



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**PETITION NO. 2 OF 2013**

**IN THE MATTER OF: ARTICLE 22, 23, 258 AND 259 OF THE CONSTITUTION OF KENYA  
2010**

**AND**

**IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL  
RIGHTS AND FREEDOMS UNDER ARTICLES 27,31, 40 AND 47 OF THE CONSTITUTION  
OF KENYA 2010**

**AND**

**IN THE MATTER OF: LAND ACT, ACT NO. 3 OF 2012 AND LAND REGISTRATION ACT,  
ACT NO. 6 OF 2012**

**AND**

**IN THE MATTER OF: L.R. GARISSA MUNICIPALITY BLOCK 111/444**

**OMAR SHARIFF MOHAMED ..... PETITIONER**

**VERSUS**

**PERMANENT SECRETARY MINISTRY OF INFORMATION AND**

**COMMUNICATION .....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**PERMANENT SECRETARY MINISTRY OF INTERNAL SECURITY .....3<sup>RD</sup>  
RESPONDENT**

**CHIEF LANDS REGISTRAR ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

This petition was filed by the petitioner on 24<sup>th</sup> August 2012 citing the following provisions of the law:-

1. *Articles 22, 23, 258 and 259 of the Constitution of Kenya*
2. *Articles 27, 31, 40 and 47 of the Constitution of Kenya on fundamental rights*

### **3. *The Land Act and the Land Registration Act.***

It is the petitioner's case that whereas he is the registered proprietor of all that property known as Title Number GARISSA MUNICIPALITY BLOCK 111/444 situated in Garissa (hereinafter referred to as the suit property) having acquired the same from one MAHAT KUNO ROBLE through a transfer and having obtained a Certificate of lease from the Kenya Government dated 13<sup>th</sup> February 2012, the respondents have unilaterally claimed that the said property belongs to the 1<sup>st</sup> respondent and have proceeded to expropriate the petitioner's said property in complete disregard of the provisions of ***Articles 31, 40 and 47 of the Constitution of Kenya*** and other relevant laws. This gave rise to this petition in which the petitioner seeks the following reliefs:-

- 1. A declaration that the Certificate of lease issued to the petitioner in respect of Garissa Municipality Block 111/444 is conclusive evidence of ownership and that the petitioner is the absolute and indefeasible owner of the same***
- 2. A declaration that the petitioner'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 and will be contravened if the respondents are not restrained by an order of this Court***
- 3. A declaration that the actions of the 1<sup>st</sup> and 3<sup>rd</sup> respondents to illegally and arbitrarily expropriate and invade the petitioner's property is null, void and unlawful to the extent that it violates the fundamental rights and freedoms of the petitioner as envisaged under Articles 27, 31, 40 and 47.***
- 4. An order of prohibition do issue to prohibit the respondents by themselves, servants, agents or whomsoever from alienating the petitioner's property comprised in title number Garissa Municipality Block 111/444 or in any manner interfering with the petitioner's possession and enjoyment of the said property***
- 5. Damages***
- 6. The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice***
- 7. Costs be awarded to the petitioner in any event***

The 1<sup>st</sup> respondent through its acting Director Mr. Olewe Owiti filed a replying affidavit and as far as is relevant to this petition deponed in paragraph 3 as follows:-

***“That on 9<sup>th</sup> December 1988, the Ministry was allocated a plot measuring about 1.4 acres for the purpose of construction of District Headquarters – letter annexed marked BNI)”***

Mr. Owiti also deponed in paragraph 6 as follows:-

***“That the person who sold the land to the petitioner must have obtained the title either by fraud or mistake. Since the title by the earlier registered owner was not clean, he did not have one to pass to the petitioner”***

And in paragraph 9 he deponed as follows:-

***“That the truth of the matter is that it is the petitioner who is encroaching on the public land and it is imperative he should be stopped”***

When counsels for the petitioner and the respondents appeared before me on 8<sup>th</sup> October 2013 following the transfer of this case from the High Court in Garissa, it was agreed that the petition be canvassed by way of written submissions to be filed on or before 7<sup>th</sup> November 2013. However, when the matter came up before me on 3<sup>rd</sup> December 2013, Mr. Mureithi for the petitioner informed me that he had spoken to Mr. Kakoi from the Attorney General's Chambers who had informed him that the respondents would only be relying on the replying affidavit of Mr. Owiti. The petitioner did however file submissions as earlier agreed.

I have considered the petition, the supporting documents and submissions by the petitioner's counsel as well as the 1<sup>st</sup> respondent's replying affidavit.

It is not in dispute that the property in dispute is registered in the names of the petitioner and a lease was issued to him on 13<sup>th</sup> February 2012 (see Exhibit OSM 1 (d)) The said property was originally registered in the names of one MAHAT ROBLE who, according to the petitioner, sold the property to him with the knowledge of the Chief Land Registrar of the Government of Kenya who is the 4<sup>th</sup> respondent herein. The lease issued to the petitioner was under the now repealed **Registered Land Act** and under **Section 27 of the said Act**

***“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”***

A similar provision is found in **Section 24 (a) of the new Land Registration Act – Act No. 3 of 2012**. Once a certificate of title has been issued by the Registrar, it shall be treated by all Courts as prima facie evidence that the person named therein as the proprietor of the land is the absolute and indefeasible owner subject only to the encumbrances easements, restrictions and conditions endorsed thereto. Such title cannot be challenged except:-

- a. ***On the ground of fraud or mis-representation 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.***

What is the respondents' response to this registration of the property in the petitioner's names? As indicated above, the replying affidavit of the 1<sup>st</sup> respondent is that the person who sold the land to the petitioner must have obtained the title either by fraud or mistake. It is further the 1<sup>st</sup> respondent's case that the title is ***“not clean”***. However not a single iota of evidence was placed before the Court to even suggest that the MAHAT KUNO ROBLE who sold the property to the petitioner obtained it by fraudulent means. An allegation of fraud is such a serious claim imputing criminality and the same cannot be proved by mere assumptions or suppositions as the respondents herein have tried to do. Clearly, the averments of Mr. Owiti could not have been made with any seriousness as there is even no suggestion of when the fraud was committed, where or by whom. Indeed no explanation is preferred as to why those involved in the fraud, if any, were not brought to book. The allegation that the title was obtained through fraudulent means and that the title is ***“not clean”*** can only be for dismissal.

The 1<sup>st</sup> respondent's other response to this petition as per the replying affidavit of Mr. Owiti is that the property in question was allocated to the 1<sup>st</sup> respondent to put up the District Headquarters on 9<sup>th</sup> December 1988. Annexed to the replying affidavit of Mr. Owiti is a letter dated 9<sup>th</sup> December 1988 from the District Commissioner Garissa and addressed to the District Information Officer Garissa in the following terms:-

***“RE: PLOT ALLOCATION”***

***“This is to let you know that your Department of Information has been allocated a plot of about 1.4 acres at the proposed site for the Garissa District Headquarters for construction of your offices.***

***Please make arrangements to fence and develop the plot”***

The above letter is not a letter of allotment as I understand it. Such a letter would normally be issued by the Commissioner of land and not the District Commissioner. Even assuming that the letter in question was a letter of allotment, such a letter could not have passed any title to the 1<sup>st</sup> respondent and neither can it defeat the rights of the petitioner who has in his possession title thereto duly issued by the Registrar of Lands. In the case of **WRECK MOTORS ENTERPRISES VS THE COMMISSIONER OF**

**LANDS & OTHERS C.A CIVIL APPEAL NO. 71 of 1977 (NBI)**, the appellant's application for a plot had been endorsed by H.E the then President but the said plot was registered in the names of the 2<sup>nd</sup> respondent. In dismissing the appellant's claim to the plot, the Court of Appeal stated as follows:-

***“H.E the President only approves the application for consideration by the Commissioner of Lands for allocation of any such property. It does not amount to the applicants obtaining title to such lands. Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held”***

See also the case of **Dr. JOSEPH N.K. Arap NG'OK VS JUSTICE MOIJO OLE KEIWUA C.A CIVIL APPLICATION NO. 60 of 1997 (NBI)**. It is true that the petitioner in this case has not produced any letter of allotment or application for the property in dispute. However, that alone cannot be a reason to impugn his title to the property which, under the law, is prima facie evidence that he is the absolute and indefeasible owner of the same. If there was any fraud in the acquisition of the said property, no other person was better placed than the 4<sup>th</sup> respondent herein to adduce evidence of any fraud or impropriety in the process of acquiring the same. No such evidence was placed before me. In the circumstances, I have no hesitation in declaring that the certificate of lease issued to the petitioner in respect of Garissa Municipality Block 111/444 is conclusive evidence of ownership of the said property and that he is the absolute and indefeasible owner of the same.

It is also the petitioner's case that the respondent's employees chased away his employees who were trying to construct a perimeter wall around the dispute property and thereafter proceeded to lay claim over the property in violation of **Articles 31, 40 and 47 of the Constitution** and also the **Land Act** which provisions provide for the right to property and fair administrative action. **Article 31 of the Constitution** provides for one's right to privacy which includes the right not to have their property seized. **Article 40 (1) of the Constitution** which is more relevant to this case provides as follows:-

***“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”***

As the petitioner has a title to the property in dispute, that right has to be protected. If that right is to be taken away for any reasons, it has to be through a decision that is lawful and procedurally fair. **Article 47 of the Constitution** says so. In paragraph 9 of the replying affidavit of Mr. Owiti, he depones that it is the petitioner:-

***“---- who is encroaching on the public land and it is imperative he should be stopped”.***

As it is already clear by now, the disputed property is registered in the names of the petitioner. It is not public land and no evidence has been placed before this Court to demonstrate that it is infact public land. And if there was any justification for dispossessing the petitioner of that land, he was entitled to a fair administrative action in challenging his title to the said property. This could only be done in the Courts. Any attempt to acquire another person's land or any other property otherwise than in accordance with the law amounts to an unlawful expropriation and it is the duty of the Court to protect one's right to property. Indeed under **Article 40 (3) of the Constitution**, the state is prohibited from depriving any person of property of any description except as provided for under the law. On the evidence before me, I have no hesitation in finding that the 1<sup>st</sup> and 3<sup>rd</sup> respondents' actions on 7<sup>th</sup> August 2012 of invading the petitioner's property and chasing away his employees was unlawful as it violated his rights as envisaged under the Constitution. The petitioner is therefore entitled to the orders prohibiting the respondents by themselves, their servants, agents or anyone whomsoever from alienating the dispute property or in any other manner interfering with the petitioner's possession and enjoyment of the said property.

Although the petitioner prayed for damages, it was not demonstrated that any damages were payable and therefore I will not award any.

The petitioner is however entitled to costs.

Ultimately therefore, upon considering the petition herein, I am satisfied that other than the prayer for damages, the petitioner is entitled to all the other reliefs sought therein which I hereby grant.

It is so ordered.

**B.N. OLAO**

**JUDGE**

**24<sup>TH</sup> FEBRUARY, 2014**

24/2/2014

**Coram**

**B.N. Olao – Judge**

CC – Mwangi

Mr. Ahmednasir for Petitioner - present

No appearance for Respondent

**COURT:** Judgment delivered this 24<sup>th</sup> day of February, 2014

Mr. Ahmednasir for petitioner present

No appearance for respondent.

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**24<sup>TH</sup> FEBRUARY, 2014**