



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO.151 OF 2012

SISTERS OF NOTRE DAME DE NAMUR REGISTERED TRUSTEES.....PETITIONER

VERSUS

THE ATTORNEY GENERAL

THE P.S MIN OF MEDICAL SERVICE

THE P.S MINISTRY OF HOUSING.....RESPONDENTS

J U D G M E N T

1. On 12/4/2012 the Petitioner herein – **SISTER OF NOTRE DAME DE NAMUR** – filed this petition against the Respondents - **THE HON. ATTORNEY GENERAL** (1st Respondent), **THE PERMANENT SECRETARY, MINISTRY OF MEDICAL SERVICES** (2nd Respondent) and **THE PERMANENT SECRETARY, MINISTRY OF HOUSING** (3rd Respondent) – asking for various orders deemed necessary because of alleged violations of petitioner's Constitutional rights by the Respondents. Later on, Ethics and Anti-Corruption Commission (EACC) joined as **INTERESTED PARTY**.
2. The petition is brought under Rules 11,12,13 and 14 of the Constitution of Kenya (Supervisory jurisdiction and Protection of Fundamental Rights and Freedom of the Individual) High court Practice and Procedure Rules, 2006 and Articles 19, 20, 21, 22, 23, 24, 27, 40 and 50 of the Constitution of the Republic of Kenya.
3. At the centre of the dispute is land parcel No. **KISUMU** Municipality/Block 12/124 on which is House No. **KISU/HOU/HG/80**. The petitioner is claiming ownership of both the land and the house, having bought them at 6 million shillings from one **JUSTIN KIMUTAI SIRMA**. The petition is styled as representing both the petitioner's and public's interests under article 22 of the Constitution of Kenya 2010.
4. The petitioner avers that it has been in open, peaceful and quiet enjoyment of the premises until 5/4/2012 when it was served with a vacation notice dated 10/11/2011 from the Ministry of Medical services requiring it to vacate the property within a given time and also pay Kshs.384,000/= being rent arrears.
5. The petitioner pleaded lack of knowledge of the process leading to or surrounding issuance of vacation notice and termed the notice and the threatened forceful eviction as irregular, ultra vires, unconstitutional and therefore null and void.
6. The intended move by the Respondents is said to constitute a violation of petitioner's Constitutional

right to own property. It is viewed as arbitrary taking and deprivation of property or otherwise a limit and restriction of petitioner's fundamental right to the enjoyment of the aforementioned property.

7. The following orders are sought:

(a) A declaration that the eviction notices issued by 2nd and 3rd Respondents on 5/4/2012 are inconsistent with articles 40, 48 and 50 of the Constitution as the petitioner is the registered owner of the property and the eviction notices were issued arbitrarily and without due process.

(b) A declaration that the allegation by the Respondents and/or their officers, agents, servants or employees to the effect that the petitioner's title was illegally or fraudulently acquired is arbitrary, capricious and irregular and contravenes the petitioners fundamental rights and freedoms as recognized by the Constitution of Kenya and is therefore of no legal effect.

(c) Consequently, an order prohibiting the Respondents whether by themselves, their officers, agents and/or servants or employees from evicting the petitioner and/or from further interfering with the petitioner's right of ownership and occupation of all that parcel of land known as **KISUMU MUNICIPALITY/BLOCK 12/124** with **HOUSE NO. KISU/HOU/HG/80** (hereafter suit property).

(d) Consequently too, an order prohibiting the Respondents whether by themselves, their officers, agents, servants or employees from restricting or otherwise limiting the petitioners peaceful enjoyment of and access to the suit property.

(e) Costs be awarded to the petitioner.

(f) Other orders the court may deem just in the circumstances.

8. The petition was responded to by the Respondents and the interested party.

9. For the respondents the then permanent Secretary, Ministry of Housing, replied with an 18 paragraph Replying Affidavit in which he deponed, inter alia, that the house on the suit property belonged to Ministry of Housing; that the house has never been alienated to anybody; that he only came to learn of petitioner's claim to ownership after the person then residing in the house – Dr. John Odondi – left it; that upon learning of the petitioner's claim, the matter was handed over to the Anti-Corruption Commission; that investigations revealed that in spite of petitioner's claim, the suit property was still government property, hence the subsequent notice to the petitioner to quit the suit property.

10. The alleged sale of the suit property to the petitioner was said to be fraudulent and illegal.

11. The interested party responded vide a Replying Affidavit filed here on 19/6/2013. The deponent – **WILFRED MUTIGA** – said he was involved in investigations into the alleged acquisition of the suit property by the petitioner. He got to establish that one **JUSTIN KIMUTAI SIRMA** fraudulently got himself registered as owner of the suit land and procured a forged certificate of lease whose purported signatory – P.K. Sibuchi – flatly refuted ever signing it.

12. On the basis of that forged title, and in circumstances that do not seem straight forward, the petitioner contracted to buy from Justin Kimutai the suit property. I have said the circumstances were less than straightforward and this is the reason: One of the beneficiaries of the purchase money paid by the petitioner was none other than the Land Registrar – **REMI W. Ngaanyi** – who would later issue the petitioner with a new certificate of lease. This fact is not lost on the deponent and it is clearly pointed out at paragraph 5(v) of the Replying Affidavit that the proceeds were shared between the seller and public officers who may have been involved in the illegal alienation of the suit property.

13. There was no lease, it was deponed, issued by the Ministry of lands for the suit property and Justin

Sirma acquired his lease fraudulently for speculative purposes and then sold it to the petitioner.

14. According to the deponent, investigations revealed that another lease over the same property had been issued to one **FELIX OBIERO ONYANGO ONGONGA** who said he had bought the suit property from one **KOSETIONY K. TINDERET**.

15. The Land Registrar, Kisumu, is said to have confirmed that Justin Sirma's lease was a forgery. The suit property having been reserved for use as residence for hospital staff was not available for alienation and Justin Sirma's lease was said to be null and void.

16. The matter came for hearing on 24/2/2014. Omondi for the petitioner started by giving a narrative concerning the background. The narrative is much the same as the relevant contents of the petition and a repeat here is not necessary. According to Omondi, the sale transaction concerning the suit property was above board. The petitioner's title was therefore good and the notice to vacate issued to the petitioner was a violation of the Constitutional rights of the petitioner to own property. The method and manner of issue was also contrary to petitioners entitlement to fair treatment before the law.

17. Further, Omondi averred that S.23 of the now repealed Registration of Titles Act (Cap 281), which protects the sanctity of title and which require too that the registered owner be proved to be a party to any alleged fraud or misrepresentation in order to defeat the title, was also violated.

18. In addition, Section 60 of the same Statute (R.T.A – Cap 281), which spells out the procedure to be followed in order to defeat any title issued under the statute, was not adhered to.

19. It seemed also to be Omondi's position that what is challenged at this stage is the clandestine way in which the process the intended eviction of the petitioner is being done and **NOT** the merit of the eviction itself. The challenge too, according to Omondi, does not concern the validity of the title. The challenge as to merit and validity of title is said to be the subject of another suit viz: ELC NO.78/2013, filed by the interested party herein.

20. To buttress his arguments, Omondi availed several decided authorities and urged the Court to place reliance on them. The first authority is **EPHANTUS KIMOTHO KIMANI & 6 OTHERS VS THE HON. ATTORNEY GENERAL & Another: HCC Petition No.222 of 2011, NAIROBI**. The case concerned purported revocation of petitioner's title on the basis that the titles concerned government land. At issue was the fairness of the procedure for revocation. The Court (**LENAOLA .J.**) found for the petitioners. The second case is **REPUBLIC VS COMMISSIOER OF LANDS & ANOTHER: HCC MIS. APPLICATION NO.30 OF 2011, NAIROBI**.

This one also concerned purported revocation of applicant's title on the basis that the land was government land. At issue also was the fairness of the procedure for revocation. The Court found for the applicant. The third and final authority is generally similar to the others. The authority is **EVERLYN COLLEGE OF DESIGN LTD VS DIRECTOR OF CHILDREN'S DEPARTMENT & ANOTHER PETITION NO.228/13, HIGH COURT, MILIMANI, NAIROBI**. Here, the applicant complained that the 1st respondent, Director of Children's Department, had seized its land unlawfully. The 1st Respondent argued that the land was government land alienated to it. At issue was the fairness of the procedure followed in appropriating the land. The court again found for the applicant.

