



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.528 OF 2014
BETWEEN
ROSE WAMBUI KURIA.....PETITIONER
AND
ETHICS AND ANTI-CORRUPTION COMMISSION.....RESPONDENT
JUDGMENT

Introduction

1. The Petitioner, Rose Wambui Kuria, resides and works for gain in Nairobi as stated in her Petition dated 30th October, 2014 which she has filed against the **Ethics and Anti-corruption Commission** (hereafter 'the Commission'), a body established under **Article 79** of the **Constitution of Kenya, 2010** and in which she alleges various violations of her constitutional rights.

The Petitioner's Case

2. In her Affidavit in Support of the Petition sworn on 30th October, 2014, the Petitioner alleged that the City Council of Nairobi (now Nairobi City County) was the grantee from the Government of Kenya of all that piece of land known as L.R No. 209/2501 and registered as Grant No. I.R 20441 (the suit property) for a term of 99 years from 1st December, 1935.
3. Her deposition was that on or about 4th August, 1992, the then City Commission of Nairobi held a meeting in which the Commission decided that in line with the Government policy at that time to reduce the number of unprofitable non-strategic establishments and public assets, it would employ prudent financial management technics. That in that regard, the then Chairman of the Commission proposed that the Chief Officer be authorized to identify and dispose off unprofitable non-essential services, properties and assets with a view to improving the Commission's financial position. The foregoing proposal was seconded, approved and confirmed and accordingly, 11,000 plots and houses belonging to the City Council were legally allocated to different individuals.
4. She further deponed that one such property sold by the City Council was the suit property herein and that the said property was legally acquired upon payment of consideration by her and the transfer to her was registered against the title on 10th August, 1992 and she has since enjoyed title to the property and has been paying land rent and rates as and when they fall due.

5. Further, according to the Petitioner, the Respondent authored a letter dated 11th November, 2013 addressed to the Interim County Secretary, Nairobi City County, requesting for documents in respect of the suit property herein allegedly for purposes of carrying out investigations into allegations of irregular alienation/disposal of the said property. In this regard, the Petitioner's contention was that the said letter was made in bad faith and calculated to single her out as having irregularly acquired the property the subject of the letter since the Respondent has only sought to get documents in respect of her property out of all the other properties sold by the City Council of Nairobi over the years.
6. She lastly contended that if the Respondent is not restrained by this Court from soliciting, requesting, demanding or in any other way calling for any document or information relating to her or in respect of the suit property herein, she will suffer grave and irreparable harm and injustice and its conduct is a clear violation of her right to equal protection and equal benefit under the law since it only requested documents relating to her property thereby singling her out as having acquired the same illegally; and that the information and documents sought are unnecessary and the Respondent's conduct is calculated to discriminate against her.
7. The Petitioner for the above reasons therefore prays for the following orders:
 - i. ***A declaration that the Respondent's act of requesting for information and documents in respect of L.R No. 209/2501 violate the principles of the Constitution and is thus unconstitutional.***
 - ii. ***A determination that the Respondent's act of requesting for information and documents in respect of L.R No. 209/2501 violates the fundamental rights and freedoms of the Petitioner to own land and to equal benefit and protection of the law.***
 - iii. ***A declaration that the Respondent's act of requesting for information and documents in respect of L.R No. 209/2501 violates the principle of lawful, reasonable and procedurally fair administrative actions enshrined in Articles 27, 47, 48 and 50 of the Constitution.***
 - iv. ***An order of injunction restraining the Respondent either by itself, its servants, employees, agents, representatives, officers, commissioners or any body or authority from requesting, soliciting, asking, demanding or in any way calling for documents or information relating to L.R No. 209/2501.***
 - v. ***A declaration that the Petitioner being the legal owner of L.R No. 209/2501 is entitled to quiet user and enjoyment of the same.***
 - vi. ***An order restraining the Respondent either by itself or through its servants, employees, agents, representatives, officers, commissioners or anybody or authority from entering, taking possession of, or in any other way interfering with the quiet enjoyment of the property rights of the Petitioner in L.R No. 209/2501.***
 - vii. ***Cost of this Petition.***
 - viii. ***Any other or further relief that this Honourable Court considers appropriate and just to grant.***

The Respondent's Case

8. In a Replying Affidavit sworn on its behalf on 20th November, 2014 and a Further Affidavit sworn on 9th December, 2014 by James Kamau Kariuki, an investigator with the Commission, it opposed the Petition.
9. Mr. Kamau in that regard deponed that the Commission has powers under **Article 79** of the **Constitution**, the **Anti-Corruption and Economic Crimes Act, 2003** and the **Ethics and Anti-Corruption Commission** to demand for information and documents from anyone including the

Petitioner.

