REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
PETITION NO. 8 OF 2012

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 (1a) OF THE TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

AND

IN THE MATTER OF ARTICLE 10, 19, 21 (1), 22 (3) c 23 (1&3), 40(1) (a) AND (b) 2 (a) AND (b), 40 (6) OF THE NEW CONSTITUTION OF KENYA

BETWEEN

PETER NYONGESA MASOLO

PROTUS BARASA BIFWOLI

ELIMA KHAVETSA KONZOLO

YUVINARIS NYAMBEGA ZACHARIAH

Bringing this Petition on their own behalf and

on behalf of 100 others.....…PETITIONERS

AND

HONOURABLE ATTORNEY GENERAL……..1ST RESPONDENT

LANDS OFFICER TRANS – NZOIA ……2ND RESPONDENT

HENRY WILFRED NDEKE WAMUKOTA……3RD RESPONDENT

J U D G E M E N T

INTRODUCTION

1. The four Petitioners are adult individuals who have brought this petition on their own behalf and on behalf of one hundred (100) other members. The first respondent is the Attorney General of the Republic of Kenya. The second respondent is Lands Officer Trans- Nzoia County lands office. The third respondent is a male adult and is the registered owner of LR NO Kiminini/Matunda Block 1/Kananachi/7.

2. The Petitioners filed the petition herein seeking the following reliefs;-

(i) A declaration that LR Kiminini/Matunda Block 1/Kananachi/7 is owned by the petitioners and that the same be transferred and/or registered in the names of the petitioners.

(ii) That the respondents be ordered to sign transfer forms to have the land transferred to their names

and in default the Deputy Registrar of the High Court be ordered to sign the same on the respondents behalf.

(iii) That a permanent injunction be given restraining the respondents by themselves, their agents, servants, employees and or any other person acting on their behalf from interfering with LR NO Kiminini/Matunda Block 1/Kananachi/7.

(iv) Costs of the petition.

(v) Any other relief this Honourable court may be pleased to grant

BACKGROUND OF PETITION

3. The history of this petition can be traced as far back as early seventies when there was a public auction involving LR NO. Kimilili/Kibingei/1031 which was registered in the name of one Crispo Kusimba. Crispo Kusimba had taken a loan from Kenya Commercial Bank and gave title to his land as security. He was unable to repay the loan. The bank sold the land in a public auction in 1972. The purchaser of the auctioned property was the third respondent in this petition. The property was duly registered in the name of the third respondent.

4. The owner of the auctioned land filed a civil case being Eldoret HCC No. 36 of 1974 in which he sued Kenya Commercial Bank and the third respondent. In that suit he alleged that his property had been sold fraudulently and that he wanted the process reversed. He was never successful as the court held that the sale was lawful and the registration of the land in the third respondent's name was lawful. Having lost the case at Eldoret High Court, Crispo Kusimba who was married to eleven (11) wives decided to get into negotiations with the third respondent in a bid to have back his auctioned land. The negotiations culminated in an exchange of the auctioned land for another parcel which Crispo Kusimba owned. The property which was given in exchange for the auctioned one is LR Kiminini/Matunda Block 1/Kananachi/7 (the suit land). The suit property was then registered in the name of the third respondent who obtained title to the same on 17/12/1993.

5. In 1994 two wives of Crispo Kusimba filed a suit at Eldoret High Court being Eldoret HCCC 32 of 1994. This suit was later transferred to Kitale where it became Kitale HCCC No. 48 of 1997. In this suit the wives of Crispo Kusimba also included him as one of the plaintiffs. They contended that they were not aware of any exchange agreement between their husband and the third respondent. They further contended that if there were any documents signed by Crispo Kusimba then the same was fraudulently done as Crispo Kusimba had no mental faculties to do so. The wives of Crispo Kusimba lost the case after the court found that whatever culminated in the exchange agreement was done aboveboard. It is after the two wives of Crispo Kusimba filed the case which was finally transferred to Kitale that they and their sons or agents began selling portions of the suit land to third parties. The sale started in 1994 and continued to 2012 when the purchasers of various pieces of land decided to file this petition.

