



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 48 OF 2012

IN THE MATTER OF: ENFORCEMENT OF THE CONSTITUTION AND THE BILL OF RIGHTS UNDER ARTICLE 22(4) OF THE CONSTITUTION

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE BILL OF RIGHTS AND CONSTITUTION UNDER ARTICLE 27, 40, 45 & 47 OF THE CONSTITUTION OF KENYA

BETWEEN

SALAD AWALE.....PETITIONER

AND

1. THE PROVINCIAL POLICE OFFICER COAST

2. THE OFFICER COMMANDING POLICE DIVISION

CHANGAMWE

3. THE OFFICER COMMANDING ADMINISTRATION POLICE

CHANGAMWE

4. THE DISTRICT COMMISSIONER

CHANGAMWE.....RESPONDENTS

**THE GOVERNMENT OF THE REPUBLIC OF
RWANDA.....INTERESTED PARTY**

JUDGMENT

1. In a Petition dated and filed on 7th May, 2012, Salad Awale, the Petitioner sued the Provincial Police Officer, Coast, the Officer Commanding Police Division Changamwe, the Officer Commanding the Administration Police, Changamwe and the District Commissioner, Changamwe, and sought -

- (a) A declaration that the Respondents' decision to capriciously evict the Petitioner and demolish developments on Plot Number LR MN/VI/3666 situate at Miritini Changamwe before lawful acquisition and compensation is unconstitutional and in a breach of Articles 10, 27, 40, 45 and 47 of the Constitution of Kenya;
- (b) A mandatory injunction prohibiting and restraining the Respondents, their seniors or juniors, from in any manner interfering, evicting, demolishing and or assisting any party in the eviction and or demolition of the Petitioner's developments on Plot Nol. LR/MN/VI/3666 situate at Miritini Changamwe;
- (c) Costs of the proceedings be provided;
- (d) Such other order or reliefs as the court shall deem just.

2. Simultaneously with the Petition, the Petitioner also filed a Chamber Summons of even date with the Petition, and sought a conservatory order prohibiting and restraining the Respondents by themselves, their servants, seniors, juniors and/or agents from evicting, demolishing developments or interfering with the Petitioner's occupation/possession of Plot LR MN/VI/3666 situate at Miritini Changamwe within Mombasa County till hearing and determination of the Petition.

3. That application was heard, and the conservatory orders were issued on 7th May, 2012.

4. Following service of the Petition and the conservatory order upon representatives of the Respondents, the Fourth Respondent filed a Relying Affidavit through Douglas Muriithi Mutai, the District Commissioner, Changamwe District sworn and filed on 16th may, 2012, and denied that the Petitioner had any interest in the suit property. This Respondent stated the Petitioner undertook to vacate the suit premises, but later reneged.

5. On 25th May, 2012, the Petitioner was granted leave to amend the Petition, within fourteen (14) days, on terms that the Petitioner himself was restrained from carrying out any developments or any dealing on the suit land, pending the hearing and determination of the Amended Petition. The Petition was fixed for hearing on 16th July, 2012. Needless to say, nothing has happened since the orders of granting leave to amend the Petition. The Petitioner never filed any such Amended Petition.

6. I also observe that the Government of the Republic of Rwanda was granted leave to join the Petition as an Interested Party while the Attorney-General as counsel for the Respondents was granted leave to file his reply within four (4) days of service of the Amended Petition and the Petitioner was granted fourteen (14) days to file his reply (if any) to the Replying Affidavits by the Interested Party, and the Attorney-General.

7. The Replying Affidavit on behalf of the Interested Party was sworn on 11th June, 2012, by Yamina Karitanyi (Ms), Minister the Counsellor and Charge D' Affairs at the High Commission of the Republic of Rwanda to the Republic of Kenya.

8. This matter has been mentioned before me not less than four times, (13/11/2015, 7/12/2015, 9/03/2016, and 20/04/2015). On 7th December, 2015, the court was informed that parties were negotiating a settlement. No such settlement was cited on the subsequent mention dates. On 8th March, 2016, counsel, including Miss Abdi, (counsel for the Petitioner) agreed to have the submissions highlighted on 28th April, 2016. On 28th April, 2016, Ms. Abdi asked Mr. Anayi to hold her brief on the ground that she was on maternity leave, and required another two weeks, and that in any event, the Interested Party had been allocated another parcel of land, and the suit land would remain with the Petitioner. There was no evidence for that assertion.

9. Mr. Ngari, learned State Counsel however informed the court that he was ready to proceed, but that he was perplexed and took great exception to the application on behalf of Ms. Abdi, for an adjournment on the grounds that Ms. Abdi was on maternity leave, when a little earlier, he had met Ms. Abdi outside

the court-room, and she was certainly not on maternity leave. He had filed his submissions on 20th March, 2013, and was ready to proceed, and so he said, he relied on his submissions, and asked for a Judgment date.

10. I took a dim view of both Ms. Abdi and Mr. Anayi that both would lie to the court, the former that she was on maternity leave, and the latter repeating the same lie, while counsel (Ms. Abdi) was outside the court-room. If there was evidence for disrespect for the court and the court process, these counsel exemplified and extended it. It all amounted to employment of dishonest tactics to delay the conclusion of a Petition filed more than four years ago.

