



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

PETITION NO. 7 OF 2017

IN THE MATTER OF ARTICLES 2(2), 10(2), 19, 20(2), 21(1), 22(1), 22(2), 23(1), 40(2), 47(2), 50(1) AND 165 OF THE CONSTITUTION, 2010

AND

IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT ON THE PROPERTY RIGHTS OF THE PETITIONER

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF NATIONAL LAND COMMISSION ACT, 2012

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACT, 2016

AND

IN THE MATTER OF LR NO. KISII MUNICIPALITY/BLOCK III/349

AND

IN THE MATTER OF REVOCATION OF TITLE OF LR NO. KISII MUNICIPALITY/BLOCK III/349

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

SAMWEL MAYIENDA OPENDA.....PETITIONER

AND

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

THE CHIEF LAND REGISTRAR.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

J U D G M E N T

1. The petitioner filed the instant petition dated 16th August 2017 on 19th September 2017 seeking inter alia the following orders against the

respondents:-

(a) Declaration that the decision of the 1st respondent and in particular the Kenya Gazette Notice published on the 17th day of July 2017, touching on and/or pertaining to LR No. Kisii Municipality/Block III/349 was irregular, illegal, unlawful and void.

(b) Declaration that the revocation of the petitioner's title in respect of LR No. Kisii Municipality/Block III/349 was/is ultra vires the provisions of the National Land Commission Act, 2012 and hence the same is invalid and unconstitutional.

(c) The honourable court be pleased to grant an order of judicial review in the nature of certiorari to quash the gazette notice published on the 17th day of July 2017 touching and/or concerning the revocation of the title in respect of LR No. Kisii Municipality/Block III/349.

(d) Permanent injunction restraining and/or prohibiting the 1st respondent herein either by herself, agents, servants and/or anyone acting on her instructions from conducting and/or carrying out any further proceedings touching and/or concerning the review of the lease over and in respect of LR No. Kisii Municipality/Block III/349 and/or making any adverse recommendations thereon and/or in any other manner interfering with the petitioner's developments on the suit property in contravention of the National Land Commission Act, 2012.

(e) Costs of the petition be borne by the respondents jointly and severally.

2. Simultaneously with the petition the petitioner filed a Notice of Motion seeking conservatory orders pending the hearing and determination of the petition. The court on 20th September 2017 certified the application urgent and fixed the same for interpartes hearing on 23rd October 2017. At the interpartes hearing on 23rd October 2017, the 1st respondent sought for time to file a response to the application and the petition and the court granted the 1st respondent 30 days to file the responses with liberty to the petitioner to file a supplementary affidavit. The court fixed the matter for mention on 22nd January 2018 for directions respecting the disposal of the application and the petition and in the meantime granted a conservatory order pending the hearing of the petitioner's application.

3. On 22nd January 2018, the 1st respondent did not attend court and had not filed any response either to the application or the petition. The 2nd and 3rd respondents though represented had also not filed any responses. The court in the premises confirmed the conservatory order to last until the petition was heard and determined. The court at the same time gave directions that the petition be argued by way of written submissions and directed the petitioner to file and serve his written submissions on the respondent who were to be at liberty to file their responses and submission upon being served with the petitioner's submissions. The respondents were served with the petitioner's submission but neither filed any response to the petition and/or submissions. The court on 19th June 2018 reserved judgment on the petition.

4. The Petitioner's Case;

It is the petitioner's case that he is the duly registered legal owner of land parcel **LR No. Kisii Municipality/Block III/349** ("the suit property") and that he has been so registered from 2003 following lawful purchase of the same from the previous registered owner, one Fredrick Sokoro Onyango as per the sale agreement dated 29th August 2003 "**SM01**". The petitioner avers that before purchasing the subject land he carried out the appropriate due diligence and that a search at the land registry revealed the property was registered in the name of the vendor and had no encumbrances as per the abstract of title annexed as "**SM02**". The petitioner further states that upon satisfying himself the property was clean he agreed to proceed with the sale transaction, paid the agreed consideration of kshs.1,300,00/= and the property was consequently transferred to him resulting with him being issued with the certificate of lease.

