



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 54 OF 2013

IN THE MATTER OF: ARTICLES 10, 20, 21, 22, 23, 35, 40, 47, 48, 159, 258 & SECTION 19 OF THE SIXTH SCHEDULE OF THE CONSTITUTION

AND

IN THE MATTER OF: SECTIONS 27, 28, 31, 63, 142, 143 & 149 OF THE REGISTERED LAND ACT (CAP 300, LAWS OF KENYA) (now repealed)

AND

IN THE MATTER OF: SECTIONS 26, 29, 30, 50 & 156 OF THE LAND REGISTRATION ACT 2011

AND

IN THE MATTER OF: SECTIONS 24, 26, 61, 79 & 80 OF THE ACT 2012

AND

IN THE MATTER OF: THE ALLEGED REGISTRATION OF MOHAMED IQBAL MOHAMED RAFIQ ABDALLA KANJI as the absolute proprietor of the property allegedly known as MOMBASA/BLOCK XX/315 ON 27TH FEBRUARY, 2012

AND

IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 21 & 40 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

JESSICA HOLDINGS LIMITED.....PETITIONER

AND

1. MOHAMED IQBAL MOHAMED RAFFIQ ABDALLA KANJI

2. THE CHIEF LAND REGISTRAR

3. THE LAND REGISTRAR MOMBASA

4. COUNTY GOVERNMENT OF MOMBASA

5. MOHAMED IQBAL as the administrator

of the estate of the late Raffiq Abdalla Kanji.....RESPONDENTS

JUDGMENT

The Petition

1. By the petition herein dated 11/10/2013 the Petitioner prays for the following orders:

- (a) A declaration that your Petitioners fundamental rights to the protection of its property and from arbitrary deprivation thereof as well as the right to fair administrative action, access to information and to a fair hearing have been breached;
- (b) A declaration that the Title Deed wrongfully and unlawfully issued to the First and/or Fifth Respondent on the 27th February 2012 is invalid in law and of no consequence whatsoever and that it does not confer any rights whatsoever, whether proprietary or otherwise, on the First and/or Fifth Respondent;
- (c) A declaration that the Second, Third and Fourth Respondents acted inconsistently with and in breach of their powers, duties and obligations under the provisions of Articles 10, 35, 47 and 50 of The Constitution;
- (d) An Order directing the Second, Third and Fourth Respondents to amend their records in respect of the suit property to reflect your Petitioner held and continues to hold the suit property as stated in the original Certificate of Title issued to it on the 19th December 2002;
- (e) An Order directing the Second and Third Respondents to forthwith and unconditionally avail to your Petitioner all the requisite information concerning how the alleged change of proprietorship and in the tenure of the suit property was effected;
- (f) Consequently, an Order prohibiting the Respondents whether by themselves or through their agents, servants or employees from interfering with your Petitioners' proprietary rights or quite possession or enjoyment of the suit property;
- (g) An Order to restrain the First and/or Fifth Respondents whether by themselves or through their agents, servants or employees or howsoever else from interfering with your Petitioners' proprietary rights or the quite possession or occupation thereof or in any other manner howsoever interfering with or causing embarrassment to your Petitioners' sub-tenants;
- (h) The costs consequent upon this Petition be paid and borne by the Respondents; and
- (i) All and other such Orders or relief as this Honourable Court may deem just and fit to grant.

2. The Petitioner, a limited liability company, claims that at all material times, the Petitioner was and remains the registered proprietor as Sub-Lessee of the residue of the term in respect of the property comprised in the Title registered at the Mombasa District Lands Registry as MSA/BLOCK XX/315 (hereinafter called '**the suit property**'). The said registration was made on 19/12/2002 (the same having been transferred to it by Car and General (Kenya) Limited) and was issued with a Certificate of Lease on 19/12/2002, the original of which is still in its possession. The Petitioner states that since 19/12/2002, it has had and enjoyed uninterrupted open possession and control in respect of the suit property and carried out improvements thereon. The suit property was registered in the name of the Petitioner pursuant to the Provisions of The Registered Land Act (**Cap 300, Laws of Kenya**) (now repealed). However, this was the applicable legislation at all material times to this Petition. The Petitioner avers that its aforesaid title was indefeasible save for as provided under the aforesaid Act. In addition to this, the Petitioner's proprietary and other rights are protected pursuant to the Provisions of the Constitution. The Petitioner referred to Sections 27 and 28 of The Registered Land Act (Cap 300, Laws of Kenya) in force at the time the matters complained of occurred which provide that:

"27. Subject to this Act-

(a) the

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease....."

28. The rights of a proprietor, whether acquired on first registration or whether subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act...."

3. The Petitioner avers that it holds the suit property as the ultimate Sub-Leases of **Kenya Estates Limited** for a term of 99 years from 1951 (less the last 7 days thereof) as follows: -

(a) by virtue of an indenture dated 19/3/1949 (registered at the Mombasa District Land Registry in Volume L. T. II, Folio 452/1 and File 1997) **Mohamed Raza Abdulla Kanji, Mohamed Jaffer Abdulla Kanji, Mohamed Taki Abdulla Kanji and Mohamed Sachedina Kalian** being the Trustees of a settlement made by **Abdulla Kanji** let to **Kenya Estates Limited** all that piece of land comprised in Title Number Msa/Block XX/2 (whole)/A registered at the Mombasa Registry in Day Book Number 462 Volume No. L.T. II Folio 452/1 for a term of 99 years from 15/10/1949;

