



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

PETITION NO. 57 OF 2019

MARIAM NDIAKU ABDALLA & 564 OTHERS.....PETITIONERS

-VERSUS-

HAKIKA TRANSPORTERS LIMITED & 7 OTHERS ...RESPONDENTS

JUDGMENT

(Constitutional petition alleging violation of various constitutional provisions; basis of claim being the allegation that petitioners have resided on the suit land since time immemorial and that they are being illegally evicted; no evidence by petitioners that they indeed reside on the suit land; no evidence that it was the 1st respondent who evicted them; 1st respondent pleading to be stranger to the petitioners averments and not having any interest in the suit land; title not in the name of the 1st respondent and nothing to connect the 1st respondent to the claim of the petitioners; no evidence of historical land injustices; no evidence that any of the respondents were in violation of the constitution or breached the petitioners' rights ; petition dismissed.)

1. This is a constitutional petition that was filed on 20 December 2019. The petitioners allege to be residents of a parcel of land identified as Plot No. 423/I/MN Utange said to measure approximately 135 acres (hereinafter, 'the suit land'). They have sued Hakika Transporters Limited (1st respondent), the National Land Commission (2nd respondent), the Chief Land Registrar (3rd respondent), the Ministry of Interior and Coordination of National Government (4th respondent), the Cabinet Secretary for Lands and Physical Planning (5th respondent), the Attorney General (6th respondent) and the County Government of Mombasa (7th respondent).

2. It is the claim of the petitioners that they have been peacefully residing in the suit land since time immemorial until sometime in the year 2020 when the 1st respondent, with the assistance of the 4th respondent through the police, began forcefully evicting them from the suit land. They aver that their woes are because the 1st respondent acquired title to the suit land despite them (petitioners) being in occupation. The petitioners further state that the issuance of the title to the 1st respondent was malicious and in breach of their constitutional rights as residents of the suit land.

3. According to the petitioners, the 3rd and 5th respondents failed to consider the presence of the petitioners in the suit land before issuing title to non-residents thereby acting in contravention of the principles and the spirit of the constitution.

4. The petitioners aver that they presented their case to the 2nd respondent (NLC) and a hearing was held on 28-29 August 2018, after which the 2nd respondent delivered its findings and recommendation on 7 February 2019. The 2nd respondent dismissed the petitioners' claim. The petitioners allege that this dismissal was due to a lack of title and aver that the NLC recommended that they seek redress from the government for consideration for settlement. The petitioners plead that the 2nd respondent recognized that they are entitled to settlement, and argue that since they have been residing on the suit land, they should be settled on the same as this is their home. They state that after the 2nd respondent delivered its recommendations, the 1st and 4th respondent began harassing and forcefully evicting them which prompted them to seek redress through the 5th respondent.

5. The petitioners state that the 5th respondent through a letter dated 25 March 2019, wrote to the 7th respondent, requesting him to summon all parties for purposes of alternative dispute resolution. They claim that thereafter, a meeting involving the parties was held on 18 April 2019. They allege that it was resolved that a ground report be prepared for the purposes of settlement of the petitioners, and that no further development was to be undertaken on the suit land. According to the petitioners, the respondents failed to adhere to the recommendations and have continued to harass, intimidate, and forcefully evict the petitioners, and further develop the suit land. The petitioners aver that they reported the matter to the office of the Director of Public Prosecution (DPP) following arrest of some of the petitioners by the police in conjunction with the 1st respondent, and on 15th October 2019 the Senior Prosecution Counsel, Mombasa, wrote to the OCS Bamburi requesting him to ensure peace in the suit land as the matter is being resolved; they claim however, that this has not been heeded.

