieved person may, within fourteen (14) days of the decision, appeal to the Environment and Land Court. Of course, in appropriate cases, the decision of the Commission can also be challenged by way of Judicial Review.

15. In this matter, the Plaintiff has alleged that its Managing Director saw for the first time a gazette notice of 17th July, 2017 in which the 1st Defendant mandated the 3rd Defendant to revoke the title for L.R. No. 12715/195 registered in the name of the Plaintiff and transfer the same to the 2nd Defendant. After seeing the said gazette notice, the Plaintiff has averred that it filed a Judicial Review Application No. 532 of 2017.

16. I have perused the Judgment of Mativo J. in Miscellaneous Civil Application No. 532 of 2017 (JR). In the said Judgment, the Judge held as follows:

“The grant of the orders or certiorari, mandamus and prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought. In this regard, it is important to mention that what emerges is that there are two titles issued in respect of the same parcel of land. This Court in the exercise of Judicial Review Jurisdiction is only restricted to examining the legality or otherwise of the decision rendered by the National Land Commission. But behind the curtain of these Judicial Review proceedings is the real dispute, namely, which of the two titles is genuine? Who is the bona fide owner of the disputed land? These questions call for the need for this Court to exercise caution, care and circumspection. First, there is the question of jurisdiction discussed earlier. Second, there is a real danger of this Court rendering a decision that will have the implication of determining ownership of the disputed land, or even directly or otherwise determine the validity of one title to land and by extension, invalidate the other title, a function outside the jurisdiction of this Court. I decline the invitation to venture into this forbidden territory.”

17. The Judicial Review Court declined to venture into the issue of the decision that was rendered by the 1st Defendant, which decision was published in the gazette notice of 17th July, 2017 because such a decision was likely to determine the issue of ownership of the suit land, which is not the mandate of a Judicial Review Court. The court further declined to determine the issues raised in the Application because it does not have jurisdiction. The court held as follows:

“While the Constitution guarantees right to access courts, the same Constitution neither operates in a vacuum nor does it automatically oust other constitutional and statutory provisions brought to life by the legislative arm of government such as the Environment and Land Court Act. [15] As such, where the constitution and legislation expressly confers jurisdiction to a court as in the present case invoking this courts vast jurisdiction will be inappropriate. The jurisdictional boundaries of the High Court are clearly spelt out under the constitution. Consequently, I find and hold that the jurisdiction of this Court in this matter has been improperly invoked. The ex parte applicant ought to have filed this Judicial Review application in the Environment and Land Court.”

18. It is with the findings of the court in Judicial Review Miscellaneous Civil Application No. 532 of 2017 that the Plaintiff moved this court by way of a Plaint. In the Plant, the Plaintiff is seeking for declaratory orders viz-a-viz the issue of ownership of L.R. No. 12715/195.

19. The 1st Defendant has not filed a Defence. Indeed, the 1st Defendant has not made any deposition, either by way of an Affidavit or otherwise, to controvert the Plaintiff’s assertion that it was never notified of the proceedings that the 1st Defendant undertook before it arrived at an adverse decision that was published in the Gazette Notice of 17th July, 2017.

20. If it is true that the Plaintiff was never notified by the 1st Defendant of the proceedings in relation to L.R. No. 12715/195, and that the Plaintiff only saw the decision of the 1st Defendant directing the 3rd Defendant to revoke its title and transfer the land to the 2nd Defendant, then the provision of Rule 30 of the National Land Commission (*Review of Grants and Dispositions of Public Land*) Regulations, 2017 is not applicable.

21. I say so because one can only file an Appeal, and more so within the strict timelines provided for under Rule 30, if he participated in the proceedings, or if he was made aware of the proceedings. If he was never informed of the proceedings, and a decision was made without hearing him, what will he be appealing against?

22. In my view, where a party claims that he was never heard by the 1st Defendant, then he has the option of filing a suit and seek for declaratory orders, either by way of a Plaint or a Petition. Indeed, it would be dishonest for a quasi-judicial body, like the 1st Defendant, to insist that the provisions of Rule 30 of the Regulations must be complied with when the person who is supposed to lodge an Appeal against its decision did not participate in the proceedings before it. Such a requirement will be a kin condemning a person, natural or legal, without hearing him, and punishing him for having not filed an Appeal within the requisite period when he was not aware of the proceedings in the first place.

23. Considering that this court has not interrogated the circumstances under which the 1st Defendant arrived at its decision in which it ordered for the cancellation of the Plaintiff's title, and in view of the fact that no evidence has been placed before this court to show that the Plaintiff was made aware of the proceedings that led to the decision of the 1st Defendant, I find that this court has the original jurisdiction to determine, firstly, the legality of the decision of the 1st Defendant, and secondly, the issue of ownership of the suit land.

24. For those reasons, I dismiss the Preliminary Objection by the 1st Defendant dated 5th November, 2018 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 4TH DAY OF OCTOBER, 2019.

O.A. ANGOTE

JUDGE