



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO. 105 OF 2012

IN THE MATTER OF THE CONTRAVENTION OF THE RIGHT TO PROPERTY

**IN THE MATTER OF THE PURPORTED REVOCATION OF TITLE NO. NGONG/NGONG
BLOCK 2/642**

BETWEEN

SUSAN NJAMBI KARIUKI PETITIONER

AND

THE DISTRICT LAND REGISTRAR

KAJIADO DISTRICT 1ST RESPONDENT

THE COMMISSIONER OF LANDS 2ND RESPONDENT

THE MINISTER,

MINISTRY OF LANDS 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. On the 11th day of November 2011, **Salome Kanyi Kariuki (Donor)** nominated **Susan Njambi Kariuki (Petitioner herein)** as her attorney and agent with powers and authority to institute suits on her behalf. On the 4th April 2012 the petitioner filed a constitutional petition on behalf of the Donor against the respondents in respect of Title No. **Ngong/Ngong Block 2/642** (subject land) which was revoked by the 1st respondent.
2. She stated that the Donor purchased the subject land from Joyce Nairesiae at Kshs.1,550,000. Prior to the sale transaction she conducted a search at the Kajiado Land Registry. The transfer was effected and a certificate of lease issued on the 4th July 2008. In March 2010 the Donor's building plan could not be approved because the subject land was under investigation by the Kenya Anti-Corruption Commission. On the 26th November 2010 the District Land Registrar Kajiado revoked the Donor's title – on the ground that it was among several parcels within Ngong Town which had been set aside as Public Bus Terminal and that the allocation of the title to private individuals was illegal and unconstitutional.

3. Further she averred that the action of revoking the Donor's title to the parcel of land was an infringement of her rights and unconstitutional. The revocation violates **Articles 40 and 64 of the Constitution**. The donor was not accorded an opportunity to defend herself or her title before the revocation .

4. Seeking intervention of the court under **Article 22 and 23** of the Constitution, the petitioner sought relief as hereunder:

- ***A declaration that the Donor's rights individually or in association with others to acquire and own property without arbitrarily being deprived of the same as guaranteed by Article 40 of the constitution have been contravened.***
- ***A declaration that the action of the Kajiado District Land Registrar (1st Respondent) in revoking the petitioner's right to own and hold land was unconstitutional and illegal.***
- ***A declaration that the decision to revoke the petitioner's title to the suit parcel of land is null and void to the extent that it violates the fundamental rights and freedoms of the petitioner provided by Article 40 of the constitution.***
- ***A declaration that, the Ministry of Lands being legal and sole repository of land records in Kenya, the petitioner was not under any duty to check the records or plans of any other Ministry or department in respect of land.***
- ***A declaration that in the alternative, the Ministry of Lands shall make prompt payment in full of just compensation to the petitioner pursuant to the express provision of Article 40 of the constitution.***

5. The petitioner filed an affidavit in support of the petition where she deponed interalia that: the vendor, Joyce Nairesiae, had previously applied and was thereafter granted a consent to transfer the subject land by the Olkejuado County Council; On the 3rd July 2008, a Rates Clearance Certificate No. 16186 was issued by the Olkejuado County Council for the subject land. On 2nd July 2008 the transfer of land was lodged at the Kajiado District Land Registry and on the 4th July 2008 a certificate of lease was issued by the Registrar to Salome Kanyi Kariuki.

6. The Attorney General entered appearance on behalf of all the respondents but did not file any further pleadings as required by the law.

7. As correctly submitted by Counsel for the Petitioner, Articles 22 and 23 of the constitution gives all individuals the right to seek legal redress in court where it is alleged that a right or fundamental freedom is contravened.

8. Article 40 of the constitution protects the right to ownership of property. Any individual should not be arbitrarily deprived of property. According to Article 40 (3):-

“The state shall not deprive a person of property of any description or of any interest in, or right over, property of any description, unless the deprivation –

- a. ***Results from an acquisition of or any interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter five; or***
- b. ***Is for a public purpose or in the public interest and is carried out in accordance with the constitution and any Act of Parliament***”

9. Affidavit evidence presented by the Petitioner stands unchallenged. The Petitioner purchased Title no. Ngong Township Block 2/642 from Joyce Nairesiae. An official search conducted at the Kajiado Land Registry showed that as at 11th August 2006 Joyce Nairesiae was the proprietor of

the subject Land. The property was transferred to the petitioner following a consent granted to the vendor by Olkejuado County Council. Rates were paid to the Council. Consequently a Certificate of Lease was issued to the Petitioner on 4th August, 2008. I have taken note of the bankers cheque issued on 8th July 2008 in the name of Joyce Kimojino. However the same having not been challenged may not be questionable.

10. A certificate of lease is a legal conferment of title as provided by section 26(1) of the Land Registration Act which states:

“26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- a. *on the ground of fraud or misrepresentation to which the person is proved to be a party; or*
- b. *where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”*

11. Although no evidence was adduced as to how Joyce Nairesiae acquired the subject land, a certificate of title having been issued, it ought to be viewed that the Petitioner acquired the title through legal process. The indefeasibility of the said title can therefore, only be challenged on account of illegality. The Court of Appeal in the case of **Henry Muthee Kathurima vs. Commissioner of Lands & Another (2015) eKLR** considered such scenario and stated thus:

“We have considered the provisions of section 26 of the Land Registration Act in light of the provisions of Article 40 (6) of the constitution and it is our considered view that the concept of indefeasibility of title is subject to Article 40(6) of the constitution. We hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the property was unlawfully acquired.”

12. Further evidence adduced by the petitioner reveals that she was barred from developing the property because it was under investigation by the Kenya Anti-Corruption Commission. Thereafter the title was revoked. According to Gazette Notice No. 15581, it was revoked amongst other titles on the ground that the portion had been reserved for public purpose under the relevant provisions of the Constitution. The allocation was stated to have been illegal and unconstitutional.

13. Had the respondents tendered evidence, they would have expounded on what prompted them to reach the conclusion. The allocation having been illegal and unconstitutional would suggest that it was acquired unlawfully. The question that is however left begging is why the title was certified as being clean and consequently transferred to the petitioner? The Respondents were to blame. The revocation herein infringed on the Petitioner’s rights.

14. I have been asked to declare the revocation null and void. I do note that a total of thirty one (31) titles were revoked. The land in issue was earmarked for a Bus Terminus. It will be unconstitutional for the order to be reversed.

15. However, it is apparent that the respondents infringed the Petitioner’s rights. Therefore they must compensate her.

16. In the premises I do order the respondents severally and jointly to pay the Petitioner Kshs.1,550,000 that she expended on the purchase of the subject land and interest thereon since the 26th November 2010 to date.

17. The respondents are also condemned to pay the costs of the Petition.

18. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 28th day of JULY, 2015.

L.N. MUTENDE

JUDGE