



Republic v Chief Land Registrar; Mburu & 3 others (Interested Parties); Chemmuttut (Ex parte) (Judicial Review Application 3 of 2016) [2017] KEELC 1881 (KLR) (19 September 2017) (Judgment)

Republic v Chief Land Registrar & 4 others Ex-Parte Charles P. Chemmuttut Ex-Parte

Neutral citation: [2017] KEELC 1881 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
JUDICIAL REVIEW APPLICATION 3 OF 2016**

**JO OLOLA, J
SEPTEMBER 19, 2017**

BETWEEN

REPUBLIC APPLICANT

AND

CHIEF LAND REGISTRAR RESPONDENT

AND

MBURU LEWA MBURU INTERESTED PARTY

JACKUELINE JOSEPHINE WANJIKU INTERESTED PARTY

MATABATU INVESTMENT LIMITED INTERESTED PARTY

NATIONAL LAND COMMISSION INTERESTED PARTY

AND

HON JUSTICE CHARLES P CHEMMUTTUT EX PARTE

JUDGMENT

Background

1. What is before me is the Ex-parte Applicant’s Notice of Motion dated 11th July 2016 brought pursuant to the Provisions of Order 53 Rule 1 of the Civil Procedure Rules and Sections 8 and 9 of the Law Reforms Act. The Ex-parte Applicant is seeking for the following Judicial review Orders:-
 - a. That an order of Mandamus directed to the Chief Lands Registrar, either by herself, subordinates, agents or whosoever compelling her to revoke the Grant Number CR. 55799,



Grant Number CR. 55798, Grant Number CR. 55781 and Grant Number CR. 55782 for LR. MN/111/432 – 435 and expunge the same from the Registry of Titles and a Certificate of Lease/Title be issued to Hon. Mr. Justice Charles P. Chemmuttut, the Applicant herein.

- b. That the Parcels of land under Grant Number CR. 55799, Grant Number CR. 55798, Grant Number CR 55781 and Grand Number CR. 55782 for LR. No MN/III/432-435 be vested in Hon Mr. Justice Charles P. Chemmuttut.
 - c. That the costs of this application be provided
2. Prior to the filing of the substantive Motion, the Ex-parte Applicants sought and were granted leave on 28th June 2016 for the Orders being sought herein. The said application for leave to commence Judicial Review proceedings was accompanied by the Ex-parte Applicant's Statement and an Affidavit in verification of Facts sworn on June 2016.

The Ex-parte Applicant's Case

3. It is the Applicant's case that on or about 5th June 1992, he applied to the Commissioner of Lands and was allocated LR No. MN/III/432-435 measuring 10.79 acres. It is his case that he subsequently paid the requisite fees but was unable to develop the land immediately due to exigencies and demands of duty. He however carried out simple subsistence farming on the suit property.
4. After a period of sometime, the Ex-parte Applicant applied to be issued with a title deed but was informed that the relevant file was missing. On 22nd September 2014 he visited the Land Registry in Mombasa and, upon conducting a search, found that the 1st to 4th interested parties herein had acquired title deeds for the same land. The 3rd Interested Party Albert Tsuma Tonya had acquired title for LR No. MN/III/432, whereas the 1st Interested Party-Mbaru Lewa Mbaru was registered as the owner of LR. MN/III/433. Similarly Jacqueline Josephine Wanjiku (the 2nd Interested party) and Matabatu Investments Ltd (4th Interested party) were respectively registered as the owners of parcel numbers 434 and 435. It is the Ex-parte Applicant's case that he is a stranger to these individuals and the Investment Company and he does not therefore know how they came to be registered as the owners of the suit property.
5. Consequently on or about 16th September 2013, the Ex-parte Applicant filed a complaint with the National Lands Commission, the 5th Interested party herein in which he alleged that the suit property had been irregularly issued to the 1st to 4th Interested Parties herein. Upon receipt of the complaint, the 5th interested party issued a notice dated 4th August 2013 which was published in the daily newspapers inviting those with interest on the land to appear before the Commission for hearing on 28th August 2014. On the appointed day, only the Ex-parte Applicant appeared and made presentations to the Commission.
6. Subsequently, the 5th Interested Party rendered a Ruling dated 8th October 2015 in which it determined and directed that:-
 - a. Titles registered as Grant Numbers CR. 55781, 55782, 55798 and 55799 be revoked because they were issued to the 1st to 4th Interested Parties unlawfully;
 - b. A Certificate of lease/title be issued to the Hon Justice Charles P. Chemmuttut, the Applicant; and
 - c. The Registrar of Titles Mombasa County be served with the Orders of the Commission for execution.



7. The Ex-parte Applicant now contends that in spite of the fact that the directive to revoke the aforesaid titles and expunge them from the Registrar of Titles was brought to the attention of the Chief Land Registrar (named herein as the Respondent) who willfully and deliberately declined to exercise her statutory duty to implement the directive even after the 5th Interested Party published its findings and determination via Gazette Notice No. 307 of 22nd January 2016. The Ex-Parte Applicant accordingly feels that he has no other remedy other than to seek the assistance of this Court to compel the Respondent to act on the directions of the 5th Interested Party.

The Respondent's Case

8. In opposition to the Application, the Respondent filed Grounds of Opposition dated 2nd May 2017 stating as follows:-
- i. That the Application herein is misconceived, frivolous, vexatious and an abuse of the process of the Court;
 - ii. That vide Section 14(c) of the *Land Registration Act*, the Respondent herein has powers to exercise discretion before proceeding with any registration and the orders sought are untenable and a nullity;
 - iii. That the National Land Commission, the 5th Interested Party herein has not complied with the requirements of Section 14(3) of the *National Land Commission Act* regarding the opportunity to be heard during the review of grants and dispositions;
 - iv. That pursuant to Article 47 (of *the Constitution*) an Order of Mandamus would be prejudicial to the Interested Parties herein;
 - v. That the issue touching on matters of ownership can only be adequately addressed and/or redressed by way of (a) Civil Suit for each party to prove their rights or claim to the suit property; and
 - vi. That the Ex-parte Applicant has no proper claim against the Respondent. The Application is thus incompetent and ought to be struck out.
9. In addition, the Respondents submit that there is no proof of unreasonableness, irrationality and/or abuse of discretion by the Respondent in exercising his duty not to comply with the directive issued by the 5th Interested Party. Accordingly, it is the Respondent's case that the Motion as filed is unmerited, frivolous and baseless and the same ought to be dismissed with costs.

The 1st to 4th Parties Case

10. The 1st to the 4th Interested Parties neither entered appearance nor filed any responses to the Motion. From an Affidavit of Service sworn by Kennedy Muranja Munene Advocate and filed herein on 28th November 2016, it is apparent that all Interested Parties were served by way of substituted service pursuant to an Order made by the Honourable Justice Angote of this Court on 5th October 2016. An extract of the newspaper advert carried out in the Standard Newspaper of 26th October 2016 is attached to the Affidavit and marked as annexure "KMM 1".

The 5th Interested Party's Case

11. In a long and detailed Replying Affidavit sworn on 16th February 2017 by its Deputy Director Legal Affairs and Enforcement Brian Ikol, the 5th Interested Party describes itself as an Independent



Constitutional Commission established under Article 67(1) of the Constitution and operationalized by the National Land Commission Act No. 5 of 2012. The Deponent avers that pursuant to Articles 67(3) and 68(v) of the Constitution, Parliament enacted the National Land Commission (hereafter National Land Commission) Act which under Section 14 mandates the Commission to review all grants or deposition to public land to establish their legality and propriety. The said section also requires the National Land Commission upon receipt of a Complaint or on its own volition to make a determination after giving every person a notice of such intended review and an opportunity to appear before it. Under Section 14(5) of the National Land Commission Act, where the Commission finds that title to land was acquired in an unlawful manner, the National Land Commission shall direct the Registrar to revoke the title.

12. The 5th Interested Party avers that in exercise of its mandate as aforesaid, it received a complaint from the Ex-parte Applicant herein dated 16th September 2013 alleging unlawful acquisition and titling of the Suitland. On receipt of the complaint, the 5th Interested Party wrote to the Interested Parties and the Ex-parte Applicant informing them of the substance of the complaint and inviting them to attend a public hearing to ventilate on how they acquired the Suitland. In addition the 5th Interested Party caused a notice dated 4th August 2013 to be published in the dailies inviting the parties to appear before the Commission for a hearing on 28th August 2014 in Nairobi.
13. The 5th Interested Party states that on the appointed day, only the Ex-parte Applicant appeared and made representation. The 5th Interested Party thereafter rendered a determination in which it inter alia directed that the impugned titles be revoked and a new one be issued in the name of the Ex-parte Applicant. The said determination was brought to the attention of the Respondent on 8th October 2015 vide a letter addressed to both the Respondent and the Land Registrar Mombasa calling for its implementation. The Registrar of Titles Mombasa confirmed receipt of the said determination and sought directions from the Respondent on how to execute the same but to-date the Respondent is yet to implement the same.
14. The 5th Interested Party therefore supports the issuance of the Orders sought herein stating that it did exercise legitimate and lawful jurisdiction, accorded due process to the parties and rendered a determination that remains lawful.

Analysis and Findings

15. I have considered the Motion before me, the Respondent's Grounds of Opposition as well as the 5th Interested Parties' Replying Affidavit. I have equally studied the submissions and authorities placed before me by the Learned Advocates acting for the parties herein.
16. The 1st to the 4th Interested Parties who are presently the registered Owners of the Suitland failed to enter appearance herein and have therefore not ventilated how they acquired the Suitland. From an Affidavit of Service filed herein on 28th November 2016, it is apparent that they were duly served by way of substituted Service pursuant to an order of this Court issued on 5th October 2016.
17. On its part, the Respondent has through the Office of the Honourable the Attorney General strenuously opposed the grant of the Orders sought herein. The Respondent submits that the writ of Mandamus will not issue in cases where whether or not to do an act is left to the discretion of an authority. Citing section 14(c) of the Land Registration Act, the Respondent submits that the Chief Land Registrar has to exercise her discretion when considering a directive such as the one issued herein by the 5th Interested Party, the National Land Commission(NLC).



18. Section 14(c) of the [Land Registration Act](#), No. 3 of 2012 provides as follows:-

“ 14. The Chief Land Registrar, County Land Registrar or any other land registrars may, in addition to the Powers conferred on the office of the Registrar by this Act:-

(c) Refuse to proceed with any registration if any instrument, certificate or other documents, plan, information or explanation required to be produced or given is withheld or any act required to be performed under this Act is not performed.”

19. In their submissions herein the Respondent contends that the above provision requires her to take into consideration the legal implications of any registration that may be made. It is apparent from the submissions placed before me that the Respondent is of the view that the 5th Interested Party did not grant the 1st to 3rd Interested parties a fair hearing at all since the notice published in the dailies only referred to the 4th Interested Party hence her refusal to effect the directive of the 5th Interested Party. As it were, the 1st to 4th Interested Parties did not appear herein and this Court can only speculate as to the position they hold on the matters raised in this application.

20. The 5th Interested Party is a Constitutional Commission established under Article 67(1) of [the Constitution](#). Article 68(c) (v) of [the Constitution](#) requires Parliament to enact legislation to enable the review of all grants or disposition to public land to establish their propriety or legality. Thus pursuant thereto, and/to Article 67(3) of [the Constitution](#), Parliament enacted the [National Land Commission Act](#), No. 5 of 2012 which Act operationalized the Commission.

21. Section 14(1), (4), (5) and 6 of the Act provides as follows:-

“ 14(1) Subject to Article 68(c) (v) of [the Constitution](#), the Commission shall, within 5 years of the commencement of this Act, on its own motion or upon a complaint by the national or Country Government, a Community or an individual, review all grants or dispositions of Public land to establish their propriety or legality.

(4) After hearing the Parties in accordance with sub-section (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. (Underlining mine)

22. It would appear to me from reading of the above provisions that the 5th Interested Party has a very wide mandate to look at various processes involved in the conversion of Public land to private land and to determine whether the conversion process leading to the issuance of a grant, lease or certificate of title was lawful. This is more so when one considers the meaning of the term “disposition” as used under Section 14(1) of the [National Land Commission Act](#). Section 2 of the [Land Act](#) defines the term “disposition” to include

“ Any sale, charges, transfer, grants, partition, exchange, lease, assignment, surrender, or disclaimer and includes the disclaimer of the creation of an easement, a usufructuary right,



or other servitude or any other interest in land or a lease and any other act by the owner of land or under a lease where the owner's rights over that land or lease are affected or an agreement to undertake any of the dispositions..”

23. It is not contested that the instant suitland was initially public utility land under the Registration of Land Act and was allocated by the then Commissioner of Lands by way of a Letter of Allotment. Accordingly, it remains leased public land where the Government is retained as the head lessor. The same therefore falls squarely within the mandate of the 5th Interested Party which also has an obligation to look at the conversion process and to determine if the same was lawful and regular.
24. In my considered view what is before this Court is not the issue of ownership of the suitland. It is also not in dispute that the 5th Interested Party Pursuant to its mandate considered a complaint made by the Ex-parte Applicant and made a determination thereon. The said determination has neither been quashed nor overturned by an Appeal or any other review mechanism provided under the rules of the Court. I think what the Respondent is actually contesting is whether the 5th Interested Party should give binding directions to her office.
25. In Republic v Land Registrar Mombasa & 2 Others Ex-parte Bhangra Limited [2012]eKLR, the Honourable Justice Frances Tuiyot held and I concur as follows:-

“It is common ground, I think that the Land Registrar has no power either under the Constitution or the Registered Land Act (now repealed) to revoke title. A string of decisions have restated this rather uncontested position of the law. That power has until recently rested exclusively with the Court. From 2nd May 2012, when the National Land Commission Act commenced, power to review grants, or dispositions of public land was given to the National Land Commission.

Section 14 of the Act makes provisions on how that power is to be exercised.

(c)

(d) So in respect to public land the Court shares this authority with the National Land Commission.

26. Similarly, in Republic v National Land Commission & Another Ex-parte Muktar Saman Olow (Misc Application No. 376 of 2014 [2015] eKLR, the Court observed as follows:-

“.....Under Section 14 of the National Land Commission Act, 2012, the Respondent is given the jurisdiction to enforce Article 68 (c) (v) of the Constitution and to review all grants or dispositions of Public land to establish their propriety or legality. In my view, the Respondent can only fulfil this mandate by probing the process under which public land was converted to private land. It would defeat the purpose of the Constitution to imagine that unlawfully and irregularly acquired land once registered as private property is no longer within the reach of the Respondent...”

27. As it were, in exercising its Constitutional and Statutory mandate, the 5th Interested Party acts as a tribunal. The determinations rendered are therefore binding on the parties unless of course they are, as I have stated, quashed or overturned by an appeal or any other review mechanism by this Court or the High Court. The Respondent herein is neither the Environment and Land Court nor the High Court. Neither is it a body superior to this Court or the High Court. In arbitrarily choosing what determinations to revoke and which ones not to revoke, the Respondent in my view not only acts in



contempt of lawful orders issued by a competent tribunal but also usurps the supervisory role of this Court and the High Court under Articles 162 and 165 of *the Constitution*.

28. I think it is only proper that if the Respondent or any other party felt for one reason or the other that the decision of the 5th Interested Party was unfair, the right course of action is to challenge the same before a Court of law but not to passively sit on the same with no action or communication as was the case herein.
29. The wording of the provisions of Section 14(5) of the *National Land Commission Act* is in mandatory terms and the determination of the 5th Interested Party is binding and has the force of law. The power is informed by historic factors including the previous operations of the Respondent's office. The legislature must have been fully conscious of those historic factors when it used the word 'direct' in relation to the power structure between the 5th Interested Party and the Respondent. The Merriam Webster dictionary defines a "directive" as "an authoritative order" issued by a high level body.
30. When Kenyans voted overwhelmingly for a new Constitution they overwhelmingly voted to establish an independent National Land Commission that would have real power to clean up the land sector. By sitting on the decisions of the National Land Commission and purporting that it has discretionary power to implement and/or disregard the same, the Respondent is taking back the very gains made by Kenyans in the enactment of *the Constitution* of Kenya 2010. This Court as an arm of Government exercises sovereign Power on behalf of the people of Kenya and will not countenance any such acts of impunity on the part of the Respondent.
31. The upshot of all the foregoing is that I find merit in the application dated 11th July 2016. The same is allowed.
32. Each Party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF SEPTEMBER, 2017.

J.O. OLOLA

JUDGE

