



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

PETITION NO. 3 OF 2019

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 10, 25, 40, 47, 50 AND 67 OF THE CONSTITUTION

BETWEEN

GATHONI PARK FARM LIMITED.....PETITIONER

VERSUS

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

GEORGE KANYIRI KINYUA.....2ND RESPONDENT

JOHN MUIRIKIA KIMANI.....3RD RESPONDENT

PETER MWANGI NG'ANG'A.....4TH RESPONDENT

DAVID KARIUKI NG'ANG'A.....5TH RESPONDENT

JOSEPH KARURI NG'ANG'A.....6TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....7TH RESPONDENT

THE DIRECTOR SURVEY.....8TH RESPONDENT

JUDGMENT

By a **Petition** dated 20th **March 2019**, the Petitioner herein brought this suit against the Respondents seeking for the following orders:-

1) A declaration

a) That the Petitioner is the lawful registered owner of all that property known as LR. No.11164/3 measuring 136 hectares or thereabouts.

b) That Section 15 of the National Land Commission Act is unconstitutional as it contravenes Article 40 (2) of the Constitution and it is ultra vires Sections 24 and 25 of the Land Registration Act.

c) That the National Land Commission has no mandate and jurisdiction to investigate, question or make recommendations on the title to private land under Article 67 of the Constitution, Section 15 of the National Land Commission Act and/or under any other law whatsoever.

2. An Order of Certiorari bringing to this Court and quashing the determination dated 7th February 2019 by the National Land Commission and the Gazette Notice published in the Kenya Gazette Vol.CXXI-No.27 directing the Director of Survey to resurvey the property known as LR. No.1164 Limuru and allocate unutilized land to the 2nd Respondent to 6th Respondents, their agents, relatives or successors or any other person whatsoever claiming LR. No.11164/3 under any historical land injustices.

3. An Order of Prohibition be issued against the Director of Surveys from implementing the recommendation of the National Land Commission dated 7th February 2019 published in Kenya Gazette Vol.CXXI No.27 in respect of L.R. No.11164/3 under any historical injustices claims.

4. The Costs of this Petition be borne by the 1st Respondent.

In its Petition, the Petitioner averred that by a letter dated **19th July 2013**, **John Muirikia Kimani** on behalf of the 2nd to 6th Respondents alleged that they were descendant of the deceased **Muirikia Kimani**, who allegedly owned vast tracts of land situated in various areas. That in spite of claiming huge tracts of land, the claimants zeroed in on the suit land originally owned by **Clarence Edward Victor Buxton (Deceased)**, without any legal basis. That the 2nd to 6th Respondents purporting to be the next of kin and children of the late **Ng'ang'a Nyutu Muirikia**, filed a historical injustice claim with the 1st Respondent claiming illegal and irregular dispossession of their ancestral land. Further that the claim sought restitution of a vast area of land without setting the legal or historical basis as to why they identified the suit land. It was further averred that the **National Land Commission** vide a letter dated **7th September 2018**, invited **Ambassador Njoroje Ngethe**, who was not the owner of the Petitioner's land to a public hearing on **27th September 2018**, regarding the historical land injustice claim by the **Muirikia** Family. That the said **Ambassador Njoroje Ngethe** presented a Memorandum on Land ownership in respect of **L.R 11164/3**, and concisely explained how he acquired the suit property before having it transferred to the Petitioner on **20th December 2013**. That it was within the knowledge of the **National Land Commission**, that the suit property was registered in the name of a **Private Limited Liability Company** which was not a party to the proceedings as the Petitioner despite being the registered owner was never invited to the meeting. The Petitioner further averred that the hearing was held on the **27th September 2018**, and on **7th February 2019** the **National Land Commission** delivered its determination and the Petitioner was never listed as a party nor its land mentioned in the recommendation.

