



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 28 OF 2011**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ARTICLES 22, 23 AND 40 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: CONTRAVENTION FUNDAMENTAL RIGHTS AND FREEDOMS UNDER**

**ARTICLES 40 OF THE CONSTITUTION**

**BETWEEN**

**NOORLANDS LIMITED.....PETITIONER**

**AND**

**1. HON. ATTORNEY GENERAL**

**2. COUNTY GOVERNMENT OF MOMBASA**

**3. THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY**

**4. THE CHANGAMWE CONSTITUENCY**

**DEVELOPMENT FUND.....RESPONDENTS**

**JUDGMENT**

**The Petition**

1. By the petition herein dated 18<sup>th</sup> April, 2012 the Petitioner seeks the following reliefs:

- (a) A declaration that its rights to the property known as Plot No. 121/V/M.N. Mombasa have been violated.
- (b) An order of mandamus to compel the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to remove all the illegal structures on the property known as Plot No. 121/V/M.N., alternative the Petitioner with the assistance of the OCPD Mombasa to remove the structures.
- (c) An order for compensation by way of general damages.
- (d) An order of eviction against all the squatters.

(e) Any other and further order that the Honourable Court shall deem just and expedient.

2. The said relief are being sought on the alleged basis that the Petitioner has been the registered owner for an estate in Fee Simple of all that piece or parcel of land known as Plot No. 121/Section v/M.N. located at Jomvu Kuu, Division of Changamwe Constituency, Mombasa and measuring 168 acres or thereabouts. The Petitioner has owned this property since 23<sup>rd</sup> July, 1955 and is up to date in payment of Municipal rates due to the 2<sup>nd</sup> Respondent as a Rating Authority in charge of Mombasa Municipality. It is alleged that sometimes in 2007 the Ministry of Lands and Settlement issued a circular through the local newspapers seeking to register illegal squatters occupying land in the Coast Province with a view to settle the said squatters. As a result of the said circular the local chiefs in Miritini location where the land is situate mobilized some village elders who started selling portions of the land to members of the public with a view to occupy the same to the detriment of the Petitioner. The officials from the Ministry of Lands and Settlement carried out a census of the people who occupied the property and did inform them that the Government will acquire the land with a view to settle them. To date there has been no offer made by the Government of Kenya to the Petitioner who is being deprived of the property. Sometime in 2009, the Petitioner prepared a sub-division scheme for the property which was being sub-divided into:

(i) 23 five acre plots for light industrial use.

(ii) 1, 25 acre plot to settle any squatters occupying the land.

3. Although the Petitioner obtained a provisional approval from the 2<sup>nd</sup> Respondent, the Petitioner has been unable to proceed with the scheme as the squatters and the village elders selling the land have allegedly threatened the Petitioner's employees, servants and or agents. The village elders under the patronage of the chief and area District Officer have further continued to sell the plots to members of the public who have built permanent and semi-permanent structures on the property. It is alleged that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have issued building permits for the said structures despite the fact that the Petitioner who owns the land has not sanctioned the development. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have further refused and or neglected to demolish the illegal structures even when called upon to do so. It is further alleged that the 2<sup>nd</sup> Respondent has provided street lights on the property thus encouraging more squatters to move in. It is further alleged that the 4<sup>th</sup> Respondent has also provided services such as roads and water to the squatters without any permission from the Petitioner. The 4<sup>th</sup> Respondent has in the circumstances legitimized the actions of the squatters and the village elders. The Petitioner's case is that the Ministry of Land had no right in the first place to seek to register people in illegal occupation of the Petitioner's land and most squatters on the property are people who bought portions from the village elders under the patronage of the chiefs and as such are not legitimate squatters. The Petitioner avers that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have a legal duty to the Petitioner as a rate payer to protect its land from illegal developments but the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have abdicated that responsibility and the Petitioner has been deprived of its property without any compensation being paid.

### **The Response**

4. The Petition is opposed by the 3<sup>rd</sup> Respondent (NEMA) vide Grounds of Opposition dated and filed herein on 3<sup>rd</sup> October, 2014. The 3<sup>rd</sup> Respondent's case is that it was never served with the petition and it only learnt of the same when written submissions relating to the motion dated 9<sup>th</sup> September, 2014 was served upon their Mombasa Office on 19<sup>th</sup> September, 2014.

5. The 3<sup>rd</sup> Respondent further states that the reliefs being sought in the petition cannot be made against the 3<sup>rd</sup> Respondent. The 3<sup>rd</sup> Respondent's case is that the petition is useless and an abuse of the court process.

6. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents did not respond to the petition. However, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed submissions in opposition to the petition.

### **Submissions**

#### **7. Brief Background facts**

The Petitioner submitted, giving brief facts that the subject matter herein relates to a parcel of land known as Plot No.121/Section V/MN located at Jomvu Kuu Division, Miritini Location in Changamwe Constituency (hereinafter called 'the Suit Property'), which the Petitioner alleges he has owned since 23<sup>rd</sup> July 1955 and has duly paid the Municipal rates due to the 2<sup>nd</sup> Respondent. Sometimes in 2007, the Ministry of Land and Settlement issued a circular through the local newspapers seeking to register squatters occupying land in the coast province with the intention to settle the said squatters. Subsequently, the local chief in Miritini Location where the land is situated started mobilizing some village elders who started selling portions of the land to members of the public with a view to occupy the same at the detriment of the Petitioner. Sometime in 2009, the Petitioner prepared a sub-division scheme for the suit property and the Petitioner obtained a provisional approval from the 2<sup>nd</sup> Respondent. However, the Petitioner has been unable to proceed with the scheme as the squatters have threatened the Petitioner.

8. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have allegedly illegally issued building permits to squatters on the Petitioner's aforesaid land despite the fact that the Petitioner has not sanctioned such developments. 2<sup>nd</sup> Respondent has provided street lights on the property thus encouraging more squatters to move into the Petitioner's said property. It is alleged that the 4<sup>th</sup> Respondent has further legitimized the trespass action of the squatters by providing amenities such as roads and water to the squatters without consent of the Petitioner, who is the registered owner of the suit land.

9. The Petitioner submitted that it is the registered owner of the suit property. The Petitioner relies on the provision of Section 23 of the Registration of Titles Act, Cap. 281 Laws of Kenya (Now Repealed though applicable) which provides that the certificate of title issued by

the registrar to a purchaser of land upon a transfer ... *shall be taken by all courts as conclusive evidence that the person therein is the proprietor of the land and his title is absolute and indefeasible.* Under Article 3 of the Constitution of Kenya, 2010 every person has an obligation to respect, uphold and defend the Constitution. This, the Petitioner submits, implies that the Respondents are under a duty to protect the Petitioner's right to own the suit property as enshrined in Article 40 of the Constitution of Kenya which stipulates that every person has the right, either individually or in association with others to acquire and own property. The state frowns upon the arbitrary deprivation of land or interest in or right over land belonging to any citizen. The Petitioner alleges that he has a right to acquire and own property and should not be arbitrarily deprived of its property by any person. The State can only acquire the Petitioner's land after it has duly compensated the Petitioner but in this instant case, there has been no offer of compensation made by the Government of Kenya.

10. The Petitioner also relies on Article 47 of the Constitution of Kenya and submitted that the Petitioner's right to fair administrative action is being compromised as the Petitioner's right to own property is not being protected by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent who are casually issuing building permits to squatters on the Petitioner's land for construction of structures despite the fact that the Petitioner who owns the land has not sanctioned such developments. Further, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have refused/neglected to demolish the illegal structures on the Petitioner's land despite being called upon to do so by the Petitioner, who claims to be the legitimate owner of the suit property. The Respondents are subject to Article 47 of the Constitution and are obliged to render Fair Administrative Action in whatever they do. The Petitioner cited the case of **Mistry Amar Singh vs. Serwano Wofunira Kulubya [1963] E.A.** for the proposition that whenever an act of illegality is brought to the attention of the Court, then the Court will not allow anybody to benefit from such an illegality. The East Africa Court of Appeal adopted the principle:

**“Ex turpicausa non oritur actio. This old and well known legal maxim is founded in good sense and expresses clear and well organized legal principle which is not confined to indictable offences. No court ought to enforce an illegal contract, or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is brought to the attention of the court and if the person invoking the aid of the court is himself implicated in the illegality .It matters not whether the Plaintiff has pleaded the illegality or whether he has not. If the evidence adduced by the Plaintiff proves the illegality the court ought not to assist him”.**

11. The Petitioner submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents being government agencies should be the first among equals to follow the law and should lead by example. Their conduct clearly shows that they are giving a blow to impunity, by allowing trespass and illegal construction on the suit property. The Petitioner urged the court to allow the petition as prayed with costs.

12. On their part the 1<sup>st</sup> Respondent through their submissions filed on 17<sup>th</sup> June, 2015 submitted that the petition is convoluted and it is not clear what the Petitioner wants. The petition fails to succinctly lay out issues to enable the court determine the same. The 1<sup>st</sup> Respondent submitted that there are no constitutional issues in the petition for this court to adjudicate. Moreover, the orders sought in the petition are not grounded on or supported by the body of the petition. There are no grounds in the petition or any factual or legal issues to support the prayers. For example, it is not clear from the petition what information the Petitioner wanted from the 1<sup>st</sup> Respondent. The Petitioner has not produced any evidence to show that it requested the 1<sup>st</sup> Respondent to furnish it with any information and it was denied. At best the petition is based on guesswork, rumours, speculation and innuendoes. There is no evidence supporting the facts or prayers set out in the petition. Any violation of the Petitioner's rights by the 1<sup>st</sup> Respondent has not been shown or demonstrated by the Petitioner. The 1<sup>st</sup> Respondent believe that he has been wrongly enjoined in this petition and that the said petition is indeed frivolous as against him as there is no cause of action whatsoever established against him and therefore the petition ought to fail and the Respondent prays that the petition be dismissed with costs.

13. The 2<sup>nd</sup> Respondent filed their submissions on 3<sup>rd</sup> February, 2015. They submitted that the Petitioner in its pleadings has not established any claim whatsoever against the 2<sup>nd</sup> Respondent. The facts set out in the petition and the verifying affidavit comprises of complaints against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in depriving the Petitioner of the suit property. The Petitioner has not demonstrated at all that the 2<sup>nd</sup> Respondent was involved and/or that the 2<sup>nd</sup> Respondent did in any way contribute and/or participate in making the decision that is sought to be remedied. The 2<sup>nd</sup> Respondent avers that the Petitioner has indeed failed to establish any wrong doing and/or any breach and or rights. The Petitioner also in its pleadings has not laid any claim against the 2<sup>nd</sup> Respondent and therefore it is their submission that the 2<sup>nd</sup> Respondent was wrongly joined to these proceedings. Therefore the 2<sup>nd</sup> Respondent's name should be struck out from these proceedings. Due to the fact that the 2<sup>nd</sup> Respondent played no role whatsoever in the alleged allocation of the suit property, it has no powers to issue or cancel property title. The 2<sup>nd</sup> Respondent submits that it cannot be faulted for undertaking its mandate or collecting property rates of a registered owner, whether disputed or otherwise of the suit property. It is trite law that payment of rates to a local authority is not in itself proof of ownership of land. The issue therefore with regard to the 2<sup>nd</sup> Respondent is whether this court has jurisdiction to strike out the 2<sup>nd</sup> Respondent's name from the proceedings herein. The 2<sup>nd</sup> Respondent submits that this court has power to strike out its name as provided under the provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules. The said Order 1 Rule 10 (2) provides as follows:

**“the court may at any stage of the proceedings either upon or without the application of either party and on such terms as may appear to the court to be just order that the name of any party improperly joined whether as a Plaintiff or Defendant be struck out and that the name of any party who ought to have been joined whether as a Plaintiff or Defendant, or whose presence before court may be necessary in order to enable the court effectively and completely to adjudicate upon and settle all questions involved in the suit, be added.”**

### **The Determination**

14. A Constitutional Petition is a process through which a person who alleges that his rights under the constitution have been abrogated seeks to redress the same through the court. A Petitioner must therefore prove serious violation of a constitutional right in order to succeed. A mere averment that a constitutional right has been or is out to be violated is not enough.

15. In the matter before the court there is no doubt that the Petitioner is the legal owner of the suit property. What is in doubt is whether any of the Respondents individually or jointly have sought to deny the Petitioner his rights. The Petitioner has alleged that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have illegally issued building permits to squatters on the Petitioner's land, and that the 2<sup>nd</sup> Respondent has provided street lights on the property thus encouraging more squatters to move into the Petitioner's property. The 4<sup>th</sup> Respondent is alleged to have further legitimized the alleged trespass action of the squatters by providing amenities such as roads and water to the squatters without consent of the Petitioner. All the said allegations are matters which required some proof. In this petition no proof was offered at all either orally or through affidavit, that any of those alleged violations really occurred. Where was evidence of building permits allegedly issued to squatters? Who was called to lead evidence that street lights was erected on the Petitioner's land? Indeed such actions, if they took place, would be illegal and would amount to a challenge on the Petitioner's constitutional right to own property. But there was no such evidence. No evidence was brought to prove that the 2<sup>nd</sup> Respondent had failed to prohibit or control land used development in that area or that 2<sup>nd</sup> Respondent had developed land use plans contrary to the interests of the Petitioner. The only document filed in support of the petition and attached to the affidavit of Petitioner was MFM4 which is a Public Notice by Ministry of Lands about the formation of a Task Force on the Ten Mile Coastal Strip. I do not know how that document establishes abrogation of Petitioner's rights.

16. What is clear is that the Petitioner, being the owner of the land, had hopes that his land would be acquired by the State for sub-division among squatters and that the Petitioner would then be compensated. However, the process is taking too long or it has been abandoned altogether. But the Petitioner is yet to prove to court any material interference with his land, and if so, by whom.

17. On the allegations that there are squatters on the Petitioner's land, no evidence is provided of the same. There was no list of alleged squatters, or which part of the property they occupy or evidence as to how long they have been on the property.

18. It is the finding of this court that the Petitioner has not laid a basis for the constitutional remedies it seeks in this court and that the Petitioner does not meet the threshold for constitutional redress.

19. For the foregoing reasons the petition herein is dismissed with costs to the participating Respondents.

That is the Judgment of the Court.

**Dated, Signed and Delivered in Mombasa this 18<sup>th</sup> day of April, 2018.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Ngoya holding brief Gikandi for Petitioner

Mr. Mwandeje for 1<sup>st</sup> Respondent

Mr. Masila holding brief Ms. Kisingo for 2<sup>nd</sup> Respondent

Mr. Kaunda Court Assistant