10. The Commission's further case was that on or about February, 2010, it received an anonymous complaint alleging irregular sale and disposal of public property by the Nairobi City Council including among others the suit property herein. In this regard, it analysed the complaint and thereafter commenced investigations. That the foregoing prompted it to write letters to relevant public institutions among them the Town Clerk, the former City Council and the Commissioner of Lands requesting for various documents to facilitate investigations of the said allegations and for further action to be taken.
11. Mr. Kamau also deponed that the investigations he conducted established that: the City Council of Nairobi was the registered owner as lessee of the suit property from the Government of Kenya for a term of 99 years from 1st December, 1935 and a grant was issued and registered at the Central Registry Lands office on 17th November, 1964. That the salient special conditions of the grant by the Government were that: the land and buildings were only to be used for accommodation of a member of the grantee's staff; the grantee was not to sub-divide the land; and the grantee was not to sell, transfer, sub-let or part with the possession of the land or any part thereof.
12. It was Mr. Kamau's other deposition that his investigations also revealed that one Habib Omar Kongo alias Daniel Kongo, the then Chairman of the City Commission of Nairobi; Zipporah Wandera, who served as Clerk of the Nairobi City Commission from February, 1991 to November, 1992 and Kuria wa Gathoni, the then Director of Planning and Architecture knowingly and dishonestly caused the terms/covenants of the grant to the Council to be varied without any Council or City Commission resolution. That in a letter dated 14th July, 1992, the City Council through Mr. Kuria wa Gathoni wrote to the Commissioner of Lands notifying him of the sale of the suit property and sought consent to transfer the property, and subsequently, on 28th July, 1992, the Commissioner of Lands noted that he had no objection to the contents of the Application and further directed the Cashier at his office to accept payments in respect of the sale transaction.
13. Further, that vide a transfer dated 30th July, 1992, the aforesaid Habib Omar Kongo and Zipporah Wandera purported to transfer the City Council's interest in the title to the suit property to the Petitioner and caused the property to be registered in her name on 10th August, 1992. Mr. Kamau then contended that there are no existing records or any minutes of a meeting that deliberated on the issue of alienation of the suit property or demonstrating that the requirements pertaining to acquisition and disposal of land under the **Local Government Act, Cap 265, Laws of Kenya** were met, and there is also no proof to show that the City Council sought consent of the Minister as required under the **Government Lands Act, Cap 280, Laws of Kenya** before the transfer was effected.
14. Mr. Kamau contended further that the grantee was in any event required to obtain written consent of the then Minister in charge of Local Government in order to transfer any interest in title, but there was neither a Council resolution nor the requisite Ministerial consent in that regard to vary the terms of the grant in respect of the suit property.
15. According to Mr. Kamau therefore, the alienation of the suit property was done fraudulently with the object of improperly alienating public property vested in a public body and the transfer purportedly made in favour of the Petitioner is invalid, null and void and conferred no estate, interest or right on her. Additionally, the fact of non-compliance with the terms/covenants of the grant to the Council regarding variation without a Council resolution renders subsequent procedures illegal and the transfer of the suit property to the Petitioner, irregular, null and void for all purposes.
16. The Commission's further position is that the Petitioner acquired no valid interest by the purported transfer of the suit property owing to the illegality and irregularity in the whole transaction and it is trite law that no cause of action can be founded on an illegality as is patently

- the case in the present proceedings. In addition, it argued that the Petitioner cannot invoke the Constitution or any other law thereof in a bid to sustain a cause of action based on an illegality.
17. In the Commission's view therefore, the promulgation of the Constitution did not take away the need to investigate corruption and economic crimes and no interpretation of the Constitution as such can be made by this Court to the grave prejudice of the public interest. Further, that the alleged infringements of the Petitioner's rights do not arise since the enforcement of the Commission's legal mandate to investigate corruption and economic crimes is adequately and comprehensively vested in the Commission by virtue of **Article 79** of the **Constitution** and the aforesaid statutes.
 18. The Commission further contended that the Petition is fatally defective as it does not set out with reasonable precision the particular provisions of the Constitution which have allegedly been contravened or infringed by it and the manner of the aforesaid infringement or what infringement by it is apprehended by the Petitioner.
 19. The Commission also stated that the Petition seeks to pre-empt its efforts in investigations relating to the suit property and yet the assumed wrongful ownership and possession of the suit property is to the grave prejudice of the public interest and that the Petitioner has failed to make material disclosure to this Court that she assumed wrongful ownership and possession, and no evidence has been provided to this Court that she acquired lawful title in relation to the suit property.
 20. In his further affidavit, Mr. Kamau deponed that he subsequently obtained a number of documents from relevant public institutions relating to the said suit property and that most of the documents relevant to the investigation and which form the subject matter of the Petition had already been supplied to the Commission.
 21. The Commission therefore urged the Court to decline the grant of the orders sought by the Petitioner and instead dismiss the Petition with costs.
 22. In addition to the above, in its Written Submissions dated 12th August, 2015, the Commission submitted that it is mandated under the Constitution; the **Ethic and Anti-Corruption Commission Act** and the **Anti-Corruption and Economic Crimes Act, 2003** to conduct investigations, and that the routine process as required by law was adhered to in accordance with the established anti-corruption legal framework. That due process and rule of law was observed as well and investigations carried out in compliance with relevant constitutional provisions. In that regard, it was the Commission's argument that the Petitioner has not demonstrated that due process was not followed in the investigations or that she was unfairly treated during the said process.
 23. While relying on **Anarita Karimi Njeru vs The Republic [1979] KLR 1272** and **Kamlesh Pattni and Another vs Republic, Nairobi High Court Misc App. No. 322 of 1999**, its contention was that the Petition is fatally defective as it does not set out with reasonable precision the particular provisions of the Constitution which have allegedly been contravened.
 24. Placing further reliance on **Mistry Amar Singh vs Serwano Wofunira [1963] EA 409**; **Attorney General vs Sunderji Trading as 'Crystal Ice Cream' [1986] KLR 67**; and **Scott vs Brown Doering, McNab and Co (3) [1982] QB 724**, the Commission submitted that the principle of *ex turpi causa non oritur* prohibits the Petitioner from relying on a cause of action if it arises in connection with her own illegal acts. The Commission therefore submitted that this Court is bound by the principle of *stare decisis*, and as such it ought to turn away the Petitioner who seeks the assistance of this Court to perpetuate an illegality.

It further argues that the Petition largely relates to the acquisition of land which is a matter within the mandate of the Environment and Land Court (ELC).

25. Finally, while relying on **Republic vs Chief Magistrate Milimani and Another ex parte Tusker Mattresses Ltd and 3 Others [2013] eKLR**, the Commission was of the view that granting the orders sought in the present matter in effect will be tantamount to fettering it in the execution of its mandate and in particular its powers to institute asset recovery proceedings as provided for under **Section 11 (1) (j)** of the **Ethics and Anti-Corruption Commission Act**, and as such, the Petitioner is not entitled to the orders sought and the present Petition is frivolous and vexatious and does not disclose any *prima facie* cause of action against it to warrant the grant of the orders sought and it ought to be dismissed with costs.

Determination

26. The key issue for determination is whether the Petitioner's constitutional rights have been violated or are threatened with violation as alleged and the remedies available to her, if any. But before I go into the substantive determination of those issues, I must address my mind to the two preliminary issues raised by the Respondent as to whether the Petition has been overtaken by events and whether this is the appropriate forum for addressing the issues raised in the Petition.

27. The Commission in that regard submitted that the documents forming the subject matter of the Petition have already been supplied to it and therefore the Petition has been overtaken by events and the orders sought should not be granted. Accordingly, that the seeking of orders against the obtaining of the said documents renders the Petition an abuse of Court process as all the necessary documents have been obtained from the Ministry of Lands and the County Government of Nairobi within the mandate of the Commission.

28. The Commission's submission was further that the foregoing notwithstanding, the Petition raises substantive issues in particular the subject relating to the process of acquisition of the suit property and as such, the same ought to be addressed in a Petition in the Environment and Land Court (ELC) and not the High Court by dint of **Article 162 (2)** as read with **Article 165 (5) (b)** of the **Constitution**. Further, that in any event, on 16th March, 2015, this Court guided her on the need to address the issues raised herein in the Petition at the ELC as opposed to the High Court but she was insistent on proceeding on with the said defect intactly in place.

29. While relying on the decision in **Tasmac Limited vs Roberto Marci and 2 Others, Misc App No 5 of 2013**, it was the Commission's position therefore that the present dispute properly belongs to the Environment and Land Court as stipulated under the Practice Directions on Proceedings relating to the Environment and the Use and Occupation of, and Title to Land dated 20th September, 2012, issued by the Chief Justice of Kenya.

30. I will address the two issues seriatim.

Whether the Petition has been Overtaken by Events?

31. It is not in dispute that the Petitioner's case was premised on the acts of the Commission relating to the seeking of information pertaining to the suit property. It is also not in dispute that the Commission has obtained the various documents and information it had sought. The Petitioner has not controverted that clear statement. Is there anything left to be determined in the circumstances? In answer thereto I note that in the Petition, there are three sets of prayers, viz:

- i. Prayers (a), (b), (c), and (d) relating to documents in respect of the suit property.
- ii. Prayers (e) and (f) on her quiet enjoyment of the said property.
- iii. Costs and any other orders the Court may deem fit to grant.

32. Without saying more, any injunctive reliefs in Prayers (a), (b), (c), and (d) cannot be granted because the Commission has all the documents it requires and so those Prayers have been

overtaken by events. No court order should be issued in vain nor in a vacuum and no injunction can issue to restrain an act that has already taken place - See **BP (K) Ltd vs Kisumu Market Services Station Ltd C.A 25 of 1992 and Ntusero Naimaua Tiye vs Jubilee Alliance Party and 3 Others, Petition No. 85 of 2015.**

33. On whether prayers (e) and (f) are matters for this Court, I recall that I informally implored the Petitioner to relook at the Petition and confirm that the said issues are for this Court to determine. Having now heard both Parties on the subject, I am satisfied that this Court has no jurisdiction to determine the question whether the title to the suit property was lawfully acquired and whether she is entitled to quiet possession thereof.

34. My reasoning in this regard is guided by the provision of **Article 165 (5) (b)** of the **Constitution** which is to the effect that:

“The High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162 (2).”

35. In this regard, **Article 162 (2)** of the **Constitution** provides that:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

- a. *Employment and labour relations; and*
- b. *The environment and the use and occupation of, and title to, land.*

36. It is thus proper to find that the question of title and the validity or otherwise therein falls within the mandate of the Environment and Land Court which was established pursuant to the foregoing provisions. The jurisdiction of the said Court was affirmed in the case of **Tasmac Limited (supra)** where the Court stated thus:

“[12] The jurisdiction of the court has been defined to mean the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented before it in a formal way for its decision.

[13] The limits of this authority are imposed by the Constitution or a statute. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. This is the kind of jurisdiction that the High Court had before the promulgation of the current Constitution.

[14] The Environment and Land Court is established pursuant to the provisions of Article 162 (2) (b) of the Constitution. It is one of the Superior Courts alongside the Supreme Court, the Court of Appeal, the High Court and the Industrial Court.

[15] According to the provisions of Article 162 (2) (b) of the Constitution, Parliament was mandated to establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land, thus the enactment of the Environment and Land Court Act No.19 of 2011.

[16] The Jurisdiction of the court is found at Section 13(1) of the Environment and Land Court Act No. 19 of 2011 which is an exposition of the provisions of Article 162(2) (b), which is to determine disputes relating to the Environment and the use, occupation and ownership of land.”

37. I agree with the reasoning above and would only add that **Section 13** of the **Environment and**

Land Court Act provides as follows:

“(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

2. ***In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—***
 - a. ***relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;***
 - b. ***relating to compulsory acquisition of land;***
 - c. ***relating to land administration and management;***
 - d. ***relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and***
 - e. ***any other dispute relating to environment and land***
3. ***Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.***
4. ***In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.***

38. Read with **Articles 162 (2)** and **165 (5) (b)** therefore the import of the above provision is that this Court can only invoke **Article 40** on the right to property where there is absolutely no doubt that an Applicant is the undisputed title owner of any suit property. Where title and the manner of acquisition thereof is in dispute, this Court must down its tools forthwith. That is the situation obtaining in the present Petition.

Conclusion

39. I am satisfied from the foregoing therefore that based on the materials before me, the instant Petition has been overtaken by events and that this Court also has no jurisdiction to determine the issues of title to land or acquisition thereof. But before I dispose of the matter, I must comment on the general substance of the present Petition. I admit that the question of land ownership is an emotive issue in Kenya and the **Constitution, 2010** was promulgated *inter alia* to address historical land injustices. **Article 67** of the **Constitution** in this regard establishes the **National Land Commission** and among the functions of the Land Commission are to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress. It is thus clear that the investigations pertaining to any alleged historical land injustices are sanctioned under the Constitution.

40. In similar breath, **Article 79** of the **Constitution** mandates Parliament to enact legislation to establish an independent Ethics and Anti-Corruption Commission. This led to the enactment of the **Ethics and Anti-Corruption Commission Act** which created the **Ethics and Anti-Corruption Commission**, a Commission established to spearhead the war on corruption. Further, I note that the **Anti-Corruption and Economic Crimes Act** gives the Commission the mandate to investigate any complaints alleging acts of corruption including in obtaining land and the Commission is also granted powers to obtain any information or documents in a person's possession that relate to suspicion of corruption or an economic crime. It must be noted therefore

that the Commission is under an obligation to investigate all and any allegations pertaining to corruption and in this regard, for one to challenge the acts of the Commission, he or she must demonstrate that the Commission has acted *ultra vires* and outside its mandate. The Petitioner has sadly failed to do so and the Petition must fail.

Disposition

41. For the aforesaid reasons, I am hereby inclined to dismiss the instant Petition with a further order that the Petitioner shall bear the costs thereof as costs must follow the event and it was brought for purely personal reasons and of no benefit to the public.

42. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF APRIL, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Ruiru for Petitioner

Mr. Opondo holding brief for Miss Kimutahi for Respondent.

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE