



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

CONSTITUTIONAL PETITION NO. 7 OF 2016

IN THE MATTER OF ARTICLES 3(1) 19, 20, 22, 23, 24, 62, 64, 68(c)(v) OF THE
CONSTITUTION OF KENYA

AND

IN THE MATTER OF NATIONAL LAND COMMISSION ACT, 2012

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS UNDER ARTICLES 27, 40, 47, 50(1), 60(1)(b) OF THE CONSTITUTION OF
KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLE 68(c)(v), 232 & 249 OF
THE CONSTITUTION OF KENYA

BETWEEN

JAPHETH KIPKEMOBI MAGUT.....
PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....1ST
RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND
RESPONDENT

KESTEM COMPANY LIMITED.....3RD
RESPONDENT

JUDGMENT

PETITIONER'S CASE

Japheth Kipkemboi Magut (*hereinafter referred to as the Petitioner*) has come to court with this petition against the **National Land Commission, the Attorney General and Kestem Company Limited**, claiming the Petitioner is the registered owner of all that parcel of land known as L. R. No. Eldoret Municipality Block 10/48, measuring 6.957 hectares situated in Eldoret which property is subject to proceedings before the National Land Commission under section 14 of the National Land Commission Act. The Petitioner further states that the same property is subject of a subsisting court case Eldoret Environment and Land Court Case No. 38 of 2012, Kestem Company Limited Vs Ndala Shop Ltd, the Commissioner of Lands and Attorney General which was brought to the attention of the National Land Commission. The Petitioner claims that the suit land is private property with the definition of Article 64 of the Constitution. It is stated that in the suit before Environment and Land Court, the ELC Case No. 38 of 2012, the Interested Party prays for cancellation of the title to land reference No. Eldoret Municipality Block 10/48 in the name of Ndala Shop Ltd to 1st defendant and registration of the same in the name of the plaintiff. The Petitioner states that he is effectively in charge of the property.

The Petitioner alleges that the National Land Commission has denied him occasions to properly conduct his defense to accusation of the Interested Party. Whenever any argument was made in explanation of his matter, his advocate would be unduly interrupted, denied time and sometimes ordered to shut up and that the National Land Commission has openly shown bias in the matter in favour of the Interested Party, guiding the Interested party on what to say in course of the proceedings, and shutting down his advocate. Furthermore, the National Land Commission has openly ordered his advocate to abandon statutory defenses such as section 14(7) of the National Land Commission Act, 2012 of bona fide purchaser for value and that the National Land Commission representatives called him on 24th May, 2016 at 9.44 a.m. through their telephone number 0716[...], and brazenly told him to only send documents to the National Land Commission but not show up for the hearing proceedings of 27th May, 2016. This was clearly to deny him the opportunity to be heard in the matter seeking cancellation of property. The National Land Commission and in particular Commissioner Tororey has been copied in parties' correspondence. This Commissioner is from Eldoret County and is openly doing the bidding of the Interested Party.

The National Land Commission has rejected all pleas to examine the Interested Party's papers presented, for clear forgeries, and clear errors. In fact, whenever that has been raised, the 1st respondent has shut down his advocate and ordered that he proceeds with other arguments. Case in point is, as has been clearly borne in the Interested Party's own papers, the Interested Party claims to have been allotted the property Land Reference No. Eldoret Municipality/Block 10/48 in 1992, when the Certificate of Incorporation produced by the same party clearly shows that the Interested Party was actually incorporated 23rd January, 1995.

The 1st respondent has instead of having the Interested party prove his case as the allegor, ordered him prove the allegations wrong. For instance, when because of the clear forgery of what has been produced as the Interested Party's letter of allotment he applied that the original and more clearer copy be issued, the 1st respondent ordered him to produce the Interested Party's said original letter of allotment or if not, the 1st respondent would rely on the forgery.

