



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

PETITION CASE NO. 25 OF 2017 (FORMERLY PET. NO. 6 OF 2016)

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS AS ENSHRINED UNDER ARTICLES 19, 20, 21, 22, 23, 24, 40, 47, 67, AND 68 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF REGISTERED LAND ACT CAP 300 (NOW REPEALED)

AND

IN THE MATTER OF LAND REGISTRATION NO. 3 OF 2012

AND

IN THE MATTER OF THE LAND ACT NO. 2 OF 2012

AND

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

AND IN THE MATTER OF THE REVOCATION OF TITLE L.R. NO. KISUMU/MUNICIPALITY/BLOCK II/121

BETWEEN

HADIJA SHEILA BARWAKA HUSSEIN.....PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....DEFENDANT

JUDGEMENT

1. Hadija Sheila Barwaka Hussein, the Petitioner, filed the petition dated the 19th February 2016 seeking for the following orders;

- a) A declaration that her fundamental rights and freedoms enshrined under Articles 40 (1), 40 (2) (a), 40 (3) (b) (i), 47 (1) and (2) of the Constitution of Kenya 2010 have been contravened and infringed upon by the National Land Commission, the Respondent.
- b) An order of Certiorari to remove into this court and quash the decision by the Respondent to revoke the Petitioner's title to the suit property known as Kisumu Municipality/Block II/121.
- c) A conservatory order in the nature of a permanent injunction directed towards the Respondent restricting/prohibiting the Respondent's, their agents, officers and any person acting under them from interfering in whatever nature with the quiet possession by the Petitioner of all Land parcel known as Kisumu Municipality/Block II/121.
- d) General, exemplary and aggravated damages under Article 23 (3) (e) of the Constitution of Kenya 2010 for the unconstitutional conduct of the 1st Respondent.
- e) Any other orders and directions the court deems appropriate.

f) Costs of this petition.

g) Interest.

2. The Petitioner's case against the Respondent is summarized as follows;

a) That she became the registered proprietor of the leasehold interest in Kisumu Municipality/Block II/121, suit property, on the 21st November 2008 after buying it from Plantex Limited. That Plantex Limited had obtained ownership of the suit property through the Letter of allotment dated 7th February 1996 under reference 30973/LXT for UNS. INDUSTRIAL PLOT – KISUMU measuring 1.890 hectares. That the plot was later registered as Kisumu Municipality/Block II/121 measuring 1.540 hectares and a lease dated the 18th October 1996 in favour of Plantex Limited issued and registered.

b) That the Petitioner has been in possession of the suit property from the 24th November 2008 and has been paying rates and rent without default.

c) That the Respondent wrote the letter dated 29th May 2013 to the Petitioner informing her that the Ministry of Fisheries had laid claim over the suit property and she was asked to suspend any dealings over it.

d) That the Petitioner has been out of the Country and that upon her return, learnt from the Kisumu Land Registry personnel that her title to the suit property has been revoked by the respondent on grounds that the said property belonged to the Ministry of Livestock and Fisheries.

e) That the Respondent is yet to formally communicate the revocation of the title to the Petitioner.

f) That the title should not have been revoked without giving the Petitioner an opportunity to explain the acquisition as she is an innocent purchaser for value without notice.

g) That the suit property was private property that was legally acquired and the Respondent had no authority over it. That the Respondent's mandate to review the grants and dispositions of public land do not extend to private land.

h) The Respondent's claim was ultra vires the Constitution of Kenya 2010 and the National Land Commission Act 2012.

i) That the Petitioner was not contacted and no notice of review contemplated under Section 14 (3) of the National Land Act, 2012 was issued and served before the revocation of the title.

j) That the Respondent's decision amounts to a clear breach of Articles 40, 47 and 67 of the Constitution of Kenya 2010 and Section 14 of the National Land Commission Act, 2012 and hence a nullity.