Further that the **National Land Commission** in its determination noted that the Claimants were only claiming the underutilized portions of **L.R 11164/1** and **L.R 11164/2**, which were not owned by the Petitioner. It was its contention that in its finding, the **National Land Commission** recommended in its determination that a resurvey of the land be carried on with a view to isolate the part that was not currently utilized so that the **Muirikia** family could be allotted the same. That pursuant to its determination of **7th February 2019**, the **National Land Commission** gazetted its recommendation through **Gazette Notice No.1995** dated **1st March 2019**, wherein it made a departure from its findings regarding compensation to restoration and purported to order the subdivision of the Petitioner's land which is illegal, irrational and a nullity in law for being a breach of the Petitioner's rules of natural justice, ignoring that the suit land was transferred to the Petitioner, issuing a recommendation, that went against **Ambassador Ngethe** who was only named as the 2nd Respondent while no orders were made against the property owned by the Petitioner, that there was no evidence of occupation of the property by the late **Muirikia Kimani**. Further that the **National Land Commission** had no mandate to deprive the Petitioner of its land and to act on spurious claims by persons purporting to make claims under the pretext of historical injustices. That the determination of **7th February 2019**, was unconstitutional and *ultra vires*.

The Petitioner particularized Unconstitutionality and *ultra vires* being that **Section 15** of the **National Land Commission Act** deprives a citizen right to own property pursuant to **Article 40** of the **Constitution**, that **Article 40(2)(a)** of the **Constitution** invalidates **Section 15** as it amounts to arbitrary deprivation of property owned by a citizen. Further that **Article 40(3)** and **(6)** of the **Constitution** only provide for deprivation of property when the land is acquired by State and not private individuals. **Article 67** only empowers the **National Land Commission** to make recommendations. **Section 15** of the **National Land Commission Act** is *ultra vires* **Section 24** and **25** of the **Land Registration Act**, **Section 14(7)** of the **National Land Commission Act** provides that no revocation of title would be effected against a *bonafide* purchaser for value without notice of defect in the title, **Article 67(3)** of the **Constitution** did not donate power to Parliament to enact legislation to deprive a Citizen of property pursuant to any recommendation made under **Article 67**. That there exist no regulation in place to regulate the performance of the mandate of the **National Land Commission** which is in breach of **Article 47** of the **Constitution** and the **Fair Administrative Actions Act**. That under **Section 23** of the **Registration of Titles Act(now repealed)**, a certificate of title is evidence that the person named thereon is the absolute owner. **Section 15(3) (b) (ii)** of the **National Land Commission Act** is inconsistent with **Section 7** of the **Limitation of Actions Act**, which provides that an action to recover land cannot be brought after twelve years from the date which cause of action accrued.

It was therefore the Petitioner's contention that the determination by the 1st Respondent violates the provisions of **Article 10** of the **Constitution** as the 1st Respondent is entitled to do social justice and observe the rule of law.

The Petition is opposed and the 4th Respondent swore an Affidavit on behalf of the 2nd to 6th Respondents and averred that they lodged a claim with the 1st Respondent based on historical injustices against members of **Muirikia family** having been deprived of their land through forceful eviction conducted by the Colonial Governments in the **1920's**. He averred that the letter dated **7th September 2018**, was addressed to **Ambassador Njoroje Ngethe**, but that he did not indicate that the suit land did not belong to him having attended the hearing. It was his contention that **Abdul Ghafar Chaudry**, registered owner of **L.R 11164/2** and the said **Ambassador Njoroje Ngethe** were unable to explain how they acquired the suit property and were also unable to produce transfer documents. It was further discovered that the suit lands shared **I.R 20588**. He denied that the said **Ambassador Ngethe** produced any Memorandum.

