



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO 3 OF 2015

REPUBLIC.....APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

EX-PARTE

LOMOLO LIMITED 1962

AND

DEANS ESTATES LIMITED.....1ST INTERESTED PARTY

KOKWENBEI COMMUNITY.....2ND INTERESTED PARTY

JUDGMENT

(Judicial Review motion for prohibition and certiorari; respondent wishing to investigate title of the ex-parte applicant based on a complaint made by some third parties; the third parties having had a dispute in court with the ex-parte applicant which they lost; no jurisdiction given to the respondent to hear a complaint based on a matter that has already been adjudged in court; grant of ex-parte applicant being a colonial grant and not proper to subject it to review; motion allowed with costs)

1. This is a judicial review motion filed on 9 February 2015 pursuant to leave granted on 27 January 2015. In this motion, the ex-parte applicant has asked for the following orders (slightly paraphrased for brevity) :-

(i) An order of prohibition restraining the National Land Commission from holding any meeting, investigation, inquiry and making any orders, directions or resolutions affecting the parcel of land known as LR No. 10939.

(ii) An order of certiorari for purposes of quashing notices and newspaper advertisements issued by the National Land Commission summoning the ex-parte applicant to a meeting to investigate and review the legality of the grant LR No. 10939, the property of the ex-parte applicant.

(iii) That costs be borne by the respondent.

2. The reasons why the ex-parte applicant has filed this motion are well elaborated in the Statutory Statement and Verifying Affidavit sworn by Mr. Harris Horns Junior who is one of the directors of the ex-parte applicant. Briefly, the ex-parte applicant is owner of the land parcel LR No. 10939 (hereinafter referred to as "the suit land") having acquired it in the year 1962 from the previous owner. The ex-parte applicant avers to have made investment in it by planting sisal, a sisal processing factory and premises occupied by its workers. In the year 2006, a group of persons filed suit being Nakuru High Court, Civil Suit No. 152 of 2006 (OS), claiming that they were entitled to the suit land by way of adverse possession. In the year 2014, another group of persons filed another suit, being Nakuru High Court No. 98 of 2013 (OS) again claiming the same land by way of adverse possession. The matters were heard and dismissed. Through a notice advertised in the Standard Newspaper of 19 January 2015, the respondent gave notice to the ex-parte applicant of intention to make inquiry into its grant of the suit land, purporting to exercise its powers under Section 14 of the National Land Commission Act. It is the position of the ex-parte applicant that this is beyond the powers of the respondent, on the grounds that the respondent's powers are limited to public land, and further, that the matters in issue have already been determined by court. It is the view of the ex-parte applicant that the meeting aims at giving the same litigants who lost in court, a chance to challenge the decision of the court through the back door. It is upon those reasons that the ex-parte applicant has sought the orders herein.

3. In the course of time, a company by name of Deans Estate Limited, and also several persons under the banner of Kokwenbei Community, applied to be enjoined as interested parties to these proceedings and they were duly enjoined. There were also several applications in between, but they do not affect the substance of the suit, and I need not mention them in this judgment, save to state that the Kokwenbei Community had filed an application for injunction to stop their eviction from the suit land which application I dismissed on the basis that their removal was in accordance with execution of a court decree in a separate suit.

4. The respondent has not filed any response to oppose this motion and neither did the Kokwenbei Community, whose interest and involvement in the matter, seems to have fizzled out after their motion for an injunction was dismissed. The only response, if I am to call it a response, for it is in support of the motion herein, was filed by Deans Estates Limited. I gave directions that the matter be heard through affidavit evidence and written submissions, and only counsel for the ex-parte applicant and counsel for Deans Estates Limited filed submissions. Neither was there any appearance at the hearing date of this motion on the part of the respondent or the Kokwenbei Community. The only material that I have in respect of the main motion, is therefore that supplied by the ex-parte applicant and Deans Estate Limited.

5. I have given due consideration to the motion herein and taken note of the submissions of counsel.

6. The complaint of the ex-parte applicant is that the respondent cannot delve into a private grant, its mandate being limited to public land; and secondly, it cannot delve into a matter that has already been decided by court. It is therefore the case of the ex-parte applicant that the respondent has no business issuing notices over its grant.

7. The functions of the respondent are well set out in the Constitution at Article 67 which is drawn as follows :-

67. (1) There is established the National Land Commission.

(2) The functions of the National Land Commission are—

(a) to manage public land on behalf of the national and county governments;

(b) to recommend a national land policy to the national government;

(c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;

(d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;

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

(f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;

(g) to assess tax on land and premiums on immovable property in any area designated by law; and

(h) to monitor and have oversight responsibilities over land use planning throughout the country.

(3) The National Land Commission may perform any other functions prescribed by national legislation.

8. It was said by the ex-parte applicant that the notice issued by the respondent was issued to it under Review of grants and dispositions which power is at section 14 of the National Land Commission Act. The said section is drawn as follows:-

14. (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 Section 14 of the National Land Commission Act, which provides as follows :-

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).

9. From the above excerpt of the Constitution and the National Land Commission Act, I have seen that the respondent indeed has power to review grants or dispositions of public land to establish their propriety or legality. Inevitably, such land would have to be privately registered for there to be a review, so to me, the argument that the suit land is privately registered is not material. But it is material that the subject land was granted a long time back, on 1 October 1963 to be precise, by the colonial Government before even Kenya attained independence. Throughout the existence of the independence Government, this land has all along been in private hands. I do not see how this land can fall into the category of grants or dispositions of public land which may be subjected to review.

10. Moreover, the dispute that was presented by the Kokwenbei Community, was nothing more than the same grievance that they presented in court in the suits Nakuru High Court Civil Suits No. 152 of 2006 and 98 of 2013. Decisions on the title of the ex-parte applicant and the rights of the Kokwenbei Community, the complainants before the respondent, were already determined in the said suit. The respondent cannot purport to have rights that supercede the finality of a judgment of a competent court. In other words, the respondent has no jurisdiction to hear and determine a matter that has already been heard and determined by courts of law. To hold otherwise, would be to give the respondent, appellate powers over decisions of courts, which it certainly does not have, and would be unconstitutional. In essence, the respondent does not have powers that override a judgment of the court.

11. For the above reasons, I am persuaded that this motion must succeed. I allow it and issue the following orders :-

(i) An order of prohibition is hereby issued barring the respondent from holding any meeting, investigating, or inquiring into the grant of the ex-parte applicant over the land parcel LR No. 10939.

(ii) An order of certiorari is hereby issued, bringing to this court, and quashing the notice issued by the respondent in the newspaper advertisement of 19 January 2015, in the Standard Newspaper, or indeed any other notice to the ex-parte applicant, purporting to investigate or review the grant of the ex-parte applicant over the grant to LR No. 10939.

(iii) The ex-parte applicant shall have the costs of this suit as against the respondent.

(iv) I make no orders as to costs for or against the interested parties.

12. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 10th day of May 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Ms. Alwala holding brief for Mr. Githui for the ex-parte applicant.

Mr. Kipkoech for Deans Estates Ltd -1st interested party.

No appearance for the respondent.

No appearance for Kokwenbei Community – 2nd interested party.

Court Assistant :Nelima Janepher

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU