



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 157 OF 2016

BETWEEN

HELLEN WACHUKA NJOROGE.....PETITIONER

AND

THE HON. ATTORNEY GENERAL.....1st RESPONDENT

NAIROBI CITY COUNTY.....2nd RESPONDENT

JUDGMENT

Introduction

1. Article 40 of the Constitution embodies and protects the right to property. It recognizes the right to claim an immunity against uncompensated expropriation of private property. It also recognizes the right to own property alone as well as in association with others. This constitutional property clause is however not absolute. Not every property owner is immunized from all interference. The interference must however not be arbitrary or unjustified.

2. The Petitioner has brought a compensatory claim. She claims that she was arbitrarily deprived of her property. The main issue that confronts the court is whether there was an arbitrary deprivation of the Petitioner's property.

Background facts

3. The material facts of this case are not in controversy and may be repeated shortly.

4. The Petitioner is a citizen of Kenya. In October 1980, the 2nd Respondent, then a local authority in whose trust land had been settled, allocated to the Petitioner all that property known as plot No **E 0503** Type A *Dandora* (" the suit Property") following an application for allotment by the Petitioner. The Petitioner took full possession and control of the suit property. The Petitioner, pursuant to the Letter of Allotment exhibited as Annexure **HW.1**, also proceed to effect payment of the requisite land rates and land rent. Then in 1982 apparently and on the allegations that the Petitioner had defaulted in paying rates and rent, the 2nd Respondent without any notification to the Petitioner re-possessed the subject property and re-allocated it to a third party.

5. The Petitioner then embarked on a follow-up mission. The Petitioner sought to be compensated, to no

avail. As the Petitioner sought an alternative plot and the 2nd Respondent was not possessed of any, the Petitioner never obtained any compensation.

Some undisputed facts

6. It is a fact that the suit property was on 5th December 1980 allocated to the Petitioner who paid the initial amount of Kshs. 400/- and thereafter continued to pay the monthly charges of Kshs. 107/-. The Petitioner apparently also fell in arrears of the monthly charges prompting the 2nd Respondent to issue notice to the Petitioner.

7. There is no dispute indeed there is concession in both the annexures being letters originating from the 2nd Respondent as well as minutes of the 2nd Respondent's full council meeting that the notices of default and possible action never reached the Petitioner.

8. Finally, there is no dispute that the subject plot was allotted to someone else and the Petitioner's proprietorship extinguished. The demands thereafter by the Petitioner for compensation were largely met by empty premises leading to the petition being filed.

The evidence of the Petitioner and the Petitioner's case

9. The Petitioner testified and also called one witness, a land valuer. The Respondents did not call any witness.

10. The Petitioner's testimony was largely to the effect that she was originally the proprietor of the suit premises until the Respondent took the same away. The Petitioner reiterated the contents of her affidavit sworn in support of the petition and filed on 20th April 2016. The Petitioner's evidence is that as of October 1980 she was the recognized proprietor of the subject property. The Petitioner urged that the dispossession was illegal, irregular, unjust and devoid of any reason, as it was undertaken without notice and without any compensation. The Petitioner further contended that the 2nd Respondent had acknowledged that it had deprived the Petitioner of the subject property irregularly and had sought to compensate the Petitioner by way of a substitute alternate property. In support, the Petitioner availed the 2nd Respondent's council minutes as well as correspondence exhibiting admission.

11. PW2, called by the Petitioner, also testified that the subject property which was originally registered in the Petitioner's name. PW2 confirmed having valued the subject property in August 2016 upon the Petitioner's instructions. PW2 testified that the correct market value of the property is Kshs. 3,000,000/- whilst the mesne profit lost by the Petitioner is Kshs. 2,483,884/- in the last 34 years. A detailed valuation report was presented by **PW2** and marked "**PExh-2?**".

Contentions by the parties

12. Only the Petitioner filed written submissions through her counsel B.N. Mbuthia.

13. Counsel submitted that the Petitioner had established that she had been arbitrarily deprived of her property by the 2nd Respondent. Counsel stated that the Petitioner was entitled to compensation at the current market value of the property which clear and unchallenged evidence had established at Kshs 3,000,000/=. Counsel finally contended that the Petitioner had been illegally evicted from her parcel of land and was consequently entitled to an annual compensatory amount of Kshs. 50,000/-from 1980. For this proportion counsel relied upon the case of **June Seventh Enterprises Ltd vs. Kenya Airport Authority HCCP No 356 of 2013** where the court awarded the evictees Kshs. 150,000/- in damage.

Discussion and Determination

14. The pleadings and submissions by the Petitioner reveal that the only issue is whether the Petitioner's rights under Article 40 of the Constitution have been violated and, if so, whether the Petitioner is entitled

to the compensatory reliefs sought.

15. Article 40 of the constitution provides as follows;

“40. (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)

(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 a 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.

(5)

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

16. A reading of Article 40 reveals that the purpose of the Article is to protect existing private property rights, including the right to acquire use and even dispose of property. A strict textual reading would reveal that no dispossession ought to take place unless there is due process and a timely just and equitable compensation to boot.

17. An appropriate approach which entails a more direct application of Article 40 of the Constitution would entail various elements. Firstly, the claimant must show that the property is a “*property?*” within the context of Article 40. Secondly, the claimant must show that there has been a deprivation of his property. If there has been deprivation the question will then be whether it was justified and was indeed undertaken in accordance with the law and, in particular, the requirements of Article 40 as to due process. Where the deprivation was justified and in accordance with the law and not wanting in procedure then the court must find out whether the compensatory angle was met. The question is then whether the compensation was just equitable and prompt.

18. In this case there is no dispute that the Petitioner’s property is “*property?*” under Article 40 of the Constitution. A cursory glance at Article 260 of the Constitution reveals that land is property for purposes of the constitutional provisions. There is also no dispute that the property had been lawfully acquired. It consequently qualifies for protection under Article 40. The evidence availed before the court clearly established that the subject property being plot No. **E0503** Dandora Phase V was regularly allocated to the Petitioner by the 2nd Respondent for a consideration. The chain of documents did not reveal any weak link to cause and bring into question the Petitioner’s proprietorship.

19. The Petitioner contends that she was arbitrarily deprived of the subject property. There is once again no dispute that the Petitioner was dispossessed in 1982. The dispossession was made absolute when the

subject property was allocated to one Mercy Wanjiku Nyaga on 21st July 1982.

20. The circumstances leading to the dispossession are also relatively clear. The position is that Petitioner defaulted in paying the monthly rentals. The 2nd Respondent purportedly issued a notice of default to the Petitioner. The notification was to the effect that the subject property would be repossessed as a result of the default. The notice did not however reach the Petitioner. This fact is acknowledged by the 2nd Respondent in its minutes of 14 March 1985. As the dispossession was going on and being made absolute in July 1982, the Petitioner was not even aware that the 2nd Respondent had intended to carry out the dispossession.

21. Deprivation of property rights must be consistent with the provisions of Article 40(3). If it is not then it will be deemed an arbitrary deprivation or dispossession. The Petitioner contended that the dispossession on the instant case was arbitrary, irregular and unconstitutional. While not denying that she had been in rent arrears, the Petitioner stated that she never received any demand or notification from the 2nd respondent to pay or make good any arrears. The Petitioner's position is vindicated by the evidence in the form of minutes (*see Exh "PHW-2?"*) of the 2nd Respondents ordinary meeting of 14 March 1985.

22. An extract of the minutes reads as follows;

"61/2/16 Appeal – Plot No E 503 – Hellen Wachuka Njoroge.

The Director of Housing Development reported that Hellen Wachuka Njoroge's case was reported to the Committee on 7th July, 1982 when she was in 6 months arrears in respect of Plot No. E 503. She was given 30 days final notice to clear the arrears. Copy in the file showed that the notice was served on 15th July, 1982. The plot was relocated to Mercy Wanjiku Nyaga on 21st July, 1982 only 6 days after the notice. It was noted that the notice might not have reached the complainant as the copy in the file bears no address. There were irregularities regarding repossession and relocation of the plot, hence Njoroge's appeal. The plot was totally developed to wall plate by Mercy Wanjiku Nyaga who also withdrew all materials loan of Kshs. 8,400/-. The Sub-Committee interviewed the allottee and after discussion, it was resolved:

To recommend that Helen Wachuka Njoroge be considered for a plot elsewhere and that the money she paid be transferred to the new plot?. [emphasis]

23. There is evidently clear admission by the 2nd Respondent that the Petitioner was not aware of the 2nd Respondent's action of repossession of the suit property. In my view, where a person is dispossessed of property without notice of even the intention to dispossess, then arbitrary deprivation must be presumed. It is simply inimical to the rule of law as due notification of intended adverse action is part of the rule of law. When the Constitution guarantees the protection of property and then one is deprived of property without notification there must be assumed that the person has acted arbitrarily. Such procedure is unfair and irrational, and is contrary to the limitation imposed by Article 40 of the Constitution. Effectively, absence of notification means there is no provision of sufficient reason for the deprivation or dispossession in so far as the proprietor is concerned. A mere attempt to give notice or failed notification once proven amounts to no notice at all and a decision maker must not act once it is shown that notice was not given. If he acts, it must be deemed as being capricious, whimsical and arbitrary.

24. The Petitioner was, in my view, arbitrarily dispossessed and deprived of her property when the 2nd Respondent proceeded with the repossession and reallocation without notification or without satisfying itself that the Petitioner had been actually notified of the intended action.

25. The Petitioner's rights under Article 40 were, evidently and I so hold, violated. It is however admitted by the Petitioner that the subject property is no longer available for purposes of restitution. While therefore it could not have been the intention of Article 40 of the Constitution that the violation of

the right to property be only remedied through an award of damages, I hold the view that in the circumstances of this case it could be appropriate to oblige the Petitioner with the compensatory relief that it has sought.

26. The rule of the thumb evident in the letter and spirit of the constitution is that compensation, where a person is dispossessed of his property, ought to be prompt full and just. Compensation under Article 40 will be deemed full and just when the property is quantified in accordance with the principle of equivalence: see **Patrick Musimba – Vs – The National Land Commission & 4 others [2016]eKLR**. Fair compensation is basically met when payment is made for the value of the land.

27. Ordinarily, compensation ought to be made prior to the deprivation but it is not inconsistent with the Constitution for the compensation to be made after the dispossession. The Constitution provides for 'prompt' compensation in these respects. The question in the instant case is: what is the value to be assigned to the compensation? Is it the value at the time of deprivation or at time of testimony (proof of case)?

28. PW2 testified that the current value of the subject property is Kshs. 3,000,000/-. The Petitioner seeks the same in addition to damages for mesne profits. The subject property was not lawfully and regularly taken over. The Petitioner is no doubt entitled to compensation. She has been waiting for compensation for a while. It could be appropriate to order just and full compensation now. The correct market value has been ascertained. It is kshs. 3,000,000/=. If the Petitioner would be settled to mesne profits then the compensation would be excessive. It would not amount to fair compensation. The case relied upon by the Petitioner of **June Seventeenth Enterprises Ltd vs. Kenya Airports Authority & 4 others [2014]eKLR** to also ask for general damages is also of no relevance in the circumstances of this case. That case involved eviction proceedings and not deprivation of property. Even though I agree that where a violation of the constitution is proven, one is entitled to damages. In the circumstances of this case, I am not satisfied that the Petitioner ought to be awarded any other sum over and above the ascertained value of the subject property.

29. The amount ascertained is Kshs. 3,000,000/-. That should constitute a fair compensation.

Conclusion

30. I am satisfied that the Petitioner has proved her case to the required standard. The Petitioner has demonstrated and established that she was arbitrarily dispossessed and absolutely deprived of her property. She is entitled to be compensated. The value of the subject property is Kshs. 3,000,000/- and I am ready to award the Petitioner the amount.

31. I conclude that the Petitioner has proved her case to the required standard.

Reliefs

32. By way of disposition the following orders best tend themselves in the circumstances of this case (a) the Petitioner succeeds;

a) The Petition succeeds

b) There shall issue a declaration that the Petitioner rights to protection of property under Article 40 of the Constitution were violated by the 2nd Respondent.

c) The 2nd Respondent shall pay to the Petitioner by way of a fair compensation the amount of Kshs. 3,000,000/- together with interest.

d) The Petitioner shall also have costs of the petition payable by the 2nd Respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 31st day of October 2016.

J.L. ONGUTO

JUDGE