



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

PETITION NO. 5 OF 2011

**THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOM OF THE INDIVIDUAL) HIGH COURT
PRACTICE AND PROCEDURE RULES, 2006 ARTICLE 262 (19) OF THE TRANSITIONAL
AND CONSEQUENTIAL PROVISIONS.**

A N D

**IN THE MATTER OF ARTICLES 21(1), 22 (3) C, 23(1) & (3) 40(1) (A) AND (B) 2 (A) AND (B)
AND 40 (6) OF THE CONSTITUTION OF KENYA 2010**

B E T W E E N

TERESA NJERI..... 1ST PETITIONER

BERNARD MUREITHI 2ND PETITIONER

HELLEN KHANALI LWANE 3RD PETITIONER

JOESPH MBOYA KIDOYI 4TH PETITIONER

AGGREY BUNYALI 5TH PETITIONER

WYCLIFF A. WANGOLA 6TH PETITIONER

RICHARD BWIRE 7TH PETITIONER

SAMSON MURERE 8TH PETITIONER

A N D

MACHEO LIMITED.....1ST RESPONDENT

COMMISSIONER OF LANDS.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

MUNICIPAL COUNCIL OF KITALE.....4TH RESPONDENT

JUDGMENT

INTRODUCTION

1. The Petitioners are individuals who are operating Jua Kali business near Kitale District Hospital at a place commonly known as Lions stage within Kitale Town. The first petitioner is a limited liability company incorporated in Kenya and is the registered owner of **LR. No. Kitale Municipality Block 5/55**. On which the petitioners are operating their businesses.

2. The petitioners brought this petition against the four respondents claiming the following reliefs:-

a) A declaration that the petitioners have a legitimate proprietary interest in land parcel **Kitale Municipality Block 5/55** and should not be evicted therefrom.

b) A declaration that the second respondent's act of registering the first respondent as the owner of land parcel **Kitale Municipality Block 5/55** and the subsequent issuance of a certificate of title to the first respondent as well as the first respondent's discrete acquisition of the said title have violated the Petitioners' Constitutional Rights to property guaranteed by Article 40 of the **Constitution of the Republic of Kenya 2010**.

c) A declaration that the fourth respondent's incessant threats of eviction of the Petitioners from land parcel **Kitale Municipality Block 5/55** as well as the imminent actualization of the same without following due process is a violation of the Petitioners' Constitutional rights to property.

d) A mandatory injunction compelling the second respondent Commissioner of Lands to cancel the certificate of title issued to the first respondent in respect of land parcel **Kitale Municipality Block 5/55** and in its place to issue a certificate of title to the petitioners for the same parcel of land.

e) That the second respondent Commissioner of Lands do transfer land parcel **Kitale Municipality Block 5/55** to the petitioners jointly and in default the Deputy Registrar of the High court of Kenya in Kitale to sign transfer forms to have land parcel Kitale Municipality Block 5/55 transferred to the petitioners jointly in their joint names.

f) That the first and second respondents do pay compensation to the petitioners.

g) An injunction restraining the fourth respondent from evicting the petitioners from land parcel Kitale Municipality Block 5/55.

h) Costs of this petition

i) Any other or further relief(s) as this Honourable Court may be pleased to grant.

3. The first, second and third respondents who had been duly served did not file any response to the petitioners petition. It is only the fourth respondent who filed a reply to the petition.

PETITIONERS CASE

4. The Petitioners contend that they were allocated the place where they are operating by the fourth respondent in 1978 on temporary basis. The petitioners cleared the area which was bushy and they set up temporary structures from where they have been operating their Jua Kali business. They have been paying for their temporary occupation licences to the fourth respondent since then.

5. In 1994 the petitioners heard that the land on which they had been operating had been allocated to a company based in Nairobi (first respondent). The Petitioners later learnt that the first respondent had obtained certificate of title to the land in 1996. They made a complaint to the Commissioner of Lands seeking his intervention. There were a number of correspondences made between the Commissioner of Lands, District Physical Planning Officer and District Lands Officer. All these correspondences were in a bid to assist the petitioners.

6. The petitioners are now contending that the first petitioner discreetly obtained title to the land in question without the Commissioner of Lands considering them having been on the land since 1978. The petitioners contend that they should have been given first priority in the allocation of the land. The petitioners state that they have been under constant threats of eviction from the fourth respondent. They now contend that their rights to property have been violated. It is on this basis that they are seeking the reliefs in this Petition.

FOURTH RESPONDENT'S CASE

7. The fourth respondent has generally denied the contentions by the petitioners. The fourth respondent particularly denies that the town clerk ever wrote a letter dated 10.11.1994 stating that the petitioners have been paying the Municipal Council licences since 1978. The fourth respondent also denied that its town clerk ever received a letter dated **8.9.1994** from the District Lands office, Trans-Nzoia. The fourth respondent further denies ever issuing any trading licences to the Petitioners.

ANALYSIS OF PETITIONERS CASE

8. I have carefully gone through the petition by the Petitioners as well as the documents in support of the petition. There is no contention that the first respondent is holding title to the land which the petitioners are occupying. The petitioners have annexed a copy of certificate of lease issued on **29.4.1996** to Macheo Limited the first respondent. According to this certificate of lease, Macheo Limited was given lease hold over **Kitale Municipality Block 5/55** for a period of 99 years. It is therefore apparent that Macheo Limited was given a letter of allotment to the land on or around **1.5.1994**.

9. There is evidence that the first respondent filed a civil case against the Petitioners in 1996. This was in Eldoret High Court civil case **No. 149 of 1996** which was later transferred to Kitale High Court. The first respondent wanted to evict the petitioners from the land. This suit was however dismissed for want of prosecution on **5.10.2004**. The first respondent filed an application seeking to set aside the orders dismissing its case but this application was too dismissed for non attendance on **17.11.2009**.

10. Though the fourth respondent is denying that the petitioners have never paid any levies to it, some of the petitioners such as the first petitioner was given a bill for temporary occupation licence on **15.2.2010** and on **6.4.2010**. The second petitioner was given a bill for market and slaughter fees on **25.2.2010**. He was also given a bill for ground rent on **16.3.2010**. All these bills were issued by the fourth respondent. Some of the bills were paid as per the documents annexed to the petition. It is therefore not right for the fourth respondent to claim that the petitioners have never paid any amounts to it.

11. The Petitioners are contending that their Constitutional rights have been violated. They have pointed out Article **40 1(a) and (b)**. The said Article provides as follows:-

“40 (1) subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property:-

a) of any description; and

b) in any part of Kenya.”

12. It is clear from the above Article that the right which is protected is the right to acquire and own property of any description and in any part of Kenya. The Petitioners had been granted temporary occupation licences to enable them carry out their business. They had not been allocated the said portions. This is why they were paying temporary occupation licences as late as 2010 as per documents filed together with their petition. The petitioners have not demonstrated that they ever applied to the commissioner of Lands to allocate them the portions they were occupying prior to 1994 when the first respondent appears to have obtained letter of allotment which enabled him to process and obtain certificate of title in 1996.

13. The Petitioners have been on the land on temporary basis. If they had any intention of being considered for allocation, they should have done so. Since they did not do so, the land was given to the first respondent who must have applied for it and obtained the same. Neither the second respondent nor the fourth respondent is saying that the first respondent followed the wrong procedures in acquisition of the land in issue. The Petitioners have not demonstrated that the acquisition of the land by the first respondent was fraudulent. It was all along known that the petitioners were on the said land on temporary basis. If the Commissioner of Lands felt that the first respondent deserved to have it, that decision should not be blamed on the first respondent.

14. The correspondence annexed to the Petitioners petition show that the petitioners raised their concerns after the first respondent had already been allocated the land. There were attempts to accommodate the petitioners after the allocation by proposals being made to change the PDP of the area to accommodate the petitioners. This suggestion came on **13.4.1999** when already the first respondent had obtained a certificate of title. There is nothing to show that the first petitioner obtained the title in a fraudulent manner. The Commissioner of Lands was under no obligation to consult the Petitioners before allocating the land to the first respondent. It was known that the Petitioners were on the land on temporary basis and they had not shown any interest in being allocated the land. Their allegations that the first respondent did not deserve the land and or that it grabbed the same has no basis.

15. The Petitioners were not in the process of acquiring the land or had not acquired it. They cannot therefore claim that their Constitutional rights under Article 40 of the Constitution have been violated. The land is already the property of the first respondent who has title to it. There is no evidence to suggest that the acquisition was fraudulent and therefore its Constitutional right to acquisition of property will be violated if the Petitioners petition is allowed.

16. The Petitioners advocate referred to two High Court decisions from Kitale Court in support of the petitioners' case. The first case involved a church and some squatters. The church was claiming 2 ½ acres when it was entitled to only ½ an acre. This case has no bearing with this petition. The Petitioners are not squatters on the suit land. The Petitioners were occupying the suit land on temporary basis. The other case of Rutongot Limited and Others, the issue was quite different. Rutongot was in the process of acquiring land when the Government deprived the company of the same. Rutongot Limited had paid 400,000/= but the Government came in and bought the same land denying the company its right to acquisition of property. This is unlike the petitioners in this case who were not in the process of acquiring the land for which they are now claiming to be registered through the court cancelling the first respondent's title.

DETERMINATION

17. I find that the Petitioners petition cannot succeed in the circumstances. The same is hereby dismissed with no order as to costs.

Dated signed and delivered at Kitale on this 16th Day of September 2015.

E. OBAGA

JUDGE

In the presence of Professor Sifuna for Petitioners and Mr. Wanyama for 4th defendant. Court Assistant – Winnie.

E. OBAGA

JUDGE

16.9.2015