11. Though I granted Ms. Abdi counsel for the Petitioner, ten (10) days within which to file her submissions, so that they would be taken into account in the Judgment, as none appeared on record in the file. Similarly, none had been filed on behalf of the Interested Party. I postponed the conclusion of writing this Judgment until I obtained further information from counsel from any of the parties.

12. On 26th May, 2016, Mr. Ngari learned state counsel was able to shed light on the proceedings in this Petition. **Firstly**, the Petition had not been amended despite orders made by the court on 25th May, 2012 allowing the amendment of the Petition. **Secondly**, the Petitioner's counsel's submissions dated 31st October, 2012 had in fact been filed on 1st November, 2012.

13. Consequently, and in so far as the Petitioner is concerned, the Petition is being determined on the strength of the averments in the Petition, the Petitioner's Affidavit in support of the Chamber Summons for the conservatory orders granted on 7th May, 2012, the Petitioner's Further Affidavit in support of the Petition sworn on 31st October, 2012, and filed on 1st November, 2012, the written skeleton submissions dated 31st October, 2012, and also filed on 1st November, 2012 and the Petitioner's Supplementary List of Documents dated 4th October, 2012, but filed on 5th October, 2012.

14. For the Respondents, the court will rely on the aforementioned Replying Affidavit of Douglas Muriithi Mutai, and the written submissions of Mr. Ngari. State counsel, dated 15th March, 2013 and filed on 20th March, 2013. For the Interested Party, the court will rely upon the Replying Affidavit of **Yamina Karitanyi** already referred to above.

THE ISSUES AND ANALYSIS

15. The law on civil claims and so in constitutional Petitions is that the parties are bound by their pleadings, and the court cannot go outside the pleadings and introduce its own causes of action or issues for determination. In this Petition/case however, the Petitioner's claim cannot be determined without reference to the ownership of the suit property. The question of ownership has arisen both from the Replying Affidavit of the Fourth Respondent that the suit property did not belong to the Petitioner, and also from the Replying Affidavit on behalf of the Interested Party that the property belonged to the Interested Party. It also arises from the Petitioner's Further Affidavit (paragraphs 2 and 3 thereof) that the Petitioner is the registered proprietor of the suit property from 1st May, 1986, though the Grant was issued by the Commissioner of Lands on 24th November, 1997, and registered on 2nd December, 1997. So the **first** issue is who is the registered owner of the suit property, the Petitioner or the Interested Party? The **second** issue would be whether the actions of the Respondents to evict the Petitioner was a breach of his constitutional rights. The other issues of costs and final orders will fall into these two primary issues.

OF OWNERSHIP OF PLOT LR NO. MN/VI/366 (THE SUIT PROPERTY)

16. From the Petitioner's Affidavits the support of the Petition as already observed, the Petitioner claims that he is the registered proprietor of the suit property by a Grant CR. No. 30827, measuring 12.88 Hectares for a leasehold term of 99 years with effect from 1st May, 1986, and that a copy of the title marked "SA 1" was attached. None was so attached to the said Affidavit. Instead, the "title" is Item "2" among the List of Documents dated and filed on 5th October, 2012, and among which is also listed

correspondence between the Minister for Lands, the Minister for Defence, and subsequent demands for rates, and land rent from Municipal Council of Mombasa and the Lands Department respectively, all happening in the month of May, 2012, and ending on the 12th July, 2012.

17. This claim of ownership, though not pleaded, must be weighed against the claim of the Interested Party. The Interested Party claims that it was allocated by the Government of the Republic of Kenya the suit land in reciprocating with the Government of the Republic of Rwanda granting the Republic of Kenya similar land in Rwanda. All this happened in 1986, and a Grant known as CR Number 30827 was issued, but that the Grant was lost.

18. By a Statutory Declaration made on 24th November, 2010, the High Commission of Rwanda H.E. George William Kayonga the High Commissioner of the Republic of Rwanda to Kenya deponed that the Grant was lost. H.E. High Commissioner also executed a Deed of Indemnity undertaking on behalf of the Government of Rwanda, at all material time to indemnify the Government of Kenya, against actions, proceedings, claims and demands, costs and damages and expenses which may be brought, levied or made against the Government of Kenya in relation to the said Grant Number 30827. By Gazette Notice No. 2092 of 2nd February, 2012, the Registrar of Titles advertised the loss of the Grant, to the suit land, and in the absence of any objection thereto, he would issue a Provisional Certificate of Title. There is no evidence that there was any objection to the issue of a Provisional Certificate.

19. In any event the Interested Party avers that the Petitioner's alleged Grant is a forgery because –

(a) The Petitioner's purported Grant is expressed to have been drawn by one Caleb T. Muhuyi, Registrar of Titles, who has been contacted by the Interested Party's Advocates and has confirmed that he never drew the said document since he was at the time based in Kiambu and not Nairobi as alleged;

(b) Whereas the purported Grant shows that an annual rent of Kshs. 208,000/= is payable thereon, there has not been exhibited any evidence by the said Petitioner that he has paid any such annual rent as alleged. The Interested Party's Grant was **Peppercorn**, and no rent was payable thereon;

(c) Whereas the Petitioner's fake title shows on its face that the property measures 10.67 hectares, the map which he relies upon shows that the same is 12.88 hectares. This is the same map that defines the Interested Party's property;

(d) There is no evidence of the consideration of Kshs. 1,040,000/= purportedly under which the same was offered to the said Petitioner and the purported Stamp Duty paid thereon of £K 2288, does not tally with the said consideration.

20. With said averments that Interested Party concluded court that the Petition is without legal and factual basis, that the Petitioner is a mere trespasser who should be removed from the suit property by the Provincial Administration, and that the Petition and proceedings commenced by the Petitioner ought to be dismissed with costs.

21. The Replying Affidavit of Douglas Muriithi Mutai, on behalf of the other Respondents was in the same vein. The suit property was allocated to the Interested Party, the Government of the Republic of Rwanda who were registered as proprietor in the Grant issued on 25th November, 1997, and registered on 22nd December, 1997. This was confirmed by the Ministry of Lands that the suit land belonged to the Interested Party and that the documents held by the Petitioner were neither genuine nor authentic, and that when confronted with by the foregoing facts, the Petitioner agreed to vacate the suit land but that he had been prevaricating and had agreed to remove his vehicles and equipment but later reneged, hence these proceedings.

DETERMINATION ON ISSUE OF OWNERSHIP

22. I have considered carefully the respective affidavit evidence by the Petitioner, the Respondents and

the Interested Party and I reiterate that the ownership of the suit land was not part of the Petitioner's pleadings. The issue arose from the Affidavits first of the Respondents, the Petitioner himself and the Interested Party.

23. Whereas it was not denied that the Petitioner used the suit land as a transport yard for his tracking business from about the same time the suit land was allocated to the Interested Party, the Petitioner has never been the registered owner of the suit land. The title listed as Item 2 in the List of Documents dated 4th October, 2012 and filed on 5th October, 2012, has glaring inconsistencies with that of the Interested Party. The grant to the Interested Party was at a Peppercorn Rent (if demanded). The purported Grant to the Petitioner is at a rent of Kshs. 208,000/= . The Petitioner's title attached to Chamber Summons for the Conservatory Orders shows an area of 10.67 Hectares, the Deed Plan relied on shows the same as 12.88 hectares. There is no evidence of the consideration of Kshs. 1,040,000/= and there is no evidence of payment of Stamp Duty of £K 2288.0.

24. Section 3 of the Government Lands Act (Cap 280, now repealed) confer upon the Commissioner of Lands the discretion to alienate land which has not been alienated. According to the Replying Affidavit of the Fourth Respondent, the documents produced by the Petitioner were, upon cross-checking by the Commissioner of Lands found to be forgeries. The Petitioner has not controverted this assertion nor the assertions by the Interested Party.

25. I do however take note that at the time of egging the then Minister for Defence, an ally of the Petitioner, the Minister for Provincial Administration and the Minister for Lands, a profusion of documents a double title may have been issued. The officer who allegedly issued the title, has denied ever preparing the title! The balance of probability is that the suit property was first allocated to the Interested Party, and the origin of the Petitioner's latter title lie in the power games between the inner sancturns of the then three Cabinet Ministers.

26. The Interested Party has over time paid over Khs. 6,104,490.80 by way of rates to the Municipal Council of Mombasa. It was illegal on the part of all those concerned to purport to alienate land which had already been alienated to a friendly Government, a member of the Commonwealth, a member of the East African Community. The suit land belongs to the Interested Party, and not the Petitioner, I so find and hold.

OF WHETHER THE ACTIONS OF THE RESPONDENTS WERE A VIOLATION OF THE PETITIONER'S CONSTITUTIONAL RIGHTS

27. I am persuaded that at the time giving rise to the Petition, and there being no Amended Petition, the Petitioner having been warned according to the Replying Affidavit of the Fourth Respondent, the Petitioner was among the squatters in the Interested Party's suit land. The Respondents assisted him to remove his motor vehicles, equipment and the temporary fence he had erected around the suit land, and to keep law and order in the exercise. There are no particulars of loss or damage suffered by the Petitioner. His prayer is therefore declined.

OF THE ORDERS OF MANDATORY INJUNCTION AND PROHIBITION

28. Having found that the suit land had been alienated to the Interested Party and the court having in orders issued on 25th May, 2012, restrained the Petitioner from *inter alia* **"...carrying out any further developments thereon in any manner whatsoever pending the hearing of the application inter partes or as the court may order,"** I find no ground for issuing any mandatory injunction or order of prohibition. Instead, I direct that the Petitioner should vacate the suit land within sixty (60) days from the date hereof.

29. The Petitioner having failed in all issues, the Petition herein dated and filed on 7th May, 2012 is dismissed with costs to the Interested Party and the Respondents.

30. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 31st day of May, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

No Appearance for Petitioner

No appearance for Respondents

Mr. S. Kaunda Court Assistant