He further contended that the Petitioner did not have any interest in the suit land and that is why it was not invited to the hearing. He also averred that he has been advised by his Advocate that the Petition is incompetent as the Petitioner having not been a party to the proceedings before the Commission, it cannot in law seek to review orders which it was not a party to. Further that the alleged land owned by the Petitioner was not mentioned in the verdict and it is curious that the Petitioner filed the suit mentioning the verdict of the proceedings. Further that the report never mentioned any land. It was his contention that the order was made within the mandate and jurisdiction of **National Land Commission**, while dealing with matters of historical injustices and the mandate and jurisdiction has not been challenged. He further alleged that there is no evidence that the Petitioner sought to participate in the proceedings and was not enjoined and that there is no way that any party would claim to be a *bonafide* purchaser for value of the land which belonged to the **Muirikia** family. He further averred that **Section 15** of the **National Land Commission Act** is not unconstitutional as the same is geared towards restoration of Justice to the people oppressed through historical injustice. He further averred that he has been advised by his Advocates that all the issues particularized as Unconstitutional and *ultra vires* to **Land Acts** are misplaced as they are intended to deprive the **National Land Commission** of its mandate and jurisdiction to deal with **historical injustices** and **rights** which are not available to the Petitioner who

acquired property fraudulently from a person who had no title to the same as the land belonged to the late **Muirikia Kimani**. He therefore urged the Court to dismiss the Petition with costs.

The 1st Respondent through **Samuel Odari** its **Deputy Director Adjudication and Settlement** swore a **Replying Affidavit** on the **19th of July 2019**, and averred that the Commission received a complaint from the **Muirikia** family who claimed that their great grandfather was the owner of a piece of land including the suit land. That the Commission then notified the parties that were named by the **Muirikia family** and invited them to appear before the **Historical Land Injustices Committee**,

to give insight. It was his contention that the Commission had the mandate under **Article 67 (2)** to initiate investigations on their own initiative or on a complaint on historical injustices and recommend appropriate redress. That on the **27th of September 2018**, the invited parties appeared before the Commission and presented their various claims. That there was no mention that the suit land herein had been transferred to the Petitioner and the Commission was therefore not aware that it had passed on to a new owner. That the Commission made a finding and recommended that a resurvey be carried out on the land with a view of identifying land that is not in use with an aim of resettling the **Muirikia family**. That the Commission made a recommendation in reference to the original undivided plot of land and not specific to the suit land and since the resurvey has not been carried out, the Petitioner is being speculative .

It was his contention that **Section 15** of the **National Land Commission** is still law and therefore any actions taken under it cannot be declared unconstitutional and therefore the determination made by the Commission is followed, the directions laid out in **Article 67 (2) (e)** and therefore the Petition is an abuse of the Court process.

The 7th & 8th Respondents filed a **Preliminary Objection** on the grounds that the Petition offends **Order 53 Rule 1 & 2** of the **Civil Procedure Rules**, and **Section 9** of the **Law Reform Act**. Further that the Petitioner is seeking for Judicial Review Orders of Certiorari, Prohibition which fall under the meaning of Administrative action expounded under

the **Fair Administrative Actions Act** as the same are sought without seeking the leave of the Court and the failure to seek leave is fatal to any **Judicial Review** proceedings. It was further denied that there was any breach of the rules of natural Justice and the **National Land Commission** could have been merely lifting the veil of incorporation and it was up to Ambassador **Ngethe Njoroge** to notify the **National Land Commission** that he was not the proper party to be summoned. Therefore the Petition does not raise a cause of action against the 7th & 8th Respondents and should be struck out.

After close of pleadings, parties filed written submissions in support and in opposition of the Petition to which the Court has now carefully read and considered.

The 7th & 8th Respondent filed a **Notice of Preliminary Objection** which the Court had directed that it be heard together with the Petition. The Court will first have to determine whether the objection raised by the 7th to 8th Respondents qualify to be a preliminary objection as described in the case of **Mukisa Biscuit Manufacturing Co. Ltd..Vs... West End Distributors Ltd (1969) EA 696**, where Law J A stated that:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which objection point may dispose the suit”.

Further the Court stated;

“A preliminary objection raises a pure point to law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial

discretion”.

It is the 7th & 8th Respondents contention that the Petition as filed is in violation of **Section 7(2)** of the **Law Reform Act**, that requires a party to seek leave of Court before seeking for **Judicial Review Orders**. If leave must be sought for the suit to be filed, then failure to seek that leave is on a point of law and therefore the same is a **Preliminary Objection** as it may dispose off the suit.

It is however this Court’s opinion that while under the previous Constitution claims under the Administrative Action could only be brought under the Judicial Review proceedings, under the new dispensation, claims by parties for violation of fundamental rights may be brought under Constitutional Petitions. See the case of **Suchan Investment Limited v Ministry of National Heritage & Culture & 3 Others [2016] eKLR** where the Court held that:-

“We have considered the rival submissions on the issue of an alternative remedy. The respondents’ submission that constitutional issues cannot be raised in judicial review proceedings was law prior to the 2010 Constitution. The law has now changed and the provisions of Article 22 (3) and 22 (4) of the Constitution as read with Article 47 of the Constitution and Sections 5(2)(b) and (c) and Section 7 (1) (a) and (2) of the Fair Administrative Actions Act suggests that violation of fundamental rights and freedoms can be entertained by way of statutory judicial review

in an action commenced by Petition under the Rules made pursuant to Article 22 (3) of the Constitution. (See Legal Notice No.117/2103 Protection of Rights and Fundamental Freedoms - Practice and Procedure Rules, 2013).”

Persuaded by the above findings of the court, this Court finds and holds that the **Petition** is properly before the court and the **Notice of**

Preliminary Objection is not merited and the same is dismissed entirely.

Having considered the available evidence and the rival submissions, the Court finds that issues for determination are:-

1. Whether Section 15 of the National Land Commission Act is unconstitutional.

2. Whether the Petitioner's Rights were Violated

1. Whether Section 15 of the National Land Commission Act is unconstitutional.

It is the Petitioner's contention that **Section 15** of the **National Land Commission Act** is unconstitutional as that is akin to land grabbing and that it infringes upon **Article 40** of the **Constitution**, various provisions of the **Land Registration Act** and that it is *ultra vires* to **Section 7** of the **Limitation of Actions Act**. The Court has noted that **Article 67(1)(e)** of the **Constitution** establishes the **National Land Commission** and provides one of its functions as;

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

Therefore **Section 15** of the **National Land Commission Act** that provides for Historical injustices was enacted by Parliament pursuant to **Article 67 (3)** that empowered Parliament to give other functions to the **National Land Commission**. It is the Petitioner's contention that the said Section seeks to arbitrarily deprive a *bonafide* proprietor of land its rights to the suit property. However given that investigations of historical injustices is one of the mandate of the **National Land Commission**, then the said contention is farfetched as the said Section defines what is historical injustices. Further the said Section mandates the Commission to exercise **due diligence** and conduct its hearings with the rules and principles of natural justice in place. Further the Commission has also been empowered to investigate issues that have been presented before it. While under **Article 40**, the Constitution gives every citizen the right to own property, it is important to note that this right is not absolute as it has further been provided under **Article 40(3)** of instances on which this right can be impeached. If through a legal process and by an entity with legal authority, it is found that title to land had been unlawfully or unprocedurally acquired, the **Land Registration Act** enacted pursuant to the Constitution provides that this right may be taken away.

Having found that the right under **Article 40** is not absolute, then the Court further finds that it cannot be said that **Section 15** of the **National Land Commission Act** is akin to land grabbing since it provides for the process and instances in which the Commission may recommend to the State appropriate redress after having conducted proper investigations and hearings.

Further the Petitioner has contended that the said **Section** is contrary to the **Limitation of Actions Act**. It is not lost to this Court and must not be lost to the parties herein the reasons as to why the **Constitution of Kenya** provided for settling of historical injustices with regards to land. The said **Section 15** of the **National Land Commission Act** actually acknowledges that there exists **Section 7** of the **Limitation of Actions Act**. However due to the unique situation, the said section has placed disputes that fall within the said limitation as those that can be considered as historical injustices.

Therefore the Court finds that **Section 15** of the **National Land Commission Act** was enacted in accordance with **Article 67** of the **Constitution**. Further the said Section has provided for guiding principles to the **National Land Commission** that will enable the Commission efficiently and effectively carry out its mandate and therefore, it cannot be said that it provides for arbitrary deprivation of the right to property. Further, the Court finds that the said **Section** is not unconstitutional and the Petitioner's prayer that the said **Section** be declared so is not merited and the same is dismissed entirely.

2. Whether the Petitioner's rights were violated.

The Petitioner has in its **Petition** averred that before the decision to order the resurvey of its land, was made, it was not afforded a chance to be heard and the decision that was made was therefore in contravention and violated its rights. It has been the Respondents contention that the Petitioner was given a chance to be heard as one of its Directors **Ambassador Ngethe** was invited to the hearing and even gave his submissions. Further that at no time did **Ambassador Ngethe** inform the Commission that the suit property has been transferred to the Petitioner. It has also been contended that the Petitioner is speculative and that the gazette notice did not mention its land and therefore it is not entitled to the orders sought. **Article 47** of the **Constitution** provides that:-

“(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 a right to be given written reasons for the action.”

Further **Article 50** of the Constitution provides that:-

(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.

It is not in doubt that the suit Land was transferred to the Petitioner on **November 2013**. Therefore the Petitioner being the registered owner of the suit property was entitled to be present during the hearing of the claims by the 2nd to 6th Respondents. While it has been argued that the

Petitioner was present during the hearing having been represented by **Ambassador Njoroge Ngethe**, the Court notes that the Petitioner is a juristic body capable of being sued and suing on its own and therefore it is separate from its share holders. See the case of **Salomon ...Vs... Salomon (1897) AC 22:-**

“The company is at law a different person and altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act”

It would therefore mean that the Petitioner had to be invited and included on its own and failure to do so was fatal. That the Claimants and the Commission had a legal duty to carry out due diligence and establish the owners of the suit property before commencing the hearing and failure to carry due diligence settled on their shoulders. This Court finds and holds that the Petitioner was not given a chance to be heard and given that the suit land which is registered in its name was subject of the proceedings in issue, it therefore follows that it was then affected and therefore was entitled to be heard. Failure to abide by principles of Natural Justice renders the decision by the **National Land Commission** invalid and the court has no option but to proceed and quash it. See the case of **Republic...Vs...National Land Commission & 2 Others, Ex Parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West) [2018] eKLR**, where the Court held that;

“In my finding, a process by which an administrative body makes findings and proceeds to make recommendations before affording persons affected thereby cannot by any stretch of imagination be termed as fair in order to meet the provisions of Article 50 of the Constitution. For a hearing to be said to be fair not only should the case that the respondent is called upon to be met be sufficiently brought home to him and adequate or reasonable notice to enable him deal with it given, but also the authority concerned ought to approach the issue with an unbiased disposition. In other words the authority ought not to be seen to be seeking representations from the respondent simply for the purposes of meeting the legal criteria. The fair hearing must be meaningful for it to meet the constitutional threshold.”

From the above analysis of the available evidence, it is evident that the Petitioner was not given an opportunity to be heard and therefore its rights under the Constitution were violated.

Having now carefully considered the available evidence, the exhibits thereto, the written submissions and the relevant provision of law, the Court finds that the Petitioner’s claim partially succeeds in terms of prayers **No.1 (a), 2 & 3** of the **Petition**.

However, the Petitioner’s claim that **Section 15** of the **National Land Commission Act** is unconstitutional is not merited and the said prayer is disallowed.

As provided by **Section 27** of the **Civil Procedure Act**, costs is awarded at the discretion of the court. However, costs ordinarily follow the events. The Petitioner being the successful litigant is entitled to costs of this **Petition**

It is so ordered.

Dated, Signed and Delivered at Thika this 19th day of December 2019.

L. GACHERU

JUDGE

19/12/2019

In the presence of

M/S Mwangi holding brief for Mr. Allen Gichuhi for Petitioner

No appearance for 1st Respondent

Mr. Mageto for 2nd Respondent

for 3rd Respondent

for 4th Respondent

for 5th Respondent

for 6th Respondent

M/S Mwangi holding brief for M/S Ndundu for 7th Respondent

for 8th Respondent

Lucy - Court Assistant.

L. GACHERU

JUDGE

19/12/2019