(b) the said **Kenya Estates Limited** by a Lease dated 11/4/967 let the said property known as MSA/BLOCK XX/2 (whole)/A to **Jijay Limited** for a term of 99 years from 1/10/1951 except the last three days of the said term which was registered at the Land Titles Registry at Mombasa as Entry No.315 title No. MSA/BLOCK/XX/2(whole)/A;

(c) by a Sub-Sub Lease dated the 14/11/1975, **Jijay Limited** sub-let the suit property to **Car & General (Kenya) Limited** for the unexpired residue of the term of 99 years from 1/10/1951 except the last 7 days thereof which was registered at the Land Registry, Mombasa as MSA/BLOCK XX/315;

(d) by a Transfer of Lease dated the 18/12/2002, **Car & General (K) Limited**, transferred to the Petitioner, the Leasehold interest comprised in the Title Known as MSA/BLOCK XX/315; and

(e) the Petitioner has since then let the suit property to several tenants thereafter on short term leases the latest one being **Tusker Mattresses Limited**.

Section 63 of The Registered Land Act which deals with the Surrender of Leases provides in sub-section (2) thereof that: -

“63(2) no lease which is the subject of a charge or a sublease shall be surrendered without the consent in writing of the proprietor of the Charge or sublease”.

4. The Petitioner avers that at no time has it consented, in writing (in terms of the provisions of the said Section 63(2)), to the surrender of Kenya Estates Limited's leasehold interest to the Fifth Respondent and the alleged surrender of its leasehold interest by Kenya Estates Limited is void and a nullity *ab initio*. Further, and/or in the alternative, if at all such interest was or is held to have been surrendered to the 5th Respondent then, and in such event, Kenya Estates Limited's lease merged into the 5th Respondents reversionary interest and, the 5th Respondent took the surrender subject to the Petitioner's interest in the suit property which, incidentally, was not capable of being extinguished by such surrender. The Petitioner further avers that it continues to hold the said property on the same terms and conditions it did prior to the alleged surrender of Lease by Kenya Estates Limited particularly given the fact that the 5th Respondent has in the past and continues to accept ground rent from the Petitioner.

5, The Petitioner avers that on 27/2/2012, the Land Registrar, Mombasa District Land Registry fraudulently, wrongfully, illegally and in breach of the provisions of the Registered Land Act in collusion with or connivance of the 1st and 5th Respondents issued a Title Deed in respect of the suit property to the 1st Respondent as absolute proprietor thereof when the 5th Respondent has and could only have an interest in the property which was the subject of the indenture dated the 19th day of March 1949 registered at the Mombasa Registry in Day Book No. 462 Volume No. LT II Folio No. 452/1 from which MSA/XX/351, MSA/XX/264 and MSA/XX/265 were created. The 1st and/or 5th Respondents' have thereafter fraudulently whether in collusion with or connivance of the 4th Respondent caused the 4th Respondent's rates records relating to the suit property to be unlawfully and wrongfully amended and altered to reflect the 1st and/or 5th Respondent as the proprietor thereof. The Petitioner avers that its efforts to obtain information from the 2nd and 3rd Respondents about the circumstances in which the change to the proprietorship and tenure of interest in the suit property or obtain an official search therefore have been unsuccessful and the 2nd and 3rd Respondents have refused and/or neglected to provide this information despite request made.

Constitutional Foundation of Petition

6. The Petitioner states that Article 2 of the Constitution of Kenya 2010 provides for the supremacy of the constitution and binds all persons and all state organs to exercise authority only as provided for therein. In doing that all state organs, state and public officers and other persons (including the 2nd and 3rd Respondents) are, by the provisions of Article 10 of The Constitution, bound by the national values and principles of governance stated therein which include good governance, integrity, transparency and accountancy. The Petitioner avers that by virtue of the provisions of the aforesaid Constitutional and Statutory Provisions as well as Articles 19, 20, 21, 22, 23, 24, 27, 35, 40, 47 and 50 of The Constitution, as of 27/8/2010, it had a fundamental and absolute right to the protection of its property and from arbitrary deprivation thereof as well as the right to fair administrative action, access to information and to a fair hearing. Any breach of the foregoing provisions or interference with the fundamental rights guaranteed under the constitution or attempt to deprive the Petitioner of its property arbitrarily and/or otherwise than in accordance with the provisions of the constitution or other Laws of Kenya would be unlawful, illegal and null and void and, of no consequence whatsoever. Further, in refusing to provide the requisite information, the Petitioner avers that the 2nd and 3rd Respondents have breached the provisions of Article 35 of the constitution. In addition, in purporting to change the proprietor and tenure of the suit property without legal justification or basis and without first calling upon the Petitioner to make its representations thereon, the 2nd and 3rd Respondents acted unfairly and in breach of the provisions of Article 47 and 50 of the constitution that entitle the Petitioner to fair administrative action that is, *inter alia*, lawful, reasonable and procedurally fair and in the case where its interests are adversely affected (as in this instance), to be given reasons for such action as well as to a fair hearing.

7. Further, the 1st and/or 5th Respondents have previously and continue to interfere with the Petitioner's proprietary rights in respect of the suit property as well as its quiet possession and enjoyment thereof. Without any lawful basis therefor, the 1st and/or 5th Respondents caused to be issued a Landlord's Notice to Terminate or Alter Terms of a Tenancy purporting to terminate the Petitioner's sub-tenant, Tusker Mattresses tenancy through Messrs J. K. Mwarandu & Co. Advocates. It is alleged that the 1st and/or 5th Respondents have in the past, and continue to harass the Petitioner's said current tenant through their *mala fide* conduct that the 1st and/or 5th Respondent's intention is to unlawfully grab and arbitrarily deprive the Petitioner of the ownership and/or benefit of the suit property. Consequently, by conducting themselves in the manner stated above, the 2nd, 3rd and 4th Respondents have also acted in breach of Article 40 of the constitution. The lease of Tusker Mattresses Limited with the Petitioner expired on 30/4/2013 but is yet to be renewed given the 1st and 5th Respondents' continued interference with the Petitioner's proprietary rights to the detriment and prejudice of the Petitioner. The Petitioner avers that the 1st and/or 5th Respondents have whether by themselves or through their agents, servants or employees caused disruptions severally at the suit property to the embarrassment of the said Tusker Mattresses Limited t/a Tusky's Supermarket. Unless restrained by this Court, the 1st and/or 5th Respondent are likely to continue or persist in the said wrongful conduct.

8. The Petitioner states that on 8/10/2003, **Kenya Estates Limited** wrote to the Petitioner informing it that it had, with effect from 1/10/2003 surrendered its head-lease for the suit Property to **'The Estate of Late Mohamed Raffiq Abdalla Kanji'**. Until the surrender, the Petitioner

paid the ground rent to Kenya Estates Limited and thereafter to The Estate of **Late Mohamed Raffiq Abdalla Kanji** who accepted the same for some time but rejected it in the years 2012 and 2013 but have, in 2013, again requested payment of the ground rent for 2012 and 2013 which has now been forwarded to them. (See a bundle collectively marked as Exhibit 'AA-3', being true photostat copies of the relevant correspondence pertaining to this matter).

9. The Petitioner avers that by reason of the provisions of The Registered Land Act (Cap 300, Laws of Kenya (**now repealed**)), the effect of 'the Surrender of its Leasehold interest by **Kenya Estates Limited** to *The Estate of the late Mohamed Raffiq Abdalla Kanji* on Petitioners' interest was that in the absence of Petitioners' consent, the said surrender was a nullity in law and invalid and of no effect whatsoever. In the alternative, the Petitioner avers that the said Kenya Estates Limited's interest merged with that of '**The Estate of the late Mohamed Raffiq Abdalla Kanji**' and that the Petitioner continues to hold the said property on the same terms and conditions it did prior to the alleged surrender of the Lease especially taking account of the fact that they have and continue to accept ground rent from the Petitioner.

10. The Petition is supported by Affidavit of Ajeshkumar Agravat sworn on 11/10/2013 and a Supplementary Affidavit of the same person sworn on 19/10/2016. The deponent is a Director of the Petitioner.

The Response

The 1st and 5th Respondents

11. The 1st Respondent sued herein also as the 5th and is the administrator of the estate of the late Mohamed Raffiq Abdalla Kanji. The 1st Respondent's case is that the late Mohamed Raffiq Kanji acquired the suit property from Mohamed Raza Abdulla Kanji, Mohamed Jafer Abdulla Kanji, Mohamed Taki Abdulla Kanji and Mohamed Sachedina Kalian in 1961. As administrator of the estate of Mohamed Raffiq Abdalla, the 1st Respondent duly registered the suit property in his name. The 1st Respondent sought to get as much information as possible about the suit property from the District Land Registry, Mombasa, and the County Government of Mombasa, since he did not have relevant documents relating to the property. The 1st Respondent's father died in 1963. The properties were managed by a real estate agent, Yusuf Dato and his elder brothers at different times and that is why he did not have copies of documents. The petition for letter of administration was filed by 1st Respondent's elder brother who died in 1991 or thereabouts before he could administer the estate. The 1st Respondent admits that the previous owners of the property in issue (when it was known as Mombasa/Block XX/2) had leased the property to Kenya Estates Limited. Thereafter, Kenya Estates Limited sold the property to his late father for Kshs. 155,000.00. Among the documents the 1st Respondent obtained are:

- (i) A Gazette Notice of 15/9/1967 notifying all persons that Jijay Limited would be wound up in three months unless sufficient cause be shown to the contrary.
- (ii) A document from the County Government of Mombasa showing that the deceased became registered as the owner of the said property on 10/11/1960. The document also shows that Kenya Estates Limited surrendered the Lease on 10/4/1967 at a consideration of Kshs. 60,000.00.
- (iii) A copy of a Lease between Car & General Kenya Limited and Uchumi Supermarket Limited dated 2/7/2001. It required the consent of Jijay Limited but it is not signed and sealed on behalf of Jijay Limited.
- (iv) Either a continuation of annexure MI 6 or a separate document also from the County Government of Mombasa showing that the property was leased to Jijay Limited (in April 1967) and was subsequently sub-divided into 12 plots and these were leased to a company known as Benbros Motors Limited.

12. The 1st Respondent states that he read and took advice on the indenture dated 19/3/1949 by which Kenya Estates Limited acquired a leasehold interest in Plot No. 2 Section XX measuring 1.950 acres or thereabout. Throughout that indenture there is no provision barring Kenya Estates Limited from surrendering the lease. The 1st Respondent has reason to believe on the basis of the documents obtained from the County Government of Mombasa that Kenya Estates Limited surrendered the lease on 10/4/1967 for a consideration of Kshs. 60,000.00. The effect is that Kenya Estates Limited ceased to have any interest in that property from 10/4/1967. Therefore, the document purporting to be a sub-lease by Kenya Estates Limited to Jijay Limited dated 11/4/1967 cannot be correct since Kenya Estates Limited had surrendered the lease on 10/4/1967, and could not thereafter sub-lease the property to Jijay Limited the very next day. As Kenya Estates Limited had surrendered the lease on 10/4/1967 upon the consideration of Kshs. 60,000.00 it ceased to have any interest that it could transfer to Jijay Limited. For the same reason Jijay Limited had no interest to transfer to Car & General (Kenya) and therefore Car & General Limited had no interest to transfer to the Petitioner.

13. The 1st Respondent states that the documents appearing at page 7 of the Petitioner's bundle and purporting to be a Certificate of Lease in favour of the Petitioner given on 19/12/2002 are forgeries. For the same reason the Certificate of Lease and the Certificate of Official Search at page 11 together with the Agreement for Sale appearing from page 12 of the said document are all invalid and a nullity.

14. The 1st Respondent's case is that the documents of title supporting the ownership of suit property by the Petitioner are based on fraud and forgery and should be dismissed by this court.

2nd and 3rd Respondents' Case

15. The 2nd and 3rd Respondents opposed the petition vide a Replying Affidavit sworn by the 2nd Respondent on 5/12/2014. The 2nd and 3rd Respondents' case is that the Petitioner is the registered sub-lessee of MSA/BLOCK/315 in entry number 4 of the white card; the 2nd and 3rd Respondents state that they have not breached any of the Petitioner's constitutional rights as stated by the Petitioner; that Mohamed Rafiq

Kanji have freehold absolute ownership of MSA/BLOCK/315 as per entry 1 in the proprietary section of the green card; that by an indenture dated 19/3/1949, Kenya Estate Limited leased the property for a term of 99 years from 15/10/1948 as per entry 1 in the encumbrance section of the green card; by virtue of the above, a separate white card in favour of Kenya Estate Limited was opened to reflect the terms of the sub-lease as per entry No 1 in the white card; the 2nd and 3rd Respondents state that no fraud was committed on their part and that the free-hold interest of the property MSA/BLOCK/XX 315 was still registered in the name of Mohamed Rafiq Abdulla Kanji as per entry No. 1 of the certified copy of the green card opened on 27/11/1975 and in the same a restriction was placed to protect the interest of the Municipal Council of Mombasa as part of the parcel comprised estate road; further, that on the 27/2/2012, the beneficiary of the estate of Mohamed Rafiq Abdulla Kanji presented a transfer by transmission and at the same time a transfer by personal representative of the estate of Mohamed Rafiq in favour of Mohamed Iqbal also known as Iqbal Rafiq; that in consideration of the above, a title deed was issued to the 5th Respondent, and as a result of the changes in entry No. 2 and 3 in the green card, a memorandum of registration of transfer was sent to the 4th Respondent to act as necessary to enforce the beneficial interest.

16. The 2nd and 3rd Respondent state that all the information appertaining to the parcel land is available at the registry and at no point have they denied the Petitioner access to the same. The 2nd and 3rd Respondents state that a freehold title had not been issued and the 3rd Respondent only formalized the registration as a result of the letter of administration and confirmation of the grant issued by the High Court via Succession Cause No. 67 of 1963. Entry 2 and 3 in the green card and that title was validly issued for registration purposes in accordance with registration practices and procedures and that the 3rd Respondent acted within their legal mandate to issue title to the 5th Respondent.

4th Respondent's Case

17. The 4th Respondent opposed the petition vide a Replying Affidavit sworn by J. N. Mwangi, its legal officer on 16/12/2013. The 4th Respondent denies that it has in cahoots with the 1st and 5th Respondents fraudulently in collusion and/or connivance acted unlawfully and wrongfully altered the rates records in relation to the suit property. The 4th Respondent states that the records in possession of the 4th Respondent indicate that the Petitioner is indeed the proprietor of that property known as Plot No. 315 Section XX. (The 4th Respondent annexed a copy of the record card in the possession of the 4th Respondent and marked '**JNM 1**'). The 4th Respondent denies the petition and puts Petitioner to strict proof.

Submissions

18. The petition was canvassed through written submissions. The Petitioner filed its submissions on 20/5/2016; the 1st and 5th Respondents filed their submissions on 14/6/2016; the 2nd and 3rd Respondents filed their submissions on 21/6/2016; while the 4th Respondent did not file submissions.

19. I have carefully considered the petition and submissions. The issues which arise from those submissions, and which this court identifies for determination, are as follows:

- (i) Whether this court has the jurisdiction to hear this petition.
- (ii) Whether the Petitioner is the proprietor in leasehold of the suit property.
- (iii) Whether the registration of the 1st and 5th Respondents' as freehold absolute owners of MSA/BLOCK/315 is proper.
- (iv) Whether Petitioner's continual rights to property have been violated.

20. The 1st and 5th Respondents submitted that the High Court has no jurisdiction to hear and determine any dispute relating to the ownership or the right to occupy or use land. The 1st and 5th Respondents submitted that under Article 162 (2) (b) of the constitution jurisdiction to hear and determine this dispute is exercisable exclusively by the Environment and Land Court which was in existence long before this petition was filed. The High Court is expressly barred under Article 165 (5) (b) of the constitution from hearing this petition. The 1st and 5th Respondents relied on the Judgment of the Court of Appeal in **Criminal Appeal No. 44, 45 and 76 of 2014 (Jefferson Kalama Kenga & 2 others vs. Republic [2015] eKLR)**. They urged the court to strike out the petition with costs and in the event this court has jurisdiction in spite of this submission, they asked the court to dismiss the petition as it has no merit.

21. The 1st and 5th Respondents submitted that this dispute should not have been commenced by way of a petition as the matter involves issues of fraud that would have been better dealt with in an ordinary suit when all witnesses would have an opportunity to testify and be examined. They further stated that it is not possible to determine this dispute with the parties before the court without violating the rights of other parties that are not before the court. The party that sold the leasehold interest to the Petitioner is Car & General (K) Limited. The 1st and 5th Respondents submitted that they have challenged the alleged title of Car & General (K) Limited or its capacity to dispose of any interest in the suit premises. It was submitted that Car & General (K) Limited (who is not before court) purports to have acquired a leasehold interest in the property from a company known as Jijay Limited on 14/11/1975. However, a Gazette Notice had been published on 15/9/1967 relating to the striking off the Register of Companies of Jijay Limited as per 1st Respondent's Replying Affidavit. If Jijay Limited was struck out in 1967 or 1968 it could not have been in existence in 1975 so as to grant a sub-lease to Car & General (K) Limited. It was submitted that Jijay Limited appears to have been wound up voluntarily on 16/10/1989. Therefore, it was submitted that a company that had been struck off the register 22 years previously cannot be voluntarily wound up.

22. The 1st and 5th Respondents further submitted that one of the documents relied upon by the Petitioner is an instrument of rectification between Kenya Estates Limited and Car & General (K) Limited to rectify a lease between Jijay Limited and Car & General (K) Limited.

This instrument is dated 2002. It was submitted that the Petitioner does not explain how a purported lease between Jijay Limited and Car & General (K) Limited entered into in 1975 could have been rectified without Jijay Limited in 2002 and yet it was struck off in 1967 and wound up in 1989. Further, that instrument is also executed by Kenya Estates Limited, which was not a party to the purported lease between Jijay Limited and Car & General (K) Limited. The 1st and 5th Respondents submitted that the court should trace the roots of the purported leasehold interest of Jijay Limited in the suit premises. It was submitted that according to the documents relied upon by the Petitioner Kenya Estates Limited leased the property to Jijay Limited upon a lease dated 11/4/1967. Kenya Estates Limited had surrendered the lease on 10/4/1967. Kenya Estates Limited having surrendered the entire lease to the 5th Respondent and that surrender having been registered on 10/4/1967 had no capacity to lease or sublease the same property to Jijay Limited, the very next day on 11/4/1967. Kenya Estates Limited therefore did not have any interest that they could pass on to Jijay Limited. Kenya Estates Limited was paid Kshs. 60,000.00 for the surrender of lease otherwise it could not have consented to the registration of the surrender on 10/4/1967. The 1st and 5th Respondents submitted that the court has no means of resolving that doubt because Kenya Estates Limited is not a party before the court. It is not for the Petitioner to challenge the registration of the surrender on lease on 10/4/1967 because the Petitioner was not a party to that surrender. It was submitted that the document appearing at page 24 of the Petitioner's motion purporting to be a consent to a transfer of a lease from Car & General (K) Limited to Jessica (K) Limited on 13/12/2002 is a nullity because Kenya Estates Limited had surrendered the lease on or before 10/4/1967.

23. The 1st and 5th Respondents submitted that while the petition is purportedly brought to protect the Petitioner's alleged right to the property, the Petitioner does not own the property. The property is owned by the 5th Respondent although it is registered in favour of the 1st Respondent. It was submitted for the 1st and 5th Respondents that it is not the function of the constitutional petition to prevent the registered proprietor of a freehold property from enforcing its right to that property; that the Petitioner's remedy would be a suit between a lessee and a lessor and involving all the parties that participated in the various transactions leading up to the Petitioner's purported sublease.

24. For the Petitioner, it was submitted that its various fundamental rights including those relating to protection of its property as well as fair administrative action as envisaged under the provisions of Articles 19, 20, 21, 22, 23, 24, 27, 35, 40, 47 and 50 of the Constitution of Kenya 2010 have been infringed and violated and contravened by the serious breaches and fraudulent conduct of the Respondents collectively and/or singularly in a manner intended and to unlawfully deprive and dispossess Petitioner of its aforesaid suit property without any basis in law whatsoever. The Petitioner submitted that it was and remains the Proprietor as Sub-Lessee of the residue of the term in respect of the property comprised in the Title registered at the Mombasa District Land Registry as Mombasa/Block XX/315. The Petitioner was registered as proprietor of the interest in the Sub-Lease on 19/12/2002 when it was issued with a Certificate of Sub-Lease pursuant to the provisions of The Registered Land Act (Cap. 300) then in force. Since then, the Petitioner has had and enjoyed uninterrupted open possession and control in respect of the suit property and carried out various improvements therein, a fact manifest and acknowledged from various documentation and correspondence attached to the Petitioner's Affidavit as follows: -

- 1) Agreement for sale from Car & General(K) Ltd to Jessica Holdings Ltd dated 20th September 2002 - Pages 13 - 19;
- 2) Transfer of Lease - Pages 20 - 24;
- 3) Instrument of Rectification - Pages 25 - 44;& 4) Various Correspondences to the Suit Property between various parties including the 5th Respondent - Pages 46 -81

25. The Petitioner submitted that these documents show and prove the manner the Petitioner has held the Suit Property as the ultimate Sub-Lessee of Kenya Estates Limited. The Petitioner submitted that it has since then let the suit property to several tenants thereafter, the latest one being Tusker Mattresses Limited. As is evident from the further correspondence which is appearing at Pages 82 - 90, the 5th Respondent has all along accepted and acknowledged the Petitioner's proprietary rights in respect of the suit property. Despite this, on 22/1/2013, the 1st Respondent purported to issue a Landlord's Notice to terminate or alter terms of tenancy through its Advocates, Messrs J. K. Mwarandu stating that he, '**the Landlord**' of Mombasa/Block XX/315 was terminating Tusker Mattresses Limited's tenancy with effect from 22/1/2013 on the grounds that the said 1st Respondent required vacant possession of the suit premises despite the fact that not only was the 1st Respondent not the proprietor or occupier of the suit premises (only being the Head-Lessee) but also that no privity existed between him and Tusker Mattresses Limited. (A copy of the said Notice appears at Page 135 of the bundle). It was submitted that the 1st and 5th Respondents have and continues to harass the Petitioner's tenant, Tusker Mattresses Limited, thereby interfering with the Petitioner's right of quiet possession of the suit premises in a manner fraught not only with *mala fides* but also exhibiting fraudulent, unlawful and illegal conduct without any basis in law whatsoever.

26. The Petitioner submitted that the 1st Respondent has now allegedly obtained a Title Deed on 27/2/2012 in respect of Mombasa/Block XX/315 purporting that he is the proprietor of the said property (Pages 154 - 158 of the bundle) and has even gone so far, in his capacity as Executor of the Estate of the Late Mohamed Raffiq Abdalla Kanji to publish notification in the press that the said property is owned by the Estate of the Late Mohamed Raffiq Abdalla Kanji - an inherent inconsistency and manifest of the fraud itself.

27. The Petitioner further submitted that, the above notwithstanding, and from the 4th Respondent's Affidavit sworn on the 16/12/2013 and filed herein, in so far as its records are concerned, the suit property is still registered in the name of the Petitioner and the record card is annexed thereto and that no Memorandum of Transfer has been issued by the Registrar of Lands to his knowledge (Paragraphs 7 and 8). Further the 3rd Respondent herein has sworn an Affidavit on the 5/12/2014 by which he confirms, at paragraph 4 thereof, that according to his records (**Exhibit 'HGS-1'**) the Petitioner is the registered Sub-Lessee of the property known as Mombasa/Block XX/315. The said 3rd Respondent, in his Affidavit, acknowledges the Petitioner's proprietary rights and alleges that the protection accorded to the Petitioner pursuant to the provisions of The Constitution of Kenya 2010 has not been infringed. The 3rd Respondent, however, alleges that the 1st Respondent (who also happens to be the 5th Respondent in his capacity as the Administrator of the Estate of the Late Mohamed Raffiq Abdalla Kanji) is the freehold absolute owner of the property known as Mombasa/Block XX/315. The Petitioner submitted that the 3rd Respondent justifies this record and purported entry in favour of the 1st Respondent as Freehold Proprietor on the basis of the Exhibits annexed thereto as Exhibit '**HGS-4 & '5'**'. The Petitioner submitted that a close perusal of the documentary evidence produced as Exhibits to

the 2nd and 3rd Respondents' Affidavit will show clearly that the entire purported registration in favour of the 1st Respondent is a complete sham and fraud and was actually intended to infringe upon the Petitioner's proprietary rights. The 1st Respondent **nor** the 5th Respondent has any rights or interest whatsoever in any property known as Mombasa/Block XX/315. The Petitioner submitted that indeed, the Freehold Property in which the 5th Respondent has any interest or right is Mombasa/Block XX/2 which is the Freehold interest from which a portion known as Mombasa/Block XX/315 was Sub-Let. The Petitioner referred to a Replying Affidavit herein sworn by the 1st Respondent on the 15/12/2014 and filed herein on the same day which he did on his own behalf as well as on behalf of the 5th Respondent (as executor) (hereinafter referred to as **'the 1st and 5th Respondents' Affidavit**). At paragraph 4 thereof, the 1st and 5th Respondents acknowledge that the freehold title in which they have any interest is known as Mombasa/Block XX/2. The Petitioner finds it particularly surprising that the purported Certificate of Confirmation of Grant produced by the 1st Respondent as **Exhibit 'MI-1'** is different from that produced by the 2nd and 3rd Respondents as **Exhibit 'HGS-5'** and that they appear to be issued by different Judges on two different dates almost 8 years apart. The Petitioner submitted that it is doubtful that having issued a Certificate of Confirmation of Grant once, the Court would issue a further Certificate of Confirmation of Grant of Probate again. The Petitioner submitted that some of the documents attached which are purported to be emanating from the Lands Registry - although there is no proof that this is so - are forged in an attempt to fraudulently and wrongfully deprive the Petitioner of its lawfully owned property as is evident from the 1st and 5th Respondents' later conduct - Pages 167 to 168 of the Petitioner's Affidavit.

28. The 4th Respondent did not file submissions but they filed a Replying Affidavit on 16/12/2013. Paragraphs 7 and 8 of the affidavit states that the ownership of the suit property is for the Petitioner, and that is why they have not filed the submissions. Affidavits by the 2nd and 3rd Respondents has annexure GH5, the grant of probate, which shows description of property. It does not include the Petitioner's land as being part of the estate of the deceased. Yet in the transfer they purport to transfer the suit property to 1st and 5th Respondents in his capacity as personal representative of his father's estate. The attached Green card shows that the land was registered to the Petitioner in 2002.

29. Mr. Makuto Learned Counsel for the 2nd and 3rd Respondents submitted that the court should determine and give effect to the proprietary rights alleged in the petition. As for costs, and if any fraud occurred, Counsel submitted that, then, even the 2nd and 3rd Respondents were victims and as such, should not be condemned to pay costs.

30. Mr. Khagram Learned Counsel for the Petitioner submitted that the costs of the petition, if any, should be met by 1st and 5th Respondents should the court uphold the petition.

Determination

31. I have carefully considered the petition and the responses to it, together with rival submissions. In my view the single issue for the determination by this Court is whether or not the Petitioner is the valid proprietor of the Sub-Lease of the property known as Mombasa/Block XX/315 – the suit property.

32. The Petitioner claims that at all material times, it was and remains the registered proprietor as Sub-Lessee of the residue of the term in respect of the property comprised in the Title registered at the Mombasa District Lands Registry as MSA/BLOCK XX/315. The said registration was made on 19/12/2002 (the same having been transferred to it by Car and General (Kenya) Limited) and was issued with a Certificate of Lease on 19/12/2002, the original of which is still in its possession. Record shows that since 19/12/2002, the Petitioner has enjoyed uninterrupted open possession and control in respect of the suit property and carried out improvements thereon. That title was indefeasible save for as provided under the aforesaid Act. Sections 27 and 28 of The Registered Land Act (Cap 300, Laws of Kenya) in force at the time the matters complained of occurred provide that:

“27. Subject to this Act-

(c) the

(d) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease.....”

28. The rights of a proprietor, whether acquired on first registration or whether subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act....”

33. The record further shows that the Petitioner holds the suit property as the ultimate Sub-Lessee of Kenya Estates Limited for a term of 99 years from 1951 (less the last 7 days thereof) as follows: -

(f) by virtue of an indenture dated 19/3/1949 (registered at the Mombasa District Land Registry in Volume L. T. II, Folio 452/1 and File 1997) Mohamed Raza Abdulla Kanji, Mohamed Jaffer Abdulla Kanji, Mohamed Taki Abdulla Kanji and Mohamed Sachedina Kalian being the Trustees of a settlement made by Abdulla Kanji let to Kenya Estates Limited all that piece of land comprised in Title Number Msa/Block XX/2 (whole)/A registered at the Mombasa Registry in Day Book Number 462 Volume No. L.T. II Folio 452/1 for a term of 99 years from 15/10/1949;

(g) the said Kenya Estates Limited by a Lease dated 11/4/1967 let the said property known as MSA/BLOCK XX/2 (whole)/A to Jijay Limited for a term of 99 years from 1/10/1951 except the last three days of the said term which was registered at the Land Titles Registry at Mombasa as Entry No. 315 title No. MSA/BLOCK/XX/2(whole)/A;

(h) by a Sub-Sub Lease dated the 14/11/1975, Jijay Limited Sub-let the suit property to Car & General (Kenya) Limited for the

unexpired residue of the term of 99 years from 1/10/1951 except the last 7 days thereof which was registered at the Land Registry, Mombasa as MSA/BLOCK XX/315;

(i) by a Transfer of Lease dated the 18/12/2002, Car & General (K) Limited, transferred to the Petitioner, the Leasehold interest comprised in the Title Known as MSA/BLOCK XX/315; and

(j) the Petitioner has since then let the suit property to several tenants thereafter on short term leases the latest one being Tusker Mattresses Limited.

34. Section 63 of The Registered Land Act which deals with the Surrender of Leases provides in sub-section (2) thereof that: -

“63(2) no lease which is the subject of a charge or a sublease shall be surrendered without the consent in writing of the proprietor of the Charge or sublease”.

35. There is no evidence that the Petitioner did at any time consent in writing, in terms of the provisions of the said Section 63(2), to the surrender of Kenya Estates Limited's leasehold interest to the 5th Respondent. In my view the alleged surrender of its leasehold interest by Kenya Estates Limited was void and a nullity *ab initio*. Alternatively any purported surrender of the said lease to the 5th Respondent would have the effect of merging the Kenya Estates Limited's lease into the 5th Respondent's reversionary interest, with the result that the 5th Respondent took the surrender subject to the Petitioner's interest in the suit property, which was not capable of being extinguished by such surrender. The Petitioner is therefore deemed to continue to hold the said property on the same terms and conditions it did prior to the alleged surrender of Lease by Kenya Estates Limited more particularly so because the 5th Respondent has in the past, and continues to accept ground rent from the Petitioner.

36. Further, although the 2nd and 3rd Respondents opposed the petition vide a Replying Affidavit sworn by the 2nd Respondent on 5/12/2014, they nonetheless admit that the Petitioner is the registered sub-lessee of MSA/BLOCK/315 in entry number 4 of the White card.

37. Again, although the 4th Respondent opposed the petition vide a Replying Affidavit sworn by J. N. Mwangion 16/12/2013, the 4th Respondent nonetheless admits that the records in its possession indicate that the Petitioner is indeed the proprietor of that property known as Plot No. 315 Section XX. (The 4th Respondent annexed a copy of the record card in the possession of the 4th Respondent and marked 'JNM 1').

38. From the foregoing it is the finding hereof that the Petitioner's various fundamental rights including those relating to protection of its property as well as fair administrative action as envisaged under the provisions of Articles 19, 20, 21, 22, 23, 24, 27, 35, 40, 47 and 50 of the Constitution of Kenya 2010 have been infringed and violated and contravened by the aforesaid breaches and conduct of the Respondents collectively and/or singularly in a manner to unlawfully deprive and dispossess Petitioner of its aforesaid suit property. It is the finding hereof that the Petitioner remains the Proprietor as Sub-Lessee of the residue of the term in respect of the property comprised in the Title registered at the Mombasa District Land Registry as Mombasa/Block XX/315. The Petitioner was registered as proprietor of the interest in the Sub-Lease on 19/12/2002 when it was issued with a Certificate of Sub-Lease pursuant to the provisions of The Registered Land Act (Cap. 300) then in force. Since then, the Petitioner has had, and has enjoyed uninterrupted open possession and control in respect of the suit property and has carried out various improvements therein, a fact manifest and acknowledged from various documentation and correspondence attached to the Petitioner's Affidavit as follows: Agreement for sale from Car & General(K) Ltd to Jessica Holdings Ltd dated 20th September 2002- (pages 13 – 19); Transfer of Lease-(pages 20 - 24; Instrument of Rectification-(pages 25 - 44); and Various Correspondence to the Suit Property between various parties including the 5th Respondent-(pages 46 -81).

39. These documents show and prove the manner the Petitioner has held the suit property as the ultimate Sub-Lessee of Kenya Estates Limited. The Petitioner has since then let the suit property to several tenants thereafter, the latest one being Tusker Mattresses Limited. As is evident from the further correspondence which is appearing at Pages 82 - 90, the 5th Respondent has all along accepted and acknowledged the Petitioner's proprietary rights in respect of the suit property. This notwithstanding on 22/1/2013, the 1st Respondent purported to issue a Landlord's Notice to terminate or alter terms of tenancy on the suit property in his capacity as 'the Landlord' of Mombasa/Block XX/315. This was a gross interference with the Petitioner's proprietary rights herein.

40. It is the finding of this Court that the Petitioner's title registered as Mombasa/Block XX/315 was indefeasible except as provided under the law.

41. Therefore, by attempting to reshuffle the records at the Land Registry by purporting that Mombasa/Block XX/315 also represented the freehold interests in respect of the Petitioner's property, the 2nd and 3rd Respondents breached their duty pursuant to the provisions of Articles 10, 20 & 21 of the Constitution of Kenya 2010 as well as Articles 35 and 47 when they refused, neglected and/or failed to give to the Petitioner the information requested and required as demanded. In **Samuel Kamere vs. Lands Registrar, Kajiado**[2015]eKLR the Court of Appeal held: -

“From the evidence, it is not disputed that prior to the registration of the Appellant, the Plaintiff was the registered proprietor of the suit property.....

Since the Plaintiff did not transfer his property to the Appellant, having regard to Sections 27 and 28 of the Act, he retained absolute and indefeasible title.....”

42. The Court of Appeal went on to cite the case of **Munyu Maina vs. Hiram Gathia Maina Civil Appeal No. 239 of 2009** where the Court stated: -

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond this instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register”.

43. With the 2nd, 3rd and 4th Respondents’ acknowledgement about the veracity and validity of the Petitioner’s title, the burden of proving the validity of the purported Freehold Title bearing the same number as the Petitioner’s title fell on the 1st and 5th Respondents which he has failed to discharge. To the contrary, the documentation adduced clearly points towards a concerted attempt to defeat the Petitioner’s proprietary interests in the suit property.

44. This Court finds that the Petitioner has proved the petition on a balance of probability.

45. The upshot is that the petition is allowed and orders issued as follows:

- (a) A declaration that the Petitioner’s fundamental rights to the protection of its property and from arbitrary deprivation thereof as well as the right to fair administrative action, access to information and to a fair hearing have been breached;
- (b) A declaration that the Title Deed wrongfully and unlawfully issued to the First and/or Fifth Respondent on the 27th February 2012 is invalid in law and of no consequence whatsoever and that it does not confer any rights whatsoever, whether proprietary or otherwise, on the First and/or Fifth Respondent;
- (c) A declaration that the Second, Third and Fourth Respondents acted inconsistently with and in breach of their powers, duties and obligations under the provisions of Articles 10, 35, 47 and 50 of the Constitution;
- (d) An Order directing the Second, Third and Fourth Respondents to amend their records in respect of the suit property to reflect the Petitioner as the proprietor as Sub-Lessee of the residue of the term in respect of the property comprised in the Title registered at Mombasa District Land Registry as Mombasa/Block XX/315.
- (e) An Order directing the Second and Third Respondents to forthwith and unconditionally avail to the Petitioner all the requisite information concerning how the alleged change of proprietorship and in the tenure of the suit property was effected;
- (f) An Order prohibiting the Respondents whether by themselves or through their agents, servants or employees from interfering with the Petitioners’ proprietary rights or quiet possession or enjoyment of the suit property;
- (g) An Order restraining the First and/or Fifth Respondents whether by themselves or through their agents, servants or employees or howsoever else from interfering with the Petitioners’ proprietary rights or the quiet possession or occupation thereof or in any other manner howsoever interfering with or causing embarrassment to the Petitioners’ sub-tenants;
- (h) The costs consequent upon this Petition be paid and borne by the 1st and 5th Respondents.

Dated, Signed and Delivered at Mombasa this 25th day of August, 2020.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Khagram for Petitioner

No appearance for 1st and 5th Respondents

No appearance for 2nd, 3rd and 4th Respondents

Mr. Kaunda Court Assistant