



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.138 OF 2011

BETWEEN

ISSACK KAMAU KABIRA.....1ST PETITIONER
TOWHIDA AWO SHARIFF.....2ND PETITIONER
ISHA AWO SHARIFF.....3RD PETITIONER
MEHBUBA GELAN KALIL.....4TH PETITIONER

AND

THE COMMISSIONER OF LANDS.....1ST RESPONDENT
THE REGISTRAR OF TITLES.....2ND RESPONDENT
THE HON. ATTORNEY GENERAL.....3RD RESPONDENT
ABDULKADIR SHARIFF ABDIRAHIM.....4TH RESPONDENT
DAHIR SHARIFF ABDULKADIR.....5TH RESPONDENT
GULF AFRICAN BANK LIMITED.....6TH RESPONDENT
TIMESCOM ENTERPRISES LIMITED.....7TH RESPONDENT
JOSEPH M. GIKONYO T/A GARAM INVESTMENT.....8TH RESPONDENT

JUDGMENT

Introduction

1. The 1st and 2nd Petitioners, Towhida Awo Sheriff and Isha Awo Shariff are the Administrators of the Estate of Awo Shariff Mohamed (deceased). In their Petition dated 22nd August 2011, they raised issues relating to the public auction of Government House No.HG 794 L.R. No.103/564 at Nairobi West in Nairobi and also the issuance of Grant of Title No.I.R.80763. (L.R.No.209/13688)

as well as the registration of the said property in the name of Abdinasir Abdirahim Mohamed, the 5th Respondent. They also complain about a charge created over the said title by Gulf African Bank Ltd, the 6th Respondent.

2. In the Petition aforesaid, they seek the following orders;

“(a) Declaration in terms of averments at paragraphs 32, 33, 34, 35 and 36.

(b) A Writ of Certiorari or an order directed to the 1st and 2nd Respondents to remove into Court the Register of Title and to quash or cancel Title No.IR.80763 L.R No.209/13688 issued to the 4th Respondent on 2nd September 1998 as it relates to alienation of Government House No.HG 794 LR No.103/654 Nairobi West and cancel entry of memorial of Transfer of Title thereof No.80763 LR. No.209/13688 to the 5th Responded and cancel memorial of entry thereto [i.e.] charge to Gulf African Bank Ltd the 6th Respondent.

(c) A mandatory order compelling the 1st Respondent to issue Grant of title to Government House HG 794 L.R No.103/564 Nairobi West to the 4th Respondent and a mandatory order compelling the 2nd Respondent to enter a memorial of the prohibitory order made in Milimani HCCC No.329 of 2003 against title to LR No.103/563 and a vesting order of title thereof in the 1st Petitioner and an order restraining the 6th and 8th Respondents by themselves or by any servant or agent of them from howsoever selling Government House No. HG 794 LR No.103/564 Nairobi West and or title No.IR 80763 LR No.209/13688 and restraining the 4th and 5th Respondents from renting, leasing, selling, charging, using, occupying or howsoever remaining on Government House HG No.794LR No.103/564 Nairobi West or title thereof or preventing the 1st Petitioners’ free and unhindered occupancy, use, possession thereof and access thereto or exit therefrom.

(d) An order for payment of damages and or mesne profits by the Respondents to the 1st Petitioner for unlawful use of Government House No.HG 794 LR 103/564 or by whatever title numbers described from 26th August 2009 until vacant possession is given to the 1st Petitioner.

(e) The Petitioners be awarded costs of this Petition.

(f) The Honourable Court be pleased to make any further or other orders for the ends of justice.”

Petitioner’s Case

3. The Petitioners’ case is contained in the Petition aforesaid, the Verifying Affidavit of Isha Awo Shariff sworn on 22nd August 2011, together with its annexures, and written Submissions filed on 10th October 2012 by its Counsel, Mr. F. N. Wamalwa.

Factual Background

4. According to the Petitioners, one Awo Shariff Mohamed died intestate on 30th July 2009 and on 17th August 2009, the 2nd and 3rd Petitioners were appointed as Administrators of his estate *ad colligenda bona*. Prior to that, on 16th February 2006, the High Court at Milimani in **Civil Suit No.329 of 2003** had entered judgment in favour of Awo Shariff Mohammed in the sum of USD

200,000 plus a further Kshs.800,000/- with costs and interest thereon at 12% p.a. from 5th June 2003. The judgment was directed at the 4th Respondent, Abdulkadir Shariff Ibrahim.

5. The Petitioners, upon being appointed Administrators of the Estate of Awo Sharriff Mohamed as above, then embarked on attempts at recovering the decretal sum from the 4th Respondent who at the time the decree was passed, served as the Director of Settlement in the Ministry of Lands and Settlement.
6. After the said Judgment, the 4th Respondent by an Affidavit sworn on 11th May 2006, offered the title for House No. HG 794 L.R.103/564 as security for an order of stay of execution in **HCC No.229/2003**, pending appeal. At the time however, all he had were a letter of allotment and an acceptance of the offer of allotment of the said property and not the actual title. He, in any event, intimated that the title would be issued in his name and on that undertaking, the Court granted an order of stay of execution of the decree aforesaid pending appeal.
7. Subsequently, that the 4th Respondent made a similar application in the Court of Appeal and on the strength of the allotment letter to the house aforesaid, was granted another order of stay pending appeal. The said order however subsequently lapsed and the Petitioners commenced execution proceedings against him for recovery of the decretal amount above stated.
8. In that regard, on 22nd September 2008, a prohibitory order was issued by the High Court attaching the title to the house aforesaid and following settlement of the terms of sale, the said property was allegedly sold to the 1st Petitioner on 26th August 2009. The 5th Respondent's objection to the sale had earlier been dismissed on 10th July 2009. The 1st Petitioner then paid the full purchase price of Kshs.2.5 Million but his efforts to acquire title were allegedly perennially frustrated by the **“collusive actions of the 1st, 2nd, 4th and 5th Respondents”**. The title was in any event later issued in the name of the 5th Respondent and charged to the 6th Respondent to allegedly defeat the 1st Petitioner's claim to the house.
9. As for the reason why the 7th and 8th Respondents were enjoined to the present proceedings, the Petitioners have claimed that the 6th Respondent engaged the services of the 8th Respondent, an auctioneer, to sell the house in a public auction and there was therefore need to stop that action from being taken and to stop third parties from being dragged into the controversy regarding ownership of the said house.
10. That for the above reasons, the title aforesaid, issued to the 5th Respondent, ought to be cancelled and all the prayers above granted as prayed.
11. I should only note here that the Petition was amended by an order dated 2nd September 2011 and the 5th Respondent was substituted and so the present 5th Respondent is one, Dahir Shariff Abdulkadir, and the Amended Petition was filed on 18th November 2011.

The 1st, 2nd and 3rd Respondents' Case

12. The Commissioner of Lands, the Registrar of Titles and the Attorney General filed Grounds of Opposition to the Petition on 10th February 2012 and they are as follows;

(1) *The Petitioners have not shown in their Petition any right that has been infringed and the manner of infringement of the right by the 1st, 2nd and 3rd Respondents.*

(2) *The Petition lacks particulars of fraud or collusion to support the Petitioners' allegations of fraud and collusion on the part of the 1st, 2nd and 4th*

Respondents.

(3) *The issues raised in the Petition require viva voce evidence in a suit commenced by Plaintiff. They are not issues that can be properly dealt with in a Constitutional Petition such as this one.*

(4) *The Petitioners are barred by res judicata and issue estoppel in view of **HCCC No.329 of 2003** in general and the Ruling of the Court (Koome, J.) given on 18th June 2010 in **HCCC No.329 of 2010** in particular.*

(5) *The Petition is scandalous as what it does is to approbate and reprobate on the legality or lack thereof of the suit land titles.*

(6) *The Petition is an abuse of the process of the Court because the issues in dispute are issues that were directly and substantially in issue and were raised or ought to have been raised in **HCCC No.329 of 2010**.*

(7) *That the Petition should therefore be dismissed with costs.*

The 4th Respondent's Case

13. Abdikadir Shariff Abdirahim also filed Grounds of Opposition on 16th March 2012 and they are as follows;

(1) *The Petition is an abuse of Court process.*

(2) *The Petition is and incurably defective.*

(3) *The Petition lacks particulars of fraud or collusion to support the Petitioners allegations of fraud and collusion on the part of the 4th Respondent.*

(4) *The issues raised in the Petition are not constitutional issues.*

(5) *The issues raised in the Petition are res judicata the same having been raised in **HCCC No.329 of 2003**.*

14. He has therefore sought that for the above reasons, the Petition ought to be dismissed with costs.

The 5th Respondent's Case

15. Dahir Shariff Abdulkadir filed a Replying Affidavit on 16th January 2012 and stated that there is no property registered as **HG 794 L.R. No.103/504** as alleged. That his father, the 4th Respondent, transferred to him title **No. L.R. No.209/13688** and when the Petitioners attempted to sell that property pursuant to the decree in **HCCC No.329/2003**, he objected to it and Lesiit J. on 10th July 2009 upheld that objection and Koome J. by a Ruling delivered on 18th June 2010 also reached the same decision.

