



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO 927 OF 2012
FORMELY PETITION NO 131 OF 2010

IN THE MATTER OF SECTION 84 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTIONS 70, 71, 74, 75, 77, 81, 82, AND 84 OF THE CONSTITUTION

BETWEEN

FRANCIS MUITIA MUGAMBI & 149 OTHERS.....
.....PETITIONERS

AND

THE HON. ATTORNEY GENERAL.....1ST
RESPONDENT

THE MINISTER FOR EDUCATION.....2ND
RESPONDENT

THE BOARD OF GOVERNORS, MAINA WANJIGI SECONDARY SCHOOL..3RD
RESPONDENT

THE COMMISSIONER OF LANDS.....4TH RESPONDENT

JUDGMENT

This Judgment has taken sometime coming and I must profusely apologize to the parties and their Counsels.

This petition dated 31st March, 2010 relates to occupation and user rights in respect to parcels of land in Galole Village, Eastleigh in Nairobi. The Petitioners aver that the plot of land in question is un-alienated Government Land within the meaning of Section 2 of the Government Land Act. It is their claim that they are owners of temporary and semi-permanent structures within Galole Village that form their residential

and commercial premises for rental purposes. The Petitioners claim that they were given the plots in 1966 by the first President of the Republic of Kenya, the Late Jomo Kenyatta as a gift to a dance group known as “Nyakinyua Dancers” who are the Petitioners’ forefathers. Further that some of the Petitioners are the last generation or descendants of the Mau Mau war veterans and detainees that were not offered settlement upon Kenya attaining independence and others were permitted by Provincial Administration Officials in Nairobi to occupy the plots. It is the Petitioners’ averments that as lawful occupants of the land, they have legitimate proprietary interests over their plots, which cannot be compromised, taken over, vitiated, curtailed, or otherwise defeated and are therefore entitled to leases.

The Petitioners aver that on 6th March, 2010 the area Assistant Chief convened a Baraza and served the Petitioners a Notice purportedly from the Ministry of Education directing them to vacate the land within 30 days on the premise that they are squatters on land belonging to Maina Wanjigi Secondary School. The notice was pursuant to a resolution of the Provincial Education Board Meeting of 19th February, 2010. The Petitioners contend that the eviction amounts to a total negation, compromise and defeat of their legitimate interest over the suit property. Further that the Government has no right under any law to acquire land for public institutions in a manner that does not cater for the interests of the affected citizens. The Petitioners averred that the evictions would amount to a violation of their rights to life and property and further offend their rights to protection of law and from discrimination.

The Petitioners thus prayed for orders that:

- a. A declaration that the inhabitants and structures or plot owners of Galole village area of Eastleigh within Nairobi have priority rights to be granted leases
 - b. A declaration that the implementation of the resolution of the Nairobi Provincial Education Board Meeting of 19/2/2010 (MIN4/PEB/FEB/2010 and MIN5/PEB/FEB/2010) contained in the eviction Notice dated 5/3/2010 violates the property rights and interests of the Petitioners in Galole Village area of Eastleigh, Nairobi within the meaning of Section 75 of the Constitution.
 - c. A declaration that the implementation of the resolution of the Nairobi Provincial Education Board Meeting of 19/2/2010 (MIN4/PEB/FEB/2010 and MIN5/PEB/FEB/2010) contained in the eviction Notice dated 5/3/2010 herein amounts to a violation of the Petitioners’ rights to protection from derogation of property under Section 75 and Protection of Law under Section 70 and 77 of the Constitution.
 - d. A declaration that the implementation of the resolution of the Nairobi Provincial Education Board Meeting of 19/2/2010 (MIN4/PEB/FEB/2010 and MIN5/PEB/FEB/2010) contained in the eviction Notice dated 5/3/2010 will violate the Petitioners right to life and livelihood secured through sections 71, 75, and 77 of the Constitution.
 - e. A declaration that the right to life under Section 71 of the Constitution includes right to live in dignity, to protection of one’s shelter and means of livelihood.
 - f. A declaration that temporary and semi-permanent structure is property within the meaning of Section 75 of the Constitution.
 - g. A declaration that the Applicants are entitled to be registered as proprietors/structure owners of the plots on which their temporary and semi-permanent premises stand in Galole Village, Eastleigh Estate, Kamukunji District, Nairobi.
 - h. That as an alternative to (g) above, a declaration that the Petitioners are entitled to be issued by the 4th Respondent, leases for 99 years in respect to parcels of land which their structures, temporary and semi-permanent premises constructed in Galole Village, Eastleigh Estate, Kamukunji District, Nairobi.
1. An order that the 4th Respondent do forthwith issue to the Applicant leases for 99 years over the parcels of land in in Galole Village, Eastleigh Estate, Kamukunji District, Nairobi on which their structures, temporary and semi-permanent premises are constructed.
 10. A permanent injunction to restrain the Respondents, their servants and/or agents from interfering with the Petitioners’ possession of their respective plots on which their temporary and semi-permanent structures are situated.
 11. An order that the Respondents do pay the cost of this suit.