6. The petitioners plead that the respondents have violated the provisions of Article 10 of the constitution which binds all state and public officers to adhere to National Values and Principles. Further to this, the petitioners contend that the respondents are bound by Article 20, 21 and 22 of the constitution to ensure the application, implementation and endorsement of the petitioners' fundamental rights and freedoms. The petitioners state that they are entitled to an order of, or declaration of rights and other reliefs, as provided under Article 23(1) and (3) of the constitution. They further aver that they have a right to be considered equal before the law and to equal protection and benefit, and to have the freedom from discrimination as provided for under Article 27 of the constitution. According to the petitioners, they have equal rights to the 1st respondent and should not be discriminated upon on the basis of their status.

7. The petitioners further state that they have the right to have their dignity protected and respected as provided under Article 28 of the constitution and should not be treated inhumanely by being harassed, intimidated, and forcefully evicted. The petitioners aver that they have a right to freedom of security of the person as provided under Article 29 of the constitution, including the right not to be deprived of their freedom arbitrarily, and not to be harassed and arrested without justification. They also state that they have the right to information including all information relating to the suit property from the respondents and how the same was registered in favor of the 1st respondent despite their presence on the suit land.

8. The petitioners plead that they have a right to property under Article 40 of the constitution including the right to be settled on the suit property as the residents thereof since time immemorial, and/or to be settled in any other suitable place within the area. The petitioners claim that they have a right to fair administrative action as provided for under Article 47 of the constitution which ought to be procedurally fair, and also have the right of access to justice as provided under Article 48 of the constitution. The petitioners argue that the respondents ought to adhere to all decisions and recommendations made.

9. The petitioners aver that the 2nd respondent is established under Article 67 of the constitution with the mandate to deal with historical land injustices such as the case herein. They state that they have brought this petition under Article 258 of the constitution as their fundamental rights are being breached by the respondents and this court has the duty to uphold the constitution and the fundamental rights of the petitioners as provided under Article 159 and 258 of the Constitution.

10. The petitioners thus seek the following orders :-

- a. A declaration that the petitioners have the right to be settled on Original Plot Number 423/I/MN as the residents thereon and in the alternative adequate compensation to be done by the government accordingly.
- b. A declaration that the harassment intimidation and forceful eviction of the petitioners from Original Plot Number 423/I/MN is in breach of their constitutional rights and whereof the respondents jointly and severally be ordered to compensate them accordingly.
- c. A declaration that the petitioners have acquired proprietary interest on Original plot Number 423/I/MN and all the subsequent subdivisions thereon and title do issue in their favor.
- d. In the alternative the petitioners be declared to have acquired proprietary interest on the area occupied by the petitioners and be settled thereon upon survey being done.
- e. An order be granted for the petitioners and their respective families not to be evicted/removed/intimidated unless at their own will and/or unless compensation is carried out accordingly.
- f. An order be and is hereby issued directing the 3rd respondent through the Land Registrar Mombasa to proceed and reconstruct the records if need be and proceed to issue title documents in favor of the petitioners respectively and accordingly without gazettelement.

11. The petition is supported by the affidavit and statement of Mariam Ndiaku Abdalla, the 1st petitioner. She more or less reiterated the contents of the petition which I have set out above. She annexed some photographs, the decision of the NLC dated 7 February 2019, a letter dated 25 March 2019 from the Chief Administrative Secretary, Ministry of Lands and Physical Planning, and a letter dated 15 October 2019 from the Office of the DPP, Mombasa.

12. The 1st respondent responded to the petition via an affidavit of Abdulhakim Abeid Khamis, the managing director of the 1st respondent. He deposed that the 1st respondent is a stranger to any activities which occurred in the past or presently happening on the suit land. Mr. Khamis deposed that the 1st respondent does not carry out any business in the suit land property or any subdivision thereunder. He deposed that the 1st respondent has no interest in the suit land and has never been a party to any dispute, any agreement, negotiations, or any transaction touching on the suit land. He deposed that the 1st respondent is a stranger to the allegations raised. He further deposed that the 1st respondent has never been a party to any hearing at the National Land Commission, no determination has ever been reached concerning the 1st respondent, and no orders binding the 1st respondent have ever been issued. He deposed that the 1st respondent has never collaborated with any of the other respondents to either harass the petitioners or breach any of their constitutional rights. He added that the petitioners have put forth various broad constitutional statements which are not supported by actual evidence. He deposed that the petitioners are not registered owners of the suit land and so, they have no tangible legal rights capable of being enforced under Article 40 of the constitution. He averred that the petitioners cannot get declaratory orders without proving their interest in the suit land. He deposed that the remedies sought cannot be granted as the petitioners have failed to demonstrate the basic right to standing and proprietary interest in the suit land.

13. In response to Mr. Khamis's affidavit, Mariam Ndiaku Abdala swore a supplementary affidavit. She asserted that the 1st respondent is a beneficial and registered owner of the suit land. To support her allegation, she annexed a copy of a Notification of Approval of the Application for Development Permission issued by the County Government of Mombasa to one Abdulhakim Abeid Khamis and others. The approval is for a proposed perimeter wall on Plot No. 6806/I/MN/Section-I-/Zone Mombasa Mainland North situated at Mwembelegeza along/ off Bamburi Factory Road. She also annexed a picture of a lorry with the registration no. KSU 615.

14. Nothing was filed by the 2nd respondent in reply to the petition.
15. For the 3rd to 6th respondents, a reply to petition was filed. All it states is that the petition is *res judicata* and that there are no constitutional issues to be determined.
16. The 7th respondent only filed a notice of preliminary objection that the petition is *res judicata*.
17. I determined the preliminary objection together with an application for injunction that was filed alongside the petition. On the preliminary objection, I did not find that I have sufficient material to hold that this suit is *res judicata* and could not make a conclusive determination on it. I directed that if the respondents still wished to pursue that line, they could file an application seeking the dismissal of the petition on that ground. No application was filed and no additional material supplied to demonstrate that this suit is *res judicata*.
18. I directed that the petition be canvassed by way of written submissions. I have seen the written submissions of Mr. Shimaka, learned counsel for the petitioners, and those of Mr. Malombo, learned counsel for the 1st respondent. Nothing was filed by the 2nd respondent and I have not seen any submissions from Mr. Mwandeje, learned State Counsel for the 3rd to 6th respondents, despite him stating that he would be filing the same. No submissions were forthcoming from the 7th respondent. All I have are therefore the submissions of counsel for the petitioners and the 1st respondent.
19. In his submissions, Mr. Shimaka, submitted that the petitioners are residents of the suit land since time immemorial and that the respondents have been acting in breach of the petitioners' constitutional rights by harassing, intimidating and forcefully evicting the petitioners. He submitted that the matter was previously heard by the 2nd respondent who recognized that they are entitled to be settled and recommended as such. Counsel further submitted that the respondents have denied having any interest in the suit land and claim *res judicata*, but they have not presented any evidence to controvert the petitioner's claim. Counsel submitted that the petitioners are protected by the constitution and have the right to humane treatment and not to be harassed by being falsely being accused and arrested, and being forcefully evicted. He relied on Article 28 and 29 of the constitution. Counsel submitted that the petitioners have attached photographs as proof of the respondents' actions showing the demolition of their homes and also the 2nd respondent's decision on settlement of the petitioners. He referred me to the case of Joseph Letuya & 21 others vs. Attorney General and 5 Others (2014) eKLR. He submitted that in that case, the petitioners sought declaratory rights as per the constitution and the same were granted. He submitted that the petitioners are suffering historical land injustices by being evicted from their only home by the very institutions that ought to protect and safeguard their constitutional rights. He further submitted that the petitioners have acquired interest over the suit land having resided thereon since time immemorial and it being their only home.
20. On his part, Mr. Malombo submitted on four issues. The first was the existence and ownership of the Original Plot No. 423/I/MN. Counsel submitted that the petition is founded on a vacuum because the petitioners have failed to establish the existence of the suit land. He pointed out that they have not attached a copy of the title nor even a search. He submitted that no nexus has been shown between the suit land and the 1st respondent. He added that in the 2nd respondent's (NLC) findings, the commission noted that the claimants did not produce any document of ownership. Counsel further submitted that the NLC found that the land had been purchased through a Government auction on 28 April 1967. On whether there is breach of the constitution, counsel cited the case of Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others (2013) eKLR. He submitted that on a casual look at the petition, no constitutional breach has been set out at all against the 1st respondent. Mr. Malombo's third issue was whether the constitution is a general substitute for normal procedures for invoking redress. Counsel submitted that Section 7 of the Land Act, 2012 prescribes the different method of acquisition of title to land. He further urged the court to find the petition to be a backdoor attempt to obtain title to what is otherwise private property which had been bought at a public auction as per the findings of the 2nd respondent. Counsel referred me to the case of Muema Mativo vs. Director of Criminal Investigation & 2 others: HFC Limited (interested Party) (2021) eKLR. Mr. Malombo submitted that in that case, the court held that the constitution is not a general substitute for normal procedures for invoking redress under substantive law and that the proper cause is to bring the claim under that law but not under the constitution.
21. The last issue was on costs. Counsel submitted that the petitioners never sought for costs in their petition and therefore, if the petition is dismissed, the same be with costs to the 1st respondent.
22. I have considered all the above and take the following view.
23. This petition alleges various violations of constitutional provisions. The petitioners have hinged this petition on the argument that they have resided in the suit land since time immemorial, and because of that, the land should thus be distributed to them. They argue that title was issued to the 1st respondent without consideration that they were the persons in occupation. In her response, the 1st respondent denied any connection with the suit land.
24. When the applicants filed this petition, they contemporaneously filed an application for injunction. I did not find merit in that application and dismissed it. I dismissed it partly because the 1st respondent had denied any connection with the suit land, and I thought that for a prima facie case to be established, at least a copy of the title claimed ought to be displayed and its owner joined as a party to this petition. Clearly, the petitioners did not take cue from that ruling and they have still not displayed any copy of title or search to the land that they claim. There is absolutely no material before this court to support the allegation that there is land registered as LR No. MNI/423. If at all such land exists, there is no material before me to say who is the current registered proprietor of that land. I do not see how this court can allow such a petition without first being supplied with documentary information about the existence of the suit land and of its proprietorship. On that ground alone this petition is a non-starter and must be dismissed.
25. Apart from the above, the complaints of the petitioners to me appear completely misguided. They had already made a claim for the land to the National Land Commission (NLC) on more or less the same grounds presented here. The NLC was not persuaded that they had demonstrated any link between themselves and the land and their claims were dismissed. The NLC advised them to seek redress from the

Government for consideration for settlement. Nowhere was it ever held that the petitioners are entitled to be settled on the suit land. I am aware that in their petition the petitioners allude to a meeting held on 18 April 2019 involving the parties and that it was resolved that a ground report be prepared for their settlement. I have no evidence of any meeting held on 18 April 2019 as alleged and no evidence of any resolution made as contended by the petitioners. The petitioners also sought to rely on a letter from the DPP and a letter from the CAS Ministry of Lands. I have looked at those letters. They only say that consideration be made for ADR (alternative dispute resolution). Nowhere is there any preposition that the petitioners are entitled to the suit land.

26. Even within this petition, the petitioners have not demonstrated that they are on the suit land. All they have brought as evidence of occupation are some photographs. That is not good enough. Photographs can be taken of any place. What the petitioners needed to file was an expert report showing their actual occupation on the ground. It is such report which would have demonstrated the land which the petitioners occupy, if at all, and the nature of their occupation. I am afraid that those photographs by themselves, in the circumstances of this case, prove no occupation of the suit land.

27. I really should not say more because as can be seen above, there is absolutely no merit in this application. The only issue left is costs. I award costs to the respondents payable by the petitioners jointly and/or severally.

28. Judgment accordingly.

DATED AND DELIVERED THIS 13TH DAY OF JANUARY, 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA