



**Republic v National Land Commission; Telkom Kenya Limited (Exparte);
Asumba & 2 others (Interested Parties) (Judicial Review Application
44 of 2019) [2023] KEELC 127 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 127 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
JUDICIAL REVIEW APPLICATION 44 OF 2019
EK WABWOTO, J
JANUARY 19, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

NATIONAL LAND COMMISSION RESPONDENT

AND

TELKOM KENYA LIMITED EXPARTE

AND

HESBON AHIRO ASUMBA INTERESTED PARTY

MABEL W. ASUMBA INTERESTED PARTY

CHIEF LAND REGISTRAR INTERESTED PARTY

JUDGMENT

1. By Chamber summons dated July 18, 2019, the Applicant sought and was granted leave to apply for the Judicial review orders to wit an order of *certiorari* removing to this court for purposes of being quashed the decision of the Respondent dated April 28, 2017 communicated to parties on January 28, 2019.
2. Upon being granted leave on March 23, 2021, the exparte applicant filed the substantive motion dated November 5, 2021 seeking for the following orders: -
 1. Thatan order of *certiorari* do issue removing to the this Court for purposes of being quashed the decision of the Respondent dated April 28, 2017 communicated to the parties on January 28, 2019 and in particular the following orders: -



- a. The commission determines that the land in question is freehold and not leasehold as claimed by Telkom Oange rendering their claim null and void.
 - b. The Chief Land Registrar is hereby directed to revoke the title for the piece of land known as LR No 26149 registered to Kenya Posts and Telecommunications and expunge it from records with immediate effect.
 - c. The Chief Land Registrar is hereby directed to uphold the title known as Kakamega/Kapsotik/1089 registered to Hesbon Ahiro Asumba as the legitimate owner of the land.
 - d. Telkom Kenya breached the lease agreement between themselves as tenants and their landlord Hesbon Ahiro Asumba by stopping to pay rent. They are still in occupation of the building todate.
 - e. The Commission advises Mr Hesbon Ahiro Asumba to seek redress for the same from the appropriate agencies.
2. Thatthe costs of this application be provided for.
 3. Thatsuch other and further reliefs or orders as this Honourable court may deem just and expedient to grant.
3. The Application was based upon the grounds set out in the body of the motion and the contents of the verifying affidavit, sworn by Nelson Mogaka its Senior Internal Counsel. The Application was also supported by the Statutory statement of facts filed alongside the application.
 4. It was deposed in the Verifying Affidavit that on or about February 24, 1992, the Applicant had invited expression of interest from members of the public with property at Serem market which they could lease to the Applicant to host telecommunication equipment known as UXD5 Exchange (Telephone Exchange).
 5. The 1st and 2nd Interested Party wrote to the Applicant vide their letter dated February 24, 1992 and indicated their willingness to lease property known as Plot 992 situated at Serem Market. It was averred that the Applicant accepted their offer and agreed to purchase the property at a sum of Kshs 750,000/-
 6. It was the exparte Applicant’s case that upon purchase of the said property, it applied to the then Commissioner of Lands for issuance of an allotment letter which was subsequently issued on 28th January 1998. The requisite payment was made in compliance with the conditions of the letter of allotment that was issued by the Commissioner of Lands. The copy of the payment voucher and payment cheque was annexed as “TKL – 10”. A title to the names of the Applicant dated June 25, 2003 to LR 26149 was also issued.
 7. It was also deposed that the Applicant appeared before the Respondent on November 4, 2016 owing to a complaint made by the 2nd Interested party. It was stated that during the hearing on November 4, 2016, the Applicant requested for additional time to procure all relevant documents to file a response and to undertake a joint survey exercise. The request was granted and the matter was adjourned to February 2, 2017.
 8. On February 2, 2017, the Respondent’s Tribunal was not sitting and the matter was to be heard on March 9, 2017 which did not proceed as scheduled as there were no sittings held on that day.



9. The Applicant contended that they did not hear from the Respondent until January 28, 2019 when it received a letter dated January 28, 2019 attaching a determination from the Respondent a determination of which the Applicant was aggrieved with its outcome.
10. The Applicant further contended that the Respondent acted in excess of its jurisdiction or power conferred on it by the [National Land Commission Act](#) for the following reasons: -
 - a. The Respondent proceeded to entertain a complaint in respect of the suit property which is private land in violation of the provisions of section 14 (1) of the [National Land Commission Act](#).
 - b. The Respondent made a determination to revoke the Applicant's title to the suit property without notice whereas the Applicant is a bonafide purchaser for value in violation of section 14 (7) of the [National Land Commission Act](#).
 - c. The Respondent proceeded to make determination including that the Applicant and the 1st Interested party in violation of the provisions of Article 67 (2) as read together with sections 5,6 and 14 of the [National Land Commission Act](#) and
 - d. The Respondent rendered a decision on January 28, 2019 which it attempted to backdate outside the statutory prescribed timelines under section 14 (1) of the [National Land Commission Act](#)
11. The Applicant also outlined various reason's as to how the Respondent had denied the Applicant an opportunity to state its case and how the resultant decision was reached in a procedurally unfair manner.
12. It was also argued that the Respondent violated the Applicant's legitimate expectations and the court was requested to allow the application.
13. The Respondent in opposition to the application filed a Replying Affidavit sworn by Brian Ikol, Deputy Director Legal Affairs on February 4, 2020 and submissions dated September 15, 2022. The contents of the which shall be analyzed later in this judgment.
14. The 1st and 2nd Interested parties opposed the said application vide a Replying Affidavit sworn by Mabel W. Asumba on March 8, 2022. It was deposed that the 1st and 2nd Interested Party were in support of the decision made by the Respondent which had been challenged by the Applicant.
15. It was averred that the suit property was freehold and not leasehold as claimed by the Applicant and that the Applicant had breached the lease agreement when it defaulted in rent payments and that the Chief Land Registrar ought to revoke the certificate of lease for LR No 26149 registered in the Applicant's name and uphold, the title No Kakamega/kapsotik/1089 as a legitimate title.
16. The 1st and 2nd Interested party denied receiving a cheque of Kshs 750,000/- as consideration for the purchase price of the suit property as no valid sale agreement and transfer instruments were ever executed as per provisions of section 3 of the [Law of Contract Act](#). It was stated that the amount of Kshs 750,000/- was received as a deposit of lease term rent of 15 years.
17. The 1st and 2nd Interested parties also denied ever having any allotment letter in respect to the suit property and termed the allotment letter and certificate of lease that was produced by the Applicant as bogus documents.
18. In respect to the fairness and or otherwise of the proceedings before the Respondent, the 1st and 2nd Interested Party averred that all the parties were accorded an opportunity to appear before the



- Respondent and that the Applicant failed and refused to appear on the proceedings of December 2, 2017 and February 2, 2018.
19. It was also argued that the Respondent had jurisdiction to review all grants or disputes of public land and private land that was initially in the hands of the public by dint of the provisions of Articles 67, 68 (C) (V) of the Constitution and Section 14 of the National Land Commission Act and further Section 5 (1) (e) of the National Land Commission Act.
 20. The ex parte applicant filed its submissions dated July 5, 2022 through the firm of Iseme, Kamau & Maena Advocates. In its submissions, six issues were outlined for determination by this court: -
 - a. Whether the Respondent acted in excess of its jurisdiction or power conferred on it by the National Land Commission Act.
 - b. Whether the Respondent denied the Applicant a reasonable opportunity to state its case and the resultant decision was reached in a procedurally unfair manner.
 - c. Whether the Respondent was biased or may reasonably be suspected of bias and the determination in question was made in bad faith.
 - d. Whether the decision of the Respondent was materially influenced by an error of law.
 - e. Whether the decision by the Respondent to revoke the Applicant's title was made in abuse of power and was unfair; and
 - f. Whether the Respondent violated the Applicant's legitimate expectations.
 21. It was submitted that the Respondent lacked jurisdiction to handle complaints relating to private land and reference was made to section 14 of the NLC Act in support of this position. The cases of Republic v National Land Commission, Estate of Fred Kubai (Interested Party) Exparte; Comply Industries Limited (2018) eKLR, Registered Trustee of Arya Pratinidhi Sabha, Eastern Africa v National Land Commission & another (2016) eKLR, Karaini Investment Limited v National Land Commission & 2 others (2021) eKLR, Samwel D Omwenga Angwenyi v National Land Commission & 2 others (2019) eKLR and Republic v National Land Commission Exparte Holton Properties Ltd (2016) eKLR were cited in support of this position.
 22. It was also argued that the chronology of events relating to the hearing of the complaints confirmed that no hearing was conducted and that the Applicant was denied an opportunity to be heard before the Respondent delivered its decision. The Applicant made reference to the provisions of article 47 and 50 of the Constitution together with section 4 (3) (a) of the Fair Administrative Action Act, 2015. The cases of Kenya Human Rights Commission v Non Governmental Organizations Coordination Board (2016) eKLR, Republic v Non- Governmental Organizations Coordination Board Exparte Evans Kidero Foundation (2017) eKLR and Sceneries Limited v National Land Commission (2017) eKLR were cited in support.
 23. It was also contended that the Respondent was biased or may be reasonably suspected of bias and its decision was made in bad faith for the following reasons: -
 - i. The Respondent, in its decision, alleges that both parties were summoned to hearings on 7 October 2016, 2 December 2017 and 2 February 2017 to make their presentations. However, no presentations were made on those dates and this is clear from the proceedings produced by the Respondent.



- ii. In its decision, the Respondent also alleges that the Applicant made presentations, and that the Applicant recognized the 1st Interested party as the legitimate owner of the land when it did not.
- iii. The Respondent alleges that the Applicant was given time to reach out to the 1st Interested Party to attempt to amicably resolve the matter when no such representation was made.
- iv. The Respondent alleges that the Applicant failed to resolve the matter with the 1st Interested Party and update the Respondent for over a year, when the only period during which the Respondent engaged with the Applicant was between 14 October 2016 and 2 February 2017, a period of only (3) months and thereafter, there was no communication from the Respondent until it rendered its decision.
- v. The Respondent made a determination without calling for relevant information from, inter alia, the County Government of Kakamega, the Commissioner of Lands who issued the Applicant's title, the Chief Land Registrar and the Directorate of Surveys when it had the power to do so.
- vi. It is clear from the proceedings annexed to the Replying Affidavit of Brian Ikol that the Respondent had a preconceived notion against the Applicant even before affording an opportunity to the Applicant to respond to the complaint. For example, at page 16 of the proceedings of 14 October 2016, the following is recorded:

“Com. Mrs. Abigail Mukolwe: Can you give them now? Simple, by the way, us we don't complicate issues. Mabel is here in her own capacity, so she gives you. Telcom I think you know the matters here are very simple. You were once a tenant then you became the Landlord, you took over her property and the plot. You go to her property as a tenant, you pay rent for some time, then somehow, by the grace of God you get the title deed, you stop paying rent, really Telcom!

Ms. Weru: My Lady, just allow me to have a look at these and also respond, probably also give our side of the story.

Com. Mrs. Abigail Mukolwe: That's okay, but am just telling you that, if the documents we have seen, - by the way you know we do preliminary investigations, and when we have a state corporation doing that to Kenyans, then you wonder is it an injustice of what do you want to call it? Some of these matters are very simple, we will give you time, when do you want to come? (Now that you have the complaint)”

It is evident from the above excerpt that from the onset, the Respondent had concluded that the Applicant was on the wrong, even before the latter had an opportunity to file a response.

- vii. The Respondent made a determination on an alleged breach of a lease agreement and rendered legal advice on a claim for rent to the 1st Interested Party whereas there was no such dispute before it and it had no power to determine the same.
24. It was also submitted that the Respondent's decision was materially influenced by an error of law and therefore ought to be quashed under the provisions of Section 2 (d) of the *Fair Administrative Action Act, 2015* for the reasons that;
- i. Firstly, the Respondent entertained a Complaint in respect of the suit property, which is private land, in violation of section 14 (1) of the *National Land Commission Act*. We reiterate our submissions at paragraph 14-18 above.



- ii. Secondly, the Respondent made a determination to revoke the Applicant's title LR No 26149 without any notice of defect in title, whereas the Applicant is a bona fide purchaser for value, contrary to Section 14 (7) of the [National Land Commission Act](#). We reiterate our submissions at paragraph 19-22 above.
 - iii. Thirdly, the Respondent made a determination (Determination No. 4 in the decision dated April 28, 2017), that the Applicant was in breach of a lease agreement between itself and the 1st interested party, in violation of Article 67 (2) of the [Constitution](#) as read with Section 5,6 and 14 of the [National Land Commission Act](#). We reiterate our submissions at paragraph 23 above.
 - iv. Lastly, the Respondent rendered its decision on 28 January 2019, outside the statutory timelines under section 14 (1) and attempted to backdate it to 28 April 2017. We reiterate our submissions at paragraph 24 above.
25. It was further submitted that the Respondent violated the Exparte Applicants legitimate expectation. The legitimate expectation was that; it would be given an opportunity to be heard, the proceedings before the Respondent would be accurate and truthful, the Respondent would exercise its powers to call for all necessary information from any source so as to arrive at a just determination and the Respondent would correctly apply the law.
 26. It was argued that the Respondent's conduct violated the Applicant's legitimate expectation and the cases of *Republic v Attorney General & another Exparte Waswa & 2 others* (2005) I KLR 280 and [Republic v Principal Secretary, Ministry of Transport Housing and Urban Development Exparte Soweto Residents from CBO](#) (2019) eKLR were cited in support of this position.
 27. The court was urged to allow the application and quash the Respondent's decision dated April 28, 2017.
 28. The Respondent filed its written submissions dated September 15, 2022. It outlined two issues for determination: -
 1. Whether the Respondent followed the rules of natural justice and the provisions of the [Fair Administrative Action Act](#) in conducting the review of the title.
 2. Whether the orders sought should be issued.
 29. It was submitted that the Respondent had jurisdiction to entertain the complaint made herein pursuant to Section 14 of the [National Land Commission Act](#) and article 68 (i) (v) of the [Constitution](#). The cases of [Republic v National Land Commission & another Exparte Muktar Saman Olow](#) (2015) eKLR and [Republic v National Land Commission & 3 others](#) Misc No 203 of 2016 were cited in support of this position.
 30. It was argued that the Applicant despite the requisite notice and sufficient time provided, failed to appear or furnish the Respondent with any relevant document in an attempt to dispute or respond to the complaint raised by the 1st and 2nd Interested party.
 31. Relying on the case of [Isaac Gathungu Wanjobi & another v AG & 6 others](#) (2012) eKLR, the Respondent submitted that where a title was unlawfully acquired and therefore null and void, it cannot be protected and in the same vein cannot confer or pass any interests since the title passed will be void abinitio and as a result no interest whatsoever shall be conveyed.
 32. The Respondent urged the court to dismiss the application dated July 18, 2019 with costs.



33. The 1st and 2nd Interested parties reiterated the contents of the Replying Affidavit sworn by Mabel W Asumba on March 8, 2022. They also supported the Respondent's position in the matter.
34. It was submitted that the proceedings before this court are defective for the following reasons: -
- i. That the Respondent's decision is but a mere recommendation not capable of being enforced or acted upon by the Land Registrar and no such enforcement proceeding have been undertaken by the Chief Land Registrar.
 - ii. The proceedings before court are statute barred in view of Section 9 of the [Law Reform Act](#) cap 26 of the Laws of Kenya. The decision of the National Land Commission was made on April 28, 2017 and the Applicant moved to court to quash the said decision on the July 26, 2019.
35. It was also submitted that the Respondent did not breach Section 14 (7) of the [NLC Act](#) that stipulates that no revocation shall be effected against a bonafide purchaser for value without notice of a defective title.
36. The 1st and 2nd Interested parties also reiterated that, the Applicant was offered an opportunity to defend itself but ignored and failed to do so.
37. It was also submitted that Section 5 (1)(e) of the [National Land Commission Act](#) gives the NLC powers to initiate investigations on its own motions or on a complaint made by any party into present or historical injustices and recommend appropriate redress.
38. The court was urged to dismiss the application with costs.

Issues, Analysis and Determination.

39. I have considered the motion, the rival submissions of the parties. I have also considered the relevant legal framework and jurisprudence. The key issues that falls for determination as follows: -
- i. Whether the Motion dated November 5, 2021 is statute barred.
 - ii. Whether the Respondent acted in excess of its jurisdiction or power conferred on it by the law.
 - iii. Whether the Applicant was denied an opportunity to be heard.
 - iv. Whether the exparte Applicant is entitled to the prayers sought.
40. In respect to whether or not the application is time barred, it is worth noting that Judicial review as a relief is provided for in among others; article 23 (3) of the [Constitution of Kenya 2010](#), section 8 of the [Law Reform Act](#) Chapter 26 Laws of Kenya, section 13(7) of the [Environment and Land Court Act, 2011](#), section 7 of the [Fair Administrative Action Act, 2015](#) and the Common law. In my view, no leave is required and neither can there be any time limitation in seeking judicial review as a relief under article 23(3) of the [Constitution](#) where proceedings are instituted to enforce the Bill of Rights under article 22 of the [Constitution](#) or where proceedings have been brought under section 7 of the [Fair Administrative Action Act, 2015](#) for the review of an administrative action.
41. Judicial review orders of *certiorari* sought under article 23 (3) of the [Constitution](#) cannot be termed as being statute barred and has no limitation of time. Courts have consistently held that there is no limitation with respect to violations of fundamental rights.
42. In the circumstances, I am unable to uphold the objection raised by the 1st and 2nd Interested Party in respect of the six months limitation period.



43. Pursuant to article 67 of the Constitution, parliament enacted the National Land Commission Act No 5 of 2012, section 14 of which provides:

Review of grants and dispositions

- (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).
[Emphasis supplied]

44. In its determination dated April 28, 2017, the commission summarized the evidence presented by Mabel Asumba, the complaint as follows: -

“She purchased the said property known as Kakamega/Kapsotick/1089 together with her husband Hesbon A. Asumba in 1992 which is a freehold land from Mrs. Belina Isirinji Shiverenje who is now deceased. This was registered in the name of Hesbon A. Asumba.

This is an ancestral land which many people had bought pieces of land from the said Mrs. Belinda Isirinji Shiverenje and she had not sub-divided the parcel of land. She did subdivide the land to many people who bought in 2011 and that is when they got this title deed No. 1089.”

45. It is clear that from the complaint and proceedings recorded by the Respondent, the dispute relating to land which was private land initially registered in the names of Hesbon Ahio Asumba. The determination of the commission directed the Chief Land Registrar to revoke the title known as L.R.



- No. 2614 and equally directed the Chief Land Registrar to uphold the title known as Kakamega/Kapsotick/1089 registered to Hesbon Ahiro Asumba as the legitimate owner of the land. The affidavit filed by the Commission is bare. It does not contain any supporting documentary evidence which the Commission relied upon to come to the conclusion that it had jurisdiction to direct revocation of the title. In my view, for the Commission to order revocation of the title, it had to establish that the title related to what previously existed as public land; and that the hitherto public land had been irregularly disposed. There was no suggestion in the complaint that what was sought was that the if the title were to be entirely revoked it would revert to the government. The Respondent did not present to this court evidence to establish that aspect or to controvert the Exparte applicant's contention on the issue.
46. It is therefore evident that the dispute raised by the complainant was a private dispute between the parties which the Commission had no jurisdiction to handle.
47. In view of the foregoing, I agree with the submissions made by the Exparte Applicant that the Respondent did not have jurisdiction to make determinations pertaining to alleged breaches of lease agreements, which constituted a private dispute between the parties. The 1st and 2nd Interested parties ought to have sought redress before the Environment and Land Court and not the National Land Commission.
48. On whether or not the exparte applicant was denied an opportunity to be heard before the Commission, I wish to begin by citing the provisions of article 47 of the Constitution which stipulates as follows:-Article 47
- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”
49. Fair administrative action, as per article 47 of the Constitution of Kenya, broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and the right to a fair administrative action. Article 47 of the Constitution codifies every person's right to fair administrative, action that is expeditious, efficient, lawful, reasonable and procedurally fair and the right to be given reasons for any person who has been or is likely to be adversely affected by administrative action.
50. I have perused the proceedings before the Respondent and various correspondences therein and I wish to state that in the instant case, there is no evidence that the Commission did not accord the Exparte Applicant an opportunity to be heard as alleged neither did the Commission violate the exparte Applicant's right to fair administrative action as contemplated under Article 47 of the Constitution and section 4 (3) of the Fair Administrative Action Act. The evidence on record confirms that the exparte Applicant was accorded an opportunity to appear before the Commission on several occasions. It is also clear that the Respondent made invitations to the ex-parte applicant relating to the review exercise of the suit property. It is apparent from the record that the ex-parte applicant was invited and given a hearing. The ex-parte applicant having earlier been given the opportunity to explain how they procured their title, I do not agree with the ex-parte applicant's contention that they were denied the opportunity to respond to the 1st and 2nd Interested parties claim. I therefore find no merit in this ground. The contention therefore by the Exparte Applicant that the Respondent violated its right to a fair administrative action as contemplated under article 47 of the Constitution and section 4(3) of the FAA Act is unfounded and has no basis.



51. On whether or not the Exparte Applicant is entitled to the reliefs sought, the scope of such orders was discussed by the Court of Appeal in the case of *Kenya National Examination Council v Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR as follows:

“... only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.

52. It is evident that having found that the respondent had no jurisdiction to determine the dispute between the exparte Applicant and the 1st and 2nd Interested parties herein, its purported decision to commence the review process is amenable to being quashed through an order of *certiorari* and I find that the Exparte Applicant has made out a case for grant of the judicial review order of *certiorari* sought herein. On the issue of costs, owing to the nature of the decision which gave rise to this judicial review motion, I direct that parties shall bear their respective costs of the suit.

53. In the end, the judicial review motion dated November 5, 2021 is allowed in terms of prayer 1 with an order that each party bears own cost of the motion. Those shall be the final orders of this court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19TH DAY OF JANUARY, 2023.

EK WABWOTO

JUDGE

In the presence of: -

N/A for exparte applicant.

N/A for respondent.

Ms Kwamboka for 1st and 2nd interested party.

N/A for 3rd interested party.

Court Assistant – Caroline Nafuna.

EK WABWOTO

JUDGE

