



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

PETITION NO. 10 OF 2015

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS UNDER ARTICLE 22
OF THE CONSTITUTION**

BETWEEN

MAHAT KUNO ROBLE

MOHAMED MAHAT

AHMED MAHAT

DAISY MOHAMED

NAHIYA DAMBIL.....PETITIONERS

VERSUS

THE PERMANENT SECRETARY MINISTRY OF DEFENCE.....1ST RESPONDENT

ATTORNEY GENERAL2ND RESPONDENT

JUDGMENT

By a petition dated 17th February 2011 and amended pursuant to this Court's leave and dated 17th April 2012, the petitioners sought the following orders:-

- 1. A declaration that the act of trespassing onto the petitioners property and the threatened forceful acquisition of the petitioners parcels of land registered as GARISSA MUNICIPALITY BLOCK 111/561, 562 and 563 is a gross violation of their Constitutional rights to private property and infringement of the protection afforded by Article 40 of the Constitution.***
- 2. A declaration that the respondents have no right in law to interfere with the petitioners private property without following due process of law in compulsory acquisition as set out in Article 40 (3) of the Constitution.***
- 3. Damages for trespassing onto the petitioners property and interfering with the petitioners right to quiet and peaceful enjoyment of the property registered as GARISSA MUNICIPALITY BLOCK 111/561, 562 and 563 and for preventing the petitioners from accessing their property.***
- 4. A declaration that the respondents are liable to compensate the petitioners for the unlawful***

demolition of the boundary wall on the parcels of land registered as GARISSA MUNICIPALITY BLOCK 111/561, 562 and 563.

5. A permanent injunction restraining the respondents whether by themselves, their agents, employees and/or servants from interfering with the respondents (sic) (must have meant the petitioners) quiet and peaceful enjoyment, possession, use and/or any dealing of the property known as GARISSA MUNICIPALITY BLOCK 111/561, 562 and 563.

6. The respondents to pay the costs of these proceedings.

The petition was supported by the affidavit of **AHMED MAHAT** the 3rd petitioner dated 17th February 2011 and a further affidavit in support of the amended petition dated 17th February 2012 and a supplementary affidavit dated 21st June 2012.

The gist of those affidavits sworn on behalf of all the other petitioners is that:

1. The petitioners are the registered owners of the land parcels registered as GARISSA MUNICIPALITY BLOCK 111/561, 562 and 563 (herein the suit property) and certificates of lease confirming the same were annexed – annexure AM-1.

2. That the suit property has been severally invaded by trespassers thereby necessitating the erection of the boundary wall in the property located adjacent to a military barracks.

3. That the District Commissioner Garissa acting on behalf of the Government of Kenya demolished the boundary wall in April 2009 and ordered them to vacate on the ground that the suit property belongs to the Government. The petitioners incurred a loss of Ksh. 1,800.000 as a result of that demolition which was done notwithstanding orders of prohibition issued by the High Court in Misc Case No. 34 of 2009.

4. That it was unlawful and Unconstitutional for the respondent to order for the demolition of the boundary wall on the mistaken assumption that it is Government property and the Brigadier in charge of the Garissa Barracks has now threatened to forcefully take the suit property and fence them off without due process which is a contravention of the petitioners fundamental rights as enshrined in the Constitution.

5. That despite several letters addressed to the respondents informing them of the unlawful nature of the intended acquisition of the suit property, they have persisted in the same and unless restrained, will proceed to take over the suit property.

The respondents filed grounds of opposition on 13th December 2011 and also a replying affidavit by **BRIGADIER FOUSTINE ODUODI SIRERA** the Commander of the Garissa Military Barracks sworn on 31st August 2011. A further replying affidavit to the amended petition was also sworn by **AMBASSADOR NANCY KIRUI** the then Permanent Secretary in the Ministry of State for Defence on 18th June 2012 and filed in Court on 20th June 2012. The gist of those replying affidavits is that:-

1. The petitioner had filed Judicial Review No. 34 of 2009 which was still pending therefore this petition is an abuse of the Court process and is forum shopping.

2. That the petition previously referred to the suit property as GARISSA MUNICIPALITY BLOCK IV/391, 392 and 393 and the amended petition to refer to the suit land as GARISSA MUNICIPALITY BLOCK IV 561, 562 and 563 was not due to an error but a new tactic to defraud the Republic of Kenya of its land and a clear offence of forgery has been committed and is being investigated as the title could be flawed.

3. That a mere declaration which deny the Court the opportunity to examine the legality of the procedure through which the suit property was acquired will lead to a miscarriage of justice and

deny the Republic of Kenya its property.

4. That the petitioners have not stated or pleaded the procedure and manner in which it acquired the suit property which is public land and therefore they have not come to Court with clean hands.

5. That the protection accorded by Article 40 of the Constitution does not extend to properties acquired unlawfully and the Kenya Defence Forces has been in occupation of the suit property since pre-independence days and no authority was granted for the allocation of the said land.

6. That the suit property was set aside for security and public interest overrides private interest.

7. That the Provincial Surveyor, North Eastern Province Mr. B.K. KIPROTICH had previously surveyed the contested area and made a report to the effect that the petitioners had fenced off a portion of the GARISSA MILITARY BARRACKS.

Submissions have been filed by the firm of **ISSA & COMPANY ADVOCATES** on behalf of the petitioners and the **HON. ATTORNEY GENERAL** for the respondents.

I have considered the petition, the supporting affidavits, the replies thereto and the submissions by counsel.

The starting point should be whether in fact this petition is an abuse of the Court process in view of the existence of **JUDICIAL REVIEW APPLICATION No. 34 of 2009 (MERU)**. Part of the petitioners' annexure is an order granted by **OUKO J.** (as he then was) in that Judicial Review Application granting the petitioners leave to apply for orders of certiorari and prohibition and which was to operate as a stay of execution against the demolition of the applicants' (petitioners herein) boundary wall on the suit property. The petitioners have submitted that the substantive Notice of Motion was never filed as it would have been an academic exercise since the respondents, with the assistance of the Garissa District Commissioner, took it upon themselves to demolish the perimeter wall on the suit property. That has not been denied. Is this petition an abuse of the Court process?

What amounts to abuse of the Court process was discussed by the Court of Appeal in **JETLINK EXPRESS LIMITED VS EAST AFRICAN SAFARIS AIR EXPRESS LTD C.A CIVIL APPEAL No. 281 of 2009 (NBI)** where the Court of Appeal cited the South African Case of **BEINOIS VS WIYLEY 1973 S.A 721 (SCA)** which defined that principle as follows:-

“What does constitute an abuse process of Court is a matter which needs to be determined by the circumstances of each case. There can be no all encompassing definition of the concept of ‘abuse of process’. It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of Court to facilitate the pursuit of truth are used for purposes extraneous to that objective”

The Court went on to cite the Court of Appeal Abuja in the Nigerian Case of **ATTAHIRO VS BAGUDO 1998 3 NWLL 545** where it is stated that the term abuse of Court process has the same meaning as abuse of Judicial process. That includes the employment of Judicial process to irritate and annoy the other party. It is a term generally applied to proceedings that are wanting in bona fides, frivolous, vexatious or oppressive. Such a process has an element of malice in it. Illustrations of abuse of Court process include:-

1. Institution of multiplicity of suits on the same subject against the same parties.

2. Instituting different suits against the same parties simultaneously in different Courts even though on different grounds.

Guided by the above principles, is this petition an abuse of the Court process? The answer is in the

negative. Although leave had been granted to file Judicial Review proceedings in **MERU HIGH COURT MISC CASE No. 34 of 2009** on 22nd April, the substantive Notice of Motion was not filed and that order automatically lapsed after twenty one (21) days in terms of the provisions of **Order 53 Rule 3 (1) of the Civil Procedure Rules.** Besides, as submitted by counsel for the petitioners, filing the said Notice of Motion would have been an academic exercise since the order being sought to stop the demolition of the petitioners' wall on the suit property would have served no purpose as the said wall was demolished. The petitioners were therefore entitled as they did, to file this petition to protect their property. It cannot be argued therefore that this petition is an abuse of the Court process. I do not, for instance, discern any institution of a multiplicity of suits in different Courts between the same parties. **MERU HIGH COURT JUDICIAL REVIEW MISC CASE No. 34 of 2009** came to an end after it was frustrated by the respondents. The petitioners were therefore entitled to pursue another claim which is their right to pursue in a Court of law no matter however implausible or improbable their chances of success. I therefore find that this petition is not an abuse of the process of the Court. It is neither frivolous, vexatious nor scandalous.

