



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

MISC. JUDICIAL REVIEW APPL. NO. 285 OF 2016

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

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

AND

IN THE MATTER OF: THE LAND ACT NO. 6 OF 2012

AND

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

AND

IN THE MATTER OF: THE REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF: THE LAND LAWS (AMENDMENT) ACT 2016

AND

**IN ACCORDANCE WITH ORDER 53 OF THE CIVIL PROCEDURE RULES 2010 AND
SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26**

BETWEEN

REPUBLIC

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

AND

JOHN WANYAMA NYONGESA

CHARLES GATIMU & OTHERS.....INTERESTED PARTIES

EX-PARTE

KIJIJI PROPERTIES LIMITED.....APPLICANT

JUDGMENT

1. In the Notice of Motion dated 27th October, 2016, the Ex-parte Applicant is seeking for the following orders:

a. That Judicial Review orders of certiorari do issue to bring into this Honourable Court for quashing the Respondent's Notice contained in a letter dated 18th October, 2016 addressed to the Ex-parte Applicant seeking to review, investigate and adjudicate third party claims relating to the Ex-parte Applicant's title to Plot No. L.R. 21215 Mavoko Sub-County in Machakos County allegedly under Section 14 of the National Land Commission Act No. 5 of 2012 on the 4th November, 2016.

b. That Judicial Review orders of prohibition do issue prohibiting the Respondent by itself, its servants, employees and/or agents howsoever and whatsoever from investigating, reviewing and/or adjudicating about any claim or claims by any party or parties relating to the Ex-parte Applicant's ownership, use, possession and proprietorship of L.R. 21215 Mavoko, Sub-County in Machakos County belonging to the Ex-parte Applicant.

c. That the Respondent and the Interested Parties be condemned to pay the costs of these proceedings.

2. The Notice of Motion is premised on the grounds that the Respondent's Notice dated 18th October, 2016 is sub-judice Nairobi ELC. NO. 428 of 2009 which is pending for hearing and determination; that the Respondent has no legal authority to review grants and titles relating to private properties and that Parliament is yet to enact legislation as provided for under Article 68(c) (v) of the Constitution.

3. The Applicant's Motion is further premised on the grounds that the Respondent is acting in vacuum because no rules have been established to govern its deliberations as envisaged under Section 14 of the National Land Commission Act and that the Application should be allowed.

4. In his Verifying Affidavit, the Ex-parte Applicant's Director deponed that the Applicant is the registered proprietor of L.R. No. 21215 Mavoko; that he purchased the suit land on 22nd February, 2011 for Kshs. 205,000, 000 and that he obtained permission to fence the land to ward of speculators.

5. It is the Applicant's case that the Applicant has been paying rates in respect to the suit land to the Machakos County Government and that he applied for change of user which Application was approved by all the concerned government departments.

6. The Applicant's Director deponed that in October, 2013, he was served with an amended Plaint by the Interested Parties in Nairobi ELC. No. 428 of 2009 claiming that they have an interest in the suit land and that on perusal of the court file, he found that the court had dismissed the Interested Parties' Application for injunction on 22nd June, 2010.

7. Consequently, it is the Applicant's case that the investigations by the Respondent are sub-judice Nairobi ELC. NO. 428 of 2009

8. In response, the Interested Parties deponed that this court does not have the jurisdiction to exercise the powers of the High Court pursuant to Article 165(6) of the Constitution; that the notice by the Respondent is not sub-judice Nairobi HCCC NO. 428 of 2009 and that the mandate of the Respondent under Article 67 is wide because it entails addressing cases of past historical injustices which do not need to relate to public land alone.

9. According to the Interested Parties, the certificate of title attached on the Ex-parte Applicant's Affidavit is a forgery by the Ex-parte Applicant and that the purported sale was unlawful and ineffective.
10. The 1st Interested Party deponed that Article 68(c)(v) of the Constitution was operationalized by Section 14 of the National Land Commission Act and that the instant proceedings are in bad faith and are aimed at insulating the Ex-parte Applicant's unlawful title.
11. The Respondent's Principal Lands Administration Officer deponed that the Respondent is mandated to review all grants and depositions of public land; that the process entails analyzing the process under which public land was converted to private land and making findings of the legality of the grant in question and that it received a complaint from the 1st and 2nd Interested Parties requesting the Commission to initiate investigations in the legality of grant L.R. No. 21215.
12. It is the Respondent's case that after conducting initial investigations, it deduced that there was no Application to support the Application for the land by the initial allottee; that there was no approved Part Development Plan on record; that the day book number 480 which was used to transfer the land to Global Holdings Limited was in respect of L.R.NO. 209/13678 and that the Government placed a caveat on the land.
13. The Respondent's officer finally deponed that the legality of the grant held by the Ex-parte Applicant has never been subject of determination by any court of law and that the Application is an abuse of the court process.
14. The Ex-parte Applicant's advocate submitted that the Respondent is only mandated in law to review grants and dispositions of public land and not private land; that the review of public land is provided for under Article 68 (c) (v) of the Constitution and that Parliament is yet to enact legislation for review of such grants.
15. Counsel submitted that the Respondent is acting in vacuum for want of Rules; that the Ex-parte Applicant is an innocent purchaser for value and that being the registered proprietor of the suit land, the Ex-parte Applicant is entitled to enjoyment of the suit land.
16. The Ex-Parte Applicant's advocates relied on several authorities which I have considered.
17. The Respondent's counsel submitted that pursuant to the provisions of Article 68 of the Constitution and Section 14 of the National Land Commission Act, the Respondent has the mandate to review the legality of grants and disposition of public land and that the suit land was a grant of public land.
18. Counsel submitted that the issue of legality of the Applicant's title and the issue of ownership of the suit land are two unrelated issues; that the review of the grant will not have a bearing on the matter before the court and that the Applicant has not proved his case for the orders sought.
19. The advocate for the Respondent relied on authorities which I have considered.
20. The Interested parties' advocate submitted that the matters addressed in the Petition are materially different from those raised in the pleadings in Nairobi HCCC NO. 428 of 2009; that the land in question was initially public land and that the Commission's mandate also extends to investigating historical injustices occasioned by massive cases of illegal or irregular allocation of public land.
21. Counsel submitted that the court should not shield the Applicant from investigations by the Respondent.
22. Counsel relied on numerous authorities which I have considered.
23. The evidence before this court shows that land known as L.R. NO. 21215 measuring 41.6Ha was transferred to the Ex-parte Applicant on 4th July, 2011.

24. According to the grant, the suit land was initially allocated to Baywater Investments Limited by the then President for a term of 99 years with effect from 1st November, 1995. The grant was registered in favour of the said allottee on 9th November, 2000.
25. It would appear that before the Ex-parte Applicant purchased the suit land from Global Holdings Limited, a suit was filed in Nairobi HCCC No. 428 of 2009 by sixty (60) people who described themselves as “*allotees and or owners of 104 parcels of land.*” The Ex-parte Applicant was subsequently enjoined in the suit by way of an amended Plaint dated 6th December, 2012.
26. Other than the Ex-parte Applicant, the Interested Parties herein also sued the Commissioner of Lands in Nairobi HCCC No. 428 of 2009 as the 2nd Defendant.
27. In the suit, the Plaintiffs (*the Interested Parties herein*) alleged that they were allocated 104 parcels of land being L.R. Nos. 25821 to 25922 in the year 2000; that the 1st Defendant was fraudulently issued with a grant in respect to the suit land and that the then Commissioner of Lands abetted in the issuance of the said fraudulent title.
28. In the suit, the Interested Parties have sought for a declaration that they should be declared the *bona fide* grantees of the land.
29. The suit that was filed by the Interested Parties is still pending, save that their Applications seeking for injunctive orders were dismissed by the High Court.
30. According to the Affidavit of the Respondent’s Principal Lands Administration Office, they commenced their investigations in respect of the suit land after receiving complaints from the Interested Parties (*who are the Plaintiffs’ in Nairobi HCCC No. 428 of 2009*).
31. The said officer deponed that their investigations revealed that the grant that the Applicant is holding was suspect because: there was no Application to support the allocation; there was no approved Part Development Plan on record; there was no evidence of the payment of legal fees to the government and the entry number in the Central Registry Stamp was for a different parcel of land.
32. In a nutshell, the Respondent is agreeing with the Plaintiffs’ allegations in Nairobi HCCC No. 428 of 2009 that the suit land was unlawfully allocated to the initial allottee, who then transferred the land to the Ex-parte Applicant.
33. As correctly deponed by the Respondent, the Respondent took over the management of land in the country after the promulgation of the Constitution. Indeed, the Respondent is the successor of the office of the Commissioner of Lands, the 2nd Defendant in Nairobi HCCC No. 428 of 2009.
34. The issue that the Respondent purportedly discovered after its initial investigations are the same issues that the Interested Parties have raised in their Plaint, that is, that the Grant that was issued to Baywater Investment Limited was fraudulently issued.
35. This court dealt at length with how the National Land Commission should handle investigations where the same issues it is investigating are before the court. In the case of ***Republic vs. National Land Commission, Ex-parte Holborn Properties Limited (2016) eKLR***, the court held as follows:

“89. Once a dispute has been filed in this court relating to the environment and the use and occupation of, and title to land, the Respondent herein (the National Land Commission) is obliged to participate in those proceedings, if the issues raised in the suit falls within its mandate, and where it does not appear, to abide by the decision of the court. 90. The Respondent cannot re-open the issue of propriety or legality of the suit properties on the ground that it did not participate in those proceedings because it has no legal authority to do so.”

36. Having admitted in the Affidavit of its officer that it is investigating the propriety of the Ex-parte Applicant's title after receiving complaints from the Interested Parties, the Respondent cannot argue that the issue of ownership of the suit land is different from the issue of reviewing the legality of the Applicant's title document. The two issues are one and the same.

37. Having arrived at the conclusion that it is only this court, by way of Nairobi HCCC No. 428 of 2009, that can interrogate the propriety of the Ex-parte Applicant's title document, I find and hold that the Respondent does not have the *locus standi* to commence parallel proceedings envisaged under Section 14 of the National Land Commission Act.

38. Indeed, the most that the Commission can do is to avail the evidence that is in its possession to the court for the final determination of the propriety of the Applicant's title viz-a-viz the Interested Parties' claim.

39. Having found that the purported investigations by the Respondent viz-a-viz the suit land are sub-judice Nairobi HCCC No. 428 of 2009, I will not address the other issues that have been raised in the Application.

40. It is for those reasons that I allow the Ex-parte Applicant's Application dated 27th October, 2016 as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 30TH DAY OF JUNE, 2017.

O.A. ANGOTE

JUDGE