



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
ELC CASE NO.210 OF 2010
IN THE MATTER OF: CHAPTER FOUR OF THE CONSTITUTION OF KENYA 2010
AND
IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS
UNDER ARTICLES 22, 23, 40 AND 165 OF THE CONSTITUTION OF KENYA 2010
BETWEEN
LABH SINGH HARMAN SINGH LIMITED.....PETITIONER
AND
THE HONOURABLE ATTORNEY GENERAL OF
THE REPUBLIC OF KENYA.....1ST RESPONDENT
THE PRINCIPAL REGISTRAR OF TITLES.....2ND RESPONDENT
DENANCY INVESTMENTS LIMITED.....3RD RESPONDENT

J U D G M E N T

1. The matter herein was initiated via a **Petition** dated **13.10.2010** and **filed on 14.10.2010** seeking the following reliefs:
- a. A declaration to issue declaring the Petitioner as the owner of the land known as **LR.No.12715/595, I.R. No.45482.**
 - b. An order of judicial review cancelling the registration of the 3rd Respondent as owner of **LR.No.12715/595, I.R. No.45482.**
 - c. An order of mandamus compelling the Registrar of Titles to register the Petitioner as owner of property known as **L.R. No.12715/595, I.R. No.45482** and to issue the Petitioner with a certificate of title.

d. An order of mandatory injunction directed at the **3rd Respondent Denancy Investments Limited**, its agents, servants, employees to vacate forthwith the land known as **L.R. No.12715/595, I.R.45482**.

e. An order of perpetual injunction restraining the **3rd Respondent** from entering, interfering, and dealing or in any manner interfering with the Petitioner's right of ownership over the land known as **L.R. No.12715/595, I.R.No.45482**.

f. An order for compensation and costs.

g. Any other relief that the court deems fit and appropriate.

2. The petition is anchored on the provisions of Articles 22, 23, 40 and 165 of the Constitution of Kenya. Along with the said petition the Petitioner contemporaneously filed **Chamber Summons** dated **13.10.2010** seeking conservatory orders. The Chamber Summons was supported by the Affidavit of Manjinder Sing Sohi director of the Petitioner sworn on 13.10.2010 and 11 annexures attached to the same.

3. The **1st** and **2nd** Respondents oppose the Petition via the Affidavit sworn by Charles Kipkurui Ngetich a Land Registrar at Ardhi House sworn on 16.11.2010 with 4 annexures attached. The **3rd** Respondent has also opposed the petition via an affidavit sworn by Sharifow Abdi Rashid Abdul a director of the **3rd** Respondent sworn on 17.11.2010 with 8 annexures attached. Further Petitioner swore a supplementary affidavit in response to the Respondents affidavits via Harjeet Singh Sokhi another Petitioner director sworn on 30.11.2010 with 8 annexures attached.

4. There is also on record an affidavit by one David Ronald Ngala Odhoch who claims to hold a Power of Attorney donated by the owner of the suit land sworn on 14.9.2012 attached with a bundle of documents. The record shows that the matter was initially directed to be heard by way of viva voce evidence and the parties went ahead to file statements of witnesses and list of the documents. However, on 2.7.2012 the Petitioner Advocate indicated to court that there was no need to call witnesses to testify as the matter is initiated by way of a petition and was a constitutional matter. The parties thereafter opted to canvass the petition by way of written submissions.

5. The Petitioners claim is that on 10.1.07 it carried out search on land Parcel No. **L.R.No.12715 I.R.No.45482** herein after referred to as the suit land and which revealed that Starvoula Rousalis who is hereinafter referred to as the vendor as the owner as registered by 6.1.1993. On 29.1.07 the Petitioner and the said vendor entered into a sale agreed at an agreement price of KShs.15 million and the payment was done as follows: 13.2.07 KShs. 1 million

22.2.07 KShs. ½ million

20.4.07 KShs.1.5 million

26.4.07 KShs.10.5 million.

On 7.5.07 the vendors advocate one Ms. Kivuva forwarded the completion documents to the Petitioner's advocates to enable the advocate transfer in favour of the Petitioner.

6. On 15.4.09 the government valuer and collector of stamp duty both approved the valuation of the suit land at KShs. 15 million and authorized the Petitioner to pay the stamp duty on 28.5.08 and on 17.9.08 the Petitioner paid KShs.900,010 as stamp duty. On 7.5.09 the Petitioner applied for registration of the transfer and paid KShs.250/- to the Lands Ministry. Registration was not effected and after 8 months, on 12.2.2010 the Petitioner and vendor were summoned to appear before the Assistant Commissioner for Lands on 9.3.2010. The purpose of the meeting was to produce previous original transfer to the vendor and all other documents in vendor's custody. The vendor did not attend the meeting.

7. However the minutes of meeting according to Mrs. Gathecha of Lands recorded on 9.3.2010 indicated that it was because land deed file was missing from the strong room at the registry. On 16.3.2010 Mrs. Gathecha Assistant Commissioner of Lands wrote to the Petitioner to the effect that the Applicant's documents had been rejected on the basis that the original provisional title presented by the Petitioner was fake as it differed with the search earlier obtained. According to the Petitioner, the reason for delaying registration changed after the meeting.

8. According to the Petitioner the fake document was the provisional title issued by the same Registrar Gathecha after gazette on 2.5.1997 and registered as entry No.6 on 23.10.1997. Furthermore, on 23.1.2008 the office of the Commissioner of Lands had given consent to transfer the land to the Petitioner. The Petitioner's documents were rejected by the Assistant Commissioner over 10 months after they were presented for registration on the 13.8.2010 and registered same day the 3rd Respondent documents. The documents used to register 3rd Respondent were provisional title gazetted on 15.1.2010 and registered on 19.5.2010.

9. The Petitioner avers that the 2nd and 3rd Respondents deprived him land which it had acquired through proper purchase and after possession since 24.4.07 a period of 4 years. The Petitioner demonstrates elements of entries in 2 searches dated 10.1.2007 and 30.9.2010 which materially contradicts each other yet the registrar confirmed both searches to be genuine. Examples given of contradictions are such as entry No.5 of search dated 10.1.2007 is a withdrawal of caveat entry No.4 registered on 19.5.2010 but entry No.57 search dated 19.5.2010 produced by 3rd Respondent is a notice of withdrawal of caveat No.4 registered on 19.5.2010.

10. Entry No.6 is provisional certificate registered on 23.10.1997 after gazette notice published on 2.5.1997 by Gathecha but on a 3rd Respondent search shows entry No.6 as provisional certificates of title registered on 19.5.2010 after a gazette notice published on 15.1.2010. The Registrar produced copy of title CNK1 and marked it as fake and stated that it originated from the Petitioner. The CNK1 shows entry No.3 transfer to Mary Njoki Mungai dated 6.1.1993. Entry No. 3 differs in both copies of title exhibited by both Respondent and Petitioner as entry No.3 by both titles is transfer to the vendor registered on 6.1.1993.

11. According to the Petitioner the allegedly fake documents originated from strong room and not from the Petitioner. The Petitioner avers that the Registrar Ngetich Affidavit fails to explain the anomalies in the search exhibited by Petitioner and 3rd Respondent. The Petitioner avers that whereas on 15.1.2010 the registrar had gazetted loss of original title allegedly by the registered owner, the register thereafter had issued and registered the provisional title on 19.5.2010 after expiration of 90 days' notice, again surprisingly by summons dated 31.5.2010 Registrar Kituyi purported to summon registered owner to appear before him on 10.6.2010 to produce the original title and other documents. The Petitioner avers that the vendor never appeared before Registrar on 3.6.2010 but one David Odhoch holder of Power of Attorney in favour of owner.

12. Odhoch collected summons same date 31.5.2010 when they were issued. According to the Petitioner this must have been a conspiracy between Registrar and Odhoch in any event the Registrar used Odhoch's address 40418 – 00100 Nairobi, instead vendors Box No.14258 Nairobi. The summons was not copied to the Petitioner though interested in property as provided by Section 56 RTA (repealed). The Petitioner avers that the glaring omissions by registrar were designs for paving way for registration of 3rd Respondent on 13.8.2010. The Petitioner further questions the legal authority of the 3rd Respondent directors in signing the agreement of sale of suit land on 26.11.09 in that they (2) directors were not lawful directors at the time of signing the agreement or transfer on 3.3.10. Thus same agreement is null and void for want of capacity. The Petitioner also impugns the Power of Attorney donated to David Ronald Ngala Odhoch and prepared by the same advocate Odhoch as he had been struck out of the roll of advocates on 5.11.07.

13. Further the same was not registered within 2 months after execution as provided by Section 9 of RDA thus agreement a nullity as the donee of Power of Attorney signed the agreement while he had no legal

authority to do so. The registrar ought to have rejected Power of Attorney as also it did not describe the suit land sufficiently to enable it effect transfer. It was a general Power of Attorney. In any event the Petitioner avers that the power was invalid because the donor/vendor had on 29.1.07 exercised power of sale of suit land and thus alleged power of Attorney to Mr. Odhoch had been extinguished. The Petitioner impugns the sale agreement between Odhoch holder of Power of Attorney and 3rd Respondent on the following grounds:

- Purchase Price KShs.20 million indicated as full price yet KShs.18.5 million was paid before execution.
- It does not show completion to be done by either exchange of documents or registration of transfer.
- The completion was to be done within 3 days but transfer was effected on 13.8.2010 a delay of 8 months.
- Further it does not show how KShs.20 million was paid. Thus a breach of Section 55 of ITPA (repealed).

The Petitioner states that in any event he had gotten possession of the suit land, had a valid agreement, and a prove of payment via a banker's cheque and had PIN and vendor's passport to prove valid purchase. The Petitioner cited various provisions of the statutes and filed a list and copies of 14 authorities to support the claim on fraud and sought court to grant prayers sought.

14. The 1st and 2nd Respondents' case is captured by the Affidavit of Charles Kipkurui Ngetich sworn on 16.11.2010 a land Registrar at Ardhi House Nairobi. He avers that the Petitioner's documents lodged could not be effected as it was discovered that they were fraudulently obtained. The copies of title and the search attached on whose basis the transfer was sought were found to be void for being forgeries. The signatures in the documents did not belong to any of the Registrars based at Ardhi House. The Petitioner was informed and even called to a meeting of 9.3.2010 in which a representative appeared and was advised to seek refund of purchase price from the vendor.

15. The 1st and 2nd Respondents aver that the 3rd Respondent lodged a proper application seeking transfer with the following documents:

- Power of Attorney
- Valuation requisition for stamp duty
- Rent clearance certificate
- Consent to transfer
- Gazette Notice of Provisional title
- Document of title and search
- Sale agreement
- Stamp duty paying slip.

16. Upon lodging above documents transfer was effected to the 3rd Respondent and is the registered owner of the suit land. The 1st and 2nd Respondents impugn the way the alleged fraudulent claims which lies in the realm of Civil Suit is couched as a constitutional case. The Respondents (1 and 2) pray for dismissal of the petition. In any event they argue the vendor ought to have been a party to the case.

17. The 3rd Respondent case is as follows: The 3rd Respondent was introduced to David R. N. Odhoch who informed it that he had property for sale. He intimated that he was not the owner but had been donated Power of Attorney and thus the 3rd Respondent appointed Advocates to act for them in the transaction.

18. Sale agreement was entered into on 26.11.09. The 3rd Respondent was informed by Odhoch that the original title was not available and untraceable and thus it was necessary for issuance of provisional certificate of title to enable a valid transfer. Requisite notice to issue provisional certificate of title was advertised on 5.1.2010 in Kenya Gazette. Meanwhile transfer documents were executed and transfer presented for purposes of assessment of stamp duty on 3.3.2010. The stamp duty was assessed at KShs.800,000/- which respondent No.3 paid. On 3.8.2010 transfer was effected.

19. The 3rd Respondent took possession of suit land, and commenced building perimeter wall around it. The Petitioner lodged the instant petition and sought conservatory orders. On 22.10.2010 the court is noted to have made the following orders inter alia:

“While the Respondent No.3 is the registered proprietor and that the 3rd Respondent may complete construction of perimeter wall..... should not undertake any further development of the suit property pending disposal of the application or until further orders of the court”.

The 3rd Respondent avers that the Power of Attorney was prepared by MC Odhoch Kivindu & Co. Advocates dated 2.2.07. By then Mr. Odhoch was an advocate of High Court of Kenya as he was struck off the roll of advocates on 12.10.07. The Power was presented for registration on 2.10.09. It was registered 2 months prior to the signing of the agreement, thus donee had legal capacity to exercise the Power as he did. The Petitioner has refused to enjoin or call the so called vendor in the case which implies that he was fictitious and an imposter/fraudster. The Petitioner never procured any report on authenticity of signatures of alleged vendor in the Petitioner's documents including agreement or even prove forgery on signatures on Power of Attorney via a hand writing expert.

20. The 3rd Respondent avers that the advocate who acted for the alleged vendor Serah Mbithe Kivuva was charged in various criminal cases involving fraudulent sale of properties and was struck off the roll of advocates. The fraud aspect on the part of Petitioner sale transaction has been raised clearly by the affidavit of Ronald Ngala Odhoch sworn 14.9.2012. He avers that under Power of Attorney dated 11.2.2010 he had been authorized by owner of lands to manage his 2 parcels of lands namely No.12715/595 and 12715/632. He states that a lady Mary Njoki Mungai attempted to transfer said lands using forged documents in one occasion and was thus summoned to verify. The police was involved to investigate her but she disappeared. That she was also summoned on 31.5.2010 at Lands Offices as there was attempt to register forged documents over suit land.

21. The Petitioner was advised to seek refund of money paid as he was defrauded. He states that the owner of land travelled abroad in 2006. He states that one advocate involved in sale transaction with Petitioner Mr. Nzioki Advocate explained to him a Mr. Hamisi introduced alleged vendor Rousalis as owner of suit land and they Hamisi and Rousalis indicated that their lawyer was Kivuva (Ms) and that they were selling suit land. Serah Kivuva Advocate carried all processes as Purchaser/Petitioner's Advocate. He explains how he got involved with 3rd Respondent leading to entry of agreement dated 26.11.09 leading thereafter to transfer of land to the 3rd Respondent. He learned thereafter that after Petitioner's documents were found to be forged, it went to court in the instant matters. The Petitioner had made complaint via its director to police on alleged fraud against Odhoch and 3rd Respondent, but failed to pursue the same. He dismisses all alleged fraud acts against him. He confirms to have effected transfer of suit land to 3rd Respondent and got KShs.20 million purchase price. He states that advocates Nzioki and Kivuva knew the identities of Rousalis and Hamisi presented alleged owners of suit land and thus 2 aided defrauding of the Petitioner.

22. He states that at police offices he learned that there were many claims against Hamisi and Serah

Kivuva advocates involving land sale fraud. He, Hamisi has been charged along with Serah Kivuva advocate in criminal charges. He further learned that the alleged Rousalis is a fraudster being sought after by police in criminal charges of Fraud. He concludes by saying that due to the aforesaid matters, the Petitioner avoids deliberately to join the so called vendor as a party or call him as a witness. He avers that if alleged vendor was genuine one, he would have interfered with the transaction Odhoch was undertaking in his 2 properties including suit land but he has never appeared anywhere to denounce him.

23. The Petitioner has cited various provisions of law and authorities in support of its case. It submits that under Section 2, 23 and 75 of RTA cap 251 repealed the 3rd Respondent is guilty of fraud in view of enumerated facts above. Further, it submits that under Section 50 RTA Cap 281 the Power of Attorney is invalid and also on the same issue relies on Section 8 and 9 of RDA Cap 285. Under Section 53 ITPA repealed fraudulent transfer is void. Further Petitioner cites Section 54 of the same act to submit that the sale lacked consideration between 3rd Respondent and Attorney thus invalid. Further Section 19 of stamp duty Act is relied on, on the basis that since no stamp duty was paid on agreement, same is inadmissible in evidence. It submits that under Article 23 of the Constitution the court can grant reliefs sought.

24. Further it is submitted that under Section 26 (1) Land Registration Act No. 3 of 2012 court can cancel title obtained by fraud; as in the instant case. Further under Section 80 of the same Act, on account of fraud or mistake as in the case of 3rd Respondent title ought to be cancelled. It is further submitted that documents drawn by advocates without practicing certificate is null and void vide **Civil Appeal No.119/02 NBK –VS- WILSON NDOLO AYA (unreported)**. Further it is submitted the title showed to be cancelled and rightful owner be registered as the owner as in case of **Civil Appeal 225/06 CHARLES K. RIRIA & OTHERS –VS- ADMINISTRATORS OF WALLACE MAKERE & OTHERS**, in which the same case held that:

“person obtaining registration by fraud include a proved knowledge of existence of unregistered interest of some other person whose interest he knowingly or wrongfully defeats by that registration”.

25. The Respondents No.1 and 2 in their submissions argue that the issues raised did not meet Constitutional thresh hold. The basis of the petition is the alleged:

- Fraud, collusion, abuses of office

- Contradictory entry in searches
- Want of legal authority of 3rd Respondent directors
- Validity of Power of Attorney
- Validity of agreement.

They thus submit that the above constitutes elements of issues within the realm of private law not public law. They submit that same ought to be ventilated via hearing, production of documents and cross-examination of witnesses mentioned. They cite **TEITIWANNANG –VS- ABIONG & OTHERS LRC**. They also cite **RE APPLICATION BY BAHADOR 1988 LRDC** where it is stated:

“The Constitution is not as a general substitute for normal procedure involving judicial control of administrative action. Where infringement can found a claim under substantive law the proper cause is to bring claim under the law not under the Constitution”

They also rely on case of **KARUME –VS- NATIONAL ASSEMBLY NAI.92/92**.

26. They submit that the Parliament has prescribed mechanisms or resolution of civil disputes via civil

procedure Act and rules but petition is eschewing the same procedure to couch claim into Constitutional claim. The test of all the massive allegations and document content would require a thorough hearing of the dispute under civil procedure but not as Constitutional case. Without hearing the case and the alleged actors and participants of alleged fraud called, the allegations remain unproved and unfit to be couched as Constitutional. They thus submit that the alleged breach of rights are unproved and only established there may be civil claims which ought to be litigated in different forums in the right procedure. They thus pray for dismissal of the petition with costs.

27. On the third Respondent submission, it is argued that the ownership was acquired and protected by Article 40 Constitution of Kenya and Section 23 (1) of the RTA and the title can only be impugned on fraud. It is argued that the right over suit land never vested in Petitioner to warrant invocation of Article 40 of the Constitution of Kenya. The 3rd Respondent submits that the reliefs sought are a mix of prerogative orders and civil reliefs under Cap 21 thus rendering petition in competent. It cites **JEREMIAH MOKU –VS- METHODIST CHURCH REGISTERED TRUSTEE & ANOTHER 2007 eKLR**. It also cites **HARRIKISSON –VS- AG OF T & TOBAGO AC 265** on the same point.

28. It is submitted that the petition must fail for lack of compliance with basic rules of separating private law matters from those that in public law arena. It is submitted that the court cannot dispossess the 3rd Respondent without any prove of fraud alleged. The remedy/reliefs sought cannot be granted as the threshold for grant has not been attained in the circumstances and material before the court. Whereas there are massive allegation of fraud and mention of many actors and prayers no evidence in form and shape of affidavits has been tendered from them. The vendor of the suit land has not been called as a witness nor enjoined in the matter.

29. It is also submitted that whereas Petitioner makes all manners of allegations against Odhoch, it never endeavoured to enjoin him or call him as a witness. Further the 3rd Respondent argues that the Petitioner is confusing possession with ownership. No ownership ever passed to the Petitioner. On sanctity of title it cites Section 22 and 23 of RTA and authorities of –

SONGOK –VS- OLE KEIWA & 4 OTHERS – Appeal No.6/97

AND CHARLES MWANGI –VS- PAUL MUSILI & 2 OTHERS. HCC.1279/07 eKLR (2008)

Also **WRECK MOTHER ENTERPRISES –VS- COMMISSIONER OF LANDS Civil Appeal 71/97.**

Section 2 of RTA defined fraud as:

“part of person obtaining registration include proved knowledge of existence of unregistered interest on part of same other person whose knowingly and wrongfully defeats by that registration”

The aforesaid threshold has not been proved.

30. After going through materials placed before the court, the following issues are noted to emerge:

1. Whether the petition is competent?
2. Whether fraud proved?
3. Whether breach of property right proved?
4. Which orders are available if any herein?
5. What is the order as to costs?

31. The Petitioner petition is anchored on Articles 22, 23, 40 and 165 of the Constitution of Kenya 2010. Article 22 deals with the enforcement of bills of rights. Article 23 deals with the reliefs the court can grant in event prove of breach of bill of rights. Article 40 deals with protection of right to property. Article 165 deals with jurisdiction of the High Court. Essentially, the petition before the court seeks to enforce bill of rights against the respondents; states Agents and private entity. Under Article 20 of the Constitution, the bill of rights can be enforced as against state vis-à-vis the private party (vertical enforcement) or between private person and another (horizontal enforcement). This is because the Articles stipulate that the bill of rights binds state organs and all persons. This is unlike the position as pertaining to the repealed Constitution. The authorities of **AG of TRINIDAD & TOBAGO 1980 AC (supra)** and like cases on the same thinking may not obtain, on our Constitutional dispensation. This is on the aspect of restricting enforcement of rights as between individual and states (vertical) but not as between 2 private parties (horizontal).

32. The allegation and complaints by the Petitioner ranged from and included:

- Fraud, collusion, abuse of office
- Contradictory entry of searches
- Falsification of entries in searches
- Want of legal authorities of Respondent directors
- Legal validity of Power of Attorney
- Legal validity of agreement which transferred suit land to the 3rd Respondent

It is submitted that the same ought to be raised and litigated in private law not public law. The reliefs sought also range from public to private law. In **JEREMIAH MUKU CASE supra, Ouko J.** held that :

“... Constitutional references are not panacea for resolution of all types of legal disputes. Invocation of Constitutional remedies should only be reserved for various breaches of Constitution and not for correction of errors either of substantive laws or procedures”.

It was further held that:

“if a remedy is available under some other legislative provisions, the court will decline to determine whether or not the Petitioner’s Constitutional rights have been violated.”

In the **CASE OF JOHN MUKORA WACHIHI & OTHERS –VS- MINISTER OF LANDS & 6 OTHERS Petition No.82/2010** as consolidated with Pet. No.83, 84, 85, 85, 86, 88, 89, 90 and 92 of 2010 **Mumbi J.** held that:

“... right to property under the Law and Constitution is afforded to registered owners of land.

Section 75 of the former Constitution, which was in force at the time the alleged allocation took place, and Article 40 of the current Constitution, protect a registered owner of property from being arbitrarily deprived of his property.

As the provisions of the Constitution and the repealed Registered Land Act illustrate, such protection is afforded only to registered owners of the Land”.

She cited the 2 cases below:

WRECK MOTORS ENTERPRISES –VS- COMMISSIONER OF LANDS AND OTHERS Civil Appeals No.71/1977. AND JOSEPH NG’OK –VS- MOIJO OLE KEIUA Civil Appeal No.60/97.

The suit land was in the process of being acquired by the Petitioner but the same never came into fruition thus the right under Article 40 Constitution of Kenya never crystalized to warrant the invocation of the Article 40.

33. This takes the claim herein outside the purview of enforcement of the bill of rights under Article 22 and 23 of the Constitution. The petition before the court is thus found to be incompetent and is for striking out.

34. Even if the same petition was found competent, still the same would not pass on merit. The massive alleged fraud in Affidavits points at the necessity of same being tested via hearing all the actors in the alleged fraud and scrutinizing the documents in cross-examination and calling the makers of the same documents to establish the genuineness of the content of the documents. I need not go through the allegations made as I have found the petition incompetent. The court thus makes the following orders:

1. The Petition herein is struck out with costs.

2. The interim orders in form of conservatory orders are discharged.

Dated and Delivered at Machakos, this 20th day of February, 2015.

CHARLES KARIUKI

JUDGE