



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.106 OF 2015

BETWEEN

KENAFRIC INDUSTRIES LIMITED.....PETITIONER

AND

RUARAKA CONSTITUENCY DEVELOPMENT FUND COMMITTEE...1ST RESPONDENT

CONSTITUENCY DEVELOPMENT FUND BOARD.....2ND RESPONDENT

HON. TOM KAJWANG.....3RD RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, Kenafric Properties Limited, in its Petition dated 17th March 2015, describes itself as a company incorporated in Kenya and has instituted the present proceedings against the 1st and 2nd Respondents, established and constituted under **Sections 5 and 24 of the Constituency Development Fund Act, Act No. 30 of 2013**, and the 3rd Respondent, Hon. Tom J. Kajwang, the Member of Parliament for Ruaraka Constituency and an *ex officio* Member of the 1st Respondent.

2. In the Petition the Petitioner is alleging violation of its right to property under **Article 40** of the **Constitution** and in that regard, it alleges that the Respondents have unlawfully encroached upon its parcel of land known as, L.R No. 336/109 (Grant No. I.R 95767) (hereafter ‘the property’) which action is an infringement of the said right to property.

The Petitioner’s Case

3. In an Affidavit sworn on its behalf by its Managing Director, Mr. Ketan Shah, on 18th March 2015, it is the Petitioner’s contention that it is the registered proprietor of the property situate at Baba Dogo within Nairobi comprising 2.433 hectares. That it has been in peaceful occupation of the said property until 16th March 2015 when employees of the 1st and 2nd Respondents descended upon the same without notice or right and accompanied by the 3rd Respondent and hundreds of other people, they deliberately destroyed an existing perimeter fence and in its place, erected an iron fence around a portion of the land.

4. The Petitioner has maintained that the property is not Government reserve land and has not been

gazetted for acquisition and neither has it been acquired by the Government for the purpose of construction of Constituency Development Fund offices.

5. Mr. Shah has further deponed that following the encroachment, he required the personnel on site to justify their actions by showing the authority under which they were acting upon, and in that regard, the persons asserted that they had been instructed by the 3rd Respondent to take over the property but they did not exhibit any grant or order of acquisition by the National Land Commission or intention to do so within the provisions of the law as required under the **Constitution**.

6. In that regard, it is also the Petitioner's case that in taking over the property, the Respondents acted with impunity and have not sought proper advice from the National Land Commission and if they have, the acts in question are in contravention of the right to secure enjoyment of its property rights under **Article 40** of the **Constitution**. Accordingly, that the Respondents have in addition failed to halt the encroachment and destruction of the property which action has resulted in destruction of part of it and thereby occasioning losses amounting to millions of shillings and that further damage and destruction looms unless the Court intervenes.

7. Furthermore, in the Petitioner's view, the Respondents have not undertaken any proceedings in any Court nor given him a right to challenge any decision made, if any, to the compulsory acquisition of the property and the terms thereon which in any event have never been communicated to him and as such, the actions remain a nullity in law. Additionally, that the Respondents have failed to adhere to the provisions of the **Land Act**, the **Land Acquisition Act** and the **Constitution** and have instead proceeded to raise extraneous issues on grounds which do not form the basis of any alleged compulsory acquisition or the commencement of proceedings before a competent body, thereby rendering it impossible for the Petitioner to meaningfully participate in any such proceedings.

8. In its Written Submissions dated 5th February 2016, the Petitioner has maintained that under the **Constituency Development Fund Act**, it is only the 2nd Respondent which is capable of being sued and taking, purchasing or otherwise acquiring, holding, charging or disposing of moveable and immoveable property and therefore if any property was to be acquired by the 1st Respondent, the 2nd Respondent was legally bound to have been involved in such acquisition.

9. In the Petitioner's further view, it has all the rights to enjoy its property as guaranteed under **Article 40** of the **Constitution** and any attempt to dispossess it of its ownership is unconstitutional. That the Respondents have not shown any evidence of acquisition by the Government under **Article 40** of the **Constitution** nor has there been any allegations that its property falls under **Article 40** of the **Constitution**, and no inquiry has been attempted under **sub-article (6)** therein. Further, that it has an indefeasible title by virtue of **Section 26** of the **Registered Land Act** and no material has been presented before the Court to show that the Petitioner acquired the title to the property fraudulently. Accordingly, that the Respondents have not at any point challenged its title to the property before the National Land Commission and as such, the present Petition ought to be allowed and the orders sought herein be granted. The said Orders are as follows:

a) A conservatory order do issue to restrain the Respondents each and all of them, either by themselves or through their agents, servants, nominees or otherwise from entering, remaining upon, or in any way interfering with the Petitioner's enjoyment of the property known as Land Reference Number 336/109 Grant No. I.R 95767.

b) A declaration do issue that the Respondents' action of entering into the Petitioner's said property contravenes the rights of the Petitioner to own and acquire property of any description in any part of the Republic as enshrined, guaranteed and protected under Article 40 of the Constitution.

c) A declaration that as a consequence of the violation of the Petitioner's right to property and the encroachment into the said property by acts of the Respondents, the Petitioner is entitled to damages and upon inquiry, an award on damages be made.

d) An order of injunction do issue, restraining the Respondents each and all of them, either by themselves or through their agents, servants, nominees or otherwise from entering, remaining upon, or in any way interfering with the Petitioner's enjoyment of the property known as Land Reference Number 336/109 Grant No. I.R 95767.

e) The Petitioner be awarded the costs of these proceedings.

f) Such other or further orders as to this Court may deem just.

The 1st Respondent's case

10. The 1st Respondent opposes the Petition and has filed an Affidavit in reply sworn on its behalf on 12th October 2015, by its Secretary, Mr. Peter Runkin. It is its case that it is tasked with the responsibility of coming up with a list of priority projects in consultation with representatives from all the wards in Ruaraka Constituency, and as such, it identified and prioritized the construction of the Ruaraka Constituency office to be implemented in accordance with the Guidelines set out for such projects.

11. That in the prioritization and planning for the construction of the said office, it identified a parcel of land within the constituency that had previously been set aside for public purposes, namely L.R No. 336/109, Baba Dogo. In that regard, the 1st Respondent asserted that it enquired from the Nairobi County Government whose mandate includes the setting aside of land for public purposes and the Nairobi County Government informed it that the property had been surrendered to the National Government and therefore vested upon the Nairobi County Government and further that the said County Government had no objection to it constructing the said office on the property.

12. The 1st Respondent further states that upon conducting a search in respect of the property, it confirmed that the property had long been surrendered to the Government and that upon interrogating the Petitioner's title to the property, it emerged that the title is in respect of a portion containing by measurement 2.433 hectares or thereabouts and that its interest is by way of a leasehold for a period of 50 years with effect from 1st October 2001. Additionally, that the Petitioner has dealt with the property over the years only by way of charge but has not been in physical occupation thereof. That in fact the property serves as a public utility which local residents use as a football field, prayer ground and a venue for public meetings, gatherings and rallies.

13. Further, according to the 1st Respondent, the property is only a portion of a large parcel of land constituting L.R Nos. 336/9, 336/12 and 336/15 measuring roughly 29.43 hectares demised by a lease dated 12th March 1915. That the title to the property was initially registered in the joint names of Jose Antonio Remedio D'Silva and Francis Soares, and was the residue and unexpired term of 99 years from 1st August 1911. That from an indenture dated 10th June 1980, the vendors sought to transfer a portion of the larger parcel to Tara Singh Dogra, Manmohan Singh Dogra, Parminder Singh Dogra, Rajinder Singh Dogra and Charanjit Singh Dogra and that prior to the said transfer, the vendors had caused the large portion to be subdivided to create three portions being L.R No. 336/9, L.R Nos. 336/12 and L.R No.336/15 and furthermore, at the time of the sub-division of the portion measuring 29.43 hectares, the applicable law was the **Town Planning Act, 1967** and the **Development and use of Land (Planning) Regulations, 1961**. It was a legal requirement at the time therefore that for the sub-division to be approved, the owner would surrender to the Government not less than 20 per cent of the larger parcel to be used for public purposes.

14. Furthermore, that as evidenced by a search dated 4th June 2014, the portion that was surrendered for public purposes is the property in dispute in the present Petition and that the same, having been surrendered for public purposes was not available for alienation for private use and that the title issued to the Petitioner with effect from 1st October 2001 is irregular. That in any event, the Petitioner has not demonstrated how a property that had been surrendered for public purposes was alienated in its favour.

15. In the 1st Respondent's further view, whereas the Petitioner has a title in its name, this Court has the constitutional duty to interrogate the process preceding issuance of title and where it is found to have been irregular, such title ought not to override the public purpose for which the property was reserved and set aside. Accordingly, that **Article 40 (6)** of the **Constitution** does not in any way extend to protection to titles that are found to have been acquired unlawfully and hence, the Petitioner is under a duty to demonstrate that title to the property was acquired lawfully, a fact the 1st Respondent contends the Petitioner has not discharged.

16. In its Written Submissions dated 19th April 2016, it was its further position that the protection accorded to property owners under **Article 40** of the **Constitution** does not extend to property acquired illegally or irregularly and that the property was set aside for the establishment of public utilities and once it was surrendered, it ceased to be unallocated land. It relied on the decisions in **Republic vs Land Registrar Kilifi and Another ex parte Daniel Ricci [2013] eKLR** and **Republic vs Commissioner of Lands and 4 Others ex parte Associated Steel Limited [2014] eKLR** in support of its case in that regard.

17. The 1st Respondent submitted further that the property is the only notable open recreational space available in the entire neighbourhood and recognized as such by the local community and the County Government, and further, that the Petitioner has not adduced any evidence to explain why it never developed the property in line with the leasehold conditions under the **Government Lands Act**.

18. Relying on **Associated Provincial Picture Houses Ltd vs Wednesbury Corporations [1974] 2 All ER 680**, it was its argument that the Petitioner could not have acquired a valid title to the property and in any event, none of its rights to property could have been violated in the circumstances.

19. The 1st Respondent has also maintained that the local community in general has valid interests in the property and the said property has all along been identified as a public utility and hence the Court ought to be guided by the need to protect and promote these interests and fundamental rights. That in any event, the public has had exclusive, uninterrupted and uncontested occupation and use of the property and therefore it has the right to further development of the same for its benefit and that the alleged re-allocation and/or extension of lease with effect from 2001 was un-procedural and illegal.

20. For the foregoing reasons, it is the 1st Respondent further argument that the Petitioner should not be allowed to benefit and exercise rights in respect of title to land that was not issued lawfully and that for the above reasons, the Petition herein ought to be dismissed with costs to it.

The 2nd Respondent's Case

21. In response to the Petition, the 2nd Respondent filed an Affidavit in reply sworn on its behalf in August 2015 by one Simon Ndweka and Written Submissions dated 7th April 2016.

22. The 2nd Respondent pointed has out that it was established pursuant to **Section 5** of the **Constituency Development Fund Act** which also outlines its mandate. Accordingly, that the Act contains a comprehensive formula for the identification and approval of projects qualifying for funding under the said Act and therefore falling within its mandate. That it has absolutely no role in direct implementation of projects and only monitors the implementation once the same have been approved for funding. Based on the foregoing, the 2nd Respondent has argued that it is a stranger to the facts complained of and it is not aware of any projects involving the construction of the 1st Respondent's offices. Additionally, that it is not aware of any complaints received by it as alleged by the Petitioner and it has been improperly enjoined to these proceedings and its participation is therefore unnecessary.

23. That in any event, if it had been enjoined herein in its capacity as the body mandated to supervise implementation of projects under the **Constituency Development Fund Act**, these proceedings would be premature and an abuse of the Court process as the Petitioner has failed to invoke the dispute resolution

mechanisms provided under the **Constituency Development Fund Act**.

24. In its Submissions, the 2nd Respondent reiterated its position above; that it is a stranger to this Petition and asserted that the Petitioner has not bothered to adduce any evidence showing that its officers were in any way involved in the actions alleged in the Petition. Furthermore, that a reading of the pleadings filed herein reveals that the dispute is primarily between the Petitioner and the 1st Respondent and as such, regarding the 2nd Respondent, the only issue for determination is whether it is a proper suit to the Petition. Accordingly, that the allegations that it is the only body capable of being sued and owning property is a mere afterthought and ought to be disregarded.

25. The 2nd Respondent has relied on **Abdul Waheed Sheikh and Another vs Commissioner of Lands and Others, Civil Appeal No. 1531 of 2005** in support of its contentions that it was improperly enjoined in these proceedings and urges the Court to expunge it from the proceedings and award it costs to that effect.

26. For the foregoing reasons, the 2nd Respondent prays that the Petition be dismissed with costs to it.

The Petitioner's Rejoinder

27. In its Further Affidavit sworn on its behalf by Mr. Ketan Shah on 7th December 2015, the Petitioner has reiterated the contents of its Affidavit in support of the Petition and contends further that the 1st Respondent has deliberately misconstrued the Indenture to the property with the aim of distorting the same to justify its illegal activities. It is therefore its position in that regard that the Indenture identifies the property to have been a resultant sub-division that was not part of any public purpose land and pursuant to proper administrative and legal processes, it was transferred to Tara Singh Dogra and others.

28. Further, that the portion subject to the Indenture has remained intact and has not been sub-divided further and its title can be traced back to the said purchasers and that the property has never been public property nor has it been used for any public purposes. That in addition, neither the Nairobi City County nor the City Council of Nairobi has had any interest in the property and it has never vested on the Nairobi County Government, and further that the legal requirement to surrender 20 per cent of the parcel of land does not arise as parcel L.R No. 336/109 has not been sub-divided and there is no intention to sub-divide the same.

29. It is its other contention that on 5th August 2004, it applied to have the Indenture under the **Government Lands Act** surrendered and that was done and a leasehold title subsequently issued under the **Registration of Titles Act** on 28th August 2004. As a result therefore, it is misleading and an abuse of the court process and abusive for the 1st Respondent to assert that the property was surrendered to the Nairobi City Council for public purposes and to proceed to annex some documents and omit others merely to mislead the Court. Further, that the 2nd Respondent has not demonstrated that the 1st Respondent presented to it any proposal for the construction of the Constituency Development Fund offices on its land and whether they approved the funding and the project. Accordingly, that the 2nd Respondent has the responsibility to show cause why such a project is being built on property not owned by the 1st Respondent.

Determination

30. Having set out the Parties' respective cases as reproduced above the question that clearly emerges for determination is whether the Petitioner's right to property under **Article 40** of the **Constitution** has been violated. If the answer to that question is in the affirmative, this Court shall then proceed to determine the appropriate remedies available to the Petitioner, if any. One preliminary issue however that emerges for determination is whether the 2nd Respondent has been wrongly enjoined in these proceedings as it alleges.

31. Before I address my mind to the said issues that I have raised for consideration, I must also pose the

question whether this Court has the jurisdiction to determine the Petition on merits and to grant the orders sought therein. That question is fundamental for reasons to be seen shortly.

32. At the heart of the Petition is the question of property rights as guaranteed under **Article 40** of the **Constitution** which is to the effect that:

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-

(a) Of any description; and

(b) In any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person-

(a) To arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) To limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-

(a) Results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) Is for public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-

(i) Requires prompt payment in full, of just compensation to the person; and

(ii) Allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

33. In that regard, whereas the key question for determination herein remains whether there has been any violation of the Petitioner's property rights as guaranteed under **Article 40** of the **Constitution**, at the core of the dispute is a larger question, who is the rightful owner of the title to the property? I say so because on one hand, the 1st Respondent lays claim to the property and argues that the Petitioner's title is defective and that it was acquired illegally and irregularly. The Parties' depositions and pleadings therefore largely revolve around the validity or otherwise of the title to the property and that is why they have largely raised issues pertaining to the Indenture to the title to the property.

34. Does this Court have jurisdiction to determine such a dispute? It should be noted that while **Article 165 (3) (b)** of the **Constitution** grants this Court the jurisdiction to determine the question whether a right

or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, such jurisdiction is limited under **sub-clause (5)** therein which is to the effect that:

The High Court shall not have jurisdiction in respect of matters-

(a) Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) Falling within the jurisdiction of the courts contemplated in Article 162 (2). (Emphasis added)

35. The aforesaid **Article 162 (2)** 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. (Emphasis added)

36. Do we have such legislation contemplated under **Article 162 (2) (b)** in existence? Indeed Parliament enacted **the Environment and Land Court Act**, and thus created the necessary Court in that regard. The Jurisdiction of the Environment and Land Court is outlined under **Section 13** of the said **Act** in the following terms:

(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. (Emphasis added)

37. I note further that in **Republic vs Chairman Matungu Land Disputes Tribunal Exparte Electina Wang'ona**, Miscellaneous Application 107 of 2010, the jurisdiction of the Environment and Land Court was discussed and the Learned Judge stated as follows:

“[4] ... And we are in a transition where courts under Article 162(2) of the Constitution have been established, particularly relevant herein, the Environment and Land Court has been established by Parliament in the Environment and Land Court Act, 2011. The said court is the one that is vested by the Constitution with jurisdiction to hear and determine disputes relating to environment and use and occupation of, and title to land. But that court is not fully operational, yet, there are existing cases pending before the various courts which must be accordingly dealt with to avoid causing a lapse in the administration of justice. In a transition such as this, transitional arrangement is, in my view, inherently necessary in the administration of justice in land cases. The fact that courts other than the Environment and Land Court will assume jurisdiction over some matters relating to land will, as it has already done, invite jurisdictional difficulties as well as objections thereto from litigants and lawyers.

He went further to state:

[5] Second; my being alive of these transitional difficulties, impels me to define the court’s jurisdictional bounds on this case that relates to land. More reason to so define the jurisdictional bounds of the court is found in the fact that existing cases are at different stages of progress, and each category will attract different treatment. In some categories, the court will have jurisdiction, and in others it will not. For instance, the High court has jurisdiction over cases where the hearing has concluded, or are awaiting judgment or are partly heard, as opposed to those where hearing is yet to commence. Thus, the Practice Directions, Issue No 1/2012, Gazette Notice No 13573 dated 4th October 2012 were made by the Chief Justice to stand in this gap.”
(Emphasis added)

38. Based on the foregoing, it is clear that the Environmental and Land Court is the Court vested, lawfully, with the exclusive jurisdiction to hear and determine disputes in relation to tenure and title to land and that is why, **Article 165 (5) (b)** of the Constitution precludes this Court from encroaching into the mandate of that Court.

Conclusion

39. Having so held, it is obvious to me that even where a party holds title to land, where the manner in which the title was acquired is challenged, **Article 40** is not an automatic defense to a claim by any other party. The proper way to proceed is to take the matter to the Environment and Land Court, prove that the title was lawfully procured and thereafter seek protection from the same Court under the said **Article 40** of the **Constitution**. In that context, I can do no better than to reproduce the dictum by Nyarangi J. in **Owners of The Motor Vessel Lillian ‘S’ vs Caltex Kenya Ltd (1989) KLR 1** to emphasise on the importance of jurisdiction thus:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

40. I must further reiterate the holding of the Supreme Court in **Samuel Kamau Macharia and Another vs Kenya Commercial Bank Limited and 2 Others [2012] eKLR** where it stated thus:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.... The issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings....Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot

expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within this authority to prescribe the jurisdiction of such a court or tribunal by state law.”

41. It should also not be lost to the Parties, and I reiterate the fact, that the Environment and Land Court is similarly vested with the powers to determine whether there has been any violation of the property rights granted under **Article 40** of the **Constitution** in its determination of the question of ownership and title to land.

Disposition

42. For the above stated reasons, I hereby hold that the Petition is wrongly before this Court and the same is struck out and the conservatory orders granted herein on 20th March 2015 are hereby vacated.

43. Let each Party bear the costs to this Petition as the dispute remains unresolved.

44. Orders accordingly.

DATED, AND SIGNED AT NAIROBI THIS 16TH DAY OF SEPTEMBER, 2016

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2016

EDWARD MURIITHI

JUDGE

In the presence of:

Kazungu – Court clerk

Mr. Onyango for the 1st Respondent

Miss Otieno for 2nd Respondent

No appearance for Petitioner

Court

Judgment delivered.

EDWARD MURIITHI

JUDGE