PETITIONERS CASE

6. The petitioners contend that they purchased the suit land on various dates and that they have been residing on it for a period of over sixteen (16) years. They further contend that when they conducted a search over the suit property they discovered that it was registered in the name of the third respondent. They further contend that it is Crispo Kusimba and his other family members who sold the land to them. The petitioners contend that Crispo Kusimba died before the suit land was transferred to the third respondent.

7. The petitioners contend that they have been waiting for the family of Crispo Kusimba to carry out Succession so that they can have individual titles which have not been forthcoming. Their demands to the third respondent to transfer the suit land to them has failed. It is on this basis that the petitioners have filed this petition seeking the prayers listed hereinabove. They contend that the third respondent has threatened them with eviction without following the law.

RESPONDENTS CASE

8. The first and second respondents opposed the petition through a replying affidavit sworn by Aggrey Kaveli who is the Land Registrar Trans-Nzoia County. The first and the second respondents contend that the suit land is currently registered in the name of the third respondent. The first and second respondents contend that Agnes Kusimba's complaint relating to the suit land was investigated and it was found to have no basis as against the third respondent. That the suit land was transferred by Crispo Kusimba Wekundu (now deceased) to the third respondent. The first and second respondent contend that if the petitioners bought any part of the suit land, they did so without due diligence as the suit property had already been transferred to the third respondent.

9. The third respondent contends that the suit land was duly transferred to him by Crispo Kusimba Wekundu and that he obtained title to the same on 17/12/1993. He contends that the petitioners are strangers to him and that they have no locus standi to bring this case. He contends that the sale agreements annexed to the petition are from 1994 onwards and all this was done after he had been registered as owner of the suit land. He further contends that any sale which occurred after he was registered as owner of the land is null and void as the purported sellers had no interest in the land capable of being sold.

10. The third respondent contends that he has already filed Kitale ***HCCC NO. 100 of 2012*** in which he seeks to evict Agnes Nandunda Kusimba and Alice Mukhwana Kusimba as well as any persons claiming under them.

ISSUES FOR DETERMINATION

11. I have carefully gone through the petition as well as the replying affidavit by the respondents and the submissions, by counsel for the parties. The following issues emerge for determination.

(i) When did the third respondent become the registered owner of the suit land?

(ii) Had Crispo Kusimba transferred the suit land to the third respondent before he died.

(iii) Was the third respondent's acquisition of title to the suit land fraudulent?

(vi) Has the third respondent violated the petitioners constitutional rights.

(v) Have the petitioners acquired the suit land by adverse possession.

(vi) Are the petitioners entitled to the prayers in the petition?

(vii) Who should pay the costs of this petition?

12. The petitioners contend that the third respondent acquired title to the suit land in a fraudulent manner after Crispo Kusimba Wekundu had died. The basis of the petitioners contention that the third respondent obtained title to the suit land fraudulently is a replying affidavit sworn on 31/10/2013 in which the Land Registrar Trans – Nzoia County avers that the third respondent obtained title to the suit land on 17/12/1993 but that the Trans-Nzoia Lands Registry does not have the supporting documents. The mere fact that the supporting documents are missing from the land registry is not an indicator that the third respondent obtained title to the land in a fraudulent way. An extract of the green card shows that the third respondent obtained the title to the suit property on 17/12/1993. The supporting documents were available as at 5/5/2001. This is confirmed from the letter of Land Registrar Kitale addressed to the Chief Land Registrar Nairobi. The land Registrar gave a chronology of events following registration of the third respondent as owner of the suit land. He enclosed a copy of agreement, transfer from Crispo Kusimba, application for land control board consent, letter of consent, Kenya Gazette notice where loss of original title was advertised, transfer of land from Crispo Kusimba to third respondent, payment receipts as well

as green card.

13. These were supporting documents which were in the file as at 5/5/2001. If the documents were subsequently taken from the file, this cannot be attributed to the third respondent. There is ample evidence as shown from the 59 page judgement by Justice Nambuye now a court of Appeal Judge in Kitale **HCCC NO. 48 of 1997** that the family of Crispo Kusimba Wekundu and Wekundu himself had tried to wrest this land from the third respondent. It is therefore not surprising that they may have been behind the disappearance of the supporting documents from the Kitale Lands office. The title to the suit land was said to have been lost and Crispo Kusimba Wekundu applied for Gazettment as having been lost. It was however surprising that two wives namely Agnes Kusimba and Alice Mukhwana produced the original title during the trial of Kitale **HCCC No. 48 of 1997**. These two wives of Crispo Kusimba are the ones who filed the case against the third respondent and others claiming that they were unaware of any exchange of land between the third respondent and their husband.

14. There was a contention by the petitioners that Crispo Kusimba died before he transferred the land to the third respondent. This contention is without basis. The suit property was registered in the name of the third respondent on 17/12/1993. By this time, Crispo Kusimba Wekundu was alive. In 1994 when his two wives filed a case against the third defendant and others, Crispo Kusimba Wekundu was dragged into the suit on allegations that he had no mental faculties to enter into any agreements. The petitioners cannot therefore claim that the suit land was transferred after the death of Crispo Kusimba Wekundu. The exchange agreement had been signed by elder sons of Crispo Kusimba Wekundu and Crispo himself. There are documents on record to show that. It is therefore my finding that the suit land was registered in the name of the third respondent on 17/12/1996 and this happened during the life time of Crispo Kusimba. There was therefore no fraud involved in the acquisition of the title by the third respondents. These findings disposses off issues Nos 1, 2 and 3 hereinabove.

15. I now move to the issue on whether the third respondent has violated the constitutional rights of the petitioners. The petitioners allege that the third respondent has violated their right to acquire property as enshrined in Article 40 (1) (a) and (b) 40 (6). I have considered the evidence tendered by the petitioners. I do not see any violation of the petitioners rights by any of the three respondents. The petitioners have totally failed to show that any of their rights have been violated. To the contrary it is the third respondent's constitutional right to own property which has been violated. The third respondent acquired the suit property in a lawful manner. He is entitled to enjoy the property but he is not doing so because some people have decided to sell his land to third parties when they have no interest capable of being sold.

16. The petitioners having realised that they have no case against the third respondent have in their petition put up a thinly veiled claim based on adverse possession They say they have been on the suit land for over 16 years and that they have been peacefully staying on it. A look at the agreements annexed by the petitioners show that they bought parts of the suit land between 1994 and 2012. The law regarding adverse possession is a special procedure in which a party can claim to be declared owner of a suit land. One has to prove certain set standards of law. There are statutes which prescribe the manner in which such a claim can be put up. Case law has also set guidelines on how the same should be established. In the case of ***Wambugu -Vs- Njuguna (1983) KLR 173*** the court of appeal held as follows;-

> ***"In order to acquire by statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeat his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years"***

17. The third respondent has been fighting for his land since the 70s. He is still doing it as can be seen

from the number of battles he has won in the corridors of justice over the years. He has even a pending case for eviction filed in 2012. It will therefore be illogical that any one has acquired part or a whole of the suit land by way of adverse possession. It is my finding that none of the petitioners has acquired title to any portion of the suit property by way of adverse possession. Having found that the petitioners rights were never violated and that they have not acquired any part of the suit land by adverse possession it follows that the prayers by the petitioners cannot be granted.

D E C I S I O N

18. From the a foregoing I find that the petitioners petition lacks merits. The same is hereby dismissed with no order as to costs. I have not ordered costs considering the position of the petitioners. They bought small parcels ranging from a point of an acre to about one or two acres. They never bothered to conduct a search to ascertain if the land they were buying belonged to the purported sellers or not. For this reasons I do not feel that an order for costs is justified in the circumstances. Let each party bear their own costs.

Dated, signed and delivered at Kitale on this 16th day of September, 2014.

E. OBAGA

JUDGE

In the presence of Mr Mokua for the Petitioners and Mr Kuria for 1st and 2nd respondents. Court Clerk – Kassachoon.

E. OBAGA

JUDGE

16/9/2014