



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO.10 OF 2012

BAYWATCH LIMITD.....PETITIONER

VERSUS

LAND REGISTRAR KISUMU..... 1ST RESPONDENT

HON ATTORNEY GENERAL.....2ND RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION.....3RD RESPONDENT

J U D G E M E N T

1. This suit was filed here on 17/10/2012 vide a petition dated 16/10/2012. **BAYWATCH LIMITED** is the Petitioner. The 1st and 2nd respondents - **LAND REGISTRAR, KISUMU** and The **HON. ATTORNEY GENERAL** – were the first parties in the suit but later on, **ETHICS AND ANTI-CORRUPTION COMMISSION** came on board as the 3rd Respondent.

2. The petition is brought under Rules 11, 12, 13, and 14 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006, and Articles 19, 20, 21, 22, 23, 24, 27, 40 and 50 of the Constitution of Kenya, 2010.

3. As filed, it is expressed to be brought in petitioner's own interests, and Public interest too, under Article 22 of the Constitution. Its narrative is simple yet profound.

4. The petitioner averred that it is the registered owner of Land parcel No. **KISUMU MUNICIPALITY BLOCK 7/409**, having bought it after conduct of due diligence and upon satisfaction that it was fair and square to buy it. But something unravelled when the petitioner thought that it had everything sewn up. The 1st Respondent caused publication of Gazette Notice No.15577 on 26/10/2010 stating the petitioners title as revoked and alleging the suit land to be reserved for Kenya Railways corporation.

5. That is what prompted the filing of this suit with the petitioner stating, inter alia, that the alleged revocation violated an array of its constitutional rights, more crucially the right of fair hearing under article 50 and the right to own property under article 40. It seems clear that the alleged violation of the other rights arises from the implications of violating these two. In all, the articles said to be violated are 19, 20, 21, 22, 23, 24, 27, 40 & 50.

6. While amplifying the import of 1st Respondents act, the petitioner averred that there

was arbitrary taking, deprivation, and interference with its right to acquire and own property. The act was also said to limit and restrict the enjoyment of such right unlawfully and without justification. It was behaviour that was capricious and disproportionate and not in consonance with the values of an open and democratic society.

7. The following prayers were therefore sought:

(a) A declaration that the 1st Respondent's action as contained in Kenya Gazette Notice No.15577, Published on 26/11/2010 revoking the registration of the petitioner as the registered owner of all that parcel of Land known as **KISUMU MUNICIPALITY/BLOCK 7/409** is inconsistent with article 40 of the constitution of the Republic of Kenya in that it unreasonably and without lawful cause or justification undermines, restricts or otherwise Limits the petitioner's fundamental right to acquire and own property and is unconstitutional, illegal and null and void ab-initio.

(b) Consequently an order prohibiting the respondents whether by themselves, their officers, agents and/or servants or employees or any other government officers of authorities from entering into, being on, revoking the petitioner's title to, restricting or otherwise Limiting the petitioner's use, peaceful enjoyment and access to all that parcel of land Known as **KISUMU Municipality/ BLOCK 7/409** by any means.

(c) An order for general and exemplary damages to the petitioner for violation of its fundamental rights and freedoms under the constitution of Kenya.

(d) An order mandamus compelling the 1st Respondent by themselves, servants and/or agents to delete any entry on the petitioner's certificate of title made as a consequence to or furtherance of the said gazette Notice No.15577 of 26/11/2010.

(e) An order that the costs consequent upon this petition be borne by the Respondents.

(f) All such other orders as this honourable court shall deem just in the circumstances.

8. The 1st and 2nd Respondents didn't respond to the petition. The 3rd respondent responded vide a replying affidavit dated 30/11/2012 and filed on 4/12/2012. All parties however filed submissions.

9. The 3rd respondents response contained, interalia, some history and background. It is clear that the legal tussle over ownership of **KISUMU Municipality/Block 7/409** (Suit Land) did not start with this petition. The 3rd respondent had filed a suit – **HCC No.105/2010** – seeking, interalia, to wrestle ownership from the petitioner herein. In the suit, 6 defendants were sued. The petitioner was the 6th defendant. Unknown to the 3rd respondent at the time, the petitioner had also filed a suit – **HCC NO.100/2010** – against Kenya Railways corporation, alleged to be the rightful owner of the land, and Kenya Anti-corruption Commission, the predecessor of 3rd Respondent herein.

10. But a new development took place Viz: The first respondent, published, or caused Publication, of **Kenya Gazettee Notice No.15577** revoking the petitioners title. The petitioner felt that the revocation was unconstitutional as it amounted to arbitrary taking and deprivation of his property contrary to the constitution. The petitioner moved to court and filed this petition.

11. But before this, the two suits pending in court had been consolidated and it would appear that the 3rd respondent herein had, in light of the new development, made an application seeking summary judgment in the consolidated suits. It would appear also that there was an application by Kenya Railways seeking the striking out of the petitioner's suit. According to 3rd respondent, this petition was filed to forestall the possible outcome of these applications.

