



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Petition 13 of 2010

ROBERT WAMITHI MUTAHI PETITIONER

AND

REPUBLIC RESPONDENT

AND

FRANCIS KIRIMA

M'IKUNYUA APPLICANT/INTERESTED PARTY

RULING

Introduction

1.The application for consideration is the Notice of Motion dated 23rd December 2011. It is brought by Francis Kirima M'Ikunyua (“the applicant”) who seeks to be joined to this suit as an interested party. He also seeks to review the judgment rendered by Hon. Justice Gacheche on 2nd June 2011 (“the Judgment”).

Background

2.Before I deal with the motion, I shall briefly set out the facts as they appear in the petition and judgment to provide the context of this decision.

3.By a petition dated 14th January 2010, the Robert Wamithi Mutahi (“the petitioner”) applied to restrain criminal proceedings against him on account of charges of forgery contrary to **section 349** of the *Penal Code (Cap 63 of the Laws of Kenya)* in *Kibera Criminal Case No. 199 of 2010* on the basis that the charges violated his fundamental rights and freedoms. According to the material before court, on or about the 8th October 1977, the applicant together with others through a partnership in the name and style of “Muigai and Others” acquired for valuable consideration a parcel of land known as **Nairobi Block 123/1-279 (formerly L R No. 57/26)** (“the suit property”) from Kentiles Limited.

4. The purchasers subsequently applied for and were granted a change of user of the suit property from agricultural to commercial use. They also surrendered to the Commissioner of Lands the title to the suit property for purposes of subdivision. After the subdivision, new titles were issued, that is, **Nairobi Block 123/1-279**. Some of the plots were subsequently sold to third parties for value. The applicant and his partners proportionately shared out the subdivided plots and the applicant received parcels; **Nairobi Block 123/44, 160, 168 and 170**.

5. Following Government's efforts to improve the country's infrastructure through the expansion and rehabilitation of Thika Highway, some of the plots were acquired and their owners compensated by the Government on 8th December 2008. The applicant avers that ownership of the suit property has not been peaceful due to repeated fraudulent and violent attempts by third parties to forcefully, unlawfully and illegally take over ownership of the suit property.

6. The applicant has personally been involved in litigation over the suit property which has resulted in the applicant and his partners being declared the legal and rightful owners. Some of the cases are as follows;

(a) In **Makadara Criminal Case Number 10630 of 1993** one Shadrack Nzuki alias (Nzau Mwalimu Nzau), one of the persons occupying the suit property and claiming adverse possession, was convicted on his own plea of guilt for trespass over the suit property.

(b) In **Nairobi HCCC No. 346 of 2002 Muigai & Others v John Wainaina, John Gathomu and Nzau Mwalimu Nzau**, Hon. Justice Rawal, in granting mandatory injunction against the defendants, found as a matter of fact that the plaintiffs including the applicant were the registered owners of the suit property. Consequently, the Police were ordered to assist in enforcement of the mandatory injunction.

(c) In **Nairobi HCCC No. 558 of 1998 (OS) Nzau Mwalimu Nzau v James Muigai and 20 Others**, an action for both adverse possession and allegation of ownership of the suit property by the accused Shadrack Nzuki by virtue of a bequest of gift thereof by a Mr Moore, Hon. Justice Kuloba dismissed the suit as bearing no merit on the 2nd July 2001.

7. On or about 12th January 2010, the petitioner was arrested by police officers attached to Kasarani Police Station, subjected to false imprisonment, intimidation, interrogation and inhuman treatment on allegations of having committed an offence *vis a vis* the subject property in 1977. He contends that no disclosure was made as to the nature of the offence and it was only through the intervention of his advocate that he was released on police bond. He was later charged with the offence forgery contrary to **section 349** of the **Penal Code**. He is alleged to have forged a conveyance and transfer, which conveyed the suit property to applicant and his partner in 1977.

8. After hearing the matter, Hon. Justice Gacheche digested the facts before her and concluded that, ***"[w]here it is so obvious that the petitioner and his partners acquired the subject land legally, would any court allow the continuation of his prosecution on the alleged charges of forgery, which charges would be based on investigations, which are in my view not only flawed but and distorted evidence, and which again clearly smirks of malice? I think not, for to do so would be tantamount to encouraging the respondent's officers to abuse and misuse their power in a most vexatious and oppressive manner. Needless to say the intended action by the respondent's officers taken after a period of 30 years would be an abuse of the court process for it is trite that any person charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court, otherwise it would be an act that would be contrary to the Constitution in which is enshrined the fundamental rights, which this petitioner pleads hereinabove."***

9. The result of the judgment was that the court declared that Wamithi's rights were infringed and the

prosecution of the petitioner stopped in its tracks. In addition, the Court declared that, ***“the applicant has a right to peaceful and quiet enjoyment of the properties known as Nairobi Block 123/1-279 (formerly LR No. 57/26).”***

Applicant’s Case

10. How is the applicant aggrieved by this judgment? Francis Kirima M’ikunyua states that together with other members of the Zimman Settlement Scheme Society are in actual occupation of the parcel of **L.R. No. 57/26 (Nairobi Block 123/1-279)**. According to his affidavits sworn on 23rd December 2011 and 11th December 2012, he was shocked when the petitioner came to the parcel of land claiming to be the registered owner. He made a report to Kasarani Police Station who after conducting investigations concluded that the property had been acquired through forgery. It is as a result of the complaint that the criminal proceedings in ***Kibera Criminal Case No. 199 of 2010*** were commenced.

11. The basis of the applicant’s Motion is that the matter proceeded for hearing without giving him an opportunity to present his case despite the fact that he was a complainant in the criminal case which was the subject of the petition. The applicant also avers that the judgment dealt with him at least five times adversely and that he ought, at least to have been heard.

12. The applicant complains that the learned judge made a finding that, *“The fact that Kirima, who is the complainant in the intended prosecution was cited by the court for contempt for dishonesty and deceit over the subject parcel of land on 17th October 2005, has not been controverted.”* He contends that he was never cited for contempt nor given an opportunity to controvert the issues raised.

13. In respect of the court’s finding that the petitioner has a right to peaceful and quiet possession of the said property, the applicant avers that he and other members of Zimman Settlement Scheme Society were in occupation and had a direct interest in the property. On the whole, Mr Kenyatta, learned counsel for the applicant, submitted that the judgment must be set aside as the applicant’s right to natural justice was denied. Counsel relied on the written submissions dated 8th March 2013.

Petitioner’s response

14. The petitioner opposes the application for review on the basis of the replying affidavit of Robert Wamithi Mutahi sworn on 3rd December 2012 and another sworn on 18th January 2013.

15. The petitioner argues that the ***Kibera Criminal Case No. 199 of 2010*** was not privately prosecuted but was prosecuted by the State which was represented in the proceedings during the petition. It was argued that it was therefore unnecessary to join the applicant to these proceedings as his interests were represented by the State. The petitioner also avers that during the entire proceedings in the criminal case the applicant was aware of the petition and indeed, as a complainant, he knew when the matter was stayed by the court and he had the opportunity to join the proceedings and in the circumstance he cannot state that he was denied an opportunity to be heard. To support this proposition the petitioner relied on the case of ***Kamau John Kinyanjui v Republic CA Criminal Appeal No. 295 of 2005[2010] eKLR***.

16. The petitioner argues that the issue of forgery is not open for re-litigation as is sought by the applicant under the guise of the present application as the only person dissatisfied by the judgment of the Court and entitled to make such application is the Director of Public Prosecutions under **Article 157(6)** of the Constitution and **Section 85-88** of the ***Criminal Procedure Code, Chapter 75 of the Laws of Kenya***.

17. The petitioner also contends that there is no discovery of new evidence as alleged by the applicant and

that in any case, a person who was not party to a proceeding cannot claim to have discovered new evidence in that proceeding. It was further stated that the present application was an avenue to escape criminal trial in ***Makadara Criminal Case Number 1460 of 2012***.

18. The petitioner also asked the court to strike the application out for reason that it was incurably defective as the order applied to be reviewed had not been annexed to the application. Counsel relied on several cases to support this argument (See ***Gulamhusein M. Jivanji v Ebrahim Jivanji and Another (1929-30) 12 EACA 41***, ***Trust Bank Limited v Geoffrey Asanyo HCCC No. 118 of 1998 (Unreported)*** and ***Agriculture Syndicate Limited v Paramount Bank Limited Milimani HCCC No. 586 of 2001 (Unreported)***).

Analysis and determination

19. The key issue for determination in the present application is whether this court should review and/or set aside the Judgment.

Review

20. The scope of review is now well settled and have been the subject of appellate decisions. In ***China Road Bridge Corporation (Kenya) v DMK Construction Ltd. [2004] 2 E.A. 31,36***, the Court of Appeal observed that, “*In an application for review, an applicant has to show that there has been discovery of a new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge and could not be produced at the time the decree was passed or on account of some mistake or error apparent on the face of the record or any other sufficient reason.*” In ***National Bank of Kenya v Ndungu Njau, Civil Appeal No. 211 of 1996, [1996] LLR 469***, the Court stated that, “*It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.*” (See also ***Eastern and Southern African Development Bank v African Greenfields Limited and Others [2002] 2 E.A. 377, 381*** per Ringera J.).

21. The applicant has cited three instances in the judgment which amount to an *error apparent on the face of the record* and which warrants this court’s intervention in review. He avers that at page 16 of the judgment, the learned judge noted that, “*The fact that Kirima, who is the complainant in the intended prosecution was cited by this court for contempt for dishonesty and deceit over the subject parcel of land on 17/10/2005, has not been controverted.*” The applicant states that as a matter of fact, he was never cited for contempt by any court.

22. The petitioner also cites page 17 of the judgment in which the learned judge declared that, “*The applicant has a right to peaceful and quiet enjoyment of the properties known as Nairobi Block 123/1-279 (Formerly L.R. No. 57/26).*” On this, he notes that the pronouncement in effect made the occupation of the applicant and other members of the Zimman Settlement Scheme Society illegal as a result of which the applicant and two other parcel owners were charged in ***Makadara Criminal Case Number 1523 and 1460 of 2012***, which proceedings have now been stayed by court in the ***Petition No. 461 of 2012***.

23. The third illustration as to why according to the applicant the judgment ought to be reviewed is that it purported to vest ownership on the petitioner of all piece of land known as ***Nairobi/Block 123/1-279*** comprising of 275 plots. He claims that the petitioner had in fact made claim to only four plots as evidenced by paragraph 8 of his Supporting Affidavit sworn on 14th January, 2010. Which read as

follows, “*THAT for the avoidance of doubt, after the subdivision of the subject plots I and other partners proportionally shared out the subdivided plots and I received the following plots Nairobi/Block 123/44, Nairobi/Block 123/68 and Nairobi/Block 123/70.*”

24. The applicant has also set out grounds that there was new evidence. I shall not go into the particulars of ‘new evidence’ for obvious reasons the applicant was not a party in that other case that he claims new evidence is now available. This ground can only be available to parties to the earlier proceedings in question. In this case, the State was the respondent and the applicant in fact complains that he was not afforded an opportunity to be heard before the adverse orders were made against him. I think this is a substantial ground which I shall consider.

Right to fair hearing

25. The petitioner in his petition claimed that the ownership of the suit parcels was had not been peaceful. He complained of “*repeated fraudulent and violent attempts by 3rd parties to forcefully, unlawfully and illegally take over ownership of the suit parcels.*” The ‘3rd parties’ referred to were however not given an opportunity to be heard on this critical issue.

26. A person who is directly affected by the outcome of the case or has a substantial interest in the matter must have reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage. The *audi alteram partem* principle which literally means “*hear the other side*” has been described as a fundamental principle of our procedural justice and its breach or apparent breach a fundamental concern to the courts.” (See *Nevin v Crowley* [1999] 1 ILRM 376,

381.)

27. The rules of natural justice dictate that a party should not be condemned unheard. Where the principles of natural justice have been breached, the Court will readily grant an order of certiorari to quash any such decision arrived at in disregard of such principles. *In the Republic v The Chief Land Registrar & another Ex parte James Njoroge Njuguna* Nairobi HC Misc. JR No. 67 of 2007 [2012] eKLR, I stated as follows; “ Without belabouring the point, it is now well established where orders are obtained in breach of the rules of natural justice such orders cannot survive judicial scrutiny. The principle was clearly stated in *Craig v Kanseen* [1943] 1 All ER 108, 113 where Greene MR stated, “The cases appear to me to establish that an order which can be properly be described as a nullity is something which the person affected by it is entitled *ex debito justitiae* to have set aside. So far the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order, and that an appeal from the order is not necessary. In my opinion, it is beyond question that failure to serve process where the service of process is required, is a failure which goes to the root of our conceptions of the proper procedure in litigation. Apart from proper *ex-parte* proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it, is one which has never adopted in England. To say that an order of that kind is to be treated as a mere irregularity, and not something which is affected by a fundamental vice, is an argument that cannot be sustained.” These sentiments represent the law in Kenya and were approved by the Court of Appeal in the case of *Provincial Insurance Co., of East Africa v Mordecai Nandwa* Kisumu Civil Appeal No. 179 of 1995 (Unreported).”

28. In this case, I find that the applicant was not given an opportunity to be heard on the issue of quiet possession of the suit property before the same was made subject of the orders in the Judgment. The petitioner’s argument that the applicant was not party to the criminal case does not hold water. The relief sought in the petitioner were not only in reference to the criminal proceedings but also dealt with the issue of quiet possession of the suit property. What is in issue is whether the applicant had an opportunity to be heard on the matter affecting his interest, however weak or fanciful. The right to be heard is a fundamental and basic right and cannot be taken away however hopeless one’s case is. It cannot be cured by holding that the decision would be right or proper. (See *Dickson Ngigi Ngugi v Commissioner of Lands* Nairobi Civil Appeal No. 297 of 1997 (Unreported) and *David Oloo Onyango v Attorney General* Nairobi Civil Appeal No. 152 of 1986 (Unreported)).

29. The issue of the interest in the land went far beyond the normal criminal process and also beyond the normal relief that would be issued to vindicate the petitioner’s right and fundamental freedom. The learned Judge in her judgment made the following orders:

§ The petitioner’s fundamental rights and freedoms of the individual under Section 70, 72, 75 and 77 of the Constitution have been contravened and violated by the respondent.

§ *The applicant has a right to peaceful and quiet enjoyment of the properties known as Nairobi Block 123/1-279 (Formerly L.R. No. 57/26).*

§ *An order of certiorari to and do remove to this court for purposes of quashing the respondent's decision of 20/12/2009*

§ *An order of prohibition against the respondent and the Commissioner of Police from arresting, harassing, intimidating and or prosecuting the petitioner on any issues pertaining to the properties known as Nairobi Block 123/1-279 (Formerly L.R. No. 57/26).*

30.I am of the view that the present application is one such an instance where the Court may intervene for it amounts to failure to observe one of the fundamental rules of natural justice.

Disposition

31.I have come to the conclusion that there was a breach of the rules of natural justice against the applicant to the extent that applicant as an occupant of the suit property was not afforded an opportunity to be heard as regards the said property. In view of this finding it is not necessary to address the other issues raised by the parties.

32.Before I conclude, I would like to note that this is a typical case where parties fighting over land open several war fronts to litigate their issues including the litigation process. As I outlined earlier in the case there have been several cases settling the issue and the learned judge directed her mind to these findings. I have dealt with the motion is so far as it concerns the right and opportunity to be heard and it is in this respect that I have granted relief.

33.I shall therefore review and vary the Judgment only to the extent that it affects the suit property in the following terms;

a) The judgment herein dated 2nd June 2011 be and is hereby reviewed and varied to the extent that the declaration that, “*The applicant has a right to peaceful and quiet enjoyment of the properties known as Nairobi Block 123/1-279(Formerly L.R. No. 57/26)* ” be and is hereby omitted.

b) For avoidance of doubt, the Orders issued with regard to the criminal proceedings namely; *Kibera Criminal Case No. 199 of 2010* are not affected by this order.

c) Each party shall bear their own costs.

DATED and DELIVERED at NAIROBI this 15th day of April 2013

D.S. MAJANJA
JUDGE

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Mr Kenyatta instructed by Kenyatta Odiwuor and Company for the applicant.

Mr Odhiambo instructed by Mose, Murugu and Rigoro Advocates for the petitioner.

Mr Njogu, Prosecution Counsel, instructed by the Directorate of Public Prosecutions for the respondent