REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL APPLICATION NO.585 OF 2012

BETWEEN

PROF. CHRISTOPHER MWANGI GAKUU.....PETITIONER

AND

KENYA NATIONAL HIGHWAY AUTHORITY.....1ST RESPONDENT

SERAH WANGARI NYORO.....2ND RESPONDENT

CHIEF LAND REGISTRAR.....3RD RESPONDENT

HON.ATTORNEY GENERAL.....4TH RESPONDENT

COUNTY COUNCIL OF KIAMBU.....5TH RESPONDENT

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....6TH RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, Prof. Christopher Mwangi Gakuu is the registered owner of all those parcels of land known as L.R No. Limuru/Rironi1073 and Limuru/Rironi/1074 (*hereinafter "the suit properties"*) each measuring approximately 0.05 situated in Limuru District within Kiambu County. In the Petition dated 19th December 2012 and supported by the Petitioner's Affidavit sworn on the same date, he alleged that he bought the suit properties from the 2nd Respondent on 3rd November 2009. Subsequently, he was issued with the respective title deeds for each parcel and he took possession thereof. Later, he applied for and obtained a letter of change of user from the 5th Respondent in accordance with the provisions of the **Physical Planning Act (Cap 286 Laws of Kenya)** to commence a residential/ commercial development project. He also applied and obtained an Environmental Impact Assessment License from the 6th Respondent. On obtaining the license, he commenced his project of erecting a building on L.R No. Limuru/Rironi/1073 and earmarked L.R No. Limuru/Rironi/1074 as a parking lot for use by tenants residing on the former. He claimed that as at 12th January 2012, the building was assessed as being approximately 60% complete and valued at Kshs.33,000,000.00.

2. On or about 19th January 2012, the Petitioner was served with a letter dated 10th January 2012, giving him 14 days' notice of intended demolition of alleged illegal structures erected on a classified road reserve. The Petitioner alleged that the said notice to demolish his building was an affront to his right to own the suit properties and that the said action violated his right to property under **Article 40** of the **Constitution** as the suit properties were not acquired in accordance with **Article 40(3)** and **Part VIII** of the **Land Act, 2012**. He alleged that if there was any right of acquisition of the said properties, then he was an innocent purchaser for value without notice and that he was never relayed with information adverse to his land ownership.
3. For the above reasons, the Petitioner now seeks the following orders;

"(a) That a declaration be issued to the effect that the suit parcels herein to wit L.R. Limuru/Roroni/1073 and Limuru/Rironi/1074 are private properties registered in the names of the Petitioner.

(b) That the demolition notice issued by the the 1st Respondent as against the Petitioner is unconstitutional and ultra vires the powers of the 1st Respondent and was done out of bad faith and a violation of the Petitioner's Fundamental Rights and Freedoms and is therefore a nullity.

(c) That an order of certiorari by way of Judicial Review be issued to bring into this Court and quash the decision of the 1st Respondent and restore the Petitioner's right to ownership of the suit parcels.

(d) That an order of prohibition by way of Judicial Review be issued directing and commanding the 1st Respondent to desist from interfering with the Petitioner's proprietary interests in parcel numbers L.R. No. Limuru/Rironi/1073 and Limuru/Rironi/1074.

(e) That an order of prohibition by way of Judicial Review be issued directing and commanding the 3rd Respondent to desist from transferring with the ownership of the suit parcels L.R. Nos.Limuru/Rironi/1073 and Limuru/Rironi/1074 and/or otherwise interfering with the Petitioner's proprietary interests in the said parcels of land.

(f) That the 1st, 2nd, 3rd, 4th, 5th and 6th indemnify and/or compensate the Petitioner jointly and severally for any losses that may be incurred by the Petitioner on any adverse decision as to his ownership of the suit parcels.

(g) That the cost of this Petition be borne by the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents herein.

(h) Any other relief or order that this Court may deem fit in the special circumstances of this matter."

The Petitioner's Case

4. The Petitioner claimed that he is the registered owner of the suit properties and that if the Government wanted to compulsorily acquire the suit properties for public purpose, he was entitled to be compensated. He contended further that the Government could not have compulsorily acquired the suit land in 1987 as alleged because Gazette Notice No.4381 of 18th September 1987, which allegedly gave notice of the compulsory acquisition does not mention the suit land anywhere and that the 2nd Respondent has clarified that the Government only acquired a portion of her land and not the whole land. He relied on the case of **Commissioner for Lands v Coastal Acqualculture Ltd KLR (E &L) 1 264** in support of his preposition in that regard.
5. It was also his submission that he was a purchaser of the suit properties for value without notice of any fraud that may have been perpetrated by another party and that the certificate of registration for the suit property reveals that the 2nd Respondent at the time of the purchase was the registered owner thereof. He alleged that he exercised due diligence before commencing his building project

and that the same due diligence was conducted by the District Planning Officer, the County Council of Kiambu and the National Environmental Management Authority before granting the necessary approvals for the said project.

6. He contended that he holds legal title to the suit properties and those titles are not tainted with any fraud or illegality as alleged and that under **Section 27** and **28** of the Registered Land Act (now repealed) he holds an indefeasible title thereto. He relied on the cases of **David Peterson Kiengo & 2 Others v Kariuki Thuo (2012) e KLR** and **Eunice Grace Njambi Kamau and Anor v Attorney General & 5 Others (2013) e KLR** where the Court recognised the Torrens System of registration of land and the doctrine of indefeasibility of title.
7. It was therefore the Petitioner's case that the 1st Respondent is in violation of the Petitioner's constitutional rights under **Article 40** of the **Constitution** and that he has suffered loses as a result of the demolition notice and the demolition of his buildings on the suit property which has since taken place. He thus urged the Court to consider the huge losses he has suffered while determining the appropriate reliefs available to him and grant him the specific reliefs set out above.

The 1st Respondents' Case

8. The 1st Respondent, Kenya National Highway Authority claimed that in 1987, the Ministry of Roads proposed and designed a dual carriage-way between Kabete and Rironi necessitating acquisition of land to accommodate the additional lanes to be added to the existent road. Subsequently, Limuru/Rironi/1073 and 1074 were compulsory acquired as dictated by law.
9. It claimed further that the suit properties are parcels of land that were created as a result of a purported mutation carried out on original land parcel No.Limuru/Rironi/506 which is a product of a mutation on L.R. No. Limuru/Rironi/216. And that through Gazette Notice No.4381 of 18th September 1987, Limuru/Rironi/216 was gazetted for acquisition by the Government for the construction of Kabete-Limuru Road and at that time the 2nd Respondent was the registered proprietor of all those parcels of land known as Limuru/Rironi/506 and Limuru/Rironi/507. Following the acquisition, the 2nd Respondent was duly compensated for her land vide cheques No.036100 and 036101 for Kshs.296,341.00 and Kshs.531 respectively. Thereafter it claimed that the 2nd Respondent subdivided Limuru/Rironi 506 to give rise to Limuru/Rironi/1073 and 1074 and purported to sell the same to the Petitioner despite the same having been compulsorily acquired by the Government. That at that point, the 2nd Respondent did not have good title to the suit property capable of being conferred to the Petitioner.

10. Further, that the Petitioner cannot claim not to have known of the fact of acquisition of the suit land by the Government as the same was duly gazetted and that he failed to exercise due diligence when purchasing the same. He is therefore barred from claiming that he was an innocent purchaser for value without notice. In addition, that the ongoing construction on the suit property by the Petitioner and assessed at 60% completion does not grant him legality to the title on which the buildings stand. In the end therefore, the 1st Respondent seeks dismissal of the Petition with costs.

The 2nd Respondent's Case

11. The 2nd Respondent, Serah Wangari Nyoro supports the Petition. She was the immediate owner of the suit properties. In her Affidavit sworn on 17th January 2013, she claimed that the suit properties were subdivisions of L.R.Limuru/Rironi/506 which measured approximately 1.11 acres which she had inherited from her late father, and was a sub-division of what was originally parcel number Limuru/Rironi/216. That L.R. Limuru/Rironi/506 was thereafter registered in her name and she was issued with a certificate of title to that effect.

12. She averred that in 1987, the Ministry of Lands acquired a portion measuring about 0.3492 hectares excised out of L.R. No.Limuru/Rironi/506 for construction of a road as part of the Nairobi-Nakuru highway and she was duly compensated for the acquired portion. That after the acquisition, a mutation was done, the acquired portion was hived off and she was left with a position measuring 0.1hectares, which she caused to be sub-divided into two portions viz L.R.

No.Limuru/Rironi/1073 and L.R No. Limuru/Rironi/1074 each measuring 0.05 hectares which were both registered in her name and which she subsequently sold to the Petitioner. She therefore claimed that there has never been compulsory acquisition of the suit properties by the Government and the Petition ought to be allowed.

The 3rd and 4th Respondents Case

13. The 3rd and 4th Respondents oppose the Petition. The 3rd Respondent, the Chief Land Registrar and the 4th Respondent, the Attorney General, relied on the Affidavit sworn by Jonathan Ndirangu King'ori, the District Lands Registrar at Kiambu who explained that the original title for the suit land was Limuru/Rironi/216 and which was measuring 36.3 acres. It was later subdivided to produce various parcels of land ranging from L.R. Nos. Limuru/Rironi 505-547. That from the records Limuru/Rironi/506 was transmitted to the 2nd Respondent and which parcel was subsequently acquired by the Government in 1987 for public interest to expand the Kabete-Limuru Road and affected parties including the 2nd Respondent were duly compensated.

14. In their written Submissions dated 15th May 2014 they further claimed that the right to own property under **Article 40** of the **Constitution** is not absolute and does not extend to any property that has been found to have been unlawfully acquired. In addition, they contended that the suit properties were unlawfully acquired since the Government had already compulsorily acquired the same properties in 1987 and that the same were therefore not available for alienation to individuals. They relied on the case of **Commissioner of Lands and Anor v The Municipal Council of Mombasa and Anor, Mombasa Misc Civil Case No. 124 of 2001** where it was held that a grant must be made in favour of a Government body and land in respect of which such grant had been made could not be available for re-allocation. They also relied on the case of **Joram Nyaga & Anor v Attorney General and Anor (2007) e KLR** where it was held that land that has been compulsorily acquired from private individuals for a public purpose is not subsequently available for alienation to individuals.

15. It was their further submission that the public interest in the construction of a public road outweighs the Petitioner's rights and that the suit properties were acquired by the Government compulsorily for the purpose of the construction of the Kabete-Limuru road and after that acquisition the 2nd Respondent was duly compensated and she was thereafter incapable of transferring land which she no longer owned.

16. Finally they submitted that since the 2nd Respondent had been fully compensated for her land *vide* cheques numbers 036100 for Kshs.296,341.00 and 036100 for Kshs.531 then the Petitioner cannot now seek compensation in respect of the same land. They thus urged the Court to dismiss the Petition.

5th Respondent's Case

17. The 5th Respondent, the County Council of Kiambu oppose the Petition. I have seen in that regard, record a Replying Affidavit sworn on 7th March 2013 by Mwangi Kinyua, an engineer who works for the 5th Respondent. In his Affidavit, he acknowledged that the Petitioner sought for and was granted approval for construction on the basis that a search done on the suit properties revealed that the Petitioner was the registered owner.

18. He however also claimed that the Physical Planning Department falls within the ambit of the 3rd Respondent and not the 5th Respondent and therefore any adverse action by the Physical Planning Department cannot be blamed on the 5th Respondent. That prior to granting the approval, the Ministry of Lands in a letter dated 12th May 2011 and written by a District Physical Planner advised the 5th Respondent that it did not have any objection to the construction so long as certain conditions were observed. Based on that communication, the 5th Respondent wrote to the Petitioner a letter dated 3rd August 2011, setting out the conditions to be observed by the Petitioner in the course of construction. He thus claimed that the mandate of the 5th Respondent is

limited to ensuring safety during the construction and it cannot be held responsible for any loss likely to be incurred by the Petitioner since it did not author the purported notice. He thus urged the Court to dismiss the Petition with costs to the 5th Respondent.

6th Respondent's Case

19. The 6th Respondent, in the Replying Affidavit sworn by Samuel Lopokoyit, the Head of Environmental Impact Assessment Section at the Nairobi County Headquarters, sworn on 1st March 2013 acknowledged that the Petitioner applied for a grant of an environmental impact assessment license to undertake construction of a proposed multi-dwelling development on L.R. No. Limuru/Rironi/1073 at Rironi area. That the 6th Respondent scrutinized the application and was satisfied that it was in compliance with the legal requirements of Regulations 7 and 8 of the Environmental (Impact Assessment and Audit) Regulations, 2003 relating to the form, content and presentation of the report. The project was therefore approved and the Petitioner was supposed to accept the proposed conditions as the basis for issuance of an Environmental Impact Assessment (EIA) license. That following the Petitioner's acceptance of those conditions, he was issued with license No. 0009916 on 8th December 2011. He thus averred that the 6th Respondent applied the relevant law and procedures in granting the license, and had nothing to do with the demolition notice. That the Petition as filed by the Petitioner raises no constitutional violations on the part of the 6th Respondent and in any event is statute barred by **Section 66(1)** of the **Environment Management and Co-ordination Act** as it seeks to impose civil liability on the 6th Respondent arising from the grant of an EIA license. He thus urged the Court to dismiss the Petition.

Determination

20. Having set out the Parties' contentions as above, the issues that would have required determination in the Petition are as follows; firstly, whether the Petitioner is the registered owner of the suit properties and secondly, whether the notice to demolish the suit properties is unconstitutional and *ultra vires*. As a corollary to that issue, the Court would also have had to determine whether there was compulsory acquisition of the suit properties by the Government and whether the acquisition process was valid or whether it was in violation of the Petitioner's rights under **Article 40** of the **Constitution**. I have deliberately framed the above issues as the ones requiring determination but I may not in fact do so for reasons to be seen shortly.

21. Having issued that caveat, I am aware that the Petitioner, before filing the Petition before me, had already filed a civil suit in the Land and Environment Court at Nairobi being **ELC No. 34 of 2012, Prof Christopher Gakuu v Kenya Highway Authority.** None of the parties addressed this Court on the import of that suit on this Petition but *suo motu* I called for the record in **ELC No. 34 of 2012** and I note that the suit is still pending determination. That being the case, I must address my mind to the issue of jurisdiction and I say so because the Petitioner in prayer (a) of his Petition as reproduced elsewhere above, seeks the following orders;

"A declaration be issued to the effect that the suit parcels herein to wit L.R Limuru/Roroni/1073 and Limuru/Rirono/1074 are private properties registered in the names of the Petitioner".

Interestingly, in **ELC No. 34 of 2012,** the Petitioner has sought the following orders;

"(a) A declaration that the parcels of land known as L.R. No.Limuru/Rironi/1073 and Limuru/Rironi/1074 are private properties registered in the names of the Plaintiff.

(b) An order of Permanent Injunction restraining the Defendant, its servants, employees and/or agents from demolishing and/or interfering with the building erected on L.R. No.Limuru/Rironi/1073.

(c) An order of Permanent Injunction restraining the Defendant, its servants, employees and or/agents from interfering with the Plaintiff's proprietary interests in L.R. Nos.Limuru/Rironi/1073

and Limuru/Rironi/1074.

(d) A declaration that the intended demolition as threatened in the notice issued on 10th January, 2012 is illegal, null and void.

(e) Costs of the suit.

(f) Any other relief that the Court may deem fit."

22. It is obvious that the causes of action in both the suit and Petition are the same and the question therefore at this stage is whether this Court can determine the issue of title to the suit properties given that the same issue is pending in **ELC No. 34 of 2012.** It is quite clear to me in that regard that the Petitioner is litigating the ownership of land title to the suit properties in this Petition as well as in **ELC No. 34 of 2012.** That being so, **Article 165 (5)** of the **Constitution** limits the jurisdiction of this Court in two aspects. Firstly, where the dispute relates to a question reserved exclusively for the jurisdiction of the Supreme Court. And secondly, in respect of disputes falling within the exclusive jurisdiction of the Courts contemplated in **Article 162 (2)** of the **Constitution** one of which is the Environment and Land Court. This position has been aptly captured by this Court in various decisions. (See - ***Robert Mwangi v Shepherd Catering Ltd & Another (2012) eKLR*** *w*here it was held that the High Court cannot delve into matters relating to title to land as it has no jurisdiction do so.)

23. In addition to the above, **Article 162(2)** of the **Constitution** specifically provides that Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to the environment, use and occupation of, and title to land. **Article 162(3)** then provides that Parliament shall determine the jurisdiction and functions of the Courts contemplated in **Article 162(2).** It is on the basis of those provisions that Parliament enacted the **Environment and Land Court Act, No. 19 of 2011** which came into effect on 30th August 2011. The object of the Act is stated to be as follows;

"An Act of Parliament to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes".

24. Applying the law as above and in my view, the issue of determination of title to the Petitioner's suit property falls within the mandate of the Environmental and Land Court as established pursuant to the provisions of **Article 162(2)** of the **Constitution** and it is that Court which has exclusive jurisdiction to hear and determine matters related to the environment, the use and occupation of, and title to land.

25. For those reasons, it follows that this Court has no jurisdiction to determine the first issue as framed for determination to wit; whether the Petitioner is the registered owner of the suit properties.

26. Having said so, I must return where I began. The Petitioner's position as I understand it seems to be that he is the registered owner of the suit properties having bought the same from the 2nd Respondent and that the action of the Government in issuing him with an eviction notice and subsequently demolishing his building erected on L.R No.Limuru/Rironi/1074 amounts to compulsory acquisition of the land and a violation of his right under **Article 40** of the **Constitution.** The 2nd Respondent while not disputing that there was compulsory acquisition of part of L.R Limuru/Rironi/506, claimed that the suit properties were hived off the remaining part of L.R Limuru/Rironi/506 after the acquisition, and therefore the suit properties were not compulsorily acquired. On the other hand, the 1st, 3rd and 4th Respondents claimed that the suit properties were compulsorily acquired by the Government from the2nd Respondent who was duly compensated, for the purposes of the construction of the Kabete-Limuru Road. In addressing that issue, it would be necessary to determine whether the suit properties were part of the land acquired by the Government in 1987. In essence and in so doing, the Court would be making findings on the ownership and title to L.R No. Limuru/Rironi/1073 and L.R No.

Limuru/Rironi/1074 a matter outside its jurisdiction.

27. Be that as it may be, I am also aware that the Petitioner has filed the instant Petition claiming that his fundamental rights and freedoms have been violated. However, the issue of ownership of L.R No.

Limuru/Rironi1053 and L.R No. Limuru/Rironi1074 is central to the determination of whether the rights of the Petitioner under **Article 40** of the **Constitution** have been violated. **Article 40** for avoidance of doubts states as follows;

"(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.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(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 land or an 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 this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

***(6) The rights under this Article do not extend to any property* that has been found to have been unlawfully acquired."**

28. To my mind, **Article 40** of the **Constitution** upholds and protects the sanctity of title and the primary consideration for the court in a case as one before me is that the title to the property was lawfully obtained. The only instance where title to property cannot be protected is where it is shown that the title was unlawfully acquired and under **Article 40(6)** of the **Constitution** such title cannot be protected. On this point I agree with Majanja J. in the case of **Isaac Gathungu Wanjohi v Attorney General & 6 Others (2012) e KLR** where he observed as follows;

"Article 40 must read as a whole so that protection afforded by Article 40 which protect the right to

property must be read to exclude property found to be unlawfully acquired under Article 40(60. This requirement is an extension of the fact that the Constitution protects higher values which are to be found in preamble to the Constitution and Article 10. Value such as human rights and social justice cannot countenance a situation where the Constitution is used to rubber stamp what is in effect unlawful."

From the evidence which tendered in this matter and which will also be tendered in **ELC.34 of 2012**, it is not the place of this Court to determine whether the 2nd Respondent may have acted fraudulently and that the titles she purported to have transferred to the Petition were not clean. That is for the Court established under **Article 162(2)** of the **Constitution.** In a prior Ruling in this matter delivered on 28th June 2013, i pointed out the fact that Ougo, J. in a Ruling for an interlocutory injunction within **ELC No.34 of 2012** had made certain observation regarding the same issues as were later placed before this Court for determination. One of the issues she alluded to was precisely the issue of the manner that the Petitioner acquired titles to the suit properties. It is an abuse of Court process to bring the same issues to this Court which in any event has no jurisdiction to determine the main issue of title before it can properly determine whether any rights under **Article 40** of the **Constitution** has been violated.

29. Having addressed my mind as above, it is clear that the Petition must fail and I have deliberately refused to address the issue as to whether the Petitioner's fundamental rights under **Article 40** have been violated and for reasons given. If any advise is needed, let him first canvass the issue of ownership of the suit properties in **ELC No. 34 of 2012.** Thereafter, he may come to this Court to determine the latter issue or invoke **Section 13** of the **ELC Act** and seek that the ELC should determine the same issue within **ELC No.34 of 2012.**

30. The Petition must therefore be dismissed and as to costs, I am satisfied that since **ELC No.34 of 2012** is still pending, let each party bear its own costs as regards this Petition.

31. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 25TH DAY OF JULY, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Kinyua for Respondent

Mr. Dullo for 2nd Respondent

Mr. Ndiema holding brief for Mr. Njiri for 1st Respondent

Order

Judgment duly read

ISAAC LENAOLA

JUDGE