16. That therefore he has not engaged in any collusive activities with any other Respondent and all he had done was to defend his right to the property in issue through the High Court. That as the lawful proprietor of the said property, he was entitled to charge it as he did to secure advances made to the 7th Respondent by the 6th Respondent and he conceded in that regard that he is a Director of the 7th Respondent Company.

17. The 5th Respondent for the above reasons seeks the dismissal of the Petition with costs.

The 6th, 7th and 8th Respondents' Cases

18. Whether by mistake or otherwise, I have not seen any pleadings by the 6th, 7th and 8th Respondents although the record otherwise indicates that the 6th and 8th Respondents were represented by Counsel.

Determination

19. The facts as earlier outlined above are largely uncontested and there are also a number of facts that have emerged which cannot be contested. They are the following;

- i. There is no title document (s) exhibited by any party for a property known as "Government House HG 794 L.R. No.103/504".
- ii. The title issued to the 5th Respondent is for L.R. No.209/13688 and not L.R. No.103/584.
- iii. Both Lesiit J. and Koome J. in HCCC No.329/2003 found that L.R. No.209/13688 was not and could not properly be the subject of the sale order in that matter.

20. With that background in mind, what exactly are the Petitioners seeking of this Court and what is the cause of action in the Petition?

21. At paragraphs 36 of the Amended Petition and flowing from averments at paragraphs 32, 33, 34 and 35 of the Petition, the Petitioners have stated as follows; (and I deem it appropriate to set out these matters verbatim);

Paragraph 36

“(a) that procurement, issuance and acquisition of Grant of Title No.IR 80763 LR. No.209/13688 Nairobi West by the 4th Respondent, a Public Officer in position of trust in the Ministry of Lands, was illegal fraudulent and an abuse of office. (sic)

(b) that Grant of Title No.IR 80763 LR. No.209/13688 issued by the 1st Respondent is fraudulent and illegal.

(c) that the transfer by the 4th Respondent having no lawful Title No.IR 80763 LR. No.209/13688 to the 5th Respondent, his son, in or about April 2000 was fraudulent, illegal and null and void. (sic)

(d) that the 5th Respondent acquired no lawful Title capable of charging to Gulf African Bank Ltd to secure debts of Timescom Enterprises Ltd to Gulf African Bank Ltd.

(e) that the 5th Respondent fraudulently charged to 6th Respondent the illegal Title No.IR 80763 LR. No.209/13688 knowing the Government House No.HG 794 LR. No.103/564 to which it related was the subject of fresh alienation and attachment and sale to answer for the debt to defeat those process. (sic)

(f) that the processes adopted by the 1st and 2nd Respondents of validating illegally title acquired by the 4th Respondent in 1998 and thereby withholding issuance of Title to Government House No.794 LR.No.103/564 Nairobi West was fraudulent and calculated to defeat attachment and sale thereof to answer for

debts of the 4th Respondent.

- g. *due process for alienation of Government House No. HG No.794 LR. No.103/564 Nairobi West ought to have been followed through to the issue of a fresh Title to the 4th Respondent.*
- h. *that on the representation of the Government of Kenya to the 4th Respondent in the due process of alienation of Title to public land and on undertakings, representations and depositions of the 4th Respondent to the Honourable Court and to the Court of Appeal for grant of stay of execution of decree in Milimani HCCC No.329 of 2003 Awo sheriff Mohamed vs Abdulkadir Shariff Abdirahim the Respondents are estopped from asserting that Title to Government House No HG 794 LR No.103564 offered and allotted by the Government of Kenya to the 4th Respondent on or about 17th December 2004 is or ought lawfully to be same, similar or synonymous with the fraudulent Title IR 80763 LR. No.209/13688 or that unlawful Grant thereof by the 1st Respondent in or about 1998 and unlawful acquisition by 4th Respondent of Title to Government House No. HG 794 Nairobi West by fraudulent process in breach of their trust did not render Title No.IR 80763 LR No.209/13688 null and void ab initio. That the due process for lawful alienation of Title thereof was not capable of stoppage to defeat attachment and sale thereof to answer for lawful debts of the 4th Respondent.*

(i) That Grant of Title No. IR 80763 LR. No.13688 being an unlawful Grant by the 1st Respondent of Government House No. HG 794 Nairobi West ought in the premises to have been cancelled.”

22. Together with the above complaints, elsewhere above, I also set out other prayers in the Amended Petition including orders of Certiorari and damages for unlawful use of the house in issue as well as *mesne* profits.
23. The Respondents have, in the above context raised, two issues which I consider pertinent and which I should determine *in limine*. They are as follows;
- a. That the issues raised in the Petition are barred by the doctrine *res judicata* as they were raised and determined in HCCC No.329 of 2003.
- b. That the Petition in any event raises no constitutional question requiring determination by this Court.
24. I will determine each of the two issues separately and if need be, I will also go on to determine the substance of the Petition.

Is the doctrine *res judicata* applicable to the present Petition?

25. *Res judicata*, in Civil Law, is ordinarily invoked using the provisions of **Section 7** of the **Civil Procedure Act** which provides as follows;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

26. In Constitutional Petitions, this Court has taken the view that *res judicata* as a principle of law is applicable but that the Court should only invoke it in the clearest of cases and where a party has relitigated the same issue in a manner amounting to abuse of Court process. I therefore reiterate the holding in Okiya Omtata vs Attorney General & Others, Petition No.593 of 2013 that;

*“Whereas these principles (of *res judicata*) have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so*

because, in my view, the principle of res judicata can and should only be invoked in constitutional matters in the clearest of cases and where a party is relitigating the same matter before the Constitutional Court and where the Court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, it must be sparingly invoked in rights-based litigation and the reason is obvious.”

27. In applying the above reasoning to the present case, I have seen the two Rulings delivered by Lesiit J, and Koome J., respectively in **HCCC No.329 of 2003**. It would seem from a reading of their contents that the suit was filed by Awo Shariff Mohammed against the 4th Respondent and later, the 5th and 7th Respondents, as well as Sasa General Investment Limited. It is unclear what exactly the substratum of the suit was but it is obvious from the facts elsewhere set out above that at some point, the decree arising from the judgment in favour of the Plaintiff, Awo Shariff Mohammed, became the focus of the proceedings and the house in dispute now was introduced by both parties to the suit. *Prima facie* therefore, some parties in that suit are also parties in this Petition but it would seem that the Petitioners are approaching the present Petition as a matter of infringement of fundamental rights and freedoms by the Respondents and the High Court in **HCCC No.239/2003**. Indeed Mr. Wamalwa for the Petitioners, in his submissions at pages 1 and 17 makes that point very strongly and in fact he argued forcefully that the substance of his clients' claims in the Petition is not the same as in the Civil Suit. I agree with him to that extent only.
28. In that context therefore, it is obvious that the two matters, interconnected by certain common facts, cannot be said to be barred by the doctrine of *res judicata* and I so hold.

Are there Constitutional Questions raised in the Petition?

29. The Respondents have argued that no constitutional question arises to be determined and the Petitioners' remedy, if at all, lies in pursuing the proceedings in **HCCC. No.239/2003** to their logical conclusion.
30. The Petitioners on the other hand have submitted that such a submission is “fundamentally misconceived”. In his Submissions on that point, Mr. Wamalwa made the argument that **Articles 27, 40(3) and 47** of the **Constitution** were violated when the 1st Respondent refused to issue a Grant to **L.R No.103/564**.
31. Further, that “*no proceedings against all participants in the registration of the impugned charge would successfully lie in HCCC No.329 of 2003 because of the peculiar facts of the case including the fact that the case including the fact that the 1st, 2nd, 3rd, 5th, 6th, 7th and 8th Respondents are not parties to Milimani HCCC No.329 of 2003.” In addition, that the main cause of action in that suit has been determined and that under **Order 53 Rule 2** of the **Civil Procedures Rules**, the time within which to seek and obtain orders of judicial review has long lapsed.*
32. On my part, I have read the Amended Petition and the Affidavit in support as well as the annexures thereto. I understand the gravamen of the Petitioners' case to be partly that the issuance of title for the disputed house to the 5th Respondent, was unlawful as was the charge created over that title in favour of the 6th Respondent. I say so because I have elsewhere above reproduced the contents of paragraph 36 of the Amended Petition as well as prayers (b), (c) and (d) of the Petition. If that be the case, where is the constitutional issue that this Court is being called upon to determine?
33. In the entire Petition, it is only in the heading that there is a sub-heading titled, “*In the matter of infringement of fundamental freedoms and Rights of the Petitioner under **Articles 19, 20, 22, 23, 24, 27, 40, 47 and 50** of the **Constitution** of Kenya*” As to how those rights were violated and how those Articles of the Constitution apply, not a word was said in the Petition. In Submissions, Mr.

Wamalwa also glossed over the issue in the words I have summarised above (that failure to issue title was a violation of the Petitioners' rights) It is now trite that a party invoking the Bill of Rights to allege must state with some measure of particularity how those provisions have been violated and I need not repeat the fact that this Court has restated that principle more than once – See **Annarita Karimi Njeru vs Republic (1976 – 1980) 1 KLR 14 and Trusted Alliance Society vs Mumo Matemu (2013) eKLR.**

34. In any event, not every pleading with a heading that invokes the Bill of Rights is necessarily, in substance, one that raises a constitutional question. It may well be disposed elsewhere and in that context, the words of the Court in **Wahid Munwar Khan vs The State AIR 91956)Hyd.22** are pertinent. In that case, the learned Judge partly stated as follows;

“It is an established practice that where a matter can be disposed off without recourse to the Constitution, the Constitution should not be invoked at all ...”

35. I wholly agree with the above holding and the issue placed before this Court cannot fit the expectations of **Articles 22(1)** and **165(3)(b)** and **(d)(i)** and **(ii)** of the **Constitution**. Those Articles, for avoidance of doubt, provide as follows;

22(1) “Every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

165(3)“(1) ...

(a) ...

(b) ...

(2) ...

(3) Subject to clause (5), the High Court shall have—

(a) ...

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) ...

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(e) ...”

36. I have said elsewhere above that there are no sufficient particulars in the Petition to enable me invoke the above provisions and even more fundamentally, the dispute before me is really about title to **L.R. No.103/564** and whether that title exists or not.

37. Further, and in addition, the dispute is about whether the title issued to the 5th Respondent for LR No.209/13688 was lawfully issued or not as was the charge in favour of the 6th Respondent with the latter title as security.

38. In that regard, those issues are not matters for this Court to determine. They are matters in the exclusive domain of the Environment and Land Court created under **Article 162(2)** of the **Constitution** and that is why **Article 165(5)(b)** provides as follows;

“(1) ...

(2) ...

(3) ...

(4) ...

(5) The High Court shall not have jurisdiction in respect of matters—

(a) ...

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”

Article 162(3) also provides as follows;

“(1) ...

(2) ...

(3) Parliament shall determine the jurisdiction and functions of the Courts contemplated in Clause (2)

(4) ...”

39. Pursuant to the above **Article**, the specific jurisdiction of the Land and Environment Court is set out in **Section 13** of the **Environment and Land Court Act Cap 12A (Laws of Kenya)** which provides as follows;

“(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other written law relating to environment and land.

(2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes relating to environment and land, including disputes?

- a. *relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*
- b. *relating to compulsory acquisition of land;*
- c. *relating to land administration and management;*

- d. *relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*
- e. *any other dispute relating to environment and land.*

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to the environment and land under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.”

40. Looking at all the above functions and jurisdiction of the Court it is obvious that all the prayers in the Petition can safely find a home there and that would have been the right place to ventilate the Petitioners’ grievances.

41. I should also note that the Respondents are misguided in stating that the dispute ought to be resolved in **HCCC No.239/2003**. I say so because that suit was really finalized when a money decree was extracted. The question as to how the title to the disputed house was acquired has never been properly determined because it was not one of the issues to be determined in that suit. In fact both Lesiit and Koome JJ. merely settled the issue whether LR. No.209/13688 was one of the properties to be sold in settling the decree but the issues now raised have not been resolved and I have said that this Court has no jurisdiction to delve into matters of title – See **Prof. Christopher Mwangi Gakuu vs Kenya National Highway Authority Constitutional Application No.585 of 2012**. To that extent therefore, it is obvious that no constitutional question under the Bill of Rights has been properly placed before this Court and so the Petition is incompetent and the real issue in context cannot be properly determined.

Conclusion

42. Having held as above, once a Court has found that it has no jurisdiction to determine any matter, it must down its tools – See **Owners of the Motor Vessel “Lilian S” vs Caltex Oil (Kenya) Ltd Civil Appeal No. 50 of 1989**. My judicial tools have consequently been downed with the consequence that only the following orders can properly be made;

- a. The Petition herein is struck out for want of jurisdiction on the part of this Court.
- b. Costs thereof shall be paid to all the Respondents save the 7th and 8th Respondents by the Petitioners.

43. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF DECEMBER, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Mr. Wamalwa for Petitioner

Miss Weru holding brief for Mr. Munyu for 6th and 8th Respondent

No appearance for other Parties

Miss Kamande holding brief for Mr. Opondo for 1st, 2nd and 3rd Respondent

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE