Yaa v District Land Registrar Kilifi County (Petition 23 of 2022) [2023] KEELC 21694 (KLR) (16 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21694 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

PETITION 23 OF 2022

EK MAKORI, J

NOVEMBER 16, 2023

IN THE MATTER OF: PRINCIPLES OF ARTICLES 40 & 67 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ALLEGED VIOLATION OF LAND OWNERSHIP RIGHTS UNDER ARTICLES 68(C), (VI) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTION 25 AND 26 OF THE LAND REGISTRATION ACT

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

MICHAEL KAZUNGU YAA .... PETITIONER

AND

DISTRICT LAND REGISTRAR KILIFI COUNTY .... RESPONDENT

RULING

1. The petitioner in this matter filed a petition against the respondent seeking the following orders:

    a. Declaration that the respondent is under obligation to implement the decision of the National Land Commission (NLC) and upon further instructions from the Chief Registrar, Ministry of Lands, Housing and Urban Development and refusal to implement the decision by the respondent herein amounted to a breach of the petitioner's constitutional rights as enshrined under Article 40 and 67 of the *Constitution of Kenya*.

b. An order of mandamus compelling the respondent to register land parcel No. Chembe/ Kibabamshe/283 in the name of the petitioner herein Michael Kazungu Yaa and issue a certificate of title and/or title deed to him.

c. An order to be issued cancelling any title registered by the respondent in favour of anybody, contrary to the decision of the NLC and the Chief Registrar.

d. General Damages awarded to the petitioner for suffering and anguish.

e. Any other further remedy the Court shall deem fit to grant in the circumstances and as relates to the suit premises.

f. An order that the respondents pay the costs of this petition.

2. Land parcel No. Chembe/ Kibabamshe/283 was initially adjudicated in favour of the petitioner herein, Michael Kazungu Yaa.

3. In his affidavit supporting the petition, he averred that he has been living, working, and using the land in question. Without his knowledge, a third party fraudulently transferred it to his name and encroached on it. The petitioner complained to the NLC, which heard the petitioner's complaint and many others involving the Chembe/Kibabamshe Adjudication Section from the 9th to the 17th of September 2015.

4. The NLC made a finding that the petitioner was the rightful owner of the suit property. On 15th May 2015, the decision was relayed to the Chief Land Registrar, Ministry of Lands and Physical Planning, Arthi House informing them of the findings and the Commission's decision to lift the embargo placed in respect to the property.

5. The petitioner brought this petition seeking that the decision of the NLC be implemented as pleaded in the petition

6. The Chief Land Register who was the sole person sued has replied that in contrast, the history reflects the petitioner as the initial allotee of the land in contestation via the adjudication process. The record shows other transactions have been effected on that title which has severally changed hands significantly that the property was transferred to Yaa Baya Bimulingo on 24th April 1993 and after that Thabit Said Swaleh on 19th July 1996. Title deeds were issued on the respective dates to the parties aforementioned. (The proprietorship section of the green card clearly shows that). The Land Registrar further averred that the title is currently registered in the name of Thabit Said Swaleh.

7. The Land Registrar is of the view that if the court proceeds to effect the findings of the NLC and order for the implementation of the same, there will be compliance, but there is a rider that the decision will affect one Thabit Said Swaleh who holds the title presently.

8. The issues for the determination of this court is whether this court should order the respondent to effect the findings of the NLC and issue a mandamus directed at the respondent to register the petitioner as the owner of the suit land and order for the cancellation of the land title Chembe/ Kibabamshe/283. And whether the other prayers seeking general damages should stand.

9. It is true the NLC made an inquiry on the irregular allocation and registration of land title Chembe/ Kibabamshe/283 and made a finding that it ought to be registered in the name of the petitioner. All parties are said to have been heard in that forum conducted by the NLC from the 9th to the 17th of September 2015. A decision was made that the title reverts to the petitioner - the original allottee of the suit property.

10. There is only one catch. The title, which is the subject of this petition, is now recorded under the name of Thabit Said Swaleh who has not been joined as a party. He ought to have been served and listed, as an interested party in these proceedings as correctly stated by the Land Registrar, the outcome of this petition will affect him. We do not know what he would have said in defence of the title he currently holds. The entire record of the proceedings before the NLC has also not been introduced in the current petition. This Court is not privy to what transpired during the hearings before the NLC to draw its conclusion - 'that all parties had been heard or allowed to be heard before that forum.'

11. The right to be heard cannot be closed on the said individual. This should have been the starting point of this petition. The petitioner ought to have joined or named that individual as an interested party because the petitioner is well aware that that person holds a parallel title to his original one, which cannot be cancelled summarily by this Court before a hearing, is done and all the parties heard.

12. Besides the issues raised in this petition could easily have been crusaded in our civil courts to decide if the title issued to Thabiti Said Swaleh was obtained through fraud or corruptly gotten as to render it fit for cancellation as envisaged under Article 40(6) of the *Constitution*:

> " The rights under this Article do not extend to any property that has been found to have been unlawfully acquired."

In addition, Section 26 of the *Land Registration Act* deposits:

> " (1) The certificate of title 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
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> (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
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> (b) where the certificate of title has been acquired illegally, unprocedurally, or through a corrupt scheme."

13. Gacheru J. has elucidated the abovementioned position vis-a-vis holding of two titles over the same land in the case of *Harrison Kiambuthi Wanjiru & another v District Land Registrar Nairobi & 3 others* [2022] eKLR, as follows:

> " However, the effect of nullifying the actions of the 1st Defendant would mean that title the reverts to the Plaintiffs. It follows therefore that the suit land shall have two titles, one held by the Plaintiffs and the other by the 2nd and 3rd Defendants. It is trite that land cannot have two titles and thus the Court shall proceed to determine which of the two titles is valid. See the case of Hubert L. Martin & 2 Others Vs. Margaret J. Kamar & 5 Others [2016] eKLR, where the Court held that;
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> 'A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows

> that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.'

14. I am persuaded that the correct approach to take is to have the two parties holding or claiming equal rights as owners of the suit property or claiming title to it, approach the Court and prove that one has a better title than the other as held in the case of *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR:

> " 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 the 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 need not be noted on the register".

15. The Court will need to hear the two parties claiming ownership of the suit property – to check the root of the title. That journey cannot be achieved in this petition.

16. This is what the doctrine of constitutional avoidance envisages. This petition should have been heard as a normal civil suit for the court to decide who between the named parties should be the rightful owner of the land in question. Constitutional avoidance has been severally addressed by the Apex Courts - see for example Thande J. in *Mutyaene v KCB Bank Ltd & another* (Petition 412 of 2020) [2023] KEHC 2205 (KLR) (Constitutional and Human Rights):

> " The doctrine of constitutional avoidance was expounded by the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR. The Court held as follows: -
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> (256) The appellants, in this case, are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:
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> > "I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."
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> (257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question that was properly before it if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).

(258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd, and 3rd respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright-infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.

34. And in the case of KKB v SCM & 5 others (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling), Mativo, J. (as he then was) had this to say about the doctrine:

> In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant's cause.

35. It can be discerned from the foregoing that where another legal course is available, through which a matter can be properly decided and which can give an applicant the relief he seeks, such course should be pursued and the constitutional court should decline to determine a constitutional issue in such matter.

36. And in Uhuru Muigai Kenyatta v Nairobi Star Publications Limited [2013] eKLR, Lenaola, J. (as he then was) stated:

> I need say no more. Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG vs S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions. The complaint in this case is not so serious as to attract Constitutional sanction.

37. The Court of Appeal in the case of Peter O. Ngoge v Francis ole Kaparo & 4 Others [2007] eKLR, the Court of Appeal stated: Similarly in Harriksson V Attorney General Of Trinidad And Tobago [1980] Ac 265, Lord Diplock stated:-

> "The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the Constitution}} is fallacious ... the mere allegation

> that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom."

17. The petitioner as I have said ought to have invoked the civil jurisdiction of the ELC to cancel the title on the grounds as set under Article 40(6) of the *Constitution* and Section 26(1) (a) (b) of the *Land Registration Act*.

18. The upshot is that the current petition fails with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 16TH DAY OF NOVEMBER 2023.

E. K. MAKORI

JUDGE

In the Presence of:

Ms Aketch for the Petitioners.

Court Clerk: Happy

In the Absence of;

AG for the Respondents