



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 319 of 2012

OVERSEAS PRIVATE INVESTMENT CORPORATION.....1ST PETITIONER

HARVEEN GADHOKE.....2ND PETITIONER

DANIEL MUTISYA NDONYE.....3RD PETITIONER

AND

THE ATTORNEY GENERAL.....RESPONDENT

AND

JOPA VILLAS LLC.....INTERESTED PARTY

JUDGMENT

Introduction

1. The issue for consideration in this matter is whether **section 78(1)** of the *Land Act, Act No. 6 of 2012* is retrospective and hence unconstitutional in so far as it violates the petitioners' fundamental rights and freedoms. The impugned provision reads as follows, "***This part (Part VII) applies to all charges on land including any charge made before the coming into effect of this Act and in effect at that time, any other specifically referred to in any section in this Part.***"

2. The *Land Act, 2012* is the substantive law on land and its preamble states that it was enacted to give effect to **Article 68** to revise, consolidate and rationalise land laws; to provide for the sustainable administration and management of land and land based resources, and for connected purposes. The *Land Act, 2012* together with the *Land Registration Act, Act No. 3 of 2012* and the *National Land Commission Act, Act No. 5 of 2012* were enacted pursuant to the provisions of **Article 68**. These statutes are intended to consolidate the various Acts of Parliament dealing with registration of land and to regulate land dealings in Kenya. **Section 109** of the *Land Registration Act* repealed five land laws: the *Indian Transfer of Property Act of 1882*, the *Government Land Act, (Chapter 280 of the Laws of Kenya)*, the *Registration of Titles Act, (Chapter 281 of the Laws of Kenya)*, the *Land Titles Act, (Chapter 282 of the Laws of Kenya)* and the *Registered Land Act (Chapter 300 of the Laws of Kenya)* with effect from the commencement date. These repealed statutes governed the registration of land transactions and other documents in the various land registries in Kenya.

Factual Background

3. The 1st petitioner, Overseas Private Investment Corporation ("OPIC") is an agency of the federal government of the United States of America and its object is to, *inter alia*, foster economic development

in new and emerging markets, complement the private sector in managing risks associated with foreign direct investment and support United States foreign policy. Its mission is to mobilize and facilitate the participation of United States private capital and skills in the economic and social development of less developed countries areas and countries in transition from non-market to market economies. The 2nd and 3rd petitioners are official receivers of the 1st petitioner.

4. In their petition dated 26th July 2012, the petitioners seek the following;

a) *A declaration that section 78(1) of the Land Act is unconstitutional, null and void in so far as it applies to charges made before the coming into effect of the Land Act, this being in contravention of Articles 40(1) and (2) of the Constitution 2010.*

b) *A declaration that sections 78(1) of the Land Act in so far as it applies retrospectively to charges drawn up before the enactment of the Land Act on 2nd May 2012 is in contravention of Articles 40(1) and (2) of the Constitution and section 23(3) of the Interpretation and General Provisions Act.*

c) *A declaration that the petitioners may proceed to enforce and realize the suit property L.R 27253/42 secured under the Charge dated 14th May 2006 without reference to section 78(1) of the Land Act.*

d) *Costs of this petition.*

e) *Such other orders as this Honorable court shall deem fit.*

5. The facts giving rise to this suit are undisputed and are that the OPIC and the interested party (“JOPA”) entered into a loan agreement. The loan was secured by promissory notes, debentures and a charge over LR No. 27253/42 (“the suit property”) for the sum of US\$ 7,100,000. Out of this sum, OPIC disbursed to JOPA the sum of US\$ 2,870,166. JOPA defaulted on its obligations to make payments despite demand being made by the OPIC. As a result the 2nd and 3rd petitioners were appointed as receivers. JOPA’s challenge to their appointment in ***Machakos No. HCCC 215 of 2008, Jopa Villas LLC v Overseas Private Investment Corporation and Others*** was dismissed on 26th November 2009 by Justice Lenaola. JOPA then appealed and its application for an injunction pending appeal was dismissed by the Court of Appeal in ***Civil App. Nai. No. 147 of 2009, Jopa Villas LLC v Overseas Private Investment Corporation and Others*** on 19th November 2010. Another application for injunction filed by depositors who had allegedly placed a deposit in respect of the suit property, that is, ***Nairobi HC Civil Suit No. 450 of 2009, Stephen Wainaina v Overseas Private Investment Ltd and Others*** was dismissed by Justice Njagi on 14th December 2011. A further application seeking to restrain the realisation of the suit property was made by a shareholder of JOPA in ***Nairobi HC Civil Suit No. 83 of 2012 Dr. Jane Wambui Weru v Overseas Private Investment Ltd and Others*** was dismissed by Justice Odunga on 27th April 2012.

6. The current outstanding balance is over US\$ 5,000,000 which amount continues to accrue interest.

Petitioners’ Case

7. OPIC avers that it is in the process of realizing the security over the suit property and has proposed to sell the suit property to AMS Properties Ltd. According to the petitioners the suit property is being sold pursuant to clause 11 of the Charge dated 16th March 2006 which provides for the OPIC’s statutory power of sale. The petitioners are aggrieved by the **section 78(1)** of the **Land Act** in so far as it has retrospective.

8. The petitioners allege that **section 78(1)** of the **Land Act** is applicable to the sale transaction because it applies the current provisions of the **Land Act** retrospectively to charges that were drawn up before the enactment of the **Land Act**. The petitioner cites various provisions under the impugned **Part VII** to demonstrate how they affect its rights. For instance, under **section 80(3)** of the **Land Act**, a charge has to

contain certain conditions *inter alia*, the terms and conditions of sale, an explanation of the consequences of default and the reliefs that the chargor is entitled to including the right of sale. The petitioners claim that these statutory conditions could not have been included in the charge dated 16th March 2006 as the charge was drafted prior to the enactment of the **Land Act**.

9. It was also the petitioners' position that **sections 90 and 96** of the **Land Act** contains variations on the remedies of the chargee and the chargees' power of sale which were not available under **sections 69, 69A and 69G** of the **Indian Transfer of Property Act (ITPA)** under which the charge was drawn. Under Clause 11 of the charge dated 16th March 2006 the power of sale could be exercised without notice, while the **sections 90 and 96** of the **Land Act** provide for a notice with the effect that property can only be sold after a cumulative 5 months and that the notice must indicate the reliefs that the chargor is entitled to. The petitioners point to the provisions of **section 80(3)** which were non-existent at the time the charge was drawn. It was therefore OPIC's case that **section 78(1)** of the **Land Act** established fresh demands which cannot be justified and are unreasonable.

10. The petitioners contend that it would be unjust to prevent the OPIC from realising its security by imposing fresh obligations which were nonexistent at the time the charge was drawn, thus impeding its accrued right under the charge and the **ITPA**. According to OPIC, this would amount to an infringement of its property rights protected under **Article 40**.

11. Ms Opiyo, counsel for the petitioners, relied on the case of **S.K Macharia and Another v Kenya Commercial Bank Ltd and Others, SCK Application No. 2 of 2011 (Unreported)**, where the Supreme Court stated that a retroactive law is not unconstitutional unless it *inter alia* impairs obligations under contracts, divests vested rights or is constitutionally forbidden. Counsel also cited **Kenya Bankers Association and Others v Minister of Finance and Another (2002) 1 KLR 61** to support the argument that a statute which takes away or impairs vested rights acquired under existing laws, or creates new obligations or imposes a new duty in respect of a transaction already past, must be presumed to be intended not to have retrospective operation.

Respondent's Case

12. The Attorney General responded to the petition by raising points of law contained in the grounds of opposition dated 2nd November 2012. It was the respondent's case that the petitioner has not disclosed any violation of its constitutional rights or the Constitution and accordingly there is no justiciable issue for the court to determine.

13. Mr Ojwang', counsel for the respondent, contended that **section 78(1)** of the **Land Act** while retrospective in its application and the provisions of the Act validate and accept instruments made under the repealed legislation but demand that consequential acts done pursuant to the said instrument be governed by the new law.

Interested Party's Case

14. JOPA opposed the petition by way of affidavits sworn by John Paul Njoroge, its director sworn on 23rd November 2012 and 12th January 2013.

15. JOPA alleged that OPIC does not have the standing to challenge the validity of Kenyan laws as it is neither a citizen nor resident in Kenya. According to it, the provisions of **Articles 22 and 258(1)** do not entitle any person other than a Kenyan citizen to apply to the court to enforce the Constitution.

16. JOPA claims that this petition is premature as there are several suits pending in court in regard to the suit property and it would be unfair to proceed to issue orders in this petition without involving all the concerned parties in the other suits. Those parties, it was argued, are bound to be affected by any decision issued in this matter, thus violating their constitutional right to fair administrative action protected under **Article 47**.

17. Mr Ndubi, counsel for JOPA, submitted that the petitioners are engaged in a speculative attack of the **Land Act** because they have failed to demonstrate to the Court that they have presented to the Lands Registrar an instrument for registration which was rejected. Counsel contended that **section 162(3)** of the **Land Act** does not bar the presentation of any instrument for registration.

18. In regard to the retrospective application of **section 78(1)** of the **Land Act**, Mr Ndubi submitted that the **Land Act** would only apply, to an effective charge and that it does not apply to past charges in respect of which there is no current responsibility arising and that the issue of retrospectivity does not arise with respect to **section 78(1)** of the **Land Act** in this case.

19. Mr Ndubi further argued that **section 78(1)** of the **Land Act** is intended to enforce the letter and spirit of the Constitution because many families and individuals had lost their property due the abuse of the chargees power of sale. Counsel urged the court to take judicial notice of the mischief the **Land Act** was intended to cure.

20. The interested party contended that even if the charge in issue was made pursuant to the provisions of the **ITPA** which has since been repealed, **section 162(1)** of the **Land Act** recognizes any right, title, power or obligations acquired, accrued, established or came into force before the commencement of the Act. The Act further provides that if any step had been taken to create, acquire, assign, transfer or execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of the Act. In this respect the interested party contended that the petitioner's rights were not prejudiced by **section 78(1)** of the **Land Act**.

21. Lastly, while urging the court to dismiss the petition, the interested party submitted that the words used in **section 78** and **80** of the **Land Act** are unambiguous and should be give their ordinary and natural meaning. Mr Ndubi referred to the case of **Orengo v Moi & 12 Others (No. 3) (2008) 1 KLR EP 715**, where the Court disregarded the presumption that an Act of Parliament is not intended to interfere with existing rights and stated that an Act of Parliament may in fact have a retrospective operation and that what was important was for the courts to give effect to the intention of Parliament.

Issues for determination

Locus Standi

22. Before I proceed to dispose of the main issue for determination, let me deal with the issue of standing. The interested party's argument that the 1st petitioner lacked the standing to challenge the validity of Kenyan laws lacks merit for several reasons. First, OPIC has property interest in the country which it is entitled to protect under the Constitution. Second, the provisions of the Constitution which the 1st petitioner seeks to enforce applies to any person and not "citizens" and therefore the case of **Famy Care Ltd v Public Procurement and Others, Nairobi Petition No. 43 of 2012 (Unreported)** is not applicable.

23. Third, **Article 20(1)** provides that, "**The Bill of Rights applies to all law and binds all state organs and all persons.**" **Article 27** protects the rights of all persons before the law and to equal protection and benefit of the law including the full and equal enjoyment of all rights and fundamental freedoms. The provision also bars discrimination of any person on any ground including race, ethnic or social origin, colour, language or birth. **Article 260** defines a person to include, "**a company, association or other body of person whether incorporated or unincorporated**" leaving no doubt that the Constitution applies to all person and benefits all persons unless the context of a specific provision limits the right to a citizen or a special category of person. For these reasons, I dismiss the argument by JOPA to the effect that the OPIC, being an overseas company, lacks standing to challenge Kenyan laws under the Constitution.

Whether section 78 (1) of the Land Act applies retrospectively

24. The latin maxim *lex prospicit non respicit* encapsulates the cardinal principle that law looks forward not backwards but this principle is neither absolute nor cast in stone. In the case of **Municipality of**

Mombasa v Nyali Limited [1963] E.A. 371 Newbold, JA., stated that “Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation the courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is a good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention.” This is the principle reiterated in **Orengo v Moi & 12 Others (No. 3) (2008) 1 KLR EP 715**.

25. The principle stated above is legislated in **section 23(3)** of the **Interpretation and General Provisions Act, (Chapter 2 of the Laws of Kenya)** which provides;

(3) Where a written law repeals in whole or in part another written law, then, **unless a contrary intention appears**, the repeal shall not -

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or

(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or

(d) affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made. [Emphasis mine]

26. I take the view that the rule against the retrospective application of law is not entirely guarded and in certain cases where the intention of the legislature is clear, the provisions may be construed to have retrospective effect. My reading of the authorities is therefore that retrospective operation is not *per se* illegal or unconstitutional. Whether retrospective statutory provisions are unconstitutional was a matter considered by the Supreme Court in the case of **Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others, SCK Application No. 2 of 2011 [2012] eKLR** where the Court observed that, “[61] As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsbury’s Laws of England, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it: (i) is in the nature of a bill of attainder; (ii) impairs the obligation under contracts; (iii) divests vested rights; or (iv) is constitutionally forbidden”

27. It is also worth noting that it is not the role of this court to dictate as to whether a law should or should not apply retrospectively. That is the province of the legislature. The role of the court is limited to product of the legislative process and determining whether its purpose or effect is such that it infringes on fundamental rights and freedoms of the individual. The duty of courts is to give effect to the will of Parliament so that if the legislation provides for retrospective operation, courts will not impugn it solely on the basis that the same appears unfair or depicts a ‘lack of wisdom,’ or applies retrospectively.

Francis Bennion in his seminal work on **Statutory Interpretation, 3rd edition, at page 235** states, “Retrospectivity is artificial, deeming a thing to be what it was not. Artificiality and make-believe are generally repugnant to law as the servant of human welfare. So it follows that the courts apply the general presumption that an enactment is not intended to have retrospective effect. As always, the power

of Parliament to produce such an effect where it wishes to do so is nevertheless undoubted.” [Emphasis added]

28. The question then is whether in the circumstances of the petitioners, such an application of the law contravenes their fundamental rights and freedoms. **Section 78(1)** of the **Land Act** which has been impugned is part of **Part VII** of the Act titled, “**General Provisions on Charges.**” The part relating to charges contains 28 sections dealing with a range of issues governing, among others, the formation of charges, the rights and obligations of the parties, the rights of third parties and the remedies of the charger and chargee.

29. **Section 78(1)** is the introductory section in **Part VII** and whether and to what extent it applies to the matters in **Part VII** must be tested as against each and every section. As demonstrated by the petitioner, some of the sections of **Part VII** when considered against **section 78(1)** may be considered retrospective and may indeed amount to interfering negatively with accrued rights. **Section 78(1)** cannot be read in isolation as doing so would be inconsistent with the legislative intention to enact what is in effect retroactive legislation. As the authorities I have cited demonstrate, the legislature is entitled to enact statutes with retrospective effect, the question is whether the court should intervene in this particular instance.

30. Prayers (a) and (b) of the petition seek what I consider abstract declarations as they do not relate to consideration of any of the provisions in relation a specific complaint by the petitioner. This Court exists to resolve actual or live disputes and what the petitioner seeks to test each and every provision of **Part VII** to see whether it is contrary to the Constitution. Whether and to what extent **section 78(1)** of the Act contrary to **Article 40** depends on the nature of the charge itself and the particular section of **Part VII** to which it relates.

31. Apart from reading the provisions of **Part VII** in the context in which they are applied to determine whether the provisions violate constitutional provisions, one must have regard to the transition provisions in **section 162** which provide;

Savings and transitional provisions with respect to rights, actions, dispositions etc

162. (1) Unless the contrary is specifically provided in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

(2) Unless the contrary is specifically provided in this Act or the circumstances are such that the contrary must be presumed, if any step has been taken to create, acquire, assign, transfer, or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act.

(3) An instrument executed before the commencement of this Act whereby any disposition permitted under this Act is completed may be presented for registration in the prescribed register and—

(a) the question whether any instrument so presented is to be registered shall be determined by the Registrar by reference to the law in force at the time of its execution; and

(b) Subject to the provisions of paragraph (a), the provisions of this Act shall apply to that instrument as if it had been executed after the commencement of this Act.

(4) If a lessor or lender had initiated any steps to forfeit a lease or to foreclose a charge, as the case may be, before the commencement of this Act, a court may on the application of the lessee or the chargor issue an injunction to the lessor or, to the lender to stop the continuation of any such step.

(5) If a court had issued an injunction under subsection (4), the lessor or lender to whom the injunction

has been issued may commence any action under this Act to terminate that lease or bring that charge to an end.

32. These transitional provisions I have cited are intended to mitigate the full rigour of the retrospective effect of the provisions of **Part VII. Section 162** of the Act permits the application of the repealed law to specific instruments made or any rights or interests accrued prior to the Act coming into force. Specifically **section 162(2)** of the Act permits transaction commenced prior to the Act to continue in accordance with the repealed law.

Disposition

33. For the reasons I have outlined above, I decline to grant prayers (a) and (b) of the petition.

34. In prayer (c) the petitioners seek a declaration that they do proceed to enforce and realize the suit property L.R 27253/42 secured under the Charge dated 14th May 2006 without reference to **section 78(1)** of the **Land Act**. I decline to grant this prayer for several reasons.

35. First, I have held that although **section 78(1)** is clearly retrospective, whether there has been a violation of the Constitution must be dealt with reference to a specific section of **Part VII** to which it applies and specific facts of the case. Second, the prayer assumes that the petitioner is unable to enforce and realize the security or that it has attempted to realize the security and has failed to do so by reason of **section 78(1)** of the Act. There is nothing to show that this is the case. Although the court is entitled to issue orders *quia timet*, even *quia timet* orders must be in reference to a set of specific facts upon which the court can conclude that the infringement or violation is likely.

36. The third reason, which fortifies the second reason, is OPIC's position and its right to sell the suit property has been affirmed by various court decisions which I have alluded in the earlier part of this judgment. The petitioners had, by virtue of the decisions, judicial imprimatur to dispose of the suit property as far back as 2008 when Justice Lenaola dismissed the JOPA's application for injunction. In fact in, ***Jopa Villas LLC v Overseas Private Investment Corporation and Others Machakos HCCC No. 215 of 2008***, Justice Ngugi was clear, in a ruling delivered on 6th July 2012 stated, "[19] *It is time for the 1st respondent [OPIC] to realize its security. It is the least the Court can do to maintain some semblance of predictability and integrity in our commercial practice after so many years of waiting.*"

37. In the circumstances, the declaration to exclude the application of **section 78(1)** of the **Land Act** to the petitioners is rejected.

38. I have anxiously considered the issue of costs. Even though this is a petition filed to enforce fundamental rights and freedoms, the issue of costs is still in the discretion of the court (see ***Harun Mwau and Others v Attorney General and Others Nairobi Petition No. 65 of 2011 [2012] eKLR***). Although the court will not usually award costs to the State, I think the case of the interested party is different. I do not see any compelling reason to deny the interested party costs of being joined in these proceedings as it is for all intents and purposes litigation between it and the petitioners concerning the property. Costs shall therefore follow event in this case.

39. The final orders therefore are that the petition be and is hereby dismissed with costs to the interested party.

DATED and DELIVERED at NAIROBI this 27th day of March 2013

D.S MAJANJA

JUDGE

Ms Opiyo instructed by Kaplan and Stratton Advocates for the petitioner

Mr Ojwang', Litigation Counsel, instructed by the State Law Officer for the respondent.

Mr Ndubi with him Mr Makori instructed by Enonda, Makoloo and Makori Advocates for the interested party.