



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC PETITION NO. 7 OF 2018

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLE 19, 22,
23, 40, 47 AND 165 (6)(7) OF THE CONSTITUTION OF KENYA 2020**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 23, 27, 40 OF**

THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF PLOT NO. NYERI/MUNICIPALITY BLOCK 1/1456

JOSEPH MWANIKI MUCHIRA.....PETITIONER

-VERSUS-

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE PERMANENT SECRETARY MINISTRY OF TRANSPORT,

INFRASTRUCTURE, HOUSEING AND URBAN DEVELOPMENT.....2ND RESPONDENT

THOMAS MUNDIA.....3RD RESPONDENT

JUDGMENT

BACKGROUND

1. By this Petition dated and filed herein on 3rd October, 2018, Joseph Mwaniki Muchira (the Petitioner) prays:

1. That a declaration be issued that the Petitioner is the rightful owner of Plot No. Nyeri/Municipality Block 1/1456;
2. That a declaration (do) issue that the actions of the 1st, 2nd and 3rd Respondents amounted to violation of constitutional rights of the Petitioner herein and a permanent injunction (do) issue restraining them from any interference of the quiet possession of the petitioner of the suit land;
3. That the Land Registrar be compelled to remove any cautions, prohibitions and any cautions (sic) placed on the suit land;
4. That a declaration be issued to declare that the Petitioner be paid damages for violation of his fundamental rights and an abuse of his property; and

5. (That the) costs of the petitioner be paid by the Respondents jointly (and) severally).

2. Those prayers arise from the petitioner's contention that he is the registered proprietor of the said Nyeri/Municipality Block 1/1456 (*the Suit property*) having acquired the same in 1998. The Petitioner asserts that upon acquisition of the suit property, he paid all Government dues including stamp duty, rent, rates and survey fees upon which he obtained a lease for the land.

3. The Petitioner avers that there was a permanent house and servant quarter on the suit property which were duly transferred to him and that he has been renting out the same. He accused officers from the Ministry of Transport, Infrastructure, Housing and Urban Development (*the 2nd Respondent*) of proceeding to the premises and ordering the closure thereof without any notice or Court order and without giving him an opportunity to defend himself.

4. The Petitioner contends that the said actions amounted to eviction and repossession of the suit property in contravention of the laid down procedure and that the same have subjected him to public ridicule and amount to a violation of his Constitutional right to ownership of property as protected under **Article 40 of the Constitution**.

5. The three Respondents are however opposed to the grant of the orders sought. In a Replying Affidavit sworn on their behalf by the Nyeri County Director of Housing (*sued as the 3rd Respondent*) and filed herein on 14th December 2018, the Respondents aver that the Government quarter No. MG/91 situate on Plot No. Nyeri/Municipality Block 1/1456 was allocated to one Florence Wachira Warundi from 1st July, 2001 and that she used to pay house rent via check-off system.

6. The Respondents further aver that Florence Wachira Warundi continued to pay rent until 30th March, 2011 when she defaulted. By then she had paid 10% (Kshs.96,000/-) deposit required for the purchase of the Government house following an advertisement vide a circular dated 24th January, 2007 and another of 2nd March, 2007.

7. The Respondent assert that the sale of Government houses was cancelled through another circular dated 28th July, 2008 as advertised in the print media on 30th July, 2008. Following a directive from the 2nd Respondent, collection of rent payment through cash was brought to an end and vacation notices were issued to all non-civil servants including for the subject property.

8. The Respondents aver that the subject property had by then accumulated rent arrears of Kshs.61,000/- and that Eustace Wachira, the husband to Florence Wachira Warundi who had since died was not a *bona fide* tenant as at the time of the evictions. The house was thereafter allocated to another civil servant who continues to occupy the same as a tenant to-date.

9. The Respondent aver that the Petitioner has not attached any letter requesting him to pay Kshs.1,200,000/- to the 2nd Respondent and that there is similarly no validation letter from the 2nd Respondent that has been attached to signify the validation of the sale of the house to the Petitioner.

THE PETITIONER'S CASE

10. Following directions given herein on 13th February, 2019, it was agreed that the petition proceeds by way of oral evidence. In that respect the petitioner called one witness in support of his case.

11. PW1 – Joseph Muchira Mwaniki is the Petitioner himself. He relied on the supporting Affidavit filed on 3rd October, 2018 together with the petition as well as a Supplementary Affidavit filed on 22nd February, 2019. He told the Court that the Respondents had violated his rights by occupying the suit property together with the house built therein.

12. On cross-examination, PW1 testified that he had purchased the suit property from one Dominic Muthoga in 1998. He told the Court he had not produced a copy of the sale agreement between himself and the said Dominic as he did not find it necessary. PW1 conceded that in the Supporting Affidavit to his application for injunction, he had stated that he was duly allocated the plot in issue. He conceded he had not annexed the letter of allotment although he maintained he was issued with one after the purchase.

13. PW1 further told the Court that he had purchased an unsurveyed plot and that he could not recall when the land was subsequently surveyed. He further told the Court he had not produced any approval by the Commissioner of Lands even though he told the Court he had it. PW1 told the Court he had never been a tenant of the Ministry of Housing as a civil servant.

14. PW1 told the Court the plot in issue is not Government land and that it ceased to be so when he purchased the same on 17th January, 2011.

THE RESPONDENTS' CASE

15. The three Respondents equally called one witness who testified in support of their case.

16. DW1 – Thomas Gikonyo Mundia is the 3rd Respondent and the Nyeri County Housing Director. He relied on his Replying Affidavit as sworn in opposition to the Petition. DW1 told the Court that the suit property is still under the management of the County Housing Department and that there was a process of sale of non-strategic Government houses which was put in the media on 30th July, 2008.

17. DW1 told the Court that for public land to be alienated, there must be an approved PDP.

18. On cross-examination, DW1 told the Court the house belongs to the Ministry of Housing. He did not however have any documents or correspondence in regard to the ownership of the house. DW1 testified that for any Government land to be converted to private land, there must be in place an approved PDP. In the instant case he had not seen any survey or PDP.

19. DW1 conceded that the parcel of land was currently registered in the name of the Petitioner. He told the Court he was unaware if the Petitioner had completed paying land rents and rates.

DETERMINATION

20. I have carefully perused and considered the pleadings herein, the testimonies of the two witnesses and the evidence adduced at the trial. I have similarly considered the written submissions and authorities placed before the Court by the Learned Advocates for the parties.

21. The Petitioner has urged this Court to issue a declaration that he is the rightful owner of all that parcel of land known as Nyeri/Municipality Block 1/1456 together with the buildings erected thereon. In support of his case, the Petitioner testified that he is the registered proprietor of the suit land having purchased the same from one Dominic Muthoga in 1998.

22. The Petitioner told the Court he followed due process and had the suit land surveyed. He further told the Court that in the year 2010, he applied for the validation of the suit property and that on 15th November, 2010, the Director of Survey confirmed that the Petitioner was duly allocated the land and that the survey documents that were used were authentic.

23. It was his case that upon validation, the 2nd Respondent herein had requested that he pays the sum of Kshs.1.2 Million being the value of the development on the suit land. The Petitioner told the Court that upon payment of the sum on 30th August 2011, the Commissioner of Lands issued him with an invoice for Kshs.19,820/- for outstanding rates and a further Kshs.131,400/- for the preparation of the Certificate of Lease for the property. He was subsequently issued with the Lease in his name on 20th September, 2011.

24. The Petitioner told the Court that he proceeded to rent out the suit property. He accused the Respondents of forcefully moving into the compound and proceedings to occupy the house erected thereon on a date that was not disclosed.

25. The 3rd Respondent – Thomas Mundia is sued in his own name. At Paragraph 4 of the Petition however, he is described as the Director of Housing in charge of Nyeri County. It was not clear to me from the Petition whether he was sued in his personal capacity or as such a director in his official capacity. It was however clear that the Honourable the Attorney General (*the 1st Respondent*) had been sued as the legal representative of the Government for the wrongful acts attributed to the Permanent Secretary Ministry of Transport, Infrastructure, Housing and Urban Development (*the 2nd Respondent*).

26. It was not in dispute that prior to the registration of the Petitioner as the proprietor thereof on 20th September 2011, the suit property was Government land housing various civil servants. It was also apparent from the 3rd Respondent's Replying Affidavit that at some point in the year 2007, the Government was minded of disposing off some houses which were considered to be "non-strategic" to the civil servants who were in occupation thereof.

27. In that respect, according to the Respondents, the Government had commenced sale of the suit property referred to as Government quarter No. MG/91 to one Florence Wachira Warundu who was then in occupation. The decision to sell the houses was however subsequently rescinded vide a Government circular dated 28th July, 2008.

28. The Petitioner's claim to the suit property however appears to pre-date the Government decision of 2007 that had given consideration to the sale of the Government houses. The Petitioner did not tell the Court if there was such a decision to sell Government houses in the year 1998 when he claims to have purchased the property from the said Dominic Muthoga.

29. It was also unclear if the said Dominic Muthoga was a civil servant and/or on what authority he had sold the land to the Petitioner in 1998. The Petitioner did not produce the sale agreement between himself and the said vendor and this Court was thus left in the dark as to the terms of the said sale agreement.

30. It was however clear to me that when he had purported to purchase the suit property from the said Dominic Muthoga, the Petitioner was aware that the land and the house erected thereon were Government land. I say so because some 12 years after the purported sale, the Petitioner penned a letter on 8th November, 2010 to the Director of Housing, stating in the relevant portion as follows:

"RE: PLOT NO. NYERI/MUNICIPALITY BLOCK 1/1456

I hereby write to apply for validation of the above plot. I wish to commence development thereon immediately and therefore would like to pay for the development erected thereon.

Your immediate response in this regard shall be highly appreciated."

31. By this letter, it was clear to me that the Petitioner sought to have the Director of Housing to ratify his purchase of the Government property. While it was not clear if the Director responded to the letter, the Petitioner relied on another letter dated 15th November 2010 addressed to the Permanent Secretary Ministry of Housing by one J. M. Mwaniki the Director of Surveys to assert that he was duly allocated the parcel of land in issue. The second letter reads as follows:

MUNICIPALITY

Your letter Ref. No. dated 15th October, 2010 refers.

The survey was carried out as per the allotment letter Ref. No. dated 17th April, 1998 in favour of Dominic Muthoga Ndai.

It was realized that a portion of Government house compound had been excised out of the allocation and the Commissioner of lands had to be requested to verify and confirm the allocation documents and which he did on 22nd October, 2001.

The Registry Index Map was thus amended and forwarded to the Commissioner of Lands for Lease preparation. Therefore the Survey documents used for the purpose are authentic and you may proceed with the necessary action.”

32. From a perusal of the above letter, it was clear that the said Dominic Muthoga had purportedly been allocated the suit property in 1998 before he disposed off the same to the Petitioner the same year. Neither the said letter of allotment to himself dated 17th April, 1998 nor the letter from the Commissioner of Lands dated 22nd October, 2001 verifying and confirming the allocation of the Government house were produced in evidence in Court.

33. I did not however think that the Director of Housing and or the Commissioner of Lands had power to validate what was clearly an irregular allocation of public land. The suit property was clearly public land with a Government house erected thereon and was therefore not available for allocation for private purposes.

34. Considering the powers of the then office of the Commissioner of lands under **Sections 3 and 7 of the Government Lands Act in James Jorum Nyaga & Another -vs- The Honourable the Attorney General & Another (2007 eKLR**, the High Court had this to say:

“The above section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner for Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18th December, 1997. That was the preserve of the President. It follows that the Commissioner of Land could not have made any grant under the Government Lands Act Cap 280 of the Laws of Kenya nor could he pass any registrable title under the Registration of Titles Act Cap. 281 Laws of Kenya.”

35. I could not agree more with the dictum of the Court. In the matter before me, the land in dispute was already alienated for public utilities and was fully developed with a Government house meant for occupation by civil servants and it could not therefore be deemed unalienated. That being the case, one could not say that the said Dominic Muthoga had acquired any interest on the land that could be conferred upon the Petitioner.

36. Arising from the forgoing, it follows that I did not find any merit in the Petition. The same is dismissed with costs to the Respondents.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 17TH DAY OF MARCH, 2022

In the presence of:

No appearance for the Petitioners

No appearance for the Respondents

Court assistant - Kendi

.....

J. O. OLOLA

JUDGE