



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC PETITION NO.128 OF 2016**

**PHILLIP KIPCHIRCHIR.....PETITIONER**

**VERSUS**

**THE CABINET SECRETARY FOR LANDS.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR.....2<sup>ND</sup> RESPONDENT**

**THE DISTRICT LAND REGISTRAR MOMBASA.....4<sup>TH</sup> RESPONDENT**

**THE DIRECTOR OF PHYSICAL PLANNING.....5<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....6<sup>TH</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION.....7<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

The Petitioner states that he is the registered owner of the parcel of land known as LRNO. MN/I/6748 (C.R 21651) the same having been registered as Leasehold for 99 years from 1<sup>st</sup> August 1988 from the Government of Kenya. On a date and time unknown to the Petitioner and in order to facilitate the unlawful sub division and reallocation of the Suit Property and the issuance of letters of allocation and title deeds for plots over the Suit Property, the Respondents and their officers unlawfully created a settlement scheme which covers the Suit Property. To the best of the Petitioner’s knowledge and information, the Respondents do not have power under the law to demand the surrender of the Suit Property and or to subdivide the same, issue letters of allotment over the same or to issue title deeds to any person over the same, to extend registration boundaries into privately owned property and or to change the registration regime of any parcel of land already registered under the Registration of Titles Act without following due process as provided under the Constitution of Kenya, 2010 and Land Act, 2012. That the Petitioner acquired proprietary rights in 1988 through a proper and lawful grant from the Government of Kenya but as a result of the Respondents and their officers’ acts and omissions, numerous plots numbered haphazardly have been created over the Suit Property and numerous persons have sought to occupy portions of the land and have put up structures, fences, cut trees, dug holes, fenced off portions and cleared ground. By virtue of the use of non-existent powers to revoke the Titles to the Petitioner’s property, the illegal and unconstitutional adjudication, allocations, issuance of illegal titles and subdivisions and invasion of the Suit Property with the help and active participation of state agents, your Petitioner is reasonably apprehensive that the Register, Folders, Kalamazoos, parcel files and all other documents relating to the Titles described above together with subdivisions thereto as well as his properties will be destroyed, altered, concealed, or otherwise criminally and fraudulently dealt with before the determination of this Petition. That the Suit Property continues to be sub divided and re-surveyed to create new titles and various dealings involving the above named plots and their subdivisions continue being registered at the Mombasa District Lands office to allow new occupants and owners take possession. The acts and omission of the Respondents and their officers acting in collusion have aided and abetted the unlawful acquisition of portions of the Suit Property by various persons in contravention of the Petitioner’s constitutional rights as protected under Article 40 of the Constitution and the Petitioner has suffered loss. Despite the Respondents having knowledge that there is no adjudication are lawfully created over the Suit Property and that there is no approved planning permission to sub-divide the Suit Property into small plots and allocate the same to third parties, (allegedly squatters)) they have colluded with their officers at Mombasa to alter the said fictitious Survey Map with the full knowledge that he has never applied for or been party to such a scheme over his own private parcel of land.

The acts and omissions of the Respondents herein and their officers are in blatant disregard of the rule of law and the Petitioner is apprehensive that unless curtailed by the Honourable Court his rights to property and fair administrative action as guaranteed under Article 40 and 47 of the Constitution of Kenya, 2010 will be violated and continues to be violated. That the government is mandated in law to provide an effective mechanism to redress the Petitioner against the effects of the unlawful takeover and dispossession of the subject land but instead its agents, the Respondents have been engaged in endorsement and continued perpetuation of the illegalities thereof. That he has never acquiesced to the said wrongful alienation of the subject land but he has been vigilant to recover the

Suit Property by filing suits against various person who have unlawfully occupied the same or entered thereupon but he has lacked the necessary support, co-operation and assistance from the Respondents who have and hold all records pertaining to the foregoing in doing so.

That the acts of the Respondents in creating a settlement scheme and settling squatters over the Petitioner's property and beyond essentially means that if the Petitioner was to seek and enforce orders evicting the said trespassers and thereafter take possession of his property, the Petitioner would essentially be in the middle of a slum area surrounded by other squatters who could be hostile to his occupation of the land. Eviction orders are therefore untenable and potentially risky and hence the Petitioner seeks compensation from the Respondents. The acts complained of in the Petition herein amount to compulsory acquisition of the Petitioner's property without following the provisions of the land acquisition act and are therefore illegal under Article 40 of the Constitution.

The Petitioner humbly prays for judgement against the Respondents jointly and severally as follows;

a) A declaration do issue that the Petitioner is the lawful registered owner of the parcel of land known as LR NO. MN/1/6748 (C.R 2165) and that his title to the same is valid.

b) A declaration that the Petitioner's property known as LRNO. MN/1/6748 (C.R 2165) was not un-alienated Government land and could not therefore be allocated or allotted by the Respondents to any other persons after the parcel of land had been leased to and registered in favour of the Petitioner.

c) An order be issued that the creation of a new registration area called Ziwa La Ng'ombe Settlement Scheme over the Petitioner's parcel of land known as LR NO. MN/1/6748 (C.R 2165), the issuance of letters of allotment to plots thereon and title deeds to plots of land sub divided from Your Petitioner's said parcel of land or derived there from and the registration of dealings involving the plots so created is contrary to law and in breach of Your Petitioner's rights enshrined under article 40 of the Constitution and amounts to compulsory acquisition of Your Petitioner's land without compensation.

d) A declaration that the plot numbers set out hereinabove, that is to say:

962, 940, 946, 945/1398, 987, 989, 990, 955, 994,996, 997, 998,993, 992, 991,999/1016,1015/1000,1013/1001,1012/1002,1011/1001,1029/1010,1030/1017,103/1018,1019/1032,1004/997,1026/1004,1027/1007, 958,1021,985,103,1005,949/038,104043,1037/936,937/10,47,933/1048,932/1049,1056,1035,1020,1034,1024/1033,935/1036,1053/913, 1052/921,1051,1062,1063,1056,1156,1197,922/1067,923,925/1079,107/927,926,930,937,975,970,973,1002,965,963,977,964,979,978,9 71,972,980,973,976,974,998,952,983,981,949134,989,982, 97982,975,913,943,949,916/1,197,1077,9115, 935,948, 987,984,988,986,774,947/1400 together with all sub divisions thereto or howsoever registered as amounting to trespass.

e) An order compelling the Respondents to compensate the Petitioner the full value of the land being a sum of Kenya Shillings One Hundred and Thirty Six Million Four Hundred Thousand (Kshs. 136,400,000.00) in line with the valuation report dated 21<sup>st</sup> October 2020 by Salem Valuers Limited.

f) Costs of this Petition and interest on [e] above from the date of the valuation till payment in full.

The Respondents herein filed the a grounds of opposition on 5<sup>th</sup> December, 2016 and further the Replying Affidavit on 23<sup>rd</sup> July, 2020 sworn by the County Land Adjudication and Settlement Officer, Mombasa together with all its supporting Annexures. In the Affidavit, the Adjudication Officer; who was also present and was among the officers who did the settlement clearly explains the how the whole process was conducted and Annexes all the supporting documents. That is clear that the Petitioner got the Land without conducting the Ground Truthing which is meant to establish if there are people already in occupation of the suit property before one is allocated. This would have actually confirmed that several people were already living in the suit property before the Petitioner was issued with the Title. This is confirmed by Ramadhan Ali Yongo who is a representative of all the residents living in the suit property and all supporting documents filed on 25<sup>th</sup> October, 2021. That he clearly analyses how they have been living on the suit property for decades until when they were settled and later on issued with the Title by the President on 8<sup>th</sup> August, 2013. Prior to that, no one including the Petitioner ever came to evict them from the suit property neither have they ever received any communication that the suit property belonged to the Petitioner herein.

That the Petitioner's Title is a new Grant which was under the mandate of the Commissioner of Lands currently National Land Commission and the 7<sup>th</sup> Respondent herein. This means the allocation and issuance of the Title were all done at the Commissioner's Office. The Land Registrar received the forwarded documents and delivers to the owner. The Land Office therefore has no record pursuant to how allocation of the suit property to the Petitioner save for the forwarded Title which is in their documents filed herein on 26<sup>th</sup> October, 2021; Grant. 21651. It is therefore their submissions that the mandate of allocation and Compensation fall within the mandate of the 7<sup>th</sup> Respondent and not the 1<sup>st</sup> to 6<sup>th</sup> Respondent. They are better placed to explain how the suit property was allocated to the Petitioner and later allocated to over 2000 residents living and who currently also have titles within the suit property.

It is their submissions that the 1<sup>st</sup> to 6<sup>th</sup> Respondent did not allocate the suit property to the Petitioner herein. In fact, the Petitioner has not even shown to this Court how he got the Title over the suit property. The Settlement was done procedurally and if the Petitioner had any issue, he ought to have raised it then. Over 2000 people were on the suit property and they were living on the suit property for decades before they were settled. Until the issuance of the Titles by the President in 2013, the Petitioner who alleges to own the property since 1991 ought to have known that there were people invading his suit property and that thereafter the people were being settled on his suit property as a Settlement Scheme. That the 1<sup>st</sup> to 6<sup>th</sup> Respondents do not allocate land. The same is within the mandate of the 7<sup>th</sup> Respondent. If at all the Petitioner was allocated this Land, the same was done by the 7<sup>th</sup> Respondent who should be having the records confirming so. Any compensation claim should hence not be directed to the 1<sup>st</sup> to 6<sup>th</sup> Respondents.

This court has considered the petition and the submissions therein. It is a principle that in constitutional litigation, a party that alleges

violation of his or her rights must plead with reasonable precision in regard to the manner in which there has been such alleged violation. This proposition was enunciated in the case of **Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272** where the court stated;

*“Constitutional violations must be pleaded with a reasonable degree of precision.*

The Articles of the Constitution which entitles rights to the Petitioner must be precisely enumerated and the claim pleaded to demonstrate such violation with the violations being particularized in a precise manner. Furthermore, the manner in which the alleged violations were committed and to what extent must be shown by way of evidence based on the pleadings. The Court of Appeal in **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** provided the standard of proof in Constitutional Petitions. The Court of Appeal judges stated that;

*“...The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:*

*“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”*

*The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19,20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1<sup>st</sup> Respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the Respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.*

*We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (Supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1<sup>st</sup> Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the Respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1<sup>st</sup> Respondent...”*

In the case of **Dr. Rev. Timothy Njoya vs The Hon. Attorney General and Kenya Review Authority HC Constitutional and Human Rights Division Petition No. 479 of 2013** stated that;

*“The Petitioner cannot come to court to seek facts and information he intends to use to prove the very case that he is arguing before the court. He must also plead his case with some degree of precision and set out the manner in which the Constitution has been violated by whom and even state the Article of the Constitution that has been violated and the manner in which it has been violated.”*

I concur with the grounds of opposition by the Respondents that looking at the Petitioner’s pleadings, the evidence of the parties as well as the submissions, it is my opinion that the Petitioner has not met the requirements of a Constitution Petition. Although the Petitioner has pleaded provisions of the Constitution, he has not demonstrated to the required standard how his individual rights and fundamental freedoms were violated, infringed or threatened by the Respondents. He has not adduced any evidence to demonstrate the alleged violations.

The Petitioner states that he is the registered owner of the parcel of land known as LRNO. MN/I/6748 (C.R 21651) the same having been registered as Leasehold for 99 years from 1<sup>st</sup> August 1988 from the Government of Kenya. On a date and time unknown to the Petitioner and in order to facilitate the unlawful sub division and reallocation of the Suit Property and the issuance of letters of allocation and title deeds for plots over the Suit Property, the Respondents and their officers unlawfully created a settlement scheme which covers the Suit Property. This ought to have been filed as a civil suit concerning ownership of land.

Even assuming that this petition was competent, it would not pass the test of the burden of proof. It is trite law that he who alleges must prove his claim. The claim must be propounded on an evidentiary foundation. In saying so, I rely on the case **Leonard Otieno vs. Airtel Kenya Limited (2018)** where Mativo J. held that;

*“It is fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution an inevitable result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”*

The 7<sup>th</sup> Respondent submitted that the Petitioner has never occupied or used the suit land and it has historically been occupied by squatters who were formally settled there by government when the settlement scheme was established. From the observation above I reach a conclusion that this petition has not been pleaded with a reasonable degree of precision and that the alleged violations have not been proved. I therefore dismiss the petition with costs to the Respondents.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22<sup>ND</sup> DAY OF FEBRUARY 2022.**

**N.A. MATHEKA**

**JUDGE**