



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 14 OF 2013

**IN THE MATTER OF: ARTICLES 19, 20, 22, 23, 64 AND 159 OF THE
CONSTITUTION OF KENYA (2010)**

AND

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLE 40 OF THE
CONSTITUTION**

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF
RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE
AND PROCEDURE RULES 2013**

BETWEEN

JOYCE MUTHONI WACIUMA.....PETITIONER

=VERSUS=

- 1. CABINET SECRETARY FOR LANDS, HOUSING AND URBAN DEVELOPMENT**
- 2. NATIONAL LAND COMMISSION**
- 3. CHIEF LAND REGISTRAR- KILIFI COUNTY LANDS OFFICE**
- 4. HONOURABLE ATTORNEY GENERAL.....RESPONDENTS**

JUDGMENT

Introduction:

1. What is before me is the Petition dated 26th November 2013. In the Petition, the Petitioner has averred that she is the registered proprietor of land known as Chembe/Kibabamshe/424 (the suit property) which was registered in her favour on 21st December 1978.
2. The Petitioner has averred that she purchased the suit property from Anavati Nyikuvi and David Masinde Anavati for Kshs.60,000 whereafter she took possession of the same.
3. It is the Petitioner's case that when she conducted an official search in the year 2008, she was informed that the title in respect of Chembe/Kibabamshe/424 did not exist and that neither was any register, file or green card in existence in the District Land Registry; that she instructed her advocate to publish a caveat Emptor in the Daily Nation newspaper of 12th January 2009 and that she apprehends that her property may have been fraudulently acquired or illegally transferred to other people.
4. The Petitioner has contended in the Petition that any illegal and irregular transfer and or interference with her ownership of the suit property by any of the Respondents contravenes her right to property and all interests conferred by registration, as guaranteed by the Constitution and the Land Registration Act.
5. It is the Petitioner's deposition that as the registered owner, she has an absolute and indefeasible title; that Section 79 of the Land Registration Act narrowly restricts the power and instances in which the Land Registrar can alter the register and that the Respondents have acted in contravention of the fundamental right of the Petitioner as enshrined under Sections 25 and 26 of the Act and under Article 40 of the Constitution.
6. The Petitioner is seeking for a declaration that the Respondents have contravened the her right to property under Article 40 (1) of the Constitution; that the Respondents are in breach of the contract entered into by the Petitioner and the State and that any act carried out by any of the Respondents in the alienation, transfer, deletion, subdivision or in any way touching on land known as Chembe/Kibabamshe/424 is void and any title subsequently issued thereto should be cancelled with immediate effect.
7. The 1st, 2nd and 3rd Respondents were served with the Petition on 2nd December 2013 while the 4th and 5th Respondents were served on 28th November 2013.
8. However, none of the Respondents filed a response to the Petition.
9. The Petition proceeded for hearing by way of affidavit evidence.

The Petitioner's submissions:

10. The Petitioner's advocate submitted that the facts as laid down by the Petitioner in her Supporting Affidavit have not been challenged. Counsel submitted that the Petitioner was the first registered proprietor of the suit property; that the effect of registration and issuance of the title deed dated 21st December 1978 was to vest in the Petitioner the absolute ownership of the land and that the rights of a proprietor whether acquired on first registration or for valuable consideration are indefeasible.
11. Counsel submitted that Article 40 of the Constitution guaranteed property rights her every person and that Article 40 (3) provides that no person shall be deprived of property without prompt and just compensation being made to the person deprived of the property.

Analysis and findings:

12. The Petitioner's case is that he was registered as the proprietor of land known as Chembe/Kibabamshe/424 on 21st December 1978.
13. The Petitioner has annexed on the Supporting Affidavit the Land Certificate that was issued to her on

21st December 1978 in respect to the suit property. The Petitioner has also annexed a Memorandum of Sale showing that she purchased the suit property from Thomas Anarati Nyikuvu and David Masinde Anarati Nyikuvu for Kshs.60,000 on 6th September 1978.

14. The Land Certificate shows that the register in respect of the suit property was opened on 30th May 1978 and the same was depicted on the Registry Index Map sheet number 22.

15. The Registry Index Map Sheet number 22 has been annexed on the Petitioner's Supplementary Affidavit with the last amendment having been made on 22nd January, 2014. The map shows that parcel number 424 is still in existence.

16. The Petitioner's complaint is that although she is holding the original Title Deed in respect to the suit property, the Respondents have failed or refused to avail to her the register to enable her transact on the land.

17. When she sought to register a caution after noticing human activities on the land, the 4th Respondent declined to register it on the ground that the suit property did not exist. The Petitioner has annexed a copy of the Application for registration of a caution on which the registrar made the following remarks:

“ I cannot register this caution because the title does not exist.”

18. A letter dated 7th June, 2013 by the Chief Land Registrar and addressed to the District Land Registrar has also been annexed on the Supporting Affidavit. In the same letter, the Chief Land Registrar inquired from the District Registrar for information in respect to the proprietorship of the suit property. The said letter was copied to the Petitioner's advocate. The Petitioner has never been informed if the District Land Registrar ever responded to the said letter.

19. The Petitioner in this matter cannot conduct a personal or official search in respect to the suit property and yet she is holding the original Land Certificate.

20. The Respondents have not rebutted the Petitioner's deposition that the suit property was lawfully registered in her name. Indeed, there is no allegation by the Respondents that the Land Certificate that the Petitioner is holding was acquired unlawfully.

21. The Land Certificate was issued to the Petitioner on 21st December 1978 under the Registered Land Act (repealed). The Registered Index Map shows that indeed the said property is in existence on the ground.

22. Section 37(1) of the Registered Land Act (repealed) provides that every document purporting to be signed by the Registrar shall, in all proceedings, be presumed to have been signed until the contrary is proved.

23. The Respondents have not denied that the Registrar signed the Land Certificate in possession of the Petitioner.

24. Section 28 of the Act provides that the rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in the Act.

25. The instances where the rights of a proprietor can be defeated are provided for under section 143(1) of the repealed Act which is the same in all respect with Section 80 of the Land Registration Act.

26. The difference between Section 143 (1) of the repealed Act and Section 80 of the Land Registration Act is that under the repealed Act, the Court could not rectify a register even where fraud or mistake had been proved, if it is a first registration. In the latter Act, it does not matter that the court is dealing with a

first registration.

27. I have always held the view that the exception provided under the provisions of section 143 (1) of the repealed Act in respect to the circumstances under which the court cannot order for rectification of a register even when fraud has been proved to be unconstitutional in view of the provisions of Article 40(6) of the Constitution.

28. I say so because Article 40(6) of the Constitution clearly provides that the right to acquire and own property does not extend to any property that has been found to have been unlawfully acquired, whether it is a first registration or not.

29. Once it is shown that a person unlawfully acquired land, it does not matter that he was the first registered owner of the same.

30. Considering that Section 27 of the repealed Act provides that the registration of a person as the proprietor of land vests in that person the absolute ownership of land, and in view of the fact that the Respondents have not denied that indeed the Petitioner is the registered proprietor of the suit property, it behooves this court to protect the rights of the Petitioner to own the suit property pursuant to the provisions of Article 40(1) of the Constitution.

31. The Petitioner has produced evidence of ownership of the suit property by annexing a copy of the Land Certificates. In the absence of evidence to the contrary, I allow the Petition dated 26th November 2013 in the following terms:

(a) The Respondents to reinstate and make available land records, including the register pertaining to land known as Chembe/Kibabamshe 424 as was on 21st December 1978.

(b) The Respondents to retain the records of the Petitioner in the register pertaining to Chembe/Kibabamshe/424 in the Kilifi Land Registry records as owner of the suit property as provided for under Sections 25 and 26 of the Land Registration Act and Article 40(1) of the Constitution.

(c) The Respondents are hereby prohibited and permanently restrained either by themselves, agents, servants or any other land official acting under them from interfering with the Petitioner's ownership, occupation, use, proprietorship and quiet enjoyment of rights to the suit property.

(d) The Respondents to pay the costs of the Petition.

Dated and delivered in Malindi this 26th day of **June**, 2015.

O. A. Angote

Judge