



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC JUDICIAL REVIEW CASE NO. 43 OF 2018

REPUBLIC.....APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

GATAMAIYU TRADING CO. LIMITED.....INTERESTED PARTY

NYAKINYUA MUGUMO KIAMBAA COMPANY LIMITED.....EX-PARTE APPLICANT

JUDGEMENT

1. Pursuant to leave granted on 6/07/2018, the *Ex parte* Applicant filed the application dated 12/7/2018 seeking an order of certiorari to quash the decision of the National Land Commission (NLC) made on 18/04/2018 declaring that the parcels of land known as land reference number (L.R No.) 89/4- 89/20 measuring 512 acres do not belong to the *Ex parte* Applicant. The *Ex parte* Applicant also seeks an order to prohibit the Respondent from interfering with the *Ex parte* Applicant's ownership of these parcels of land or its or its right to obtain title deeds, abstracts of title and certificates of official searches, and from making further orders, directives or taking proceedings relating to this matter.

2. The *Ex parte* Applicant relied on the grounds that the Respondent exceeded its powers or jurisdiction in making a decision on a matter in which the court has already entered judgement and the Court of Appeal determined the appeal.

3. Mary Kihui, the *Ex parte* Applicant's director swore the affidavit in support of the application on 29/06/2018 where she deponed that the Interested Party filed **Nairobi HCCC NO. 4496 of 1994** against the *Ex parte* Applicant claiming ownership of L.R Numbers 89/4, 89/5, 89/6, 89/7, 89/8, 89/9 and 89/11-89/20 measuring 512 acres in total. She deponed that the court confirmed the *Ex parte* Applicant's ownership of the suit land vide the judgement entered on 13/02/2012. Being dissatisfied with that decision, the Interested Party lodged **Civil Appeal No. 84 of 2013** against that decision and also filed an application for stay of execution of the judgement delivered in the High court. The Court of Appeal did not grant orders of stay on the ground that the appeal was not arguable. She annexed copies of the judgement in the High Court and the ruling of the Court of Appeal in **Civil Appeal No.84 of 2013 Gatamayu Trading Company Ltd v Nyakinyua Mugumo Kiambaa Company Limited & Others**.

4. She deponed that in 2015, the Interested Party referred this matter to the Respondent for determination of the issue of ownership of the suit parcels of land and averred that the *Ex parte* Applicant objected to the jurisdiction of the Respondent to hear and determine the dispute, but the Respondent nevertheless heard the matter and made the decision dated 18/04/2018, a copy of which she produced together with the documents filed by the parties before the Respondent. She deponed that the Respondent exceeded its jurisdiction, and if this court does not stop it, it is likely to affect the *Ex parte* Applicant's ownership rights.

5. The suit was opposed by the Respondent through the averments in the replying affidavit of Brian Ikol, the acting Director of legal affairs at the National Land Commission sworn on 08/11/2018. He deponed that the Respondent is an independent commission and that it acted within its mandate under Article 68 (c) (v) of the Constitution and Section 14 of the National Land Commission Act which mandates the Respondent to review all grants and dispositions of public land either on its own motion or upon receipt of a complaint from the National and County Governments, communities, organisations or individuals and make a determination.

6. The Interested Party filed a replying affidavit in opposition to the *Ex parte* Applicant's application, sworn by its director, John Njoroge Mugana, on 22/02/2019. He defended the Respondent's decision made on 18/04/2018 on the ground that the Respondent adhered to Article 47 of the Constitution by granting both parties an opportunity to participate in those proceedings. He added that the matter before the High Court did not touch on the disposition of indenture hence the dispute could not be classified as *res judicata*.

7. Counsel for the parties filed their respective submissions which the court has considered. In a nutshell, the *Ex parte* Applicant contends

that by the Respondent hearing this matter when the High Court had already determined it and while an appeal was pending in the Court of Appeal, the NLC attempted to oust the court's jurisdiction. It also submitted that the *Ex parte* Applicant was the owner of the suit land, and that since the land was not public land at the time the Respondent was reviewing the grant or disposition, the Respondent had no jurisdiction to deal with it.

8. The Respondent submitted that irregularly acquired land even when registered as private land fell within the Respondent's jurisdiction. The Interested party supported the Respondent's position by adding that Section 14 of the National Land Commission Act allowed the Respondent to carry out investigations as to how public land was converted into private land and whether the conversion was irregular or not.

9. The court has considered the *Ex parte* Applicant's application, the responses and the submissions of parties. Section 14(4) of the National Land Commission Act (NLC Act) was largely relied on by the Respondent and the Interested party as the law that gave the Respondent jurisdiction to investigate complaints relating to the propriety or legality of all grants or dispositions of public land and then make a determination. The Section enjoins NLC to make a determination after hearing the parties in accordance with sub-section (3).

10. The Court of Appeal delivered judgement in **Civil Appeal No. 84 of 2013 Gatamayu Trading Company Ltd v Nyakinyua Mugumo Kiambaa Co. Limited & Others** on 05/02/2019 in the appeal filed by the Interested Party against the *Ex parte* Applicant and other parties over the suit properties. That court has considered that judgement and notes that some of the issues determined by the Court of Appeal were raised before the Respondent and it went ahead to make a determination on the issues while the appeal was pending in the Court of Appeal in disregard of the *sub judice* rule. NLC had no jurisdiction to deal with the suit land after the High Court had determined the issue of ownership of the suit land, while an appeal over the same suit property was pending before the Court of Appeal. The Court of Appeal dismissed the Interested Party's appeal on 5/2/2019.

11. The application dated 12/07/2018 is allowed to the extent that the Respondent's decision made on 18/04/2018 is quashed. The *Ex parte* Applicant is awarded the costs to be borne by the Interested Party and the Respondent.

Dated and delivered at Nairobi this 13th day of November 2019.

K.BOR

JUDGE

In the presence of: -

Ms. M. Mwaura holding brief for Mwaura Shairi for the *Ex parte* Applicant

Ms. J. Machinda for the Respondent

No appearance for the Interested Party

Mr. V. Owuor- Court Assistant