12. But there is more in the 3rd respondent's reply. It was averred, interalia, that the suit land was vested by law upon Kenya Railways Corporation. It was not available therefore for alienation. The

initial purported alienation therefore to **Roselyne Ann Anyuka** and **Joseph Raching Wasambo** was illegal, null and void ab-initio. It appears clear that **Roselyne and Joseph** sold the land and ownership changed hands several times before the petitioner herein became a buyer and registered owner. The 3rd respondent's argument is that as the initial allottees did not acquire a good title, so also are all the subsequent buyers and owners including the petitioner herein.

13. The petitioner felt impelled to file a response in view of what the 3rd respondent averred in the replying affidavit. For that reason, a supplementary affidavit was filed on 27/12/2012. The 3rd respondent reply was faulted for being out of context and not relating to the petition. The petitioner averred that the issue at hand concerned violation of the constitution.

And the 3rd respondent was said not to have demonstrated his authority to appear in this matter.

14. In lieu of oral arguments, submissions were filed. The petitioner's submissions were filed on 27/12/2012. The petitioner was termed as the fifth purchaser of the suit property, having so purchased it from **Babobhai Constructions company Limited**. Before purchase, all due diligence was conducted. All was fine and the petitioner became the registered owner. And being such owner, the petitioner became entitled to protection Under Section 23 of the now repealed Registration of Tittles Act (Cap 280) and article 40 of our new constitution. But the 1st Respondent put a damper on all this when its purported to revoke the title.

15. The alleged revocation was said to have been done without notice to the petitioner. The gazette Notice did not state any law violated or the purpose for which the property was meant. The notice was said to take the petitioner's property without compensation or consultation.

16. Several decided authorities were cited to illustrate that the Registrar does not have power to revoke title. They are:

(1) **KURIA GREEN LIMITED VS REGISTRAR OF TITLES & Another: Petition NO.107/2010 Nairobi.**

(2) **ISAAC WANJOHI VS THE HON. ATTORNEY GENERAL & ANOTHER: PETITION NO.154/2011, NARIOBI.**

(3) **POWER TECHNICS LIMITED VS HON. ATTORNEY GENERAL & OTHERS: PETITION NO.178 OF 12011, NAIROBI.**

(4) **REPUBLIC VS THE REGISTRAR OF TITLES: HCC. MISC. NO.84/2011, MOMBASA.**

(5) **SOUND EQUIPMENT LIMITED VS THE REGISTRAR OF TITLES: HCC PETITION NO.106/2010, NAIROBI.**

The petitioner asked the court to make a finding that the Registrar's action violated article 40 and 47 of the constitution.

17. The award of damages was urged at 2,500,000/= in line with the reasoning advanced in both Isaac Wanjohi's case (Supra) and Kuria Green case (Supra). Simply stated, the reasoning was that the action of revoking the title was reprehensible, being in breach of article 47 of the constitution and being a denial of the petitioner's right to due process.

18. The 1st and 2nd respondents submissions are dated 15/1/2013. It was pointed out that the suit Land is claimed by Kenya Railways Corporation, which was not enjoined as a party. The property was said to have been illegally acquired by the petitioner and, that being the case, the provisions of article 40 (6) of the Constitution, which removes protection from, illegally acquired property, would apply.

19. The court was also asked to note the existence of the other suits involving the same parties concerning the same parcel of land. According to these two respondents, the petitioner does not deserve the protection of the right to property. Affording the petitioner such protection for property that was illegally acquired would, according to these two respondents, amount to sanctioning illegality and it would be a departure from court determinations in **CHEMEY INVESTMENTS VS ATTORNEY GENERAL & 2 OTHERS: HCC PETITION NO.94/2005, NAIROBI, AND PARAMOUNT BANK LIMITED VS MOHAMED ALIAS QUEREISHI & ANOTHER: APPEAL NO.239 OF 2001) E KLR.**

20. Damages were opposed for the reason that the property was illegally acquired. The petition was said to be brought in bad faith as other interested parties were not enjoined yet they would be affected if the petitioner wins.

21. The 3rd respondents submissions were filed on 18/2/2013. It was submitted, inter alia, that though the petitioner alleges to have bought the suit property, its awareness that the property belonged to Kenya Railways corporation was there or ought to have been there. The 3rd respondents also referred to two existing suits involving the parties and concerning the same land. It then opined that this suit is an afterthought and a reaction to the 3rd respondents endeavour to determine the two suits.

22. The 3rd respondent further said that investigations were done by its predecessor (KACC) which revealed that the suit land was part of a larger parcel vested in Kenya Railways. The findings led the 3rd respondent to institute suit No.KSM HCC NO.105/2010 against the petitioner and others for recovery of the suit land. But the petitioner had also instituted KSM HCC NO.100/2010 against Kenya Railways concerning the same land. The two suits were then consolidated.

23. The 3rd respondent continued to say that the suit land was not available for alienation to private individuals or at all, having been already alienated to Kenya Railways. This is the position taken by court in **Milan Kumar Shah & 2 others V The City Council of NAIROBI and others: HCC Misc. No.1024 of 2005(0.S).** The initial allocation to one Reselyne Onyuka and Joseph Raching was therefore wrong and so also was the purchase and transfer to other parties who came after these two, petitioner's herein included.

24. The Commissioner of Land was said to have had no power to allocate or alienate the suit property as his delegated power under Section 7 of Government Lands Act (cap 280) did not allow him to do so.

This is the position taken by the courts in **JORAM NYAGA & Another V The Attorney General & Another (unreported): HCC Misc. NO.1732/04 and Milan Kumar Shah's case (supra).**

25. And concerning the revocation complained of, the 3rd respondent submitted that the revocation was in public interest. The title was said to have been acquired without following due process and in disregard of public interest. The petitioner was aware or ought to have been aware that the land belonged to Kenya Railways. The petitioner, 3rd Respondent claimed, can not claim to be entitled to due process when it comes to its private interests in the suit property.

26. I have considered the petition, the responses made to the petition, and the rival submissions. I have assiduously read the decided authorities availed by both sides.

27. Several facts are clear Viz:

- (a) **There exists two suits involving the parties herein and concerning the same piece of land.**
- (b) **The 1st Respondent published Notice No.15577 revoking the petitioner's title.**
- (c) **The petitioner is the immediate registered owner of the suit land having acquired it from the previous owner through purchase.**

28. It is against this background that I now set out to decide the case.

29. It is clear that in the two suits pending between the parties, ownership is a central issue. When one looks at the prayers sought in this petition, again ownership is a central issue. In the earlier suit, the 3rd respondent is trying to wrestle ownership from the petitioner herein. In the petition; the roles have reversed. Ownership been wrestled from the petitioner vide the gazette notice complained of. The petitioner wants ownership to revert back to itself.

30. Elementary rules of procedure require that when an issue is already pending decision in a suit already filed, a latter suit can not be filed to resolve the same issue. And when such latter suit is filed, it is supposed to be stayed. I realise that the earlier suits already pending are ordinary suits. They invoke provisions of ordinary statutes. But the petition as filed is not an ordinary suit; It is raising constitutional issues. I realise too that it was filed in reaction to an event that took place after the two suits had already been filed. That event is the publication of the gazette notice that revoked the petitioners title. The best way forward is not to stay the petition. But such of the issues if any, as are common in both the suits and the petition are to be left out to be dealt with in the pending suits.

31. There is need to explain why the suits are the best forum for this: The first reason is that the suits were filed earlier and are still pending. The second reason is that the petition as filed leaves out one crucial party – Kenya Railways Corporation. Kenya Railways corporation is a party in the pending suit. It is the party to which the suit land is said to belong. The third reason is that the prayers sought, though formulated differently in the petition, are also sought in the suits and, finally, or fourthly if you like, the objectives meant to be achieved by the petition can be achievable via the earlier suits.

32. It is not therefore possible to consider the merits of this petition. The earlier suits should have been brought to closure first. I note that even the issue of the gazette Notice now being challenged had been raised in the earlier suits when the 3rd respondent sought to have the suits marked compromised vide an application dated 7/4/2012 and filed on 8/8/2012. An appropriate response to that application would have brought out the issue raised in the petition.

33. But the petitioner decided to constitutionalize the issues by filing this petition. And it did so in an amateurish way, given that the earlier suits were left pending and are still in existence. I agree with the 3rd respondent's assertion that the petition is an after-thought and possibly a reaction by the petitioner to 3rd respondents application to have the earlier suits marked compromised. Petitions like this one where the issues raised are the same issues raised in pending suits must be discouraged. There is no need of unnecessarily constitutionalizing issues which can be handled by way of ordinary suits. And this is particularly so where such suits are already filed. And it seems to me that all the issues raised can be well canvassed in the pending suits.

34. Given what I have said heretofore, it is clear that the petition herein is for dismissal and I hereby dismiss it with costs. The upshot of the dismissal is that the parties should go back to the earlier suits and ventilate their issues there. It can be seen that I have avoided determining weighty issues raised in the petition. I have done so because the earlier suits are still pending.

HON. A.K. KANIARU

ENVIRONMENT & LAND - JUDGE

30/6/2015

30/6/2015

A.K. Kaniaru J.

Oyugi N.O. Court clerk

No party present

Interpretation: English/Kiswahili

M/S Eredi (AG's office) for 1st & 2nd Respondents

M/s Maina for 3rd Respondent

Gichaba (absent) for petitioner

Court: Judgement read and delivered in open court. Right of appeal 30 days.

HON. A.K. KANIARU

ENVIRONMENT & LAND - JUDGE

30/6/2015