



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC MISCELLANEOUS APPLICATION (JR) NO. 582 OF 2016**

**IN THE MATTER OF AN APPLICATION BY SAMUEL GITHEGI MBUGUA, GRACE MUTHONI GITHEGI, MARGARET NYOKABI MBUGUA, CHRISTINE MITHIRI MBUGUA, AND RUTH WANJIRU, ESTHER NJERI & PAUL NDUNGU AS EXECUTORS OF THE ESTATE OF MARY WARURII GAKUNJU FOR JUDICIAL REVIEW ORDERS OF PROHIBITION**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT NO. 5 OF 2012**

**AND**

**IN THE MATTER OF : THE LAW REFORM ACT CAP. 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE ENVIRONMENT AND LAND COURT ACT 2011**

**IN THE MATTER OF: ELC NUMBER 577 OF 2009**

**(MACHETHA KARIUKI & OTHERS VS. SAMUEL GITHEGI MBUGUA & OTHERS – PENDING)**

**IN THE MATTER OF: CIVIL PROCEDURE RULES 2010 & THE FAIR ADMINISTRATIVE ACTION ACT 2015**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

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

**AND**

**1. KASARINI FARMERS CO-OPERATIVE SOCIETY**

**2. KASARINI ANCESTRAL FAMILIES SELF HELP GROUP**

**3. ASSUMPTION SISTERS OF NAIROBI**

**REGISTERED TRUSTEES.....INTERESTED PARTIES**

**EX-PARTE**

**1. SAMUEL GITHEGI MBUGUA**

**2. GRACE MUTHONI GITHEGI**

**3. MARGARET NYOKABI MBUGUA**

**4. CHRISTINE MITHIRI MBUGUA )**

**5. RUTH WANJIKU, ESTHER NJERI**

**& PAUL NDUNGU**

**AS EXECUTORS OF THE ESTATE**

**OF MARY WARURII GAKUNJU)**

**JUDGMENT**

Through amended plaint dated 18<sup>th</sup> January, 2010 filed in court on the same date in Nairobi HCCC No. 537 of 2009 (now ELC No. 557 of 2009), the 1<sup>st</sup> interested party herein(as plaintiff) sought the following reliefs against the ex parte applicants, the Commissioner of Lands and the Registrar of Titles, Nairobi(as defendants):

(a) Nullification of any subdivision and transfer made on the parcel of land originally known as L. R No. 7153/R and now known as L.R No. 12825 (Grant No. I.R 35930) by the defendants.

(b) Rectification of the register by reverting to the original parcel number L.R No. 7153/R (now L.R No. 12825, Grant No. I.R 35930) with the plaintiff being shown as the registered owner.

(c) Any other or further order the court may deem fit to grant.

In its amended plaint, the 1<sup>st</sup>interested party averred that at all material times, it was the registered and/or beneficial owner of all that parcel of land originally registered as L. R. No. 7153/R and now registered as L.R No. 12825 (Grant No. I.R 35930) situated at Kiambu measuring 377.2 hectares. The 1<sup>st</sup> interested party averred that in the year 1981, the ex parte applicants together with the Commissioner of Lands and the Registrar of Titles colluded and fraudulently caused the 1<sup>st</sup>interested party's parcel of land aforesaid to be subdivided into several portions of various sizes which the ex parte applicants thereafter shared amongst themselves. The 1<sup>st</sup> interested party averred that the purported subdivision of its said parcel of land, L.R. No. 7153/R (now L.R No. 12825, Grant No. 35930) and the transfer of portions thereof to the ex parte applicants was fraudulent, illegal and incapable of conferring any title upon the exparte applicants. It is on account of the foregoing that the 1<sup>st</sup>interested party sought the rectification of the register by the cancellation of the subdivision of the said parcel of land and the titles held by the ex parte applicants and the registration of the said parcel of land in the name of the 1<sup>st</sup>interested party.

The ex parte applicants filed amended joint statement of defence on 8<sup>th</sup> February, 2010 in which they denied the 1<sup>st</sup>interested party's claim in its entirety. The ex parte applicants denied that the 1<sup>st</sup>interested party was the registered or beneficial owner of L.R No. 7153/R (now L.R No. 12825, Grant No. I.R 35930) situated in Kiambu. The ex parte applicants denied that they had caused the said parcel of land to be subdivided and registered in their names through collusion and fraud. The ex parte applicants averred that they were the lawful owners of the said parcel of land having legally and procedurally acquired and occupied the same openly for several years. The ex parte applicants averred that the 1<sup>st</sup>interested party had no legal or beneficial interest in the said parcel of land. The ex parte applicants averred further that the 1<sup>st</sup> interested party's suit was time barred.

While Nairobi ELC No. 557 of 2009 was pending hearing and determination, the 1<sup>st</sup> interested party filed a constitutional petition against among others, the ex parte applicants in the High Court at Nairobi in Petition No. 462 of 2013 (ELC No. 870 of 2012) claiming that their constitutional rights in respect of L.R NO. 7153/R had been violated. The petition was struck out by Majanja J. on 1<sup>st</sup> April, 2014 as an abuse of the court process. The court found that what the 1<sup>st</sup> interested party had wished to achieve through the petition was the same as what they had sought in Nairobi HCCC No. 537 of 2009 (ELC No. 557 of 2009) that was pending hearing before the court.

On 5<sup>th</sup> March, 2015 the court made an order in ELC No. 557 of 2009 that the status quo be maintained in relation to the subdivisions of the said parcel of land known as L.R No. 7153/R (now L.R No. 12825, Grant No. I.R.35930) namely, Land Reference Numbers 12825/2, 12825/5, 12825/6, 12825/7, 12825/8, 12825/11, 12825/15, 12825/18, 12825/22, 12825/23, 12825/24 and 12825/26 pending the hearing of an application that had been filed in that suit by the ex parte applicants. The status quo order restrained the 1<sup>st</sup> interested party from in any manner interfering with the exparte applicants' peaceful occupation and possession of the said parcels of land. The said order has neither been reviewed nor set aside.

On 16<sup>th</sup> February, 2016, the respondent wrote to the ex parte applicants over what it referred to as "Dispute over L.R Nos. 7153/1, 7153/R and L.R No. 12825-Kiambu". In that letter, the respondent informed the ex parte applicants that it had received a complaint from the 1<sup>st</sup> interested party that the ex-parte applicants had chased it from the parcel of land it had occupied for a long time. The respondent requested the exparte applicants to provide information within 2 weeks on how they acquired LR No. 7153/R. The respondent informed the applicants that the complaint by the 1<sup>st</sup>interested party had been brought to it under Article 67 (2) (e) of the Constitution on historical land injustices and Article 67 (2) (f) of the Constitution on alternative dispute resolution. The respondent also referred the ex parte applicants to section 6(2) of

the National Land Commission Act, 2012 that empowers it to seek information in relation to land matters in furtherance of its mandate.

In a letter dated 23<sup>rd</sup> February, 2016, the ex parte applicants' advocates notified the respondent that the issues which were the subject of the 1<sup>st</sup> interested party's complaint before it were also the subject of a case that was pending before this court namely, ELC No. 557 of 2009 and as such the same were *subjudice*. The ex parte applicants' advocates informed the respondent that it was not necessary to engage the parties in parallel legal process on the same issues as there was a risk of contradictory decisions being made on the matter. The respondent did not respond to the ex parte applicants' advocates' letter aforesaid. In the meantime, the ex parte applicants learnt that the respondent was processing the complaint by the 1<sup>st</sup> interested party. The ex parte applicants' advocates wrote to the respondent another letter on 7<sup>th</sup> March, 2016 requesting it to cease and desist from initiating a parallel adjudicative process on the 1<sup>st</sup> interested party's complaint failure to which they would challenge such action in court. The respondent responded to the second letter by the ex parte applicants' advocates on 30<sup>th</sup> March, 2016 but did not give any commitment that it shall cease further action on the 1<sup>st</sup> interested party's complaint.

On 2<sup>nd</sup> June, 2016, the ex- parte applicants filed an application for leave to institute judicial review application for an order of prohibition to prohibit the respondent from hearing the petition, complaint or dispute that had been referred to it by the 1<sup>st</sup> interested party or its officials or the plaintiffs in ELC No. 557 of 2009. The ex parte applicants were granted leave on 7<sup>th</sup> June, 2016 and filed the Notice of Motion application for judicial review on 20<sup>th</sup> June, 2016. This is the application which is the subject of this ruling. In the Notice of Motion application dated 14<sup>th</sup> June, 2016, the ex parte applicants have sought the following orders:

1. That the Honourable Court be pleased to grant the ex-parte applicants an order of prohibition against the respondent prohibiting the respondent from hearing either by itself or a committee of itself, a petition, complaint or dispute referred to it by a group referring to itself as Kasarini Farmers Co-operative Limited or its officials or plaintiffs in Nairobi Environment and Land Court (ELC) Case Number 557 of 2009 and/or reviewing or in any way encumbering, interfering with or revoking or recommending for revocation to the Registrar, the titles to Land Reference Numbers, L.R No. 12825/10, L.R No. 12825/14, L.R No. 12825/9, L.R No. 12825/17, L.R No. 12825/19, L.R No. 12825/16, L.R No. 12825/7, L.R No. 12825/26, L.R No. 12825/11, L.R No. 12825/6, L.R No. 12825/23, L.R No. 12825/22, L.R. No. 12825/24, L.R No. 12825/15, L.R No. 12825/18, L.R. No. 12825/25, L.R. N. 12825/21, L.R. No. 12825/5, L. R No. 12825/8, L.R. No. 12825/20 and L.R. No. 12825/16 registered in the names of the ex-parte Applicants.
2. That the costs be granted to the ex-parte applicants in any event.

The application was supported by the statement and verifying affidavit sworn by one of the ex-parte applicant's Margaret Nyokabi Mbugua both dated 2<sup>nd</sup> June, 2016 that were filed together with the application for leave. The ex parte applicants filed further affidavits on 18<sup>th</sup> January, 2017 and 1<sup>st</sup> March, 2017 in support of the application sworn by Grace Muthoni Githegi and Margaret Nyokabi Mbugua respectively. The application was opposed by the respondent and the 1<sup>st</sup> and 2<sup>nd</sup> interested parties. The 3<sup>rd</sup> interested party supported the application.

The ex parte applicants and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties are involved in another pending case namely, HC. Petition No. 373 of 2016 (now ELC Petition No. 1358 of 2016) in which the 3<sup>rd</sup> interested party and one, Ndunde Investments Limited has challenged the respondent's power to entertain, the complaints that had been lodged with it by among others, the 1<sup>st</sup> and 2<sup>nd</sup> interested parties with respect to L.R No. 7153/1, L.R No. 7153/2, L.R No. 12825 and L.R No. 35930. In the petition, the 3<sup>rd</sup> interested party is one of the petitioners, the respondent herein is named as the respondent while the ex parte applicants herein and the 1<sup>st</sup> and 2<sup>nd</sup> interested parties are named as interested parties together with others who are not parties to this application. In a ruling that was delivered by Onguto J. on 31<sup>st</sup> October, 2016 in the said petition (HC. Petition No. 373 of 2016, now ELC Petition No. 1358 of 2016), the judge noted that the dispute in that petition concerned the jurisdiction of the respondent herein to investigate the titles relating to L.R No. 12825(Grant No. 35930) (Original number 7153/R) and L.R No. 7153/1 which have since been subdivided and that a similar dispute was already pending before this court in ELC No. 557 of 2009. The judge noted further that this court was the best forum to determine all the issues that had been raised in HC. Petition No. 373 of 2016 (now ELC Petition No. 1358 of 2016). As a consequence of those observations, Onguto J. transferred HC. Petition No. 373 of 2016 (now ELC Petition No. 1358 of 2016) to this court with directions that it be heard together with ELC No. 557 of 2009 if possible. This court has not given directions on how HC. Petition No. 373 of 2016 (now ELC Petition No. 1358 of 2016) should be heard in relation to ELC No. 557 of 2009. The background that I have given explains the involvement of the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties in these proceedings.

I will now go back to the application before me. The respondent opposed the application through a replying affidavit sworn by Brian Ikol on 3<sup>rd</sup> November, 2016 while the 2<sup>nd</sup> interested party opposed the application through Notice of Preliminary Objection dated 22<sup>nd</sup> August, 2016 and replying affidavit sworn by Bernard Wanjohi Kimani on 5<sup>th</sup> December, 2016. The 1<sup>st</sup> and 3<sup>rd</sup> interested parties did not file any response to the application but made oral submissions at the hearing. The respondent contended that the ex parte applicants' application is an abuse of the process of the court because a similar application by the ex parte applicants had been considered by the court and dismissed. The respondent admitted that it had received a complaint from the 1<sup>st</sup> interested party invoking its jurisdiction under Section 14 of the National Land Commission Act, 2012 and requesting it to review the titles for L.R No. 7153/1, L.R No. 7153/2, L.R No. 12825 and Grant No. I.R 35930. The Respondent admitted further that it did summon the ex parte applicants and the 1<sup>st</sup> interested party to appear before it for a hearing to determine the issue of the legality and propriety of all the grants and dispositions relating to the said parcels of land.