The chair of the panel hearing the matter in the 1st respondent, Ms. Abigail Mbagaya, called him to her office and advised him that his land file though existing had been cannibalized at the Ministry of Lands, yet at the same time demanded that he produced the documents therein in defense of the matter. The National Land Commission has openly and so brazenly advised him at the last session that they would not consider the additional documents that he sought to produce in evidence. He is apprehensive that his right to property is likely to be violated and that he accuses the National Land Commission of bias and especially Commissioner Tororei who hails from Eldoret. The petitioner prays for: -

- a) An Order of Prohibition against the 1st Respondent, staying permanently the proceedings by the 1st Respondent investigating the proprietorship of the property Land Reference No.***

ELDORET MUNICIPALITY/BLOCK 10/48, as commenced or at all or recommending the revocation of the Petitioner's Title to Land Reference No. ELDORET MUNICIPALITY/BLOCK 10/48 for being Res sub judice, and that any determination of the issue of ownership of the property Land Reference No. ELDORET MUNICIPALITY/BLOCK 10/48 to be determined in Eldoret Environment and Land Court case No. 38 of 2012 Kestem Company Limited vs. Ndala Shop Limited, the Commissioner of Lands and the Attorney General FORMERLY Eldoret High Court Civil suit No. 137 of 2000 Kestem Company Limited vs. Ndala Shop Limited, Commissioner of Lands and the Attorney General;

b) A declaration that under Section 14 of the National Land Commission Act, 2012 the 1st Respondent can only review grants of public land as defined under Article 62 of the Constitution of Kenya and that that jurisdiction does not extend to private land as defined by Article 64 of the Constitution of Kenya, 2010;

c) A declaration that Land Reference No. ELDORET MUNICIPALITY/BLOCK 10/48 registered in the name of the Petitioner herein being private property, in terms of Article 64(b) of the Constitution of Kenya, 2010, the 1st Respondent lacks jurisdiction to review the same allegedly under Section 14 of the National Land Commission Act, 2012 or direct the revocation of the Certificate of Title and that the resultant proceedings, hearings and determination undertaken without jurisdiction and are thus ultra-vires, null and void;

d) A declaration that the conduct of the 1st Respondent herein against the Petitioner has infringed, infringed and violated the Petitioner's inviolable right to a fair administrative action and fair hearing protected under Articles 25,27, 47 and 50(1) of the Constitution;

e) A declaration that the 1st Respondent breached the Petitioner's legitimate expectation that he would hold its title to the suit property until its title was declared unlawful as by law provided;

f) A declaration that the 1st Respondent has infringed, infringed and/or violated the Petitioner's right to property decreed under Articles 40 as read with Article 60(1)(b) of the Constitution;

g) An Order of permanent injunction directed at the 1st Respondent and Interested Party, their agents, officers or any person whosoever or howsoever acting on their behalf from unlawfully interfering in any way whatsoever with the Petitioner's proprietorship or Title Land Reference No. ELDORET MUNICIPALITY/BLOCK 10/48;

h) The Honourable Court be pleased to award the Petitioner general damages against the 1st Respondent and Interested party jointly and severally for losses and inconveniences suffered by the Petitioner;

i) The Honourable Court be pleased to award the Petitioner exemplary damages against the 1st Respondent for breach of the Petitioner's fundamental rights;

j) The costs consequent upon this Petition be borne by the Respondents and Interested party in any event on indemnity basis;

k) The Honourable Court do make any such other or further Orders as it may deem just and expedient in the circumstances to remedy the violation of the Petitioner's fundamental rights.

1ST RESPONDENTS RESPONSE TO THE PETITION

The 1st respondent states in a reply filed and signed by ZK Yego that the commission conducted its proceedings as empowered by section 14 under the general command of his Vice Chair Abigael Mbagaya Mukolwe and duly granted the Petitioner and the 3rd respondent an opportunity to be heard. Both parties

availed oral and documentary evidence and were afforded an equal opportunity to canvass their cases. That at the conclusion of the said proceedings, the Petitioner rushed to court and filed this case. That it is not true that they proceeded to investigate and revoke title to land parcel number Eldoret Municipality Block 10/48 during the currency of the order of injunction by the court as the determination relating to the parcel had already been done way before the Petitioner moved this honorable court. The 1st Respondent reiterates that it has a constitutional mandate under the provisions of Article 67 of the Constitution to manage public land on behalf of the national and county governments.

The 1st Respondent avers that under section 14 of the National Land Commission Act No. 5 of 2012, it has a legal mandate to review all grants and dispositions of public land to establish their propriety or legality upon receiving a complaint from an individual, community, county or national government. The 1st Respondent avers that in exercising the said mandate it gave the Petitioner and the 3rd Respondent sufficient opportunity to appear before it and their right to be heard was guaranteed and observed. The 1st Respondent avers that it has no powers to revoke title to land but can make a determination upon hearing the parties to a complaint. If the 1st Respondent finds that the title was acquired in an unlawful manner it shall direct the Registrar to revoke the said title.

The 1st Respondent avers that the Petitioner voluntarily appeared before them and gave an account of how it acquired title to land parcel number Eldoret Municipality Block 10/48. At no time did the Petitioner object to the jurisdiction of the 1st Respondent to handle the complaint presented to it by the 3rd Respondent for determination in line with the provision of section 14 of the National Land Commission Act. Furthermore, the Petitioner did not bring to the attention of the 1st Respondent the existence and pendency of court proceedings in respect of the subject matter and cause of action to wit Eldoret HC Environment & Land Case No. 38 of 2012 *Kestem Company Limited -VS- Ndala Shop Limited, Commissioner of Lands & the Attorney General.* Furthermore, the Petitioner is not a party to the suit pending in court. The 1st Respondent avers that proceedings in Eldoret HC Environment & Land Court Case No. 38 of 2012 were stayed pending the hearing of proceedings for review of grants and issuance of a determination by the 1st Respondent.

The 1st Respondent denies in toto the Petitioner's allegations pleaded in paragraph 15 of the Petition particularly that the 1st Respondent denied the petitioner an opportunity to properly conduct its defence, or that it showed bias in favour of the 3rd Respondent or shut down the Petitioner during the proceedings or that its Commissioners are doing a bidding for the 3rd Respondent. The 1st Respondent denies that it rejected pleas to examine the 3rd Respondent's papers presented for forgeries and errors. The 1st Respondent denies that it did not exercise a proper standard of proof or issued a fair determination. The 1st Respondent avers that the Petitioner's allegations are an afterthought and unfounded excuses sensing that the evidence adduced before the 1st Respondent weighed heavily in favour of the 3rd Respondent.

The 1st Respondent denies that it has openly and brazenly discriminated against the Petitioner in favour of the 3rd Respondent. The 1st Respondent further denies that the Petitioner has openly been denied due process, denied time to produce evidence, shut down on important aspects of the matter or the 3rd Respondent was given all facilities, including production of forgeries and exhibits.

The 1st Respondent avers that whereas every person has the right under Article 40 of the Constitution to acquire or own property title to the said property can be challenged on ground of fraud, misrepresentation or where the certificate of title was acquired illegally, unprocedurally or through a corrupt scheme.

The 1st Respondent avers that the Petitioner's prayers for prohibition, declaration, injunction, general damages, exemplary damages and costs have no basis in law.

2ND RESPONDENTS GROUNDS OF OPPOSITION

That the proceedings before the National Land Commission (1st Respondent) are not Res subjudice at all as the 1st Respondent has concurrent jurisdiction with the courts by dint of section 14 of the National Land Commission Act, 2012 and hence the order of prohibition ought not to issue as the 1st Respondent is conducting its constitutional and statutory mandate. That the Suitland having been public land before allocation to the 1st registered proprietor, the 1st Respondent can commence proceedings under Section 14 of the National Land Commission Act to review the propriety of the grant or disposition of the same. That the Petition is premature as no decision has been made by the National Land Commission and the petitioner can apply for certiorari once a decision is rendered if he suspects likelihood of bias by the 1st Respondent.

3RD RESPONDENT'S RESPONSE:

The 3rd respondent through Stephen Metho, its director states that the parcel of land known as Eldoret Municipality Block 10/48 was allocated to the 3rd respondent and him pursuant to the application and that despite the foregoing, the petitioner, who he trusted immensely, owing to their various transactions whilst at Wheatland motors, Eldoret, breached the said trust, and fraudulently caused the said parcel of land to be registered in his name. That being aggrieved, he moved the National Land Commission and they invited the Petitioner as well as the other parties affected vide letter dated 12th April, 2016.

The petitioner submitted himself to the jurisdiction of the Commission and the determination of the commission was due any moment from the date of filing affidavit. That it is indeed true that the 3rd respondent filed Eldoret Hccc No. 137 of 2000 (now Eldoret E & L No. 38 of 2000) but nevertheless, the petitioner herein is not a party to the said suit. The said suit has never been heard nor determined. The court file has persistently been missing from the court registry, making it impossible to proceed with the hearing thereof. The determination of the complaint lodged before the National Land Commission shall not in any way prejudice the said suit. That he is advised by his counsel now on record, which he verily believe to be true that Article 40 of the Constitution specifically excludes from its protection, any property that is unlawfully acquired.

That in view of the foregoing, he wishes to state that Margaret Tuitoek is the wife of the petitioner herein and that the company known as Ndala Shop is wholly owned by the Petitioner. The transaction involving transfer of property from, Margaret Tuitoek to Ndala Shop Limited, and finally the Petitioner is nothing but a series of transaction to sanitize title that was illegally acquired. Annexed hereto and marked SM 3(a) and (b) is a copy of the transfer dated 19th June, 1997 as well as the lease dated 19th February, 1997. That the petitioner and his enterprise cannot hide behind corporate veil to perpetrate fraud. The petitioner's description of himself as an innocent purchaser for value is incorrect. The 3rd respondent alleges that the conduct of the 1st respondent was within the law and that the Petitioner was afforded an opportunity to be heard and even granted adjournment to prepare for hearing.

The Petitioner reiterates that the property is private property. Moreover, that the property was allegedly allocated to the 3rd respondent before it was incorporated according to the document produced by the 3rd respondent. He states that the documents are superimposed and overwritten in the names of the 3rd respondent. The Petitioner has gone at length to state how the 3rd respondent illegally obtained title which I think is not an issue to be determined in this dispute. However, the allegations of bias are relevant as the Petitioner's claim that the National Land Commission asked him not to appear before it and went ahead to make a decision.

PETITIONER'S SUBMISSIONS

Mr Bwire learned counsel for the Petitioner submits that Article 40 of the Constitution of Kenya guarantees every person the right, either individually or in association with other to acquire and own property of any description and in any part of Kenya. The Petitioners are owners of private land as defined in section 64 of the Constitution of Kenya. The constitution of Kenya, 2010 vests in the National Land Commission the power to investigate title in relation to public land and not private land. It was

therefore a violation of the petitioner's right to own property of any description in any part of Kenya for the 1st, 2nd and 3rd respondents to purport to investigate to petitioner's title to land.

The petitioner relies on the decision of Justice Odunga in *Nairobi High Court Judicial Review No. 117 of 2016 – Republic Vs National Land Commission ex-parte Cecilia Chepkoech Leting & Others* and argues that the petitioner has demonstrated that there is an infringement of the petitioner's rights.

The petitioner submits that the National Land Commission has no jurisdiction to investigate title to private land. The jurisdiction of National Land Commission is only for reviewing of grants to public land. The petitioner argues that the property in dispute is private land hence National Land Commission has no jurisdiction.

According to the petitioner, the issue is not the process of alienation but the status of the land at the time of investigation and whether the land was alienated before the effective date. If it is public land, the National Land Commission has jurisdiction and if it is private land, the National Land Commission has no jurisdiction.

The petitioner further submits that the matter of determination of the proprietor of the suit property is sub judice as it is pending in court for determination thus Environment and Land Court Case No. 38 of 2013 Kestem Company Ltd Vs Ndala Shop Company Ltd. The National Land Commission was advised of the pendency but ignored and neglected to stop the proceedings.

On whether the National Land Commission was biased and failed to afford the petitioner a fair hearing in the proceedings for investigating allocation in the suit property and the decision of 4.8.2016, the petitioner submits that the Commission is enjoined by Article 47 of the Constitution of Kenya to exercise its administrative authority fairly when determining issues that affect rights of parties. The National Land Commission failed to adhere to the principles in Article 47 of the Constitution. Moreover, that the National Land Commission failed to observe Article 50(1) of the Constitution hence did not offer a fair hearing to the petitioner.

According to the petitioner, National Land Commission did not consider imported evidence and denied the petitioner the opportunity to present evidence and required the petitioner to prove his case despite the fact that the 3rd respondent has the complaint and therefore, had the burden to prove his case.

Basically, a failure to consider evidence before it and reasonableness, the petitioner submits that the National Land Commission was clearly biased and the actual result was pre-determined.

THE 1ST RESPONDENT'S SUBMISSIONS

Mr. Z K Yego learned counsel for the 1st respondent has identified the issues for determination thus whether the 1st respondent has jurisdiction to investigate and recommend revocation of title over private property and private property alienated before the effective date of the constitution and whether the matter for determination of the proprietorship of the suit property is sub judice. To begin with, the respondent submits that the issue as to whether the 1st respondent was biased and did not afford the petitioner a fair hearing and did not apply to principles of fair administrative action in proof as the decision of the National Land Commission was nullified by consent of all parties in the aforesaid petition.

According to the respondent, there are no existing proceedings. On this issue as to whether the National Land Commission has jurisdiction to investigate and revoke or recommend revocation of title over private property and private property alienated before the effective date of the constitution, the respondent submits that the applicants contend that upon registration of land as private land under the Land Registration Act, or under the Registration Land Act repealed, the rights of a registered party crystallized and were protected from review and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which the person is proved to be a party or whether the certificate of title has been acquired illegally unprocedurally or through a corrupt scheme is true,

however, whereas every person has a right either individually or in association with others to acquire and own property of any description and in any part of Kenya any property which is found to have been unlawfully acquired is not protected by the provision of Article 40(6) of the Constitution.

The 1st respondent submits that it has jurisdiction to review all grants and dispositions of private land where such land was previously public land. To limit the jurisdiction of the 1st respondent to public land under Article 62 of the Constitution is defeat at and self-serving as it gives the provision of Article 68©(v) a very narrow interpretation and mocks the intention of the people of Kenya and Parliament and defeats the purpose of the said constitution and statutory provision.

On whether the matter for determination of the proprietor of the suit property is sub judice, the 1st respondent submits that both parties have participated in the proceedings before the 1st respondent fully aware of the pending suit thus Eldoret E & L Case No. 38 of 2012 thus Kestem Company Ltd Vs Ndala Shop Company Ltd, Commissioner of Lands and Attorney General and that the plaintiff in the pending suit being 3rd respondent seeks a relief for cancellation of title of Land Ref. Eldoret Municipality Block 10/48 in the name of Ndala Shop Ltd 1st defendant and registration of the same in favour of the plaintiff. The respondent argues that the respondent before the Commission is different from the respondent in the pending suit as in the former case the respondent is Joseph Magut whilst in the latter case the respondent is Ndala Shop Ltd. According to the 1st respondent, nothing prevents the interested party from electing to have its claim determined by a different forum with competent jurisdiction. The pending case has never kicked off. The 1st respondent prays that the petition be dismissed with costs.

SUBMISSIONS BY ATTORNEY GENERAL

Mr. Ngumbi senior litigation counsel for the honorable Attorney General submits that that the proceedings before the National Land Commission (1st Respondent) are not Res subjudice at all as the 1st Respondent has concurrent jurisdiction with the courts by dint of section 14 of the National Land Commission Act, 2012 and hence the order of prohibition ought not to issue as the 1st Respondent is conducting its constitutional and statutory mandate. That the Suitland having been public land before allocation to the 1st registered proprietor, the 1st Respondent can commence proceedings under Section 14 of the National Land Commission Act to review the propriety of the grant or disposition of the same. That the Petition is premature as no decision has been made by the National Land Commission and the petitioner can apply for certiorari once a decision is rendered if he suspects likelihood of bias by the 1st Respondent

3RD RESPONDENTS' SUBMISSIONS

Mr. Tororei learned counsel for the 3rd respondent submits that on three issues are for determination namely whether the Commission had jurisdiction, to effect of the pendency of the suit namely Eldoret E & L Court Case No. 38 of 2012. Whether or not the petitioner is entitled to the protection offered by the Article 40 of the Constitution. On the issue of jurisdiction, the 3rd respondent submits that the 1st respondent has jurisdiction to review grants and disposition of private land where such land was public land as all land belonged to Government before being allocated to individuals. According to the 3rd respondent, the suit land was initially public land and that the 1st respondent has jurisdiction to review its title to establish its property or legally. Mandate was retrospective. The 3rd respondent further argues that the petitioner submitted himself to the jurisdiction of the commission and only came to court after failing to obtain certain documents. On the pending suit, the 3rd respondent argues that the petitioner is not party to the suit and that the same has not been heard and determined.

Lastly, the 3rd respondent argues that the petitioner is not entitled to the protection under Article 40 of the Constitution as he has not come with clean hands as the property was fraudulently acquired with the participation of the petitioner.

I have considered the petitioner's responses and rival submissions and do find the following issues for determination:

(1) Whether National Land Commission has jurisdiction to investigate and revoke or recommend revocation of title over private property and private property alienated before the effective date of the constitution.

(2) Whether the proceedings of the national land commission are sub judice.

(3) Whether the 1st respondent breached the principles of fair hearing and fair administrative action.

(4) What orders should the court make.

(5) Who should pay costs

I have perused the certificate of lease issued on 3.8.2010 in respect of Eldoret Municipality Block 10/48 by Land Registrar, Eldoret certifying that Japheth K. Magut was the registered proprietor of the leasehold interest. I do find that the petitioner being the registered proprietor of the suit property was entitled to protection of section 40 of the Constitution subject to a confirmation that the property was neither illegally acquired nor acquired through a corrupt scheme and therefore, was entitled to come to this court vide a petition to protect his rights.

On the first issue, I do find that the Commissioner is a creature of the constitution of Kenya, 2010. Article 67 of the Constitution of Kenya 2010 establishes the National Land Commission whose functions are to manage public land on behalf of the national and county Governments and to recommend a national land policy to the national government, to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya to conduct research related to land and the use of natural resources, and make recommendations to appropriate Authorities; to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress; to encourage the application of traditional dispute resolution mechanisms in land conflicts; to assess tax on land and premiums on immovable property in any area designated by law; and to monitor and have oversight responsibilities over land use planning throughout the country. The National Land Commission may perform any other functions prescribed by national legislation.

Article 68 of the constitution of Kenya provides for the enactment of legislation on land thus Parliament shall revise, consolidate and rationalize existing land laws; revise sectoral land use laws in accordance with the principles set out in **Article 60 (1); and —**

(c) enact legislation—

(i) to prescribe minimum and maximum land holding acreages in respect of private land;

(ii) to regulate the manner in which any land may be converted from one category to another;

(iii) to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage;

(iv) to protect, conserve and provide access to all public land;

(v) to enable the review of all grants or dispositions of public land to establish their propriety or legality;

(vi) to protect the dependants of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land; and

(vii) to provide for any other matter necessary to give effect to the provisions of this Chapter.

The National Land Commission Act, no 5 of 2012 was enacted pursuant to Articles 67 and 68 of the constitution of Kenya 2010. The object and purpose of this Act is to provide for the management and administration of land in accordance with the principles of land policy set out in Article 60 of the Constitution and the national land policy and for the operations, powers, responsibilities and additional functions of the Commission pursuant to Article 67(3) of the Constitution inter alia. Section 14 of the National Land Commission Act provides for Review of grants and dispositions thus: -

(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 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).

The import of the above is that the National Land Commission is empowered on its own motion or upon a complaint by the National or a County government, a community or an individual to review all grants or disposition of public land to establish their property or legally subject to Article 68(c)(v) of the Constitution. In my view, land that was formerly public land but has now been converted to private land is subject to review by the National Land Commission as finding otherwise will not make legal sense due to the fact grants and disposition refer to land that has been converted from public to private. Moreover, the Article 68(c)(v) is considered to apply in retrospect as it refers to all grants and disposition existing at the time of the promulgation of the constitution.

I do find that the interest of the maker of the constitution in view of the provisions of Article 67(3) of the constitution of Kenya 2010 and parliament through section 14 of the national land commission Act was to give the National Land Commission the power to investigate the process used by an individual to acquire title whether past or the future.

I do agree with Hon. Justice Angote in **Republic Vs National Land Commission exparte Holborn Properties Ltd 2016 eKLR** in holding that:

The reading of Section 14 of the National Land Commissions Act shows that Parliament contemplated that it is the Respondent that shall have the jurisdiction to review all grants and disposition of public land notwithstanding the use of the words “subject to Article 68 (c) (v) of the Constitution in Section 14(1) of the Act”.

What Parliament had in mind by using the words “subject to Article 68(c)(v) of the Constitution” is that the mandate to review grants or disposition of public land was to be undertaken by the Respondent until such a time that another body will be established by an Act of Parliament, to do so.

I say so because Section 14(1) clearly stipulates that the Respondent shall review all grants and disposition of public land while Sections 14 (3), (4), (5), (6), (7), (8) and (9) of the Act gives the procedure that the Respondent ought to follow while conducting the exercise of reviewing grants and disposition of public land.

Although the Respondent, in addition to the provisions of the Act, is required to make rules for the better carrying out of its functions of reviewing grants or dispositions of public land, the absence of the rules cannot be sufficient reason to stop it from exercising those functions considering that the Act is clear on how the exercise should be carried out.

Indeed, the mandate that Parliament has conferred on the Respondent to review grants or dispositions of public land to establish their propriety or legality emanates from the provisions of Article 67(3) of the Constitution. The said Article provides that National Land Commission may perform any other function that is prescribed by national legislation.”

Justice Angote further finds, and I agree that: -

“The body that was to be given the mandate to review such grants or dispositions by Parliament was not only supposed to deal with public land that was illegally or irregularly allocated after the promulgation of the Constitution but even before

Although the Constitution has defined private land to consist land registered under any freehold or leasehold tenure, and whereas Section 14(1) of the National Land Commission Act gives the Respondent the powers to review all grants or disposition of public land, it follows that such a review can only entail land that has been converted from public land to private land.

I say so because the Respondent cannot review what is still, according to the records, public land. One must have acquired land that was initially public land and issued with a title document, either as a freehold or leasehold, for a review to be done.

It is therefore not true that once land falls under the purview of the definition of “private land”, the same cannot be reviewed. Indeed, it is only such parcels of land that can be reviewed by the Respondent with a view of recommending to the Registrar to revoke the title.

The recommendation to the Registrar by the Respondent to revoke title which it finds was illegally issued is only in respect to the initial allottee. However, where the initial allottee of public land has transferred land to a bona fide purchaser for value without notice of defect in the title, the Registrar does not have the jurisdiction to revoke such a title (see Section 14(7) of the National Land Commission Act).

The issue of whether the parcel of land under review by the Commission was initially public land has to be established first by the Respondent before it can make a recommendation for or against revocation.”

The spirit of Article 67(3) and Article 67 of the constitution of Kenya is that all existing grants should be investigated by the National Land Commission and appropriate action taken. This should be read with

Article 40 of the Constitution of Kenya and section 26 of the Land Registration Act which do not protect land title that was illegally acquired. This court thus finds that the power of the national land commission to review all grants or disposition of public land entails power to review grants and dispositions in respect of land that has been converted from public land to private land before or after the promulgation of the constitution is **retrospective**.

It is a cardinal principal of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the Legislature to affect existing rights, it is "deemed to be prospective only. As a logical corollary of the general rule, that retrospective operation is not taken to be intended unless that intention is manifested by express words or necessary implication, there is a subordinate rule to the effect that a statute or a section in it is not to be construed so as to have larger retrospective operation than its language renders necessary. In other words, close attention must be paid to the language of the statutory provision for determining the scope of the retrospectivity intended by Parliament. But if the literal reading of the provision giving retrospectivity produces absurdities and anomalies, a case not prima facie within the words may be taken to be covered, if the purpose of the provision indicates that the intention was to cover it. The inhibition against retrospective construction is not a rigid rule and must vary **secundum materium**. It has been said that the basis of the rule is no more than simple fairness which ought to be the basis of every legal rule.

It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole.

Construing Articles 67 and 68 of the Constitution of Kenya and the provisions of section 14 of the National Land Commission Act and the report of **the Ndungu Commission and the Truth Justice and Reconciliation Commission**, one would conclude that there was an intention to cure some evil in the grants and dispositions of public land.

On the second issue of **sub judice**, I do find that the principle is based on public policy that if a matter is pending in a court of law of competent jurisdiction, any other court or body of equal jurisdiction should not try the same but should be stayed pending the outcome of the proceedings in the court. This principle pre-empts the existence of the conflicting decisions. I do find that the subject matter before the commission is the same before the Environment & Land Court Eldoret in Case No. 38 of 2012. The parties are the same or litigate in the same name, save that the petitioner is the purchaser from Ndala Shop Ltd.

On the third issue of fair hearing and fair administration of justice, I do find the same to be moot having nullified the proceedings and the decision of the National Land Commission by consent.

On the fourth issue, I do give a **declaration** that under Section 14 of the National Land Commission Act, 2012 the 1st Respondent can review grants of public land as defined under Article 62 of the Constitution of Kenya and that has been converted from public land to private land. An Order of **Prohibition** against the 1st Respondent, staying permanently the proceedings by the 1st Respondent investigating the proprietorship of the property Land Reference No. ELDORET MUNICIPALITY/BLOCK 10/48, as commenced or at all or recommending the revocation of the Petitioner's Title to Land Reference No. ELDORET MUNICIPALITY/BLOCK 10/48 for being Res sub judice, and that any determination of the issue of ownership of the property Land Reference No. ELDORET MUNICIPALITY/BLOCK 10/48 to be determined in Eldoret Environment and Land Court case No. 38 of 2012 Kestem Company Limited vs. Ndala Shop Limited, the Commissioner of Lands and the Attorney General FORMERLY Eldoret High Court Civil suit No. 137 of 2000 Kestem Company Limited vs. Ndala Shop Limited, Commissioner of Lands and the Attorney General. Lastly on the issue of costs, the petitioner is awarded half costs of the petition. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 13TH DAY OF JULY, 2017.

A. OMBWAYO

JUDGE