In support of the Petition, the Petitioners annexed a copy of the Notice to Vacate dated 5/3/2010 signed by Mr. James Ongati the Secretary, D.E.B, Kamukunji District together with the Chief's invitation to a Baraza. The Petitioners also annexed correspondence over formalization of Galole Village squatters. The first letter is dated 12/10/2009 by the District Commissioner to the Provincial Commissioner detailing the occupation of the squatters in Galole Village with a proposal that the squatters be given documentation for the land. The second letter is dated 4/11/2009 from the Provincial Commissioner to the Commissioner of Lands forwarding the District Commissioner's letter and concurring with the proposal that the squatters be given documents for the land. The Petitioners annexed a Supplementary Agenda indicating that the 'Formalization of Galole Village Squatter' be included as an Agenda item in the General Purposes Committee Meeting to be held on 19/1/2010. Also annexed thereto was an excerpt of the minutes of the General Purpose Committee meeting held on 19/1/2010 wherein it was resolved under part 9 that, "***The request of the members be considered subject to evaluation by Technical Officers.***"

Zuhura Rajab, the Principal and Secretary to the Board of Maina Wanjigi Secondary School swore a Replying Affidavit to the Petition on 16th July, 2010. The deponent stated that the 3rd Respondent was started in 1989 on Land Parcel No. 36/1/917, hived off from Eastleigh Airport Primary School. Subsequently, that the School Management initiated the process of procuring the registration of documents for the School. The deponent stated that the Director of Physical Planning prepared a Part Development Plan No. 267 which was approved by the Minister for Lands when after the Commissioner of Lands issued a letter of allotment dated 19th July, 2007.

It was deposed that 1992, the School Management obliged to the Government's request to construct the Kenya Christian Industrial Training Institute (the institute). However, that the construction exercise opened the school's property to grabbing whereby 4 parcels were hived off from the school compound which are now registered as L.R. Nos. 36/1/760, 36/1/761, 36/1/792 and 36/1/793. The deponent stated that the irregularly created plots were then invaded by squatters who brought down the school fence and established a slum inside the school. It is her deposition that the slum has no toilet facilities and the human waste is dumped in an open sewer inside the school. As a result no further developments could be undertaken in the school despite there being availability of funds.

Following this menace, the Principal deposed that the School Management requested the Ministry of Education and the Provincial Administration to assist in securing a title deed for the school, to cancel the titles irregularly issued and to evict the squatters. Further to this, the School Management held a meeting with the Provincial Education Board on 19th February, 2010 and a further meeting with the District Commissioner, Kamukunji and Security Agents which resolved that a Notice be issued to the squatters residing on land belonging to the school to vacate with immediate effect. Subsequent to the meetings, the District Education Officer, Kamukunji issued a Notice to all squatters on Land Parcel L.R. 36/1/917 to vacate the said property.

It is deposed for the 3rd Respondent that the Petitioners encroached onto the property sometimes in 1992 when the Institute was under construction and not in 1966 as alleged. Further that there was nothing to prove the claims that the Petitioners are members of the '**Nyakinyua Dancers**' and that they ought to have obtained title documents if indeed they were granted the land by the founding President. The deponent contended that the land belonging to the school is well surveyed where an allotment letter has been issued and that the School Management awaits registration as proprietors. Further that it is in the public interest that the land is reverted back to the school as there is a need of increasing amenities with the increase in enrollment following the introduction of free Secondary Education.

In support of the response, the Principal, **Maina Wanjigi Secondary School** annexed the following documents: a Part Development Plan No. 267 approved by the Minister of Lands on 3/7/2007; two Letters of Allotment, one for Nairobi Eastleigh UNS. Plot No. A for Secondary School dated 5th November, 2004, and the second for Existing Site for **Maina Wanjigi Secondary School** dated 19th July, 2007; a letter from the Commissioner of Lands to the Director of Survey directing that the plot be surveyed in view of the letter of allotment of 19th July, 2007; a copy of the Kenya Gazette Notice No. 4752 as well as an excerpt of The Standard newspaper listing the Part Development Plans that have been completed

including that in respect of the 3rd Respondent's property; Photographs showing the extent of the encroachment into the 3rd Respondent's property; and correspondence from the School head to various offices including the Commissioner of Land, City Council of Nairobi, and to Provincial Director of Education requesting for title documents.

When the application came up for hearing *ex-parte*, this Court (**Dulu J.**) on 8th April, 2010 granted conservatory orders restraining the Respondents from demolishing the Petitioners' homes or otherwise interfering with the quiet enjoyment of their premises or possession of their respective plots for a period of 14 days unless extended or varied by the court. Subsequently, one **Stanley Muriuki Joseph** filed an application dated 5th May, 2010 seeking orders that he be joined to the proceedings as an interested party and that the orders issued on 7th April, 2010 and any other orders subsequent thereto as far as they affect his proprietary rights of property known as **LR. No. 36/1/762 Eastleigh Section One** be set aside and vacated forthwith. The application was premised on grounds that the Petitioners had misrepresented to this court that the plot of land in their occupation constitutes unalienated Government Land when in fact the land is private to which the interested party holds beneficial interest as administrator and beneficiary.

The Interested Party's application dated 5th May, 2010 was heard *inter-partes* and this court (Gacheche J.) on 9th June, 2010 directed that the orders given 7th April, 2010 in so far as they affect the Interested Party's rights to property **LR. No. 36/1/762 Eastleigh Section One**, be set aside and vacated forthwith. Following this order, this Court deduces from a Supplementary Affidavit sworn on 24th May, 2012 by **Samuel Kathiari Itabari** on behalf of the Petitioners and their submissions that the Petitioners were evicted from the property and their property demolished at the behest of the Respondents. Mr. Itabari deposed that the act of demolition was wholly unjustified and illegal as the same was effected without any valid court order and at unauthorized hours so as to deny the petitioners legal redress.

The Petition was canvassed by way of written submissions. **C.B. Mwongela & Co. Advocates** for the Petitioners filed submissions dated 26th November, 2013. At the time of filing these submissions, the Petitioners had been evicted from the property in dispute. Despite their eviction, counsel submitted that the Petitioners are entitled to leases or title deeds for the property in dispute having been allocated by the first President of Kenya who was empowered under **Section 3** of the **Government Land Act** to, *inter-alia*, to make grants or disposition of any estates, interests in or over un-alienated Government land. Counsel submitted that the Petitioners had legitimate proprietary interest over their respective plots in accordance with **Section 75 of the Constitution**.

It was submitted for the Petitioners that the eviction amounted to a violation of their right to life and property under **Sections 71 and 75 of the Constitution**, (now repealed) right to protection of the law under **Sections 30 and 77** thereof and the right to protection from discrimination. Further that the eviction was violent and forceful and the Petitioners were left with no alternative places to reside, neither were they accorded any opportunity to salvage any of their property, building materials and household goods before and after demolitions and that the education of the Petitioners' children was interrupted. Counsel also submitted that evictions should not in any way result in individuals being rendered homeless or vulnerable to the violation of another's rights. In support of this submission, counsel cited the case of **Ibrahim Sangor Osman v Minister of State for Provincial Administration and Internal Security (2011) eKLR**

There were no submissions filed from the Office of the Attorney General for the Respondents, despite given several chances to do so.

The Court has now considered the pleadings generally, the annexures thereto and the written submissions and the court finds that: -

The current state of affairs on the ground, from the Petitioners' submissions is that the Petitioners are no longer in occupation of the property having been evicted, as they say, at the behest of the Respondents. Despite this, the Petitioners remain steadfast that they are still in pursuit of their claim for entitlement of leases and/or title documents for their respective plots within the property. It is their averment that they

were in possession of the property since 1966, their forefathers having been granted the property by the founding President of the Republic of Kenya. These averments are strongly opposed by **Zuhura Rajab** in the sworn affidavit on behalf of the 3rd Respondent who deposes the property in question is not unalienated as alleged by the Petitioners but land that is known as L.R. No. 36/1/917 belonging to the 3rd Respondent. It is her disposition that the Petitioners and other private developers began to encroach onto the 3rd Respondent's property sometime in 1992 at a time when a part of the said property was hived off to construct the Kenya Christian Industrial Training Institute. There is no contention as to the physical location of the property and thus this court safely asserts that both parties make reference to one property only that the Petitioners claim it is unalienated whereas the 3rd Respondent maintains it is alienated and allocated to them.