5. The petitioner further avers that he took occupation and possession of the suit property and subsequently sought and obtained the requisite development approval from the Municipal Council of Kisii and the NEMA license for the intended development as per "**SM06**" and "**SM07(a) and (b)**" respectively. The petitioner avers and contends he was a bona fide purchaser for value without any notice of any defect in the title held by his predecessor, if indeed there was any such defect. The petitioner asserts that he validly purchased the suit property and all the legal and procedural processes were observed in getting the property transferred to him and therefore his title is indefeasible and ought to be afforded protection under the law.

6. The petitioner however states that on or about the 16th day of March 2016 the National Land Commission, the 1st respondent herein, published a newspaper advertisement purporting that the title to the suit property was unlawfully acquired and/or formed and/or comprised of Riparian Reserve. The petitioner in response to the newspaper advertisement made written representations to the 1st respondent explaining and setting out how he acquired the suit property and how he got to be registered as the owner thereof. The petitioner avers further that despite the clear explicit representations that he made to the 1st respondent, the 1st respondent proceeded to issue a gazette notice published on 17th July 2017 where it was indicated that the petitioner's land parcel **LR Kisii Municipality/Block III/349** among others were revoked and no reasons and/or basis was given for the alleged revocation.

7. The petitioner contends that the 1st respondent acted *ultra vires* and against the rules of natural justice as she constituted themselves the complainants, the prosecutor and the judge in their own cause. The petitioner avers that his constitutional rights to fair administrative action were infringed to his detriment as the 1st respondent's decision as carried out in the gazette notice had the potential effect of depriving him of his property without due process of the law being adhered to. The petitioner thus avers that the 1st respondent's decision was irregular and outside the scope of the 1st respondent's statutory and constitutional mandate and hence the same ought to be annulled and/or quashed.

8. As observed at the commencement of this judgment the respondents never filed any responses to the petition inspite of being served and

being afforded the opportunity to do so. The petitioner's averments therefore are virtually uncontroverted and/or challenged. The 1st respondent entered an appearance on 23rd October 2017 and on the same date Mr. Wambugu advocate appeared on their behalf and sought leave of the court to be granted time to file a response on behalf of the defendant. The court granted the 1st respondent 30 days leave within which to file a response but failed to do so up to the time judgment was reserved.

9. On the evidence and material placed before the court by the petitioner it is evident that the subject property was allocated to one Fredrick Sokoro vide a letter of allotment dated 22nd April 1994 issued by the Commissioner of Lands ("SM03"). The abstract of title ("SM02") shows that the said Fredrick Sokoro Onyango was registered as owner of the suit property on 24th May 1999 and was issued with a certificate of lease on the same date. The petitioner pursuant to an agreement of sale dated 29th August 2003 ("SM01") purchased the suit property for the consideration of kshs. 1,300,000/= and the property was transferred to him and he was issued a certificate of lease dated 29th August 2003. The petitioner sought and was granted development approval by the Municipal Council of Kisii ("SM05"). The petitioner as per the copy of the certificate of official search dated 29th August 2017 ("SM04(b)") is still the registered proprietor of the suit property. The court in the premises is satisfied the petitioner is validly registered as the proprietor of land parcel Kisii Municipality/Block III/349.

10. The National Land Commission under Article 67(e) of the Constitution and Section 14 of the National Land Commission Act No. 5 of 2012 has mandate and power to investigate and review grants and dispositions of land. Under Article 67(e) of the Constitution the National Land Commission has power:-

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

Section 14 of the National Land Commission Act provides 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 county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.

(2) Subject to Article 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).

Section 14(7) provides that no revocation of title shall be effected against a bonafide purchaser for value without notice of a defect in the title.

11. In the instant matter there is no evidence to show there was a defect in the title in regard to the suit property or that if there was any defect the petitioner had any notice of it. The court on the basis of the evidence adduced by the petitioner is satisfied the petitioner was a bona fide purchaser and that if there was any defect in the title he had no notice. There is no evidence to demonstrate that the 1st respondent before making the recommendation to have the petitioner's title revoked complied with the provisions of Articles 47, 48 and 50 of the Constitution on fair administrative action, access to justice and fair hearing. The recommendation by the 1st respondent is not supported and/or backed by any reasons and it is therefore not possible to determine on what basis the decision to revoke the petitioner's title was reached. The procedure and the process is not shown to have been transparent. In a situation where a party's rights and interests stand to be affected as in the instant matter, the process must be transparent and not opaque. The court cannot presume that the process and the procedure followed was fair. It has to be demonstrated to have been transparent and fair. This is not the case in the present matter and the court cannot find that the petitioner was subjected to fair administrative action as envisaged under article 47 of the Constitution.

12. While it is not clear why the 1st respondent made a recommendation for the revocation of the petitioner's title, from the evidence tendered by the petitioner, the allegation made by the 1st respondent was that the suit property was unlawfully and/or irregularly alienated and/or allocated to the petitioner. No further particulars have been furnished as to what constituted the unlawfulness and/or the

irregularities. This court sitting in Nairobi in the case of **Veronica Waithira Trustee of Inter-Christian Churches & 3 Others -vs- Kenya National Highways Authority [2014] eKLR** had occasion to consider a case with similarities to the present case where there was a claim of unlawful and irregular allocation of a parcel of land alleged to be on the road reserve. In the case, I observed thus:-

“The defendant has argued and asserted that the plaintiffs title was illegally and unlawfully procured and therefore cannot be deserving of protection under the law. However, there is no evidence that the government has recalled and/or revoked the title. Both the Land Registration Act Section 26(1) that provide for the indefeasibility and Article 40(6) of the Constitution envisage that where a registered title is impugned on the grounds set out in the provisions that due process would be followed to have such title revoked, cancelled and/or annulled. The courts have in a series of cases in the recent past held that due process has to be followed before a registered title can be revoked on the grounds of having been fraudulently or irregularly issued.”

13. The court again considered what constitutes an unlawfully and/or irregularly acquired title in the case of **Eunice Grace Njambi Kamau & Another -vs- The Attorney General & 5 Others [2013] eKLR** and it rendered itself thus:

33. Whereas various land commissions such as the Njonjo Land Commission have in their reports documented what they referred to as land grabbing and/or the acquisition of title to land illegally and unlawfully there is no definite definition of who a land grabber is and what constitutes an illegal and/or an unlawful title. In my view, the determination whether or not a title is illegal or unlawful has to take into account the circumstances and the process through which the title was obtained and/or acquired and provided the title is regularly issued by duly authorized officers entitled to do so by the government, it is my opinion that such title can only be impugned under Article 40(6) of the Constitution by it being established that the title was unlawfully obtained or acquired by the person shown to be registered as the owner. The doctrine of sanctity of title is anchored on the premise that a registered owner of land who holds a certificate of title that is duly registered is prima facie the owner of that property and the title he holds is indefeasible unless the title is shown to have been unlawfully acquired and/or procured. My understanding is that for the title of a registered owner to be impugned on account of fraud such an owner must have had knowledge that the title was fraudulently obtained or procured and/or the owner was party to the fraud.”

14. I have no reason to depart from my above holding in the above case as I still hold the view it was an apt exposition of the legal position. In the instant case I would use a similar test and hold that it was not demonstrated that the petitioner was holding a title to the suit property that was unlawfully and/or irregularly procured. To that extent therefore, no basis existed for the 1st respondent to recommend its revocation. The Gazette Notice to the extent that it affected the petitioner’s land parcel **LR No. Kisii Municipality/Block III/349** was unwarranted and must be quashed in that respect.

15. For all the above reasons, I find merit in the petition and I grant the same in terms of prayers (a), (b) and (c). The costs of the petition shall be borne by the 1st respondent.

JUDGMENT DATED, SIGNED and DELIVERED at KISII this 28TH DAY OF SEPTEMBER 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Ollando for the petitioner

N/A 1st, 2nd and 3rd respondents

Ruth court assistant

J. M. MUTUNGI

JUDGE