The respondent contended that the said parcels of land are public land and as such subject to its review jurisdiction. The respondent contended that in addition to the powers conferred upon it under section 14 of the National Land Commission Act, 2012 to review grants, it has a constitutional mandate under Article 67(2)(e) of the Constitution to initiate investigations on its own motion or on a complaint into present and historical land injustices and to recommend appropriate redress. The respondent contended that the issues raised in the complaint by the 1<sup>st</sup> interested party before it are different from the issues that have been raised by the 1<sup>st</sup> interested party in ELC No. 557 of 2009. The respondent contended that the ex parte applicants had appeared before it and made submissions and as such the present application is an afterthought. The respondent contended further that it is exercising quasi-judicial powers and as such this court should exercise restraint

before interfering with its mandate.

As I have stated earlier, the 2<sup>nd</sup> interested party opposed the application through, the affidavit of Bernard Wanjohi Kimani sworn on 5<sup>th</sup> December, 2016 and a Notice of Preliminary Objection dated 22<sup>nd</sup> August, 2016. The 2<sup>nd</sup> interested party contended that the parcels of land in dispute are public land and as such the respondent had jurisdiction to interrogate the legality and authenticity of the titles in respect thereof. The 2<sup>nd</sup> interested party contended that the respondent was well placed to investigate the legality of titles and to resolve historical land injustices. The 2<sup>nd</sup> interested party contended that the respondent had not been called upon to determine the issue of the ownership of the disputed parcels of land but the legality of the grants held by the ex parte applicants. The 2<sup>nd</sup> interested party contended that the ex parte applicants' application has no merit since the respondent has jurisdiction to entertain the complaint before it. In its Notice of Preliminary Objection, the 2<sup>nd</sup> interested party contended that the ex parte applicant's application is an abuse of the process of the court.

The application was argued orally before me on 11<sup>th</sup> December, 2017 and 16<sup>th</sup> January, 2018 when the advocates for the parties made lengthy submissions and cited a number of authorities in support of their respective cases. I have considered the application before me together with the statutory statement and the various affidavits that were filed in support thereof. I have also considered the Notice of Preliminary Objection and the replying affidavit that was filed by the 2<sup>nd</sup> interested party in opposition to the application. Finally, I have considered the submissions of counsel and the authorities that were cited in support thereof.

There is no dispute that the respondent had power under section 14 of the National Land Commission Act, 2012 (the Act) on its own motion or upon a complaint to review all grants or dispositions of public land to establish their propriety or legality. This mandate has since come to an end. It is arguable whether the respondent can continue with the review of grants or dispositions of public land in respect of complaints that were pending before it when its mandate under that section expired. I am of the view that the respondent cannot purport to review any grant or disposition of public land after the expiry of its mandate under Section 14 of the Act whether such review is pursuant to a new complaint or a complaint that was pending as at the time its mandate expired unless Parliament extends its mandate under that section of Act.

In my view, if it was the intention of Parliament to empower the respondent to continue processing complaints pending before it after the expiry of its mandate, it would have provided for such eventuality in the Act. In the absence of such provision in the Act, the respondent would be exercising powers it does not have if it purports to continue with review of grants and disposition of public land after the expiry of its mandate. Parliament provided for the extension of the respondent's mandate under section 14 of the Act. If the respondent had pending reviews or investigations at the expiry of its mandate, that would be a proper basis for seeking extension of its mandate under section 14 of the Act. However, until the extension is granted by Parliament, the respondent must lay down its tools with regard to the exercise of the powers that were granted to it under the said section of the Act. For the foregoing reasons, I disagree with the advocate for the respondent that the respondent can continue to process the complaints over grants and disposition of public land that were pending before it after the lapse of its review mandate.

I am not persuaded that the respondent's power to undertake such exercise is saved by the provisions of sections 26 as read with section 23(3) (e) of the Interpretation and General Provisions Act Chapter 2 Laws of Kenya. The investigations that were pending after the expiry of the respondent's review mandate could be saved under the said provisions of the Interpretation and General Provisions Act only if there was no contrary intention in the National Land Commission Act, 2012 (the Act). I am of the view that it was the intention of Parliament that the respondent discharges its review mandate within 5 years from the date of commencement of the Act with liberty to the respondent to apply for extension. That intention is expressed clearly in the Act. The provisions of section 23(3)(e) of the Interpretation and General Provisions Act does therefore apply. I am of the view that Parliament could not have provided the respondent with the extension window if the respondent could continue reviewing grants and dispositions of public land without such extension.

In view of the foregoing, I am in agreement with the ex parte applicants that the respondent would be acting without jurisdiction if it purports to continue with the review of the titles held by the ex parte applicants over the suit properties and that this court has power to prohibit abuse of power or exercise of nonexistent powers. Assuming that I am wrong in my findings above and that the respondent can still review grants and dispositions of public land with respect to complaints that were pending before it as at the time of the expiration of its review mandate, the questions that arise are, whether the respondent can proceed with such review in respect of the suit properties which the applicants have claimed to be private land and while there are in existence parallel legal proceedings which are pending before this court touching on the validity of the applicants' titles over the suit properties.

From the material before the court, I am in agreement with the respondent and the interested parties that the suit properties were initially public land before the same were alienated for private use. In the circumstances, the respondent had power under section 14 of the National Land Commission Act, 2012 (the Act) to investigate how the suit properties were alienated by the Government to the ex parte applicants. I am not in agreement with the ex parte applicants' argument that once public land has been alienated for private use, it is beyond the reach of the respondent's review mandate.

As to whether the respondent could proceed with the review of the said grants and dispositions in respect of the suit properties at the instance of the 1<sup>st</sup> interested party while there were pending proceedings that had been instituted by the 1<sup>st</sup> interested party before this court touching on the same subject matter, I am in agreement with the ex parte applicants that it would amount to an abuse of judicial process for the respondent to engage in such exercise. I am of the view that once a court of competent jurisdiction is seized of a matter, the court must be given an opportunity to pronounce itself on such matter before any other or further proceedings relating to the same matter are considered.

I am in agreement with the decision of W. Korir J. in the case of Republic vs. National Land Commission & Another Ex parte Muktar Saman Olow (2015) eKLR where he was faced with a situation similar to the one before me. The judge stated as follows:

*“The attempt by the Respondent to review the grant in question while there are court cases geared towards addressing that issue is clearly an abuse of power bordering on contempt of court.”*

Mumbi J. also dealt with a similar situation in the case of Josephine Akoth Onyango vs. National Land Commission & 3 Others (2015) eKLR in which the respondent had also purported to initiate investigations in respect of a property that was the subject of an ongoing court case in the High Court. The Judge agreed with the decision of W. Korir J. that I have referred to above and stated that:

*“I am satisfied that the orders sought by the petitioner on this matter are merited on the face of it, the respondent is overreaching on entering into a matter that is already before the court which has jurisdiction to deal with it.”*

The respondent and the 1<sup>st</sup> and 2<sup>nd</sup> interested parties had also argued that apart from the power that was conferred upon the respondent under section 14 of the Act, the respondent also has power under section 15 of Act to investigate and adjudicate on historical land injustices.

Section 15(3) of the Act, provides as follows:

*“A historical land claim may only be admitted, registered and processed by the commission if it meets the following criteria-*

*(a) .....*

*(b) The claim has not or is not capable of being addressed through the ordinary court system on the basis that-*

*(i) The claim contradicts a law that was in force at the time when the injustice began; or*

*(ii) The claim is debarred under Section 7 of the Limitation of Actions Act or any other law;”*

It is clear from the foregoing that it was not the intention of the legislature that the respondent becomes a substitute for the court in the adjudication of historical land injustices. The role of the respondent is supposed to be complementary. The respondent does not have exclusive power to adjudicate on historical land injustices. It is the 1<sup>st</sup> interested party who filed a suit in court (ELC No. 557 of 2009) challenging the ex parte applicants’ titles over the suit properties. What this means is that the 1<sup>st</sup> interested party’s claim over the suit properties is capable of being addressed through the court system and as such the claim cannot be entertained by the respondent under section 15 of the Act as it does not meet the criteria set out above.

I am of the view that it is not open to the 1<sup>st</sup> interested party to move both the court and the respondent to adjudicate on the same subject matter. I am not persuaded by the respondent and the interested parties’ arguments that the 1<sup>st</sup> interested party’s complaints before the respondent and before this court are different. I am of the view that the 1<sup>st</sup> interested party has to make an election. If it wishes to pursue its claim before the respondent, it should withdraw its suit which is pending before this court.

The upshot of the foregoing is that I find merit in the ex parte applicants’ Notice of Motion dated 14<sup>th</sup> June, 2016. The application is allowed in terms of prayer 1 thereof. Each party shall bear its costs of the application.

**Delivered and Dated at Nairobi this 16<sup>th</sup> day of May, 2018**

**S. OKONG’O**

**JUDGE**

**Judgment read in open court in the presence of:**

No appearance for 1<sup>st</sup> Applicant

Ms. Gatuhi holding brief for Njagi for 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Applicants

Ms. Mwachiro for 3<sup>rd</sup> Applicant

Mr. Mbutia for Respondent

No appearance for the 1<sup>st</sup> Interested Party

Mr. Gatitu for the 2<sup>nd</sup> Interested Party

No appearance for the 3<sup>rd</sup> Interested Party

Catherine Court Assistant