I have carefully perused the documents availed by both parties in support of their arguments. Whereas the Petitioners claim to have been allocated the property in the mid 60's by the founding President of the Republic, there is no evidence whatsoever that the Petitioners have furnished this court to support that claim. The Petitioners contend that the President under **Section 3 of the Government Land Act (now repealed) had the power to, subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land**. Even if so, the Petitioners do not have in their possession a Grant registered under any regime of the existing statutes at the time, in their favour. There is no signed document from the President granting title although or from the Commissioner of Lands whom the President could delegate these powers to. The only documents availed to the court are correspondence between officers of the Provincial Administration and the City Council of Nairobi over formalization of the Galole Village Squatters. I did take note that the first letter is the one dated October 2009.

There is no evidence that the Petitioners in the 40 plus years they claim to have been in possession made steps to regularize and obtain title documents in respect of the property. The 3rd Respondent, on its part has demonstrated how it acquired the property, the two Letters of Allotment, the first allocating the 3rd Respondent an unsurveyed plot marked 'A' and subsequently a survey undertaken by the Director of Survey culminating into a Part Development Plan (PDP) which was approved by the Minister of Lands and forwarded to the Commissioner of Lands for purposes of issuance of title. The PDP shows that the land is an 'existing site for Secondary School'. The second allotment letter was issued to the 3rd Respondent on 19th July, 2007 by the Commissioner of Lands after the approval of the PDP by the Minister of Lands on 3rd July, 2007. The Court of Appeal in the case of **Wreck Motor Enterprises v Commissioner of Lands & 3 others, Civil Appeal No. 71 OF 1997 [1997] eKLR** held that even where the H.E. the President had endorsed or appended his signature on the applications to the Commissioner of Lands for allocation of unalienated Government Land, the same is not sufficient to grant title over any land to anyone. The Court observed that: ***Title to land property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held.***

It is my finding that the Petitioners have not established that they have priority rights over that of the 3rd Respondent to entitle them to be granted leases and or title documents over the property. The court has also found that the Petitioners have not exhibited a right or interests over the property. It follows therefore that the Petitioners cannot claim deprivation of property or that the same was compulsorily taken possession of under **Section 75 of the (repealed) Constitution**. The court is satisfied that the 3rd Respondent is the lawful allottee of the property and therefore the **notice** issued to the Petitioners to vacate the premises did not amount to a violation of the Petitioners' rights to protection from derogation of property.

On the issue of evictions from the suit property, it is imperative to note that the Court was made aware of the developments from the bar. It was submitted by counsel that the Petitioners were violently and forcefully evicted from the property at the behest of the Respondents and as a result, the Petitioners were left homeless. Further that they were not afforded an opportunity to salvage any of their belongings. This eviction, counsel submitted, was undertaken during the subsistence of conservatory orders granted by the

court. With the circumstances that befell the Petitioners, they did not amend their Petition to reflect the prevailing state of affairs, choosing instead to do so through submissions. On careful perusal of the same, I do take note that the Petitions merely threw allegations to court without an attempt to prove them. There was no precision as to the date and time the eviction exercise took place.

The Petitioners continue to allege that the said eviction was at the behest of the 3rd Respondent, yet present nothing to the court that even suggests that the school was behind the demolition of the Petitioners' homes and business premises. As captured somewhere in this Judgment, an Interested Party obtained orders on 9th June 2010, discharging any conservatory orders in respect to his property LR No. 36/1/762 Eastleigh Section One. Could the evictions have been as a result of the orders of the Court of 9th June, 2010? This court can only speculate. There being no certainty, this court is unable to make any orders against the Respondents.

Having now considered the pleadings generally and on the foregoing, the Petition is hereby dismissed. I make no order as to costs.

It is so ordered.

Dated, signed and delivered this 16th day of December 2014

L.N. GACHERU

JUDGE

In the Presence of:-

.....For the Petitioners

.....For the 3rd Respondent

.....For the 1st, 2nd & 4th Respondents

.....Court Clerk