



Krystalline Salt Limited v National Land Commission; Birya (Interested Party) (Judicial Review Application 4 of 2019) [2024] KEELC 3606 (KLR) (16 January 2024) (Ruling)

Neutral citation: [2024] KEELC 3606 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
JUDICIAL REVIEW APPLICATION 4 OF 2019**

MAO ODENY, J

JANUARY 16, 2024

**IN THE MATTER OF: ARTICLE 23(3), 40(1), 47, 48, 50,
61, 64, 67, 165(6) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: SECTION 8 & 9 OF THE LAW OF REFORM
ACT CAP 9 AND FAIR ADMINISTRATIVE ACTIONS ACT, 2013**

AND

**IN THE MATTER OF: AN APPLICATION BY KRYSTALLINE SALT LIMITED FOR THE
JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI IN RESPECT
OF UNLAWFUL AND ILLEGAL ORDERS BY THE NATIONAL LAND COMMISSION**

BETWEEN

KRYSTALLINE SALT LIMITED APPLICANT

AND

THE NATIONAL LAND COMMISSION RESPONDENT

AND

ERIC FONDO BIRYA INTERESTED PARTY

RULING

1. This ruling is in respect of a Notice of Motion dated 20th May 2019 by the Applicant seeking the following orders;
 - a. That this honourable court be pleased to grant the judicial review orders of;
 - i. Certiorari to bring to this court for purposes of being quashed, the respondent's recommendations dated 9th November 2019 vide a gazette Notice Vol. CXX No. 138



relating to the Applicant's Properties known as L.R No. 132427 and LR no. 25565 for being unlawful, illegal and procedurally irregular and

- ii. Prohibition to restrain the respondent whether by itself, its agents or howsoever otherwise from implementing the said recommendations.
 - b. That the court be pleased to issue any other orders it deems just and fair in the circumstances
 - c. That the costs of the application be provided for.
2. The Respondent filed grounds of opposition dated 16th July 2019 and stated that it operated within its mandate as set out in Article 60 (1) of the Constitution thus had jurisdiction to make the decision in question. The Respondent also stated that it was not a party in Malindi ELC 287 of 2016 and that LR No. 25565 was not the subject of litigation in Malindi ELC 287 of 2016.
 3. The Interested Party, Katana Fondo Biryra deponed that he is the beneficial and legal owner of a parcel of land known as Giriama Village Island situated at Gongoni measuring 34 hectares, which he has occupied since 1964.
 4. He further deponed that on or about the year 2005 he discovered that the Applicant caused the suit premises to be registered in its name fraudulently therefore increasing measurement from 2,000 hectares to 2,034 hectares. He stated that the fraudulent acquisition led to him raising an issue vide a letter dated 29th September 2014.

Applicant's submissions

5. Counsel for the Applicant gave a brief background to the suit and stated that the Applicant is the registered proprietor of all that piece of land known as LR No. 13427 and LR No. 25565.
6. Counsel stated that on 27th October 2016 the Interested Party filed a suit against the Applicant and two others claiming inter alia that the Applicant was not lawfully granted proprietorship interests in the first property and sought for a declaration that 34 hectares should be carved off and given to him.
7. That on 22nd February 2018 the suit was dismissed with costs on the grounds that no cause of action was disclosed against the Applicant. The Interested Party lodged an Appeal against the dismissal on 1st March 2018 which appeal is still pending hearing and determination.
8. It was counsel's submission that the Interested Party filed an application for review/vary/setting aside of the order dated 19th July 2018 and further lodged a complaint with the National Land Commission raising the same issues without the Applicant's knowledge.
9. Counsel stated that on 9th November 2018 the Respondent vide a gazette Notice Vol. CXX No. 138 made the following remarks and recommendations relating to the first property:
 - a. Krystalline Salt must surrender the Giriama Village which was never part of their allocation
 - b. LR No. 13427 be amended to exclude the Village 34 hectares.
 - c. Both parties to respect road reserves and public rights of access
10. On the second property counsel submitted that the Respondent recommended that:
 - a. The second property was legally acquired
 - b. Land currently used for salt production
 - c. All fresh water wells be excised for use by the community



- d. Mangrove forests be excised from the lands as they are public land be vested in Kenya Forest Service for the people of Kenya
 - e. Persons staying on the land be settled in their provided that the lands are good for habitation and not for salt production
11. Counsel listed the following issues for determination:
- a. Whether the Respondent acted beyond its jurisdiction in issuing the recommendation and remarks
 - b. Whether the Respondent has the mandate to review grants after their authority to do so has lapsed.
 - c. Whether the Respondent acted unreasonably/arbitrarily or in bad faith
 - d. Whether the Respondent's actions are tainted with illegality.
 - e. Whether the Respondent's actions are contrary to Fair Administrative Action
 - f. Who should bear the costs of the suit.
12. On the first issue on whether the Respondent acted beyond its jurisdiction, counsel relied on Article 67 of the *Constitution* 2010 and the *National Land Commission Act* and submitted that the main function of the National Land Commission is to manage public land on behalf of the national and county governments.
13. Counsel submitted that the Applicant's parcel No. LR No. 13427 is private and not public land hence does not fall within the mandate of the Respondent as any dispute relating to private land is within the jurisdiction of the ELC court. Further that there is a pending appeal before the ELC court in respect of the property thus sub judice.
14. Counsel cited the case of *Robert Mutiso Lelli and Cabin Crew Investments Ltd v National Land Commission & 3 Others* [2017] eKLR and submitted that LR No. 25565 was legally acquired thus private property and does not fall within the mandate of the Respondent.
15. On the issue whether the Respondent has the mandate to review public grants, counsel submitted that in the event the suit properties were indeed public land as alleged by the Interested Party, the mandate of the Respondent to review grants and dispositions of public land lapsed on 2nd May 2017.
16. Counsel cited the case of *Republic v Secretary of the Firearms Licensing Board & 2 others Ex - parte: Senator Johnson Muthama* [2018] eKLR where the court granted an order of certiorari as the Respondents had acted *ultra vires*.
17. Counsel also relied on the case of *Republic versus National Land Commission Act ex Parte Giraffe Estate Ltd ; City County Government of Nairobi and 5 Others (interested parties)* [2020] eKLR and *Republic v National Land Commission & 3 others Ex-parte Samuel Githegi Mbugua & 5 others* [2018] eKLR.
18. Counsel further submitted that the Respondent had acted arbitrary and contrary to fair administrative action and relied on the cases of *Konton Trading Limited vs Kenya Revenue Authority & 3 others* [2018] eKLR, *Pevans East Africa Limited vs Betting Control & Licensing Board & 2 Others, Safaricom Limited & another (Interested Parties)* [2019] eKLR, *Republic vs Counterfeit Agency Ex Parte Caroline Mungat/a Hair Works Saloon* [2018] where the court stated that bad faith can be inferred where there is a deliberate breach of due process or where the decision maker appears to have been influenced by irrelevant considerations.



19. On the issue whether the decision was tainted with illegality, counsel relied on the case of *Republic vs Commissioner for Domestic Taxes Ex Parte, Fluer Investments Limited* [2020] eKLR and Section 14(5) of the *National Commission Act*.
20. Counsel submitted that the Respondent's actions were contrary to fair administrative action and relied on section 47 (1) of the *Constitution* which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
21. Counsel also cited the provisions of Section 4(3) of the *Fair Administrative Actions Act* and the case of *Republic vs National Land Commission & another Ex Parte Farmers' Choice Limited* [2020] eKLR where the court held that the Applicant was deprived of the right to fair administrative action since there was lack of sufficient or prior notice.
22. It was counsel's further submission that the alleged hearings that were done by the 1st Respondent contravened an injunction barring the Respondent Commission from hearing the dispute.
23. According to counsel, the Hansard also reveals that pursuant to the said court order, the Commission could not continue with the sittings to revoke the *ex -parte* applicant's title basing on a process that had been halted by the court.
24. Counsel relied on the case of *Martin Nyaga Wambora v Speaker of the County of Assembly of Embu & 3 Others* [2014] eKLR, where the court held that the process before the County Assembly was a nullity by virtue of disobedience of a court order.
25. Counsel therefore urged the court to allow the application with costs.

Interested Party's submissions

26. Counsel for the Interested Party submitted that the dispute is in relation to LR No.. 13427 which the Applicant alleges to be the legal owner but the Interested Party asserts that the Applicant unlawfully encroached onto the portion of land measuring approximately 34 hectares.
27. Counsel listed the following issues for determination:
 - a. Whether the subject suit property is private land and if the Respondent had the mandate to adjudicate over the subject property.
 - b. Whether the said recommendations violate the sub- judice doctrine.
 - c. Whether the respondent was given an opportunity to be heard before the Respondent made the recommendations.
 - d. Whether the respondent acted *ultra vires* in making the said recommendations.
 - e. Whether the Interested Party's portion from the subject suit property is an undefined and unascertainable portion.
 - f. Whether the Respondent's recommendations are a direct illegal and/or forceful expropriation of private land.
 - g. Whether the Applicant should be granted leave to seek the aforementioned orders.
28. It counsel's Submission that the Respondent's actions and recommendations were made pursuant to Article 67 of the *Constitution* and Section 14(1) of the *National Land Commission Act* which gives the Respondent the mandate either on its own motion or upon a complaint by the national government



or county government, a community or an individual to review all grants or dispositions of public land in order to establish their proprietary or legality.

29. Counsel relied on the case of *Republic vs National Land Commission Ex Parte Krystalline Salt Limited* [2015] eKLR and submitted that the Respondent had the mandate to review the grants.
30. It was counsel's submission that the matter is not sub judice as the case of *Katana Fondo Birya Vs Krystalline salt Ltd & 2 others* [2018] eKLR was dismissed vide a ruling dated 22nd February 2018 and an application for reinstatement of the suit was allowed on 27th September 2018 while the hearing of the complaint was conducted by the Respondent in February 2016 and the recommendations gazetted on 9th November 2018.
31. Ms Onyango further relied on the case of *Republic vs National Land Commission Ex Parte Holborn Properties Limited* [2016] eKLR where the court emphasized that NLC could review grants that fell within the purview of private land but which was initially public land with a view to recommending that the Registrar revokes the title. Counsel urged the court to dismiss the application with costs.

Respondent's submissions

32. Counsel submitted that the Respondent made its determination as provided for under Article 47 of the *Constitution* and section 4 & 5 of the *Fair Administrative Actions Act*.
33. Counsel relied on the cases of *Selvarajan v Race Relations Board* [1976] 1 All ER & *Judicial Service Commission v Gladys Boss Shollei & Another* [2014] eKLR and urged the court to dismiss the application with costs.

Analysis and Determination

34. The issues for determination are whether the Respondent had the mandate to hear the complaint and make recommendations as per the gazette Notice dated 9th November 2018, whether the Respondent acted *ultra vires* or in bad faith and whether the Respondent's actions were contrary to fair administrative action. Has the Applicant met the threshold for grant of judicial review orders?
35. The functions of the National Land Commission are provided for under Article 67 (2) (e) of the *Constitution*, which stipulates that, these powers include: (e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.
36. Article 68 (c) (v) provides that Parliament shall enact legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality.
37. Article 61 (2) of the *Constitution* classifies land in Kenya as public, community or private. Article 62 of the *Constitution* defines public land thus:-

“ 62.

(1) Public land is—

- (a) land which at the effective date was un-alienated government land as defined by an Act of Parliament in force at the effective date;



- (b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;
- (c) land transferred to the State by way of sale, reversion or surrender;
- (d) land in respect of which no individual or community ownership can be established by any legal process;
- (e) land in respect of which no heir can be identified by any legal process;
- (f) all minerals and mineral oils as defined by law;
- (g) government forests other than forests to which Article 63 (2) (d) (i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;
- (h) all roads and thoroughfares provided for by an Act of Parliament;
- (i) all rivers, lakes and other water bodies as defined by an Act of Parliament;
- (j) the territorial sea, the exclusive economic zone and the sea bed;
- (k) the continental shelf;
- (l) all land between the high and low water marks;
- (m) any land not classified as private or community land under this Constitution; and
- (n) any other land declared to be public land by an Act of Parliament—
 - (i) in force at the effective date; or
 - (ii) enacted after the effective date.”

38. Article 64 of the *Constitution* defines private land in the following terms:-

“64. Private land consists of —

- (a) registered land held by any person under any freehold tenure;
- (b) land held by any person under leasehold tenure; and
- (c) any other land declared private land under an Act of Parliament.”



39. Section 14 of the [National Land Commission Act](#) provides:-
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.
40. The above stipulate the mandate of the National land Commission as provided for in the [Constitution](#) and the [National Land Commission Act](#).
41. The principles of judicial review were clearly set by Lord Diplock in the case of [Council for Civil Services Unions –vs- Minister for Civil Service](#) (1985) AC 374 at 401D when he stated that:
- “Judicial review I think developed to a stage today when.... One can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call illegality, the second irrationality, and the third “procedural impropriety.....”By illegality as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it....By ‘irrationality’ I mean what can now be succinctly referred to as ‘Wednesbury unreasonableness’. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it... I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. ”
42. Judicial Review is concerned with the decision making process and not the merits of the decision as was held in the Supreme court case of [Peninah Nadako Kilishwa –v- Independent Electoral Boundaries Commission \(IEBC\) & 2 others](#) (2015) eKLR that:
- “The well-recognized principle in such cases, is that the court’s target in judicial review is always no more than the process which conveyed the ultimate decisions arrived at. It is not the merits of the decision, but the compliance of the decision making process with certain established criteria of fairness. Hence an Applicant making a case for judicial Review has to show that the decision in question was illegal, irrational or procedurally defective. ”
43. Counsel for the Applicant argued that the suit land is private land therefore does not fall within the mandate of the Respondent and further that even in the event that the suit land was public land, the mandate of the NLC had ended by 2nd May 2012.
44. In the case of [Compar Investments Limited vs. National Land Commission & 3 others](#) (2016) eKLR, the court held as follows:
- “Despite the fact that the Petitioner’s land is currently classified as private land because it holds a 99 years’ leasehold tenure over the same, I do not think that fact alone bars the 1st Respondent from inquiring into its propriety. I say so because, all land in Kenya belongs to the Republic hence the leasehold title held by the Petitioner. The suit property has a history which history tells the procedure of its alienation and hence its legality or otherwise. The Government has powers to alienate its land and grant it to private individuals in forms of grants or leases...But suppose I am wrong in making that finding, I would still arrive at



the same conclusion given the provisions of Section 14(1) of NLC Act which allows the 1st Respondent, on its own motion or through a complaint lodged by an individual or a community, to review a grant. KURA in its letter dated 5th June, 2013 lodged a complaint to the 1st Respondent over the suit property and requested it to investigate the title of the Petitioner over the suit property and that was a sufficient reason for NLC to act under the law.”

45. The Respondent has powers to inquire into the acquisition of private land that was previously public land but the same has to be done procedurally following the principles of natural justice, giving each party an opportunity to be heard and only giving recommendations within its mandate. The record shows that there were various correspondences from the Respondent to the Applicant but there is no indication that Applicant ever responded to the said letters.
46. As earlier stated, Article 67 (2) (e) of the Constitution provides that the functions of the National Land Commission include “to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.”
47. Talking about the Respondent giving recommendations within its mandate, the National land Commission revoked the Applicant’s title, which was not within its mandate. The Commission could recommend that the Land Registrar revoke a title, as provided for under Section 15 of the National Land Commission Act. This is within the mandate of the Land Registrar upon being served with a court order after parties have been heard to determine ownership as was held in the case of Robert Mutiso Lelli and Cabin Crew Investments Ltd v National Land Commission & 3 others [2017] eKLR.
48. Similarly in the case of Mwangi Stephen Muriithi v National Land Commission & 3 others [2018] eKLR, the court held that:

“I find that there is no provision empowering the Commission to revoke titles even where it is established that the same were unlawfully or irregularly acquired. The power to revoke title is vested in the Registrar and not the Commission, which can only recommend,

In any case, the provisions of Article 67 (2) of the Constitution cited above is clear and overrides the provisions of section 14 (4) of the Act which provides that “after hearing the parties in accordance with subsection (3), the Commission shall make a determination.” the Constitution is the Supreme Law of the Land as is indeed espoused under Article 2 (4). To the extent that the 1st Respondent rendered a determination as opposed to a recommendation, I find that the decision is tainted with illegality.”

49. The Respondent rendered a determination to revoke the Applicant’s title couched as a recommendation but the result was that the determination was tainted with illegality as the process was flawed.
50. The Applicant further submitted that the National Land Commission acted *ultra vires* in dealing with a boundary dispute, which is the preserve of the Land Registrar. That the Interested Party alleged that the *ex-parte* Applicant’s boundary encroached on 34 hectares of his land. Boundary disputes are the preserve of the land Registrar as provided for under Section 18(2) of the Land Registration Act which provides as follows:

“

- “(1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan



shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.

(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:

Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act, (Cap. 299)."

51. In the case of Azzuri Limited v Pink Properties Limited [2017] eKLR the court held that:

“Because general boundaries are identifiable by using the existing physical features, and by interviewing the owners of the adjacent plots, the law requires disputes relating to such boundaries to be handled by the Land Registrar, and not Surveyors or even the court”

52. The issue raised by the Interested Party to the Commission was that the Applicant had encroached on part of its parcel of land, which in effect was a boundary dispute. The Commission therefore acted *ultra vires* in determining that the Applicant cedes 34 hectares of the suit land.

53. On the issue that the Commission conducted or purported to conduct a hearing while there was a court order barring the same, Counsel also submitted that the dispute on ownership was before the Environment and Land Court and that the National Land Commission was served with an order of injunction barring it from proceeding with the hearing.

54. It was counsel’s further submission that before the hearing commenced the Commission was served with a court order which was acknowledged by the presiding Commissioner Abigael Mbagaya as per page 29 of the Hansard Annexed to the supplementary affidavit sworn by Hasmita Patel on 3rd March 2023.

55. Counsel noted that the Respondent Commission did not therefore conduct any hearings pursuant to this injunction as Commissioner Abigael Mbagaya thus observed in Kiswahili;

“Kumbe wamekimbia kortini wakaenda wakachukua court order kutusimamisha tusiwasikize sasa hivi vile tunaongea na nyinyi washapata court order kutusimamisha tusiwasikize. Na kwa sababu tume ya ardhi huwa tunatii sharia hatuwezi kuwasikia kwa sababu korti imetusimamisha. Sasa wananchi wale ambao wamedhulumiwa na mabo ya chumvi hatuwezi kusikiza mambo ya krystalline salt.”

56. This shows that if any hearings took place while the injunction was still in force then the Commission hearings were a nullity as they were done in disobedience of the court order. There is no evidence that such order had been lifted by the time the hearings took place.

57. In the case of Robert Mutiso Lelli and Cabin Crew Investments Ltd v National Land Commission & 3 others [2017] eKLR (*supra*) the court held that:

“Once there is a suit pending before a competent court and the NLC or its predecessor is a party, and the proceedings are either pending determination or have been fully determined



by that court, the NLC cannot purport to hear and determine an inquiry touching on the same dispute.

Therefore, whereas I need not over emphasize that the National Land Commission has power under Section 14 of the *National Land Commission Act* derived from Article 68 of the *Constitution* to review titles and dispositions to public land to establish the legality of the titles, that power is not absolute.

It must be exercised within the confines of known legal boundaries. Where a court of law is already seized of a dispute of ownership of the disputed land, the National Land Commission must exercise restraint. It can only avail evidence before the court of law hearing the dispute, to demonstrate that the title was illegally and or irregularly acquired, and not to oust the court's jurisdiction by taking upon itself the mandate of hearing and determining the dispute.”

58. I have considered the application, the submissions by counsel and the relevant judicial authorities and find that the Respondent, National Land Commission acted *ultra vires* and therefore the outcome of the hearings were a nullity.
59. It follows that the Applicant's Notice of Motion dated 20th May 2019 is hereby allowed as prayed with costs to the Applicant.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF JANUARY 2024.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

