



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NUMBER 42 'B' OF 2011

**IN THE MATTER OF: ARTICLE 40, ARTICLE 27 AND ARTICLE 47 OF THE
CONSTITUTION OF KENYA AND THE (SUPERVISORY JURISDICTION AND
PROTECTION OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE
RULES, 2006.**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHT AND
FREEDOM UNDER ARTICLE 40, ARTICLE 27 AND ARTICLE 47 OF THE CONSTITUTION
REGARDING RIGHT TO PROPERTY DISCRIMINATION AND RIGHT TO FAIR
ADMINISTRATIVE ACTION ALL RELATING TO L.R. NO. 5052, NORTH OF SHIMONI
TOWN, COAST PROVINCE.**

BETWEEN

HEMEDI SEFU ABDALLA.....PETITIONER

AND

NAINESH KANTILAL SHAH.....1ST RESPONDENT

COMMISSIONER OF LANDS.....2ND RESPONDENT

LAND REGISTRAR OF TITLES COAST PROVINCE.....3RD RESPONDENT

MINISTER OF LANDS.....4TH RESPONDENT

ATTORNEY GENERAL.....5TH RESPONDENT

RULING

THE PETITION

1. This ruling relates to a Petition dated 26th July, 2011 and seemingly filed on 5th September, 2011 together with a Chamber Summons dated 26th July, 2011, by one Hemedi Sefu Abdalla (the Petitioner) purportedly on his own behalf, and on behalf of members of his family which comprises of more than 150 adult people and their children who the Petitioner says, have at all times material to the Petition lived upon the land known as L.R.No. 5032, North of Shimoni Town, Coast Province, (the suit land), their ancestral home where they have lived all their lives, built, developed, eked a living and buried their loved ones.

2. The Petitioner alleges that during all this time, the said land was registered in the name of the Petitioner's grandfather, one **Alawi Bin Kassim**, who is deceased, and was the father of one Abdalla Alawi, now deceased, and who was the father of the Petitioner, and who together with others, are the owners of the said property, which the Petitioner claims is their ancestral land.

3. The Petitioner claims that the first Respondent without the knowledge of the petitioner and/or any other member of his family has, through a process unknown to the Petitioner, caused the said parcel of land to be registered in his name, and to cause the same to be sub-divided into two parts, LR No. 12638 and LR No.123639 with an area of 44.78 Ha. and 4.299 Ha. respectively. The petitioner claims that he and his family occupy LR No 12638 which he claims has been further sub-divided into eleven(11) sub-plots from L.R No. 12368/I to 12368/II.

4. The Petitioner contends that the act of registering the first Respondent as the owner of the property known as L.R No. 12638(and the sub-division thereof), amounts to a contravention of the provisions of the Constitution of the protection of the right to own property. The petitioner further contends that as the second to fifth Respondents have aided the First Respondent in dispossessing the Petitioner and his family of their ancestral land, they too have contravened the Constitution and their action is an illegality.

5. For the above reasons, the Petitioner seeks the following orders:-

“(1) A declaration that the property originally known as L.R No. 5032 and North of Shimoni Town, Coast Province, and subsequently sub-divided as aforesaid, does not belong to the First Respondent;

(2) An order that any registration of the said property in the name of the first Respondent be purged from the record (register of lands) and any transfer thereof be nullified;

(3) A declaration that the property originally known as L.R. No.5032, North of Shimoni town, Coast province belongs to the petitioner's family and clan and thus the property be registered in the name of the petitioner to hold in trust for the whole of the petitioner's family and the entire family of the late Bin Kassim.”

6. The Petition was declared to be supported by the Affidavit of the Petitioner sworn as aforesaid on 27th July, 2011 and filed with the Chamber Summons of the said dates, seeking conservatory orders to restrain the respondents from any dealing with the property known as L.R. No. 5032, North of Shimoni Town, Coast Province pending the hearing *inter partes*, of the Application. The Chamber Summons was heard and a conservatory order was granted on 5th September, 2011, and was to last 14 days only but has for all practical purposes, been observed by the respondents pending determination of this petition.

7. Both the Chamber Summons and the petition were opposed by the First Respondent through the Replying Affidavits sworn on 17th February, 2012, both filed on 20th February, 2012, the salient points of which were that the application as fatally defective on the grounds *inter alia* that:-

“(1) this was not a representative suit, yet he seeks orders on behalf of 150 persons whose names have not been disclosed;

(2) the authority on behalf of or represent the 150 adult members who stand to benefit from the petition has not been annexed;

(3) plot Number 5032 does not belong to the petitioner and has never belonged to him;

(4) no proceedings have been annexed to show how the Estate of ALAWI BIN KASSIM devolved to ABDALLA ALAWI and then to the petitioner;

(5)the orders sought will infringe upon the Constitutional rights of the First Respondent;

(6) the First Respondent does not own plot No. 5032, North of Shimoni Town, Coast Province;

(7)the petition is not supported by any Affidavit or any evidence, making the same fatally defective and/or incapable of being sustained;

(8) there are no Constitutional issues raised in these proceedings to warrant the grant of orders sought;

(9) the issues before court are issues of title, possession and ownership of land, and that these cannot be said to be constitutional issues, and can be tried in the Environment and Land Division of the High Court;

(10) for the real issues to be determined, oral evidence, examination of witnesses as well as documents of title is necessary.”

8. By consent of counsel representing the petitioner and the respondents, it was resolved that the petition herein be determined by way of written submissions. The petitioner’s written submissions dated 23rd June, 2014 were filed on 24th June, 2014. The First Respondent’s written submissions dated 23rd September, 2014 were filed on the same day, together with several authorities annexed thereto. In addition, the First Respondent’s counsel also relied on a List of Authorities dated and filed on 21st February, 2012. Counsel for the First Respondent filed on 28th March, 2014, a List of fifteen Issues which were adopted by counsel for the petitioner as points of argument in their submissions dated 23rd June, 2014 as already stated. The Attorney-General, who was counsel for the second, third, fourth and fifth respondents filed no submissions.

THE ISSUES

9. Though there were fifteen issues raised by counsel for the First Respondent and adopted in argument by the counsel for the petitioner, the real issue here is whether the petition raises any Constitutional issue for determination by this court, and concomitant issue is whether the orders sought can be granted.

10. As I understood the argument by counsel for the petitioner, the petitioner’s case is that the disputed land belonged to the petitioner’s ancestors, one Mzee Alawi Bin Kassim and Mzee Abdalla Alawi, the grandfather, and father of Hemedi Sefu Abdalla, the petitioner. By analogy, counsel submitted that the ownership of the said land was like Jacob’s well, as the Samaritan woman retorted to Jesus in the Gospel of John, (John 4:12), that he Jesus, could not be greater than Jacob who gave them (Samaritans/Israelites), the well to satisfy their and needs of their stock of animals. Similarly, the First Respondent with the aid of the 2nd-5th respondents could not, and could never take their right away by way of purchase. If the respondents did so, then their transactions were fraudulent and illegal, and that fraud vitiates every transactions. Counsel relied on two cases.

11. Firstly, the Australian case of **FARLEY (AUST.) PROPRIETARY LIMITED VS J.R. ALEXANDER & SONS (QUEENSLAND) PROPRIETARY LIMITED [75 C.L.R.] 482**. This case concerned the registration of trade mark which was procured by fraud, but citing the English case of **Jonesco vs. Beard [1930] A.C. 298, at page 301, 302, Williams J** said:-

“Fraud is conduct which vitiates every transaction known to the law. It even vitiates in judgment of the Court. It is an insidious disease and if clearly proved spreads to and infects the whole transaction...In most cases a registration obtained in fraud of the rights of another would also involve a fraud on the Registrar...where original registration was procured by fraud, the use to which the monopoly so obtained was subsequently put could not cure the initial invalidity.”

12. Secondly, in the English case of **LAZARUS ESTATES LIMITED VS BEASLEY [1956] 1 ALL ER 341**, Denning LJ, with whose judgment Parker LJ agreed said:-

“No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever.”

Parker LJ said:-

“..... the meaning of a declaration as to the quality of work, if proved to be false vitiates all transactions known to the law of however high a degree of solemnity.....”

13. Counsel for the petitioner subsequently submitted that the Court should not allow the First Respondent to take advantage of that which they obtained illegally, or failed to prove how they obtained. Counsel dismissed as technical whether this Court has jurisdiction to determine the matter and thus this Court has the necessary jurisdiction and should allow the petition.

14. As already indicated, the petition was opposed by counsel for the First Respondent. **Firstly**, this Court has no jurisdiction as the claim herein concerns ownership, title, occupation and used of land. That is a jurisdiction conferred upon the Environment and Land Court, and not this Court, under both Articles 162(2) and 165 of the Constitution of Kenya, 2010.

15. **Secondly**, if the claim is founded on alleged illegality, even illegality envisaged under Article 40(6) of the Constitution of Kenya, 2010, and Section 24 of the Registration of Titles Act (Cap 281, Laws of Kenya) and the law applicable to this claim such illegality or fraud must be established through a legally established process. Counsel relied on the case of **VEKARIA INVESTMENTS LIMITED VS KENYA AIRPORTS AUTHORITY & 2 OTHERS [2014] e KLR**.

16. **Thirdly**, if the claim is founded upon alleged historical injustice, the proper forum is the Land commission established under Article 67 of the Constitution of Kenya, 2010. The mandate of the Land Commission under Article 67(1)(e) of the Constitution is:-

“to initiate investigations, on its own ... or on a complainant, into present or historical land injustices, and recommend appropriate redress.”

17. **Fourthly**, Article 40(3) affords protection to an individual or any juridical person in respect of deprivation of property of any description by the Senate, unless the deprivation is for the prescribed reasons, and the remedy is compensation by State.

OPINION

18. I have considered the rival arguments. The issue here is one of ownership or title to land as envisaged by Article 162(2)(b) of the Constitution, which jurisdiction is denied to this Court, by Article 165(5)(b) of the Constitution. This matter therefore properly belongs to the jurisdiction of the Environment and Land Court. I decline to exercise it.

19. If there is any compulsory acquisition as contemplated by Article 40(3), and if there is no constitutional issue raised in this petition, where does that leave the petitioner?

20. The proper forum for the petitioner and alleged co-petitioners is the ordinary civil court, where they are bound to prove their case on the balance of probability that they are the beneficiaries by inheritance, of the estate of Mzee Alaw Bin Kassim through Mzee Abdalla Alawi and others representing the other 149 people whose identities are unknown.

21. **Secondly**, in such action the petitioner will have to demonstrate how the First Respondent acquired the disputed land illegally or fraudulently. Under Section 107 of the Evidence Act, (Chapter 80 Laws of Kenya) he who alleges the existence of facts must prove so. That burden never shifts except under

Section 112 of the Evidence Act, again only if it is shown the particular fact or set of facts is especially within the knowledge of a particular party, and not otherwise. The Petitioner cannot shift that burden.

22. Allegations of fraud or illegality are not with respect, Constitutional issues. Like deprivation of property, by compulsory acquisition, the petitioner alleging breach of his right to property must show legal or equitable right to the property. Similarly allegations of discrimination under Article 27 or unfair administrative action must show the Petitioner's rights and how he was/has been discriminated by unfair administrative action under Article 47 of the Constitution. Mere allegations of fraud do not advance the cause of constitutionality.

23. In the upshot therefore I find that the petitioner herein raises no Constitutional issue and is therefore fails.

24. It is dismissed with costs to the respondents.

25. I direct the civil case HCCC 622 of 2011 be heard on priority

26. There shall be orders accordingly.

Signed, Delivered and Dated at Mombasa this 18th day of March 2015.

M. J. ANYARA EMUKULE

JUDGE

In open Court

In the presence of:

Mrs. Kariuki for Petitioner

Mr. Njoroge for 1st Respondent

No appearance for 2nd-5th Respondents

Cyrus Mutisya – Court Assistant