



REPUBLIC OF KENYA



KENYA LAW
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**Njithi v Chief Lands Registrar & 2 others (Environment & Land Petition
E025 of 2023) [2023] KEELC 21263 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21263 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E025 OF 2023
MD MWANGI, J
OCTOBER 31, 2023
IN THE MATTER OF CONTRAVENTION OF ARTICLES 40 AND
47 OF THE CONSTITUTION OF KENYA (2010)
AND
IN THE MATTER OF THE LAND REGISTRATION ACT
AND
IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION
ACT)**

BETWEEN

CHARLES MUCHIRI NJITHI PETITIONER

AND

THE CHIEF LANDS REGISTRAR 1ST RESPONDENT

**PETER NYAGA KAMUNDI T/A NYAGA KAMUNDI & CO.
ADVOCATES 2ND RESPONDENT**

EQUITY BANK KENYA LIMITED 3RD RESPONDENT

JUDGMENT

Background

1. The Petitioner in this matter purchased a property known as Flat No. C2 registered at the Government Land Registry at Nairobi in Volume N77 Folio 150/1 File 20250 (hereinafter referred to as ‘the Suit Property’) from the 3rd Respondent, Equity Bank Kenya Ltd, who sold the same in exercise of the chargee’s statutory power of sale way back on 19th June, 2009, for the sum of Kshs 10.0 million. The



- 2nd Respondent was the Advocate acting for the Petitioner in the transaction of purchase of the suit property.
2. The 3rd Respondent upon receipt of the full purchase price, and in fulfilment of its obligations under the agreement with the Petitioner duly forwarded the completion documents to the 2nd Respondent on behalf of the Petitioner, for purposes effecting the transfer in favour of the Petitioner. The Petitioner asserts that he had paid to his Advocate, the 2nd Respondent all the requisite fees and registration costs. He therefore expected a seamless completion of the transaction and the registration of the title to the suit property in his name. However, after numerous follow ups, the 2nd Respondent eventually disclosed to the Petitioner that he had lost the title documents to the suit property that had been forwarded to him by the 3rd Respondent.
 3. The Petitioner pleads that he on many occasions wrote to the 2nd Respondent seeking a way forward more so on the replacement of the lost title to no avail. This forced him to withdraw his instructions from the 2nd Respondent and demand the hand-over of all the documents pertaining to the purchase of the suit property to his current Advocates. However, this was not to be. The 2nd Respondent vanished into thin air and has since closed his Law Firm. The information on the Law Society of Kenya database shows that the 2nd Respondent has not taken out the annual Practising Certificate since the year 2017. The Advocates on record for the Petitioner have been unable to trace him completely.
 4. The Petitioner, frustrated and confused, attempted to seek a replacement of the lost title through the 3rd Respondent, Equity Bank Ltd. The 3rd Respondent has however, been unwilling to make the application for replacement of the title rightly insisting that their obligations under the Sale by Charge were extinguished the moment they forwarded the completion documents to the Petitioner's former Advocate. The 3rd Respondent has however issued the Petitioner with a 'no-objection' letter.
 5. The Petitioner's attempt to make the application for replacement of the title directly and in his own name was rejected by the 1st Respondent, the Chief Land Registrar. The 1st Respondent's directions were that the 3rd Respondent being the holder of the last registered interest on the title should be the one to make the application.
 6. The Petitioner pleads that he has suffered and continues to suffer prejudice for no fault of his own. He has failed to get the title to the suit property that he lawfully purchased over 13 years ago. That is why he has come to the Court seeking for orders to compel the 1st Respondent to allow his application for replacement of the lost title and registration in his name.
 7. The Petitioner's case is that the 1st Respondent's rejection of his application for replacement of the lost title contravenes his right to fair Administrative Action under Article 47(1) of the [Constitution](#) that guarantees every person fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 8. The Petitioner avers that the [Fair Administration Act](#) requires an Administrator to accord the person against whom administrative action is taken an opportunity to be heard before an adverse decision is taken against him. The Petitioner asserts that the 1st Respondent rejected his application for replacement of the lost title in spite of the explanations of the circumstances surrounding the loss of the title document by way of a Statutory Declaration, and presentation of the Letter of no-objection by the 3rd Respondent. The decision by the 1st Respondent has condemned the Petitioner to continuous suffering for lack of the title to his property.
 9. Further, the Petitioner contends that he has been denied the opportunity to fully enjoy his right to property under Article 40 of the [Constitution](#) through the non-issuance of the title to his lawfully



obtained property. The refusal by the 1st Respondent to register title to the suit property in the name of the Petitioner, and the refusal by the 3rd Respondent to make the application for the replacement of the lost title inhibits his right to full enjoyment of his property.

10. The Petitioner prays for three reliefs namely:
 - a. A declaration that the 1st Respondent's refusal to replace the Petitioner's title violates the Petitioner's right to own property.
 - b. A declaration that the 1st Respondent's rejection of the Petitioner's application for replacement of title in spite of the Petitioner's circumstances violates the Petitioner's right to fair administrative action.
 - c. An order directing the 1st Respondent to allow the Petitioner's application for replacement of lost title as the beneficial owner of the property.
11. The Petitioner in addition to the 3 main reliefs prays that this Court be pleased to issue 'such further orders as it may deem just and expedient for the ends of justice'.
12. To his supporting affidavit, the Petitioner attached amongst the other annexures, the letter of no objection issued by the 3rd Respondent and addressed to the 1st Respondent. In the said letter dated 18th February, 2022, the 3rd Respondent confirms that it indeed sold the suit property to the Petitioner through a public auction in exercise of its Statutory Power of Sale via an agreement dated 19th June, 2009. The bank confirms that it has no objection to the replacement and transfer of the title to the property to the Petitioner having sold the same via public auction and received all the proceeds of sale in full.

Response by the Respondents

13. When the matter was first mentioned before the Deputy Registrar of this Court on 25th May, 2023, the 1st Respondent and the 3rd Respondent were both represented by Advocates who sought time to respond to the Petition. The 2nd Respondent did not appear despite service through his last known email address.
14. The 3rd Respondent filed an affidavit sworn by one Samuel Wamaitha, its Assistant Manager, Legal Services. In the said affidavit, the deponent confirms that the Petitioner indeed bought the suit property on 19th June 2009 and paid the full purchase price of Kshs 10.0 million. He further confirms that the 3rd Respondent issued a letter of no objection to the Petitioner confirming that it has no objection to the replacement and transfer of the title to the suit property to the Petitioner
15. The 3rd Respondent states that they have no objection to the replacement of the lost title. He deposes that the Court may allow the Petitioner to apply for the title and get one in his own name.

Issues for Determination:

16. The Petitioner informed the Court through his Advocate that he was relying on the affidavit evidence in support of his Petition and had no intention of filing any submissions. The 3rd Respondent confirmed that it supports the Petition.
17. Having considered the Petition and the supporting affidavit as well as the Replying affidavit by the 3rd Respondent, the Court is of the view that the issues for determination in this matter are:
 - a. Whether the Petitioner's rights to property and to fair administrative action have been violated.



- b. What are the appropriate reliefs that the Court may grant in this matter to remedy the violations against the Petitioner's rights?

Analysis and Determination

18. The Petitioner's case though arising from a mere transaction of purchase of property through a public auction has mutated into a complex multi-faceted case that raises issues of violation of fundamental and human rights. The Petitioner, since 2009, almost 14 years ago after lawfully purchasing the suit property is yet to have a title in his name. He argues that the absence of a title has inhibited him from fully enjoying his rights to property.
19. Article 40 of the Constitution guarantees the right of every person, either individually or in association with others, to acquire and own property of any description and in any part of Kenya.
20. Registration of title to private land in Kenya is governed by the Land Registration Act. Issuance of title to land, cements the ownership giving the property owner an assurance of legal recognition of the title to the property and the opportunity not only to fully enjoy his property but to also use it for example as a security for financial facilities. Section 26 of the Land Registration Act provides that the Certificate of title once issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner of the particular land.
21. The petitioner is therefore justified to state that he is unable to enjoy his property rights fully in the absence of a title. The court finds that the Petitioner right to property has indeed been violated. He had a right to approach this Court under the provisions of Article 22(1) of the Constitution to seek a remedy for the violation of his right to property. The Article provides that:
- “Every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”
22. The Petitioner further alleged violation of his right to Fair Administrative Action under Article 47(1) of the Constitution by the 1st Respondent. The Petitioner's contention was that the 1st Respondent rejected his application for replacement of the lost title without according him a hearing. Further, that the 1st Respondent did not give due consideration to his explanations of the circumstances surrounding the loss of the title.
23. I do not entirely agree with the Petitioner on the allegation of violation of his right to Fair Administrative Action. After the purchase of the property through a Public Auction, the Petitioner missed one critical step. The Petitioner failed to seek a vesting order from this Court which would have not only enabled the 1st Respondent not only to consider the Petitioner's application for replacement of the lost title but to also proceed to register title in his name upon its replacement. The Petitioner's response to the question by the Court on the vesting order confirmed that the Petitioner had not sought and obtained the vesting order.

What Are The Appropriate Reliefs That The Court May Grant In This Matter To Remedy The Violations Against The Petitioner's Rights?

24. The Court has observed that the Petitioner did not obtain a vesting order conferring the ownership of the suit property to him after the successful purchase through a Public Auction. It is the vesting order



- that would have enabled the 1st Respondent to process the Petitioner’s application for replacement of the lost title and eventually process the title in the Petitioner’s name.
25. The Petitioner in this petition has not prayed for a vesting order which is the appropriate remedy in this matter redress the violation of his property rights.
26. The question that this court must ponder at this juncture is whether it should drop this petition at this point and leave the Petitioner at the cross-roads to find his way home?
27. Considering the circumstances of this case, I think this is a proper case for this court to exercise its constitutional authority under Article 23(3) of the *Constitution* and fashion an appropriate relief as the justice and the circumstances of this case demand. I note that the Petitioner in his Petition included a prayer for, ‘such further orders as the Court may deem just and expedient for the ends of justice.’
28. Article 23(3) of the *Constitution* empowers the court to, in any proceedings brought under Article 22, grant appropriate relief, including--
- (a) a declaration of rights;
 - (b) an injunction;
 - (c) a conservatory order;
 - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
 - (e) an order for compensation; and
 - (f) an order of judicial review.
29. Article 23(3) does not limit the court to only the reliefs listed thereunder. It gives the court the liberty to grant the kind of relief that is required and most appropriate to secure the protection of the right violated. Mativo, J (as he then was) in the case of *Night Rose Cosmetics (1972) Ltd vs Nairobi County Government & 2 others* (2018) eKLR observed that:
- “This Court is empowered by Article 23(3) of the Constitution to grant appropriate reliefs in any proceedings seeking to enforce fundamental rights and freedoms such as this one.”
30. Mativo, J adopted the definition in the South African Constitutional Court case of *Minister of Health & others -vs- Treatment Action Campaign and others* in which appropriate relief was defined as follows:
- “... Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the Circumstances of each particular case, the relief may be a declaration of rights, an interdict, mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the Court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...” the Courts have a particular responsibility in this regard and are obliged to “forge new tools” and shape innovative remedies, if need be to achieve this goal”.
31. The 3rd Respondent herein, Equity Bank Ltd who was the Seller of the suit property concedes to the Petition. It confirms the Sale to the Petitioner by Public Auction. It confirms receipt of the purchase price in full. It expressly states that it has no objection to the replacement of the lost title and issuance of a new one in the name of the Petitioner.



32. Having considered the foregoing, I find it appropriate to issue first and foremost issue a vesting order vesting the title to the suit property in the Petitioner. Secondly, I do hereby issue an order directing the 1st Respondent to allow the Petitioner's application for the replacement of the lost title as the owner of the property and further to register the suit property in the name of the Petitioner.
33. On the issue of costs, I find it appropriate, considering the unique circumstances of this case, to order that each party bears its own costs.

Final disposition

34. Accordingly, the Petition succeeds in the following terms:
- A. A declaration hereby issues that the 1st Respondent's refusal to replace the Petitioner's title violates the Petitioner's right to own property.
 - B. A vesting order be and is hereby issued vesting the title to the suit property, Flat No. C2 registered at the Government Land Registry at Nairobi in Volume N77 Folio 150/1 File 20250 in the Petitioner, Charles Muchiri Njithi.
 - C. An order be and is hereby issued directing the 1st Respondent to allow the Petitioner's application for the replacement of the lost title as the owner of the suit property, Flat No. C2 registered at the Government Land Registry at Nairobi in Volume N77 Folio 150/1 File 20250 and further to register the suit property in the name of the Petitioner Charles Muchiri Njithi.
 - D. Each party shall bear its own costs.

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF OCTOBER, 2023.

M. D. MWANGI

JUDGE

In the virtual presence of:

Mr. Waya Ndegwa holding brief for Mrs. Koech for the Petitioner.

Mr. Wanda holding brief for Mr. Juma for the 3rd Respondent.

No appearance for the 1st and 2nd Respondents.

M. D. MWANGI

JUDGE