3. The petition is opposed by the Respondent through the replying affidavit sworn by Brian Ikol, advocate and deputy Director, Legal Affairs and Enforcement with the Respondent, sworn on the 24th June 2016. The Respondent's case is summarized as follows;

a) That the Respondent had upon receiving a complaint from the Permanent Secretary, Ministry of Fisheries Department, alleging that the suit property had been illegally carved out of the Ministry's land and allocated to Plantex Ltd and the Petitioner, written the letter dated 29th May 2013 to Plantex Limited and the Petitioner seeking their response and further asking them to suspend any further dealing on the land until after the complaint is determined. That the review hearing took place on the 23rd April 2014 when a representative of the Ministry was heard. That the Petitioner was not present and that the annexed copy of the proceedings show that the Respondent was to contact them to present their case later.

b) That subsequent investigation at the Department of Surveys and the Special Plans Records Office showed that the suit property was part of the Land earmarked for the Fisheries department and was therefore not available for allocation.

c) That the Petitioner has not availed approved or conversion plans changing the user of the land and that being a fundamental defect, the purported first registered owner did not get a good title and could not pass a good title to any other person.

d) That the right to protection of property under **Article 40 of the Constitution 2010** do not extend to property that has been unlawfully acquired.

4. The court issued directions on filing and exchanging written submissions on the petition on the 13th November 2017. That the learned counsel for the Petitioner and Respondent then filed the written submissions dated the 11th December 2017 and 8th August 2018 respectively.

5. The following are the issues for the court's determinations;

a) Whether the Respondent's legal mandate to review leases extends to suit land currently registered in the name of the Petitioner.

b) Whether the Respondent has revoked/cancelled or recommended the revocation/cancellation of the Petitioner's title to the

suit land.

c) Whether the Petitioner has been accorded a fair hearing in the review.

d) Whether the Petitioner's right to property has been infringed by the Respondent through the process so far undertaken.

e) Whether the Petitioner is entitled to any of the prayers sought.

f) Who pays the costs.

6. The court has carefully considered the grounds on the petition, the affidavit evidence and annexures thereto by parties, the written submissions and authorities cited by both learned counsel and come to the following conclusions;

a) That the Learned Counsel for the Petitioner and Respondent made reference in their written submissions to **Articles 67 (2), 68 (c) (v) of the Constitution of Kenya 2010** and **Section 13 of the National Land Commission Act No. 5 of 2012** to support their case on the extent of the Respondent's power to review grants or dispositions. That while the Petitioner's counsel position is that the review power does not extend to the suit property registered in the name of the Petitioner, the Respondent's counsel's submission is that it does for reasons that the land was carved from land set aside for the Fisheries Department and hence public land that the Department has complained was illegally allocated. That the court has carefully considered the decision in **Republic vs National Land Commission & 4 Others exparte Fulson Company Limited [2015] eKLR cited by counsel for the Petitioner and the cases of Republic vs National Land Commission Exparte Krystalline Salt Limited [2015]eKLR , Republic vs National Land Commission & Another Exparte Muktar Saman Olow [2015] eKLR, Republic vs National Land Commission exparte Holborn Properties Limited [2016] eKLR and Belgo Holdings Limited vs National Commission & Another [2017] eKLR** cited by Counsel for the Respondent which are all of persuasive value to the Court. That the court understands the said decisions to be saying the following among others;

i. That the National Land Commission power to review grants or dispositions do not extend to private land that did not emanate from public land.

ii. That the National Land Commission's power to review the grants or disposition extends to private lands that emanated from public land.

iii. That where the National Land Commission, in its exercise of review powers finds that a privately registered land that emanated from public land was unlawfully and irregularly converted and allocated, it would be within its powers to make revocation recommendation to the Registrar.

iv. That where the National Land Commission in its review exercise finds the privately registered land that emanated from public land was regularly and lawfully converted and allocated, and that the land is required for public use, then it may have the land compulsorily acquired in accordance with the law.

That this court concurs with the said positions.

b) That as Kisumu Municipality/Block II/121, the suit property, has undoubtedly its origins from public land, as evinced by the letter of allotment dated 7th February 1996 over unsurveyed Industrial Plot in Kisumu, the lease dated 18th October 1996, and the certificates of lease in favour of Plantex Limited and the Petitioner, then the Respondent has power under **Section 14 of the National Land Commission Act** to inquire into the process through which the land was carved from the public land and allocated to private use. That the Respondent's letter dated 29th May, addressed to Plantex Limited and the Petitioner, clearly summarized the complaint received from the Permanent Secretary, Ministry of Fisheries Development and required of the addressees to present their response and to suspend any further dealings on the land until the matter is fully and finally determined. The letter is as reproduced herein below;

ARDHI HOUSE

NGONG ROAD

P.O. 44417

NAIROBI

DATE: 29TH MAY 2013

Ref: NLC/ADM.1/13/(3)

PLANTEXT LTD

P.O. BOX 3823-40100

KISUMU

HADIJA SHEILA BARWAKA HUSSEIN

P.O. BOX 3823-40100

KISUMU

Dear Sir,

RE: REVOCATION OF TITLE- PARCEL NO. KISUMU MUN./BLOCK 2/121

We have received a complaint from the Permanent Secretary, Ministry of Fisheries Development; P. O. Box 58187-00200 Nairobi dated 14th May, 2013 on the above matter that the land parcel referred above was illegally/irregularly carved out of the Ministry's parcel and allocated to you.

We are seeking a quick response from you on your position in relation to the same to enable us take the necessary action.

The Commission is mandated to manage and administer Public Land in country and also to review grants and dispositions on Public land to determine their legality and propriety.

By a copy of this letter, we are asking you to suspend any further dealings on this land until the matter is fully and finally determined.

Yours faithfully,

ABIGAEI MBAGAYA- MUKOLWE (MRS.)

VICE CHAIRPERSON

NATIONAL LAND COMMISSION

CC

The Permanent Secretary

Ministry of Fisheries

NAIROBI

ATT: M. N. RINGU

c) That subsequent to the letter dated the 29th May 2013, the Respondent held a review hearing of the suit property's grant on Wednesday the 23rd April 2014 as confirmed by a copy of the proceedings attached to the replying affidavit. That on the last page of the proceedings Commissioner Abigail Mukolwe observed that Hadija had not turned up and will try to get her one more time to go and present her case before they proceed and make a resolution. That there is however no evidence on whether a subsequent hearing took place or whether the Petitioner was invited to attend. There is also no evidence whether any resolution has been made to date though the Petitioner alleges that her title to the suit property has been revoked by the Respondent.

d) That Petitioner has annexed the following certificates of Official Searches marked "HSBH-06" to the petition-

i) Certificate of official search dated 24th July 2015 for Kisumu/Municipality/Block II/121.

ii) Certificate of official search dated 20th November 2012 for Kisumu/Kogony/6445.

iii) Certificate of official search dated 20th July 2009 for Kisumu/Block 2/121 and,

iv) Certificate of official search dated 23rd January 2014 for Kisumu Municipality/Block II/121.

That it is not clear how the certificate of official search for Kisumu/Kogony/6445 relates to this petition. That it is also not clear whether reference to Block 2 means the same to Block II. That the registered proprietor of the parcels subject matter of the certificates of official searches listed above is Hadija Sheila Barwaka, who the court take to be the Petitioner.

e) That provisions of **Section 107 of Evidence Act Chapter 80 of Laws of Kenya** lays the burden of proving that the Respondent had revoked the title to the suit land upon the Petitioner as she is the one alleging so. That the court has checked through the

documents filed with the affidavits in support of the petition and the notice of motion that was later abandoned and seen no such confirmation. That there is therefore no revocation decision in respect of the suit property that is capable of being called into this court for quashing.

f) That what the Petitioner appears to have been pursuing without clearly stating so is an order to stop the Respondent from inquiring into her title to the suit land. That in view of the findings in (a) and (b) above, the Respondent has power to either entertain the complaint received from the Fisheries Department or in its own motion investigate the process through which the suit property was carved out of public land and registered in the name of Plantex Limited and thereafter the Petitioner. That therefore, the letter by the Respondent dated 29th May 2013 to the Petitioner and another was issued in exercise of the Respondent's statutory and constitutional duty and cannot be taken to amount to a breach or infringement of the Petitioner's constitutional rights and freedoms.

7. That in view of the foregoing, the court finds no merit in the Petitioner's petition and the same is dismissed with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 14TH DAY OF NOVEMBER 2018

In the presence of:

Petitioner Absent

Respondent Absent

Counsel M/s Assuf for the Petitioner

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE