

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION. NO. 54 OF 2015

BETWEEN

ANTHONY OTIENDE OTIENDE.....PETITIONER

VERSUS

PUBLIC SERVICE COMMISSION.....1ST RESPONDENT

SARAH NJUHI MWENDA.....2NDRESPONDENT

THE CABINET SECRETARY, MINISTRY OF

HOUSING, LAND & URBAN DEVELOPMENT.....3RD RESPONDENT

JUDGMENT

Introduction

1. This judgment relates to the Petition filed on 16th February 2015. The Petition raised two core issues. One concerns the promulgation of regulations and forms (“impugned forms”) by the Cabinet Secretary in charge of Housing, Land and Urban Development, who is the 3rd Respondent herein. The impugned forms were promulgated for the purpose of effecting the provisions of the Land Registration Act, 2012.
2. The second issue relates to the appointment of the 2nd Respondent as the Chief Land Registrar by the 1st Respondent. The manner of appointment

of the 2nd Respondent as well as her qualifications were questioned by Petitioner. The appointment is stated, in sum, to have been unconstitutional, irregular and illegal.

3. Two affidavits were filed in reply to the Petition.

Brief Background facts

4. The Land Registration Act No. 3 of 2012 (“the LRA”) alongside the National Land Commission Act No. 5 of 2012 (“the NLAA”) and the Land Act, No. 6 of 2012 (“the Land Act”) were enacted in March 2012, all with an assigned commencement date of 2 May 2012.
5. Under Section 109 of the LRA, five land law statutes were repealed. The five statutes namely the Indian Transfer of Property Act 1882, the Government Lands Act (Cap 280), the Registration of Titles Act (Cap 281), the Land Titles Act (Cap 282) and the Registered Land Act (Cap 300) were until May 2012 the main substantive and procedural statutes governing land transactions in Kenya.
6. Sections 12 and 13 of the LRA provide for the appointment of the Chief Land Registrar by the 1st Respondent as well as the statutory qualifications for such office. Section 110 of the LRA on the other hand provides for the making of regulations by the 3rd Respondent for purposes of the effective application of the LRA.

7. Pursuant to the powers donated under Section 110 of the LRA, the 3rd Respondent promulgated the impugned forms and guiding rules for use by both the various land registries and the public in completing land transactions in Kenya.
8. In or about July 2014, the 1st Respondent also caused the appointment of the 2nd Respondent as the Chief Land Registrar envisaged under Section 12 of the LRA.
9. The Petition contests both the promulgation of the impugned forms under Section 110 of the LRA as well as the appointment of the 2nd Respondent as the Chief Land Registrar of the Republic of Kenya.

The Petitioner's Case

10. The Petitioner's case is contained largely in the Supporting Affidavit sworn by the Petitioner on 13th February 2015.
11. It is the Petitioner's contention that the LRA was intended to assist in the consolidation of the various laws dealing with land registration and additionally that pursuant to Article 67 of the Constitution the National Land Commission ("the NLC") was to assist in the formulation of a comprehensive programme for the registration of title to land in Kenya.
12. While conceding that the 3rd Respondent had a statutory mandate to promulgate prescribed forms for the purposes of disposition of land, the Petitioner however contends that under Section 110(2) of the LRA, such forms could only be promulgated and prescribed by the 3rd Respondent

upon and after receipt of the NLC's advise which the 3rd Respondent never sought or received from the NLC. Additionally, the Petitioner also contends that as the impugned forms were never tabled before Parliament for the necessary approval pursuant to Section 34 of the Interpretation and General Provisions Act (Cap 2), the same are null and void.

13. It is the Petitioner's contention that as the forms are not recognizable under Section 43 of the LRA due to the lack of NLC's input and want of approval by Parliament, the Petitioner's as well as members of the public's right to own property under Article 40 of the Constitution is threatened. Additionally, the Petitioner contends that the land policy principles under Article 60 have been violated by the 3rd Respondent.

14. With regard to the appointment of the 2nd Respondent as the Chief Land Registrar, the Petitioner contends that the appointment was not only shrouded in mystery and irregularities but also contrary to the Constitution and statute. The Petitioner states that even though the 2nd Respondent applied for the post of the Chief Land Registrar, she was never originally shortlisted only for the 2nd Respondent to end up being shortlisted again alongside two other candidates. According to the Petitioner, the 2nd Respondent was not qualified for the post. Further, the Petitioner also stated that the 2nd Respondent had failed to meet the

integrity threshold to be appointed to the office of the Chief Land Registrar.

15. In appointing the 2nd Respondent as the Chief Land Registrar, the Petitioner contended, the 1st Respondent had violated Article 232(2) of the Constitution which extols fair competition and merit as the basis of appointment to public office. Further, the Petitioner contended that the 1st Respondent had also failed to observe the provisions of Article 10(2) as to equality, social justice and accountability as the 1st Respondent in appointing the 2nd Respondent had failed to take into account gender, progressive implementation of appointment of persons with disabilities and access to employment for the youth. Finally, the Petitioner also contended that the 2nd Respondent's appointment as the Chief Land Registrar was contrary to Article 27(3) which guarantees equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

16. The Petitioner sought three substantive prayers, viz:

- a) *A declaration that the forms promulgated by the 3rd Respondent without taking into account the advice of the National Land Commission and without the necessary parliamentary approval are null and void.*
- b) *A declaration that the 2nd Respondent is not a fit and proper person with due regard to her suitability, qualifications and hence her appointment as the Chief Land Registrar is inconsistent with the Constitution and statute and hence invalid.*

c) An order of review and setting aside the approval and appointment of the 2nd Respondent.

The Respondents' case

17. The 1st and 3rd Respondents filed Replying Affidavits to the Petition. The affidavits were sworn by Ms. Alice Otwala the Secretary to the 1st Respondent on 22 February 2016 and Hon. Charity Kaluki Ngilu on 3 March 2015.
18. The 1st Respondent denied that the recruitment process and ultimate appointment of the 2nd Respondent was contrary to both the Constitution and the statute.
19. According to the 1st Respondent the vacancy for the post of Chief Land Registrar was advertised twice with the first advertisement of February 2014 being non-responsive. The second advertisement of June 2014 attracted seven (7) applicants, of which one was male and one was a person living with disability. The 1st Respondent further contended that the process was transparent as the names of the successful applicants were published on the 1st Respondent's website before the short listing and interviews were undertaken. The 2nd Respondent was then appointed on merit from the three shortlisted candidates one of whom was a person living with disability. The 1st Respondent insisted that it strictly took into account the qualifications outlined in Section 13 of the LRA.

20. Hon. Charity Kaluki Ngilu who swore the 3rd Respondent's Replying Affidavit was at the material time the Cabinet Secretary in charge of Land, Housing and Urban Development.
21. The 3rd Respondent insisted that the NLC had no role to play in the day to day or "issue by issue", participation in land registration process, in the 3rd Respondents view, the NLC could only be involved in a comprehensive land registration process.

Discussion and Determination

22. I must first point out that the litigation herein was staggered on 29th July 2015 when the court (Mumbi J) ordered a stay of proceedings pending the determination by the **Supreme Court of Advisory Opinion No. 2 of 2014- In the Matter of the National Land Commission**.
23. It was not until May 2016 when the proceedings in this Petition actively resumed, with directions as to the filing of written submissions. While the Petitioner filed his submissions on 18th May 2016, the Respondents did not.
24. The issues raised by the Petition as already pointed out were two fold. The Petitioner questioned the propriety of the 2nd Respondents appointment as the Chief Land Registrar by the 1st Respondent. The Petitioner also questioned the propriety of the impugned forms, in the absence of approval by Parliament, for purposes of effecting land registration under the LRA.

Propriety of the 2nd Respondent's appointment as the Chief Land Registrar

25. My first chore with regard to this issue is whether the question as to the 2nd Respondent's propriety is now moot as there is apparently no live controversy as concerns the 2nd Respondent's appointment as the Chief Land Registrar.
26. The Petitioner made no submissions with regard to this issue and simply left it to the court's determination.
27. The 2nd Respondent, it is not in dispute, is no longer in office. The Petitioner says the 2nd Respondent was removed from office on account of alleged corruption and abuse of office. The 2nd Respondent indeed currently faces charges related to abuse of office.
28. I have no doubt that the dispute as concerns the 2nd Respondent's appointment no longer raises a live controversy with any practical effect. The conditions imposed for her appointment and process followed would certainly not be applicable even if reviewed. The 2nd Respondent may not be re-confirmed as the appropriate office holder and neither may the court issue an order for her removal from office. It would be moot. I do not also deem it that the interest of justice or public interest would dictate, in the circumstances, that I discuss and determine this aspect of the dispute.
29. Even though I have the discretion to discuss and determine the dispute

when it no longer presents a live or existing controversy, the interest of

justice does not dictate that I proceed and determine it. Mootness in and of itself bars me from determining that aspect of the dispute, as the challenge was specific to the 2nd Respondent's appointment and occupation of office as the Chief Land Registrar, which appointment and occupation have both since terminated. The challenge had nothing to do with how the appointment should be undertaken. The challenge too had nothing to do with the qualifications for the office of the Chief Land Registrar. There will be no benefit to the larger public and neither will any legal certainty be achieved by any determination of the issue as raised by the Petition.

Referral of LRA Registration forms to the NLC for advice and to Parliament for approval before promulgation

30. On this issue, the Petitioner's arguments were straightforward.

31. While conceding that the 3rd Respondent had powers under Section 110 of the LRA to make regulations which may prescribe forms to be used in connection with the LRA as well as any other matter for the better carrying application of the LRA, the Petitioner was categorical that such regulations as promulgated by the 3rd Respondent had to take into account the NLC's advice as well as meet with Parliament's approval as provided under Section 110(2) of the LRA. According to the Petitioner, the 3rd Respondent disregarded this statutory requirement and did not

therefore seek NLC's advice or Parliament's approval before promulgating the regulations and statutory forms.

32. Additionally, the Petitioner contended that the 3rd Respondent had also failed or neglected to invite public participation prior to promulgating the impugned forms.

33. Consequently, the Petitioner asserted that the Petitioner and other members of the public were being compelled to use forms not recognized by the LRA. This, it was submitted, threatened the enjoyment of the right to own property under Article 40(1) of the Constitution and also violated the land policy principles enshrined under Article 60 of the Constitution.

34. The 3rd Respondent, in response, contended that advice from the NLC was not necessary as the NLC was only mandated by the Constitution under Article 67(2) to advise the national government on a comprehensive land registration programme. The 3rd Respondent however made no mention of whether the impugned forms were tabled before Parliament for approval.

35. The starting point is definitely the acceptance and recognition that the Parliament has delegated partially its law-making role to the 3rd Respondent vide Section 110(1) of the LRA. The Section deals with delegated legislation and provides as follows:

110(1) The Cabinet Secretary shall make regulations prescribing anything which may be prescribed

under this Act generally and for the better carrying into effect the purposes and provisions of this Act and without prejudice to the generality of the foregoing such regulations may prescribe

a) the forms to be used in connection with this Act.

b) the manner and form of the registries of land, the procedures to be followed by the registries and hours they are to be open for business.

c) procedures for the transfer of land from one category to another.

d) particulars and format to be contained in a register or other document required to be kept under this Act; and

e) any other matter for the better carrying into effect of the provisions of this Act.

(2). In making the regulations, rules or prescribing any matters required under this Act, the Cabinet Secretary shall take into account the advice of the Commission as required under the Constitution and such regulations or rules shall be tabled before Parliament for approval.

36. The now repealed Section 34 of the Interpretation and General Provisions Act (Cap 2), in so far as it is relevant, provided as follows:

34(1) All rules and regulations made under an act shall, unless a contrary intention appears in the Act, be laid before the National Assembly without unreasonable delay, and , if a resolution is passed by the Assembly within twenty one days on which it next sits after the

rule or regulation is laid before it that the rule or regulation be annulled, it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the making of any new rule or regulation.

37. The above section was repealed by Section 27 of the Statutory Instruments Act, No 23 of 2012 which came into force on 25 January 2013. The Statutory Instruments Act provides in its long title that it is an Act of Parliament to provide for the making, scrutiny, publication and operation of statutory instruments and for matters connected therewith. A statutory instrument is defined under Section 2 of the Statutory Instruments Act to mean

Any rule, order, regulation, direction, form, tariff of costs of fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued”.

38. Section 11 of the Statutory Instruments Act provides as follows:

- 11(1) *Every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before Parliament.*
- (2) *An explanatory memorandum in the manner prescribed in the Schedule shall be attached to any statutory instrument laid or tabled under subsection (1).*

(3) *The responsible Clerk shall register or cause to be registered every statutory instrument transmitted to the respective House for tabling or laying under this Part.*

(4) *If a copy of a statutory instrument that is required to be laid before Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void.*

39. There should be no doubt that Section 110 of the LRA was enacted pursuant to Article 94(5) of the Constitution which stipulates that:

(5) No persons or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.

40. In the case of **Trusted Society of Human Rights Alliance vs. Cabinet Secretary Devolution and Planning & 4 Others** [2016]eKLR, the court with regard to delegated legislation stated as follows

[78] For various reasons, delegated legislation is an inevitable feature of modern government. Pressure of Parliamentary time and technicality of subject matter of legislation are the most common and known reasons: see Executive Council of the Western Cape Legislature vs. President of the Republic of South Africa [1995] 4 SA 877 .

[79] In Executive Council of the Western Cape Legislature vs. President of the Republic of South Africa (supra) it was also stated that the fact that it is very rare for Acts of Parliament to contain all provision which are essential for its implementation has also always led to or prompted delegated

legislation. Of the competence of Parliament to delegate its legislative powers the court in Executive Council of the Western Cape Legislature vs. President of the Republic of South Africa (supra) per Mahomed DP stated that delegation could not be determined in the abstract but depended

“inter alia on the constitutional instrument in question, the powers of the legislature in terms of that instrument, the nature and ambit of the purported delegation, the subject matter to which it relates, the degree of delegation, the control and supervision retained or exercisable by the delegator over the delegate, the circumstances prevailing at the time when the delegation is made and when it is expected to be exercised, the identity of the delegate and practical necessities generally”

[80] In the context of implementation of statute, it is not uncommon to delegate to the executive the power to not only legislate various implementation provisions but also the commencement date as there may exist various practical reasons why a new Act should not come into effect as soon as the Presidential assent is given and the Bill is gazetted. Parliament, it must be stated, is also not expected to deal with all matters concerning implementation.

[81]The texture of our Constitution contains nothing which expressly prohibits delegation of legislation to other bodies. Indeed, Article 94(5) of the Constitution allows provisions having the force of law to be made by persons other than Parliament where the Constitution or legislation expressly allows. Delegated legislation and powers are also themselves subject to judicial review especially where the delegatee has attempted to obtain from Parliament greater powers to legislate than should have been given.(emphasis)

41. Legislating is the function of Parliament. Clear procedure and processes are set out both in the Constitution and Standing orders. Where Parliament fails to adhere to the manner and form of legislating then such legislation will be rendered invalid and void for being inconsistent with the Constitution and law: see Articles 2(4) and 165 (3)(d)(ii) of the Constitution. See also **Kenya County Bus Owners Association -v- Cabinet Secretary for Transport and Infrastructure & 5 Others [2014] eKLR.**
42. *A fortiori*, where statute confers power upon the executive to legislate then the manner and form provided for the making of such subsidiary legislation is to be complied with. The statutory provisions must be complied with.
43. The relevant statutory provision, in this case section 110 of the LRA, stipulates that the advice of the NLC ought to be taken into account prior to the promulgation of any rules or regulations. The same statutory provision also provides that there has to be parliamentary approval prior to any rule or regulation being promulgated by the 3rd Respondent.
44. Additionally, the Statutory Instruments Act No. 23 of 2013 which is a statute enacted to promote the better making, enactment, scrutiny and operation of subsidiary legislation by third parties (not parliament) also provides not only for public participation in such enactment but also

parliamentary approval. This Act came into force in January 2013. It repealed sections of the Interpretation and General Provisions Act (Cap 2), which also provided that, for subsidiary legislation to come into force, Parliamentary approval was necessary.

45. It is clear in the instant case that the 3rd Respondent was under a duty, in the course of law-making to observe and comply with all the relevant statutory provisions relevant to such law-making. In this respect, the 3rd Respondent was duty bound to comply with the provisions of Section 110(2) of the LRA and the provisions of the Statutory Instruments Act, No. 23 of 2013.

46. Additionally, the 3rd Respondent was duty bound to comply with the constitutional edict of public participation in law making process: see the cases of **Doctors for Life International vs. Speaker of the National Assembly & Others** [2006] ZACC 11 and **Nairobi Metropolitan PSV's Sacco Ltd & 25 others vs. County of Nairobi Government & 3 Others** [2014]eKLR.

Dealing with non-compliance

47. Where non-compliance with statutory provisions and requirements is alleged, the question to be answered is not whether there has been 'substantial' or 'exact' compliance. It is : was there compliance? The decision whether there has been compliance is not pegged to a mere textual reading of the statute, in my view, but rather what is the object

sought to be achieved by the statutory provision and whether that object has been achieved. It is about the statute's objective and purpose and this test, in my view, will countenance any deviation from statutory prescriptions provided the purpose of the statute has been achieved. In that regard therefore, the purpose of the statute as a whole as well as the specific provision is to be gathered and identified.

48. Secondly, the court is to identify the steps, if any, taken to comply with the statutory provisions.

49. Thirdly, the court will then ponder on whether the subsidiary legislation has achieved the purpose of the statute.

50. Finally, the question as to whether there is any practical prejudice as a result of non-compliance is to be answered prior to the making of any orders.

51. The above approach is dictated by the new constitutional democracy which expects persons purporting to act under the authority of any law and under the Constitution to be subservient to both the Constitution and to the people of Kenya, whose interest ought to be paramount. I consequently have little hesitation in parting ways with the decision of Ojwang J (as he then was) in **Republic vs. Wilfred Onyango Nganyi & another [2008]eKLR** where it was held that as it is commonplace and routine for subsidiary legislation to be promulgated without following the laid down statutory procedure (parliament's scrutiny and approval

prior to gazette) such ministerial instruments or regulations are not necessarily void.

52. In the instant case, it is not in doubt that the purpose of the LRA was to *“revise, consolidate and rationalize the registration of titles of land [and] to give effect to the principles and objects of devolved Government in land registration and for connected purposes”*.

53. With a view to achieving its purpose of revising, consolidating and rationalizing the registration of title to land, the LRA repealed the previously applicable substantive and procedural statutes and also provided various officers and bodies with powers and functions. The Chief Land Registrar as well as the Deputy Land Registrars and County Land Registrar were conferred with powers under the LRA. The NLC was not left behind either. And there were other officers also conferred with powers including officers responsible for land survey and land valuation. Together all these officials acting with the NLC are to create registration units, establish land registries, maintain land registers, prepare and maintain cadastral or survey maps for every registration unit, prescribe the terms and conditions of sale, amongst other functions and powers.

54. It is relatively clear that while the functions and powers were isolated to individual officers and bodies, with the aim of rationalizing the registration of title, no individual office or body is expected to operate

and act in isolation. The NLC is an independent constitutional commission vested with powers, inter alia, to advise the National Government on a comprehensive programme for the registration of title in land throughout Kenya: see Article 67(2) (c) of the Constitution and Section 6(1) of the National Land Commission Act No. 5 of 2012. The NLC does not however act and operate in isolation, as independent a commission as it is.

55. Thus is in **Re the National Land Commission [2015]eKLR**, the Supreme Court whilst rendering itself in an advisory opinion sought by the NLC appreciated the fact that the various officers and bodies including the NLC and the Cabinet Secretary responsible for matters relating to land cannot in the process of implementing and putting into effect the statutory provisions under the LRA, the Land Act, the National Land Commission Act operate in isolation. So held the Supreme Court:

[253]...the relationship between the NLC and the National and County Government is one of mutual cooperation, coordination and consultation. The functions of these constitutional organs are complementary and no organ may purport to carry on its operations in isolation. This element is a recurring theme throughout the [Land Registration] Act".
(emphasis)

56. For the country to rationalize the registration of titles to land, which is one of the aims and purposes of the LRA, the national government through the Cabinet Secretary or officers appointed by the Public

Service Commission cannot purport to act in isolation. Likewise, for the country to achieve a successful comprehensive programme for the registration of title in land throughout Kenya, the NLC cannot also purport to act in isolation. It is little wonder that Section 6(2) (b) of the NLC Act enjoins the NLC to “hold inquiries for the purposes of performing its functions under the Act”. Such functions include the execution of its constitutional mandate like advising the national government on a comprehensive programme for the registration of title in land. Conversely, in the performance of his functions under the LRA, the Cabinet Secretary is expected to take into consideration the advice of NLC on the comprehensive programme for the registration of title to land in Kenya. This point was once again made clear by the Supreme Court in **Re the National Land Commission** [supra] when the court stated as follows.

“ [265] The Cabinet Secretary, while undertaking these functions, is to take into consideration the advice of the NLC, on the comprehensive programme for the registration of title to land in Kenya, in accordance with the Constitution”.

57. In my view, a programme for the registration of title to land in Kenya should not and cannot constitute, at this stage of revising consolidating and rationalizing registration of titles to land, a one stop blue-print. It is a continuous process involving all the players, namely the NLC, the designated offices under both the Land Act and the LRA, the Cabinet

Secretary responsible for matters relating to land, the NLC officers and staffers appointed under the National Land Commission Act and the County Government officers/executives responsible for matters relating to land. None ought to act in isolation.

58. It is thus with little wonder that Section 7(3) of the LRA enjoins the Cabinet Secretary to establish land registries and also to determine the forms to be applied in the registration process (Section 7(5)). Under Section 110(2) however such forms are to be prescribed by the Cabinet Secretary upon taking into account the advice of the NLC and the approval of Parliament. Both the Cabinet Secretary and the NLC have a role to play, even when it comes to basic forms.

59. It consequently follows that, in the instant case, the Cabinet Secretary's contention that the NLC role is simply limited to advising the national government on a comprehensive programme for the registration of title throughout Kenya and that the NLC has no role to play in the process of promulgation or prescribing the impugned forms to be used in the registration process, is not tenable.

60. It is true that the promulgation of regulations or forms for purposes of effecting registration was delegated to the 3rd Respondent by Parliament. It is also true that there is a common law presumption against sub-delegation, expressed in the latin maxim *delegatus delegare non potest* (a delegatee cannot delegate). This maxim, in context, is no

doubt based on the assumption that where the legislature has delegated powers and functions to a subordinate authority, it intends that authority to exercise those powers and functions and not someone else. I understood the 3rd Respondent to argue; that it should not delegate powers to promulgate forms to the NLC.

61. I do not agree.

62. Parliament under Section 110 (2) of the LRA expressly conferred powers upon the 3rd Respondent to promulgate forms and other regulations or rules for the better carrying into effect the purposes and provisions of the LRA. Parliament however also expressly enjoined the 3rd Respondent to take into account the advice of the NLC pursuant to the NLC's Constitutional mandate. Additionally, Parliament retained its superintending role of approving any such regulations or rules or forms prior to promulgation by the 3rd Respondent. In my view the principle of *delegatus delegare non potest* would not consequently apply in view of the express statutory provisions of Section 110(2) of the LRA. Taking into account the advice of the NLC, which may not even be binding, does not mean sub-delegation.

63. For the impugned forms which included prescribed statutory leases to take effect the 3rd Respondent was expected, nay obligated, to comply with three steps. Firstly, the advice of the NLC as required under the statute. Secondly, the need of public participation in such subsidiary

legislative process and, thirdly, obtain Parliamentary approval of the prescribed regulations, forms or rules.

64. The purpose, in my view, of obtaining the advice of the NLC under Section 110(2) of the LRA is to ensure that there is cohesion even as a comprehensive programme for registration of title is being developed. I have little doubt that the prescription of statutory registration forms, which include titles, is part of the programme. It is part of the aims and objectives of the post- 2010 land statutes which sought to have a unitary system of land especially when one looks at Section 105 of the LRA as to the transiting of title documents from the repealed (RTA, LTA, RLA) statutes to the LRA. Uniformity and a totally comprehensive registration programme may not be achieved in the absence of the NLC's input.

65. Secondly, I also have little doubt that the concept of public participation in the legislative process is now part of our constitutional dictates and safeguards: See Articles 10 and 174 of the Constitution as well as the Supreme Court decisions in **Communications Commissions of Kenya & 5 Others vs. Royal Media Services & 5 Others** [2014]eKLR [379 & 381] and **Speaker of Senate & Another vs. Attorney General & 4 Others** [2013]eKLR [136]. In matters concerning land, emotive as it has been in Kenya and going by history, new processes which lead to private ownership need be clearly made known to the public and their input ingested or appreciated. In these respects the 3rd Respondent

ought to import in its process of governance the various international and regional covenants which recognize the participation of the people in public affairs. A policy of inclusion rather than exclusion of the public, from affairs of government which directly impact on them, ought to guide the 3rd Respondent.

66. Thirdly, and finally, Section 110(2) of the LRA expressly provides for approval of Parliament to be sought by the Cabinet Secretary prior to the promulgation of the regulations forms or rules. The Statutory Instruments Act No. 23 of 2013 also expressly, at Section 11, provides for the laying of any regulations, rules and forms before Parliament for scrutiny and approval. Before the enactment of the Statutory Instruments Act, the Interpretation and General Provisions Act (Cap 2) at Section 34 also provided for such subsidiary legislation or forms to be laid before Parliament for approval. There is consequently no doubt that the 3rd Respondent had an obligation under statute (or more correctly two statutes) to lay the impugned forms made under Section 110 of the LRA before Parliament for approval.

67. I have already identified the general purpose of the LRA which was effectively to revise consolidated and rationalize the registration of titles to land in a more comprehensive and simplified manner. The more specific purpose of the LRA was carried into effect through the regulations, form and rules. In particular, Sections 7 and 43 which

provide for prescribed forms for purposes of effecting registration was to be implemented through the 3rd Respondents action under Section 110 (1) of prescribing the statutory forms.

68. There is no contest that the 3rd Respondent did not seek or obtain the advice of the NLC prior to promulgating the statutory forms. The NLC in its letter to the Petitioner dated 10th February 2015 states as much. This letter was not contested by the 3rd Respondent and hence affirming the fact that the NLC did not participate in the process of the statutory forms being prescribed.

69. Secondly, it is also not contested that the public was not involved in the process. There is certainly no evidence before me that an attempt was made to engage the public and obtain the views of the public.

70. Finally, it is not in controversy that the impugned forms were ever placed before Parliament for scrutiny and approval before being gazetted.

71. In all the instances there was not even an attempt to comply with the statutory provisions entailing the process of sub-legislating. No step was taken by the 3rd Respondent to comply with the provisions of Section 110(2). In my view that was unlawful, unprocedural and unconstitutional.

72. It is not easy to ascertain whether there has been or there is any practical prejudice due to the non-compliance. The impugned forms have been

put to use for nearly three years now. They may have defects and in land matters the defects may only become apparent years later. For now, the defects, if any, are not patent.

73. The Petitioner alleged that the use of the forms have infringed on both Articles 27 (as to equal treatment) and Article 40 (as to right to own property). The Petitioner also contended that the continued user of the impugned forms violates the law as the forms are not recognized under Section 43 of the LRA. I have however been unable to identify the manner of violation of the rights guaranteed under Articles 27 and 40 of the Constitution. No doubt, in promulgating the impugned forms without public participation the 3rd Respondent violated Articles 10, 174 and 232 of the Constitution. In promulgating the regulations and forms without the input of the NLC and without Parliament's scrutiny and approval, the 3rd Respondent also acted contrary to Section 110 of the LRA.

74. In so far as the 3rd Respondents duty was a legislative one, albeit delegated and in so far as the 3rd Respondent failed to absolutely adhere to the prescribed process, the 3rd Respondent and the impugned regulations must be faulted.

Is the Petitioner entitled to the reliefs sought?

75. It is not in controversy that the impugned forms were intended to and have been put to use in carrying out the purposes and provisions of the

LRA. The impugned forms are certainly not inconsistent with one of the objectives and purposes the LRA which is also to ensure a proper and effective registrations of title to land.

76. In so far as the impugned forms have no input by the NLC, the independent commission mandated to assist the national government in achieving a comprehensive program for the registration of title, the impugned forms must be deemed to fail to meet the Constitutional threshold or muster. The 3rd Respondent should not and must not proceed with the registration reforms and programs which, include prescribed statutory forms, without the advice of or consultation with or the input of the NLC.

77. The Petitioner alleged non-compliance on the part of the 3rd Respondent. The Petitioner has discharged the burden of proof to the required standard. I find that the 3rd Respondent acted ultra vires the powers conferred on the 3rd Respondent by the LRA when it promulgated the regulations and without consulting the NLC and or obtaining Parliament's approval. To that extent the impugned regulations and forms are invalid.

78. I am however conscious of the fact that an outright declaration of invalidity without more would certainly interrupt the registration processes of various titles. That is a process that is certainly and currently on-going. Such a disruption would also cloud the land

registration system with uncertainty. Likewise titles already issued in the application of the impugned regulations and forms would be placed in doubt.

79. In my view, the non-compliance especially with regard to non-consultation with the NLC and failure to obtain parliament's approval were grave, given that the people of Kenya under Article 67(2) (c) of the Constitution yearned for and mandated the NLC to advise on the development of a comprehensive land registration programme. It would be appropriate to invalidate the impugned forms but at the same time and in the public interest suspend such invalidation to avoid throwing the entire system of registration of title into disarray and chaos. That is the measured and proportionate approach that ought to be taken, as I shortly will, to ensure that there is compliance with the law while at the same time not leaving all the players and stakeholders in limbo or chaos.

80. I am satisfied that the court has such residual powers to suspend any orders or declarations of invalidation.

Final orders

81. I have faulted the 3rd Respondent. I have also appreciated the effect of an outright order of invalidity, it would disrupt the process of registration of title uncontrollably.

82. The Petition succeeds.

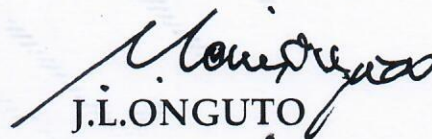
83. I would consequently make the following orders.

- a) *A declaration is hereby issued that the registration forms as well as forms of title including Leases, Title Deeds, Grants and Certificates of Title or of Lease made and promulgated by the 3rd Respondent without the advise of or input of the National Land Commission and without the necessary public participation and or parliamentary scrutiny and approval are unconstitutional null and void.*
- b) *However considering the immediate consequences of the above declaration on the registration of titles processes currently ongoing and already undertaken, the declaration of invalidity is hereby suspended to enable the 3rd Respondent to initiate meaningful engagement with the public, seek and take into account the advice of the National Land Commission, if any, on the impugned regulations and forms pursuant to Section 110(2) of the LRA and seek Parliament's approval pursuant to Sections 110(2) of the LRA and Section 11. of the Statutory Instruments Act No. 23 of 2013.*
- c) *Additionally, the declaration of invalidity under (a) above is not to operate retroactively.*

d) In default of compliance with (b) above by the 3rd Respondent within twelve (12) months, all the regulations and forms promulgated under Section 110 of the LRA, in the absence of the National Land Commission's advice and in the absence of Parliament's approval shall stand null and void for all intents and purposes on the 366th day following this order.

84. As to costs, I direct and order each party to bear its own costs of the Petition.

Dated, signed and delivered at Nairobi this ^{19th}.....day of December, 2016.


J.L. ONGUTO
JUDGE