21. Mulei for the interested party was the first to respond to Omondi's arguments. He noted a deviation between Omondi's arguments and the petition. He said that the arguments focused on the procedural mis-steps allegedly made by the respondents while the petition is seeking a declaration as to the validity of title.

22. Mulei went on to say that the suit property has always been the property of the Kenya Government reserved for the Ministry of Housing. He wondered how the government could loose it without due process. He pointed out that while the petitioner is talking about the violation of its constitutional rights, there are the constitutional rights of the government and the public to consider.

23. Noting also the mention of Section 60 of R.T.A (Cap 281) as having been violated in relation to petitioners rights of ownership, Mulei asserted that the law applicable to the matter is contained in R.L.A, (Cap 300), not R.T.A (Cap 281). He continued to say that investigations revealed that a lease purportedly issued by the Government was relied on. That lease was a forgery. It is not signed by the purported seller, **JUSTINE K. SIRMA**, and Philip Kisaka, the registrar who purportedly signed it, disowned the same.

24. The lease allegedly issued to petitioner should have raised petitioner's suspicions. It is signed by Ngaanyi who is the same person listed as a beneficiary of the purchase price. Mulei wondered why Ngaanyi was a beneficiary. He said the money was being distributed to a racket to facilitate transfer. The petitioner therefore paid money to fraudsters. According to Mulei, the Petitioner should have conducted a search at the relevant Land's office in Nairobi.

25. The interested party offered 10 decided authorities to guide the Court. The authorities are:

(i) **KENYA ANTI-CORRUPTION COMMISSION VS AHMED KARAMA SIAD & 2 OTHERS MOMBASA HCC NO.300/2007** (Ahmed's case).

(ii) **MILANKUMARN & 2 OTHERS V CITY COUNCIL OF NAIROBI & 2 OTHERS (UNREPORTED) HCC NO.1024/2005(O.S), NAIROBI**
(MilanKumarn's case hereafter)

(iii) **SYEDNA MOHAMED BARHANDDUDIN SAHEB & 2 OTHERS VS BENJA PROPERTIES & 2 OTHERS (2007) EKLR** (Syedna's case)

(iv) **REPUBLIC VS THE COMMISSIONER OF LANDS & ANOTHER EXPARTE LIMA LTD**

Eldoret: Judicial Review Case No.10/2008 (Lima's case)

(v) **REPUBLIC VS SENIOR REGISTRAR OF TITLES, MOMBASA & 2 OTHERS EXPARTE COMEN LTD** (Comen's case hereafter): **MBSA:HCC:MIS APPL.NO.70/10**

(vi) **MACFOY VS UNITED AFRICA COMPANY LTD (1961) 3 ALL E.R 1169: (MACFOY'S CASE)**

(vii) **JOHN PETER MUREITHI & 2 OTHERS VS AG & 4 OTHERS: HCC MISC APPL. NO.158/05** (John's case).

(viii) **NEPTUNE CREDIT MANAGEMENT LTD & ANOTHER VS CHIEF MAGISTRATE'S COURT & 2 OTHERS (2005) eKLR** (Neputune's case hereafter).

(ix) **JAMES JORAM NYAGA & ANOTHER VS ATTORNEY GENERAL & ANOTHER (2007) eKLR** (Jame's case).

(x) **CYCAD PROEPRITIES LTD VS THE ATTORNEY GENERAL & 3 OTHERS: HCC PETITION NO.70/2010:** (Cycad's case).

26. It is apt and pertinent to look at the import of some of the cases. Ahmed's case (Case No.i) concerned an application by the predecessor of the interested party herein to restrain **AHMED KARAMA SAID** and others from selling, leasing, charging, subdividing, wasting, transferring or dealing in Land Parcel **MOMBASA ISLAND/BLOCK XI/839** pending hearing and final determination of the main suit. Justice J.B Ojwang (as he then was) while granting the application observed that the principle of innocent purchaser for value without notice of irregularity is subject to the qualification that creation of the title itself is not in flagrant breach of statute law. Where it is shown to be such, it is a nullity ab-initio.

27. Milankumarn's case (Case No.ii) involved applicants who, inter alia, sought to protect title that encompassed an illegal acquisition of a road reserve. Such illegal acquisition entailed also an unjustified interference with rights of access to properties of adjoining land owners. The court dismissed the suit after finding that due process was not followed in acquiring the title. It noted further that the Commissioner of Lands had no authority in law to alienate land which had already been alienated.

Such purported alienation was said to be void ab-initio.

28. Syenda's case (Case No.iii) involved an attempted acquisition for land in a fraudulent manner so as to superimpose a title on another one genuinely issued earlier. The court upheld the earlier title and rejected the fraudulent move by the purported holder of the new title.

29. Lima's case (Case No.iv) involved an application to review and set aside a judgment already entered in favour of **LIMA LIMITED**. It appears clear that Lima Limited had sought and obtained prerogative orders quashing notices of forfeiture to government of land parcels already allocated to it. Some of the grounds on which the application for review and setting aside were done was that there had been non-service of crucial parties by the applicant and there was also concealment of vital facts by the same side. The court allowed the application on these two grounds.

30. Comen's case (Case No.v) involved an application for orders of **CERTIORARI, PROHIBITION** and **MANDAMUS** concerning land parcel **MOMBASA BLOCK XIX/MI/299** over which the Senior Registrar of Titles, Mombasa, had issued Gazette Notice No.5562 published in the Kenya Gazette dated 21/5/2010 revoking Comen's Limited's title. In the course of proceedings, it was found as a fact that such title was issued to Comen's Limited before it was incorporated as a company. It was a title therefore issued to a non-existent legal person. The application for Judicial review by Comen's Limited was rejected on the ground, amongst others, that the title was issued to a non-existent person. The act of issuing title to a non-existent person was void ab initio.

31. Macfoy's case (Case No.vi) was offered to show that an action done without the backing of due process is void ab initio and does not require a court order to declare it so. Circumstances may arise however where a court order may be necessary to declare such action as void.

32. As can be seen so far, the decided authorities focus on situations and circumstances where the acts of the parties are void ab-initio or where the surrounding circumstances raise issues of illegalities and/or procedural improprieties.

33. Ezedi (A.G's office) for respondents associated herself with Mulei's arguments and reiterated her reliance on the replying affidavit sworn by **TIROP KOSGEI**. Further, she said the petitioner had not demonstrated well how it acquired the title. Title to government property, she said, has to be acquired by following the right procedure.

34. Ezedi further said that the petitioner's title is clearly shown as fake and article 40(6) removes protection from holders of titles that are illegally acquired.

35. Omondi replied to all this and averred that the right procedure was not followed while initiating the move intended to be taken against the petitioner. And because of that the petitioner's entitlement both under articles 40 and 47 of the Constitution were violated.

36. Omondi's further averment is that the insinuation that the petitioner was not diligent enough is misplaced as the petitioner made all the necessary efforts and did what anybody would have done in the circumstances.

37. I have considered all the material laid before me by all parties. It appears that the petitioner was persuaded into buying the suit property, which it immediately did and went into possession and occupation. All was Kosher until a letter from the respondents brought a rude awakening viz: its title was under challenge and there were claims of rent owed; there was also threatened eviction to boot. This is

what gave rise to this petition. According to the petitioner, the sale transaction was genuine and above – board. There was due diligence on its part. Title to property was passed on legally and procedurally to it. It paid all the necessary consideration and has subsequently always paid required rates to Kisumu Municipal Council. It is unfair treatment therefore and an invasion of its property rights for the respondents to emerge to make claims and threats.

38. But the respondents have their story too. And the story is this: The petitioner was a victim of an elaborate con game conceived by the alleged seller of the suit property and corruptly executed by him together with conniving and colluding government officials. Title to the suit property never passed and the petitioners only recourse is to the alleged seller.

39. During hearing of this matter Omondi for petitioner seemed to take the position that the statutory law applicable is in the Registration of Titles Act (Cap 281). In the state he particularly mentioned sections 23 and 60. Omondi also took the position that the petition is not concerned with the merits of the case.

It was concerned, he argued, with the fairness of the process of the intended action against the petitioner.

40. The response of Mulei, the interested parties counsel, noted a disconnect between Omondi's averment and the substance of the petition. It also pointed out that the statute applicable is not Registration of titles Act.

41. I agree with Mulei. It is plain that the statute applicable is the Registered Land Act (Cap 300). The lease documents availed as annexures all show Registered Land Act (Cap 300) as the applicable statute. The lease document themselves were issued under that statute. There is therefore a clear mismatch here. And the mismatch also applies to Omondi's obvious misapprehension as to the nature and substance of the petition. The petitioner is seeking declaratory orders as to rights of ownership followed by consequential orders arising from such declarations. Quite clearly, rights of ownership will not be delved into without looking into the merits. In trying to consider the matter, it is inevitable that a finding will have to be made whether such rights were lawfully acquired or even acquired at all. When all this is considered, the upshot is that the petitioner's petition remains inadequately and wrongly canvassed.

42. The Respondents made a written response to the petition that I think was not sufficiently considered by the petitioner. For instance, it is asserted that the sale transaction between the petitioner and the alleged seller of the suit property was a fraudulent arrangement. To support this, annexure “TK10”, which is a letter from the Land's office, Kisumu, confirming that the seller's certificate of lease was a forgery, was availed. There is nothing given by the petitioner's side as a rebuttal. It remains therefore true that the sale transaction was conducted on the basis of a fake or forged lease certificate. Can a transaction ensuing therefrom then confer a good title? Obviously no.

43. But that is not the only noticeable anomaly. There is another and it is this: The petitioners own statement contains details as to how the purchase money was to be distributed. Crucially noteworthy here is that one of the beneficiaries is the land Registrar who was later to issue a lease certificate. It puzzles a bit that the petitioner couldn't smell a rat when this scenario was unfolding. One would have expected that the petitioner would be concerned that such an official was benefiting from purchase money. The lease certificate availed by the alleged seller didn't show such official as possessing an interest. When the Respondents depone that compromised government officials were involved in the deal, that does not sound hollow.

44. When all this is taken into account, it is easy to agree that no good title ever passed to the petitioner. Consequently, no property rights of the petitioner under the Constitution or any other statute were ever violated. Such rights never existed in the first place. The petitioner was duped into a transaction that gave it a false sense of legal ownership, possession and occupation. The premise of the transaction was that the suit property was private property then belonging to the seller – **JUSTIN KIMUTAI SIRMA**. But Kimutai's title turns out now to be a forgery.

45. Perhaps another thing the petitioner should have noted is that the alleged seller of the suit property

had not signed the lease certificate where he was supposed to sign it and that **PHILIP KISAKA SIBUCHI**, who is the Ministry of Land official said to have signed the title document availed a detailed written statement in which he denied ever signing it.

46. There are other shenanigans of the same general nature that seem to have gone on concerning the same property. These one's do not concern the petitioner but its clear that a similar con game had been perpetrated against another victim. The interested party's replying affidavit show that one **FELIX OBIERO ONYANGO** had a certificate of lease allegedly issued after he bought the same suit property from a Mr. **KOSETIONY TINDERET**.

47. Having now considered what both sides presented, it is clear that the petition herein cannot succeed. Both the Respondents and the interested party have put forward unassailable proof that the suit property is still government land in law. It was never legally availed for alienation in the first place and was never available for sale or transfer to anybody. The petitioner's petition is therefore found unmeritorious and is hereby dismissed with costs.

A.K. KANIARU – JUDGE

29/5/2014

29/5/2014

A.K. Kaniaru – Judge

Dianga George – C./C

No party present

Interpretation – English/Kiswahili

Oila for interested party

M/s Aliongo for Esedi for Respondents

Other counsels absent

COURT: Judgment is read and delivered in open **COURT**.

Right of Appeal – 30 days.

A.K. KANIARU - JUDGE

29/5/2014