The petitioners have annexed to their petition the certificates of lease in respect to the suit property – annexure **AM 1**. It is the respondents' case that the suit property was acquired fraudulently. In paragraph nine (9) of the replying affidavit of **BRIGADIER FOUSTINE ADUODI SIRERA**, it is deponed as follows:-

“That I verily believe that the petitioners alleged title deeds are forgeries and a fraud and therefore confers no title to them”

On her part, **AMBASSADOR NANCY KIRUI** has deponed in paragraph 10 and 14 of her replying affidavit sworn on 18th June 2012 as follows:-

10 “That from the affidavit of Brigadier Foustine Oduodi Sirera sworn on 31st August 2011 which accessitated the amendment to the petitioners petition, a clear offence of forgery has been committed and we are conducting investigation before we launch a complaint as to the offence”

14 “That I am advised by learned State Counsel Mr. Motari that the Constitution protects right to property either individually or through an association and that Article 40 (2) (b) of the Constitution of Kenya has declared that the right to protect individual property does not extend to those properties acquired unlawfully”.

It is therefore the respondents' case that the petitioners do not have good titles to the suit property. Indeed it is their submission that the suit property is infact public land vested in the 1st respondent. This Court has not been informed about the results of the investigations launched by the respondents to show that the suit property was irregularly or fraudulently registered in the names of the petitioners. If the respondents had any claim to the suit property, nothing would have been easier than commencing proceedings to assert such claim. On the other hand, if the respondents desired to compulsorily acquire the suit property, then the proper legal machinery for doing so under the **new repealed Land Acquisition Act CAP 295** should have been invoked as far back as 2011 when the respondents discovered what they allege to be a fraudulent acquisition of the suit property. Better still, such process should have commenced in 2005 when the titles were issues.

It is not in dispute that the suit property was registered in the names of the petitioners on 18th December 2005 when they were issued with titles thereto under the **repealed Registered Land Act. Section 27 (a) and (b)** of the said Act protects the sanctity of titles in the following terms:-

“Subject to this Act –

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease”

The petitioners enjoy a 99 year lease from 1.12.1999 in respect to the suit property and no evidence has been placed before this Court to demonstrate that the petitioners’ titles were obtained fraudulently or that the suit property was at any time allocated to the respondents or specifically to the Garissa Barracks as alleged. **Section 25 and 26 of the new Land Registration Act 2012** has similar provisions protecting the rights of a registered proprietor and confirming that the certificate of title issued by the Land Registrar is prima facie evidence to be accepted by the Court that the person named therein is the absolute and indefeasible owner of such land. As indicated earlier, no evidence has been placed before this Court to demonstrate that the titles in respect of the suit property are forgeries. The Court is therefore entitled to presume that the titles which are duly signed by the Land Registrar are genuine. This is because, **Section 83 (1) and (2) of the Evidence Act** provides as follows:-

(1) “The Court shall presume to be genuine every document purporting to be a certificate, certified copy or other document which is _

(a) declared by law to be admissible as evidence of any particular fact;

(b) Substantially in the form and purporting to be executed in the manner, directed by law in that behalf; and

(c) Purporting to be duly certified by a Public officer”

(2) “The Court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the officer character which he claims in such document”.

Since the respondents were the ones who sought to impugn the authenticity of the petitioners’ titles to the suit property, **Section 107 of the Evidence Act** placed the burden of such proof on them. From the evidence on record, the respondents did not prove the allegation that the said titles are forgeries. It was not enough simply to allege fraud in the manner that the titles were acquired without placing before the Court cogent evidence in proof of the same. This Court therefore finds that the petitioners hold valid titles to the suit property and are therefore entitled to protection of their rights thereto as provided under **Article 40 of the Constitution**. In an attempt to persuade this Court that the suit property is public land, the respondents counsel has cited **DHANJI RAMJI VS COMMISSIONER OF PRISONS & A.G H.C.C.C No. 275 of 1998 (NKU)**. In that case, however, there was evidence that the land which had been allocated to the plaintiff and a certificate of lease issued to him was infact land that had earlier been Gazetted as Public land. Such land would therefore not be available for alienation to another party. In this case now before me, no such evidence has been brought forward to show that the suit property was at any time Gazetted as Public land for use by the Garissa Barracks.

Counsel for the respondent has also submitted that Public interest overrides private interest and therefore the petitioners should not be allowed to circumvent the rights of the larger population of Kenya. That is correct in principle. This Court was referred to the case of **REPUBLIC VS SENIOR RESIDENT MAGISTRATE, MOMBASA & OTHERS EX-PARTE COMMEU LTD H.C MISC CIVIL APPLICATION No. 70 of 2010**. In that case, the applicant had been allocated public land but that allocation was subsequently revoked by a Gazette Notice. The applicant’s attempt to quash that revocation was dismissed on two grounds namely (a) that the allocation had infact been made to a non-existent party and (2) that the allocation had been revoked by Gazette Notice since it was public land. That case does not aid the respondents herein for the simple reason that there is no such Gazette Notice revoking the petitioners’ title which, as I had indicated above, must be presumed to be genuine.

The up-shot of all the above is that whereas the petitioners have tendered before this Court certificates of

lease in respect of the suit property duly signed by the Land Registrar, no such evidence has been availed by the respondents to demonstrate that they have any registrable interest in the said land or that it forms part of land allocated to the Garissa Barracks. Similarly, no evidence has been placed before this Court to show that the petitioners titles to the suit property were even cancelled if, as in alleged, they were obtained through fraudulent means. Therefore, by demolishing the petitioner's wall to the suit property, the respondents were clearly committing an act of trespass and violating the petitioners' right to a quiet and peaceful enjoyment of their property as enshrined under **Article 40 of the Constitution**.

REMEDIES

I have at the start of this judgment set out the petitioners' prayers. I will therefore answer them as follows:-

1. A declaration is issued that the act of trespassing onto the petitioners' property and the threatened forceful acquisition of the petitioner parcels of land registered as GARISSA MUNICIPALITY BLOCK 111/561, 562 and 563 is a gross violation of their Constitutional right to private property and infringement of the protection afforded by **Article 40 of the Constitution**.
2. A declaration that the respondents have no right in law to interfere with the petitioners' private property without following due process in compulsory acquisition as set out in **Article 40 (3) of the Constitution**.
3. With regard to the damages available for the said trespass and violation of the petitioners rights over the suit property, counsel for the petitioners has submitted that this Court awards Ksh. 30,000,000.00

Article 23 of the Constitution provides that in determining a violation of rights, the Court may, in addition to other reliefs, make an order for compensation. **Section 13 of the Environment and Land Court Act** similarly provides that in exercise of its jurisdiction under the Act, this Court may also make an award for damages.

It is clear from the supporting affidavit of **AHMED MAHAT** that the acts of trespass on the part of the respondents involved invading the suit property and ordering the petitioners to vacate. In the circumstances of this case, I am of the view that the proposed figure of Ksh. 30,000,000.00 is on the high side. A sum of Ksh. 1,500,000.00 will suffice as damages for the respondents' violation of the petitioners' rights under **Article 40 of the Constitution**.

4. A declaration that the respondents are liable to compensate the petitioners for the unlawful demolition of the boundary wall on the parcels of land registered as GARISSA MUNICIPALITY BLOCK 111/561, 562 and 563. In paragraph 5 of the supporting affidavit of **AHMED MAHAT**, he has deponed as follows:-

"The demolition ordered by the respondents on the petitioners' private property is therefore patently unlawful and contravened the Constitution. The petitioners incurred a loss of more than Ksh. 1,800,000.00 in the demolition of the boundary wall"

The prayer was really one for special damages which must be strictly proved by production of supportive documents such as receipts. No such evidence was laid before the Court to prove that the petitioners incurred such loss. That prayer is dismissed.

5. A permanent injunction is issued restraining the respondents whether by themselves, their agents employees and/or servants from interfering with the petitioners quiet and peaceful enjoyment possession, use and/or any dealing of the property known as GARISSA MUNICIPALITY BLOCK 111/561, 562 and 563.

6. On costs, it is the submission by counsel for the respondents that the petitioners unlawfully acquired the suit property and are therefore not entitled to costs. Reliance is placed on the decision of

ELECTRICAL OPTIONS LTD VS A.G & COMMISSIONER OF LANDS CONSTITUTIONAL PETITION No. 23 of 2011 (MILIMANI, NBI). A perusal of that judgment shows that although compensation was not awarded, costs were awarded to the petitioner. Costs follow the event unless the Court, for good reasons, orders otherwise. I do not see any such good reasons in this case to justify denying the petitioners their costs.

I therefore direct that the respondents shall meet the petitioners' costs.

It is so ordered.

B.N. OLAO

JUDGE

19TH AUGUST, 2016

Judgment dated, delivered and signed in open Court this 19th day of August, 2016

Ms Kiragu for Mr. Issa for Petitioners present

Attorney General for Respondents absent

Right of appeal explained.

B.N. OLAO

JUDGE

19TH AUGUST, 2016