



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 330 of 2011

BETWEEN
BOARD OF GOVERNORS,
EMBAKASI GIRLS SECONDARY SCHOOL.....PETITIONER

AND

THE COMMISSIONER OF LANDS.....1ST RESPONDENT
REGISTRAR OF TITLES NAIROBI.....2ND RESPONDENT
THE HON ATTORNEY GENERAL..... 3RD RESPONDENT
THE DIRECTOR OF SURVEY.....4TH RESPONDENT

AND

RIAKINA LIMITED.....1ST INTERESTED PARTY
MWAFA COURT2ND INTERESTED PARTY

JUDGMENT

Introduction

1. This matter is in reality a land dispute couched in the guise of a petition to enforce the right to property by **Article 40** of the Constitution.

2. In the recent case of **Bishop Absolom Ndungo and Others v Attorney General and Others Nairobi Petition No. 444 of 2012 (Unreported)** I stated, “*The dispute between the petitioners and the Church is a property dispute, the responsibility of the State in such circumstances is to provide a framework for resolution of such disputes as a means of protecting the property. Various statutory enactments like the Land Act, Act No. 6 of 2012 and the Land Registration Act, Act No. 3 of 2012 which repealed previous statutory enactments like the Registration of Titles Act fulfil the protection guaranteed by the Constitution by providing an orderly manner of acquisition, holding and disposal of property. Where disputes arise between parties, the ordinary procedures for dispute settlement provided by the State are to be invoked. This is evidenced by the fact that our courts, on a day-to-day basis, deal with land cases within the framework established by the Constitution and law enacted pursuant to Constitutional provisions to protect property rights. (See Tony Munene v Commissioner of Lands and Others Nairobi Petition 322 of 2012 [2012]eKLR). It is therefore unnecessary to have recourse to constitutional provisions to resolve what is in fact an ordinary civil dispute respecting claims to*

property.”

3. This is one such dispute which I should have struck it out on that ground nevertheless but in order to ensure resolution of the matter once and for all I proceeded to hear it.

Petitioner’s Case

4. The petitioner, Embakasi Girls Secondary School (“Embakasi Girls”), is a public school within Nairobi County. In 1995, the Embakasi Divisional Development Committee applied and was allocated an unsurveyed piece of land by way of a letter of allocation dated 12th June 2000 issued to the Permanent Secretary, Treasury to hold in trust for the Embakasi Girls. According to the letter, the area of the property was about 8 hectares as per Part Development Plan (“PDP”) No. 42/28/200/01. The proposed lease was a term of 99 years from 1st June 2000. Upon receipt of the allocation letter Embakasi Girls paid the necessary amount for the survey to be commenced and for issuance of a title deed.

5. The petitioner’s complaint is that a part of its property, about 3.80 hectares, was allocated to Riakina Limited (“Riakina”), the 1st interested party, who were issued with a Grant No. 92931, LR No. 209/14059 for the property. Riakina then sold it to Mwafa Court Ltd (“Mwafa Court”), the 2nd interested party.

6. The petitioner alleges that its right to the property was violated as the suit property was allocated without regard to constitutional values and principles. In the petition dated 21st December 2011, the petitioner seeks the following;

(a) *A declaration that the respondents and the interested parties have violated and or are likely to violate the constitutional rights of the stakeholders in Embakasi Girls Secondary School specifically the students, parents and residents of Embakasi and other members of public on whose behalf this petition has been brought.*

(b) *A declaration that the allocation, allotment, issuance of Grant, transfers, in respect of LR No. 209/14059 in favour of the 1st and 2nd interested parties are illegal, irregular, unconstitutional, null and void.*

(c) *An order:*

(i) *Cancelling the allocation, issuance of Grant No. 92931 LR No. 209/14059 and or entries on the original grants, including transfer to the 2nd interested party property herein and an order for rectification and restoration thereof into government and or trust land.*

(ii) *That a grant be issued to the petitioner of the entire parcel of 8 hectares in the letter of allotment dated 12th June 2000.*

(iii) *An order prohibiting the respondents and interested parties, their servants, agents and or such persons claiming under them, from entering, remaining disposing in any way, transferring, constructing, leasing, charging or dealing in any way or manner whatsoever and howsoever with the suit properties known as LR No. 209/14059.*

(iv) *Restoration of the suit properties herein known as LR No. 209/14059 into the original public facilities.*

(v) *Costs of the petition.*

(vi) *Or that such other orders as this Honourable Court shall deem just.*

Interested Party’s Case

7. Riakina the first interested party, did not appear in these proceedings despite being served by substituted service through the newspaper.
8. Mwafa Court, the second interested party, opposed the proceedings through a replying affidavit of Johnson Ngarari Mwaura sworn on 20th January 2012. The position of Mwafa Court is that it purchased LR No. 209/14059 from Riakina, the 1st allottee, who was the duly registered owner for valuable consideration. It avers that after the purchase it continued to pay land rent and City Council rates and that it has even obtained approval of the City Council to commence development. Its argument is that it is an indefeasible title holder having purchased the property from the first interested party without notice of any fraud or irregularity. It submits therefore that it is entitled to the protection under **section 23** of the *Registration of Titles Act (Chapter 281 of the Laws of Kenya)*.

Evidence from the Commissioner of Lands

9. The respondents opposed the petition through the affidavits of Silas Kiogora Mburugu, the Chief Land Administrator working with the Department of Lands. The replying affidavit and the supplementary affidavit were sworn on 17th January 2012 and 16th April 2013 respectively. The parties agreed that Mr Mburugu should give oral evidence based on the documentation held by the Commissioner of Lands.
10. Mr Mburugu testified that he had in his possession the file No. 202097 in respect of parcel Nairobi LR No. 209/14059. He stated that the file was opened on 10th April 2000 for an unsurveyed residential plot. The allocation was done on 1st December 1997 to a Riakina. The size of the plot was approximately 4.0 Ha for a term of 99 years from 1st February 1997. The allottee wrote the letter dated 5th December 1997 accepting the offer. Upon payment of the legal fees and stand premium the land was duly surveyed and it became LR 209/14059. Mr Mburugu testified that after the land was surveyed it was found to be 3.8 ha as reflected in the title. The grant was duly prepared and executed by the Commissioner of Lands on 6th August 2001. In 2004 consent was given to transfer the land from Riakina to Mwafa Court.
11. Mr Mburugu further testified that Embakasi Girls was allocated the land on 12th June 2000 as an unsurveyed plot measuring about 8 hectares for a term of 99 years from 1st June 2000 covered by PDP No. 436. When implementing the allocation an overlap was noticed between the plot allocated to Embakasi Girls and the one allocated to Riakina. Mr Mburugu stated that at the time Embakasi Girls was allocated the plot in accordance with PDP No. 436 which was prepared in 2000. The earlier Part Development Plan No. 300 was prepared in 1984 to guide the allocation and land use in the area and it was in accordance with that plan that Riakina was allocated its plot.
12. It was Mr Mburugu's confirmed that PDP No. 436 was prepared without taking into consideration the earlier plan, PDP No. 300, which provided the basis for land allocations including the allocation to Riakina. When this was error discovered a fresh allocation letter was issued to Embakasi Girls dated 21st November 2000 (Ref. 222341/14) for land measuring approximately 4.1 Hectares. The letter cancelled the earlier letter of dated 12th June 2000. Subsequently, the Headmistress was warned by a letter dated 6th March 2001 to ensure that construction was within the proper boundaries.

Determination

13. The issue for determination is whether the petitioner's property rights have been violated. The facts given by Mr Mburugu were not disputed by the petitioners and the 2nd interested party and in my view, in the absence of any evidence to the contrary, represent the true position regarding the properties owned by them.
14. The history of the property shows that it was allocated on the basis of the PDP prepared by the Director of Physical Planning in 1984 and approved in 1986. The plan made provision for Embakasi Girls and other properties. Riakina was one of the parties allocated the unsurveyed property under Part Development Plan No. 300.

15. It is through the allocation to Embakasi Girls that an error was discovered and the Headmistress notified by issuing another allocation letter which revoked the previous allocation. In PDP No. 436, the property purportedly allocated to Embakasi Girls included the plot already allocated to Riakina hence the total of area under the allocation letter dated 12th June 2000 was 8 hectares.

16. On the basis of the documentary evidence provided by the Commissioner of Lands I find and hold that the property allocated to Riakina was not property reserved for public use. This is because Part Development Plan No. 300 upon which the allocation was made had provision for the school and the plot so reserved and allocated to Riakina was separate from that allocated to the school though both plots were adjacent to each other.

17. I also find and hold that the subsequent PDP No. 486 did not take into account the sub-division and allocation that had already taken place on the basis of the earlier plan hence allocation to Embakasi Girls was in error and that error was corrected by issuing a fresh allocation letter dated 21st November 2000 which cancelled the earlier allocation letter dated 12th June 2000 to it.

18. The 2nd interested party now has a title which confirms its proprietorship of L.R. No. 209/10459. On the other hand, Embakasi Girls holds an allocation letter entitling it to 4.19 hectares of an unsurveyed plot. Each party has its own property and I see no reason to interfere with the respective rights of either party.

19. Embakasi Girls has failed to prove any violation of its rights under **Article 40**. What is apparent is the fact that Embakasi Girls is not clear on its boundaries and it should now, with assistance of the respondents move to secure its property by acquiring a title to the property and demarcating and securing its boundaries.

20. The petition is dismissed with no order as to costs.

DATED and DELIVERED at NAIROBI this 31st day of May 2013

D.S. MAJANJA
JUDGE

Ms Gitau instructed by Kamunye Gichigi and Company Advocates for the petitioner.

Mr Kakoi, Litigation Counsel, instructed by the State Law Office for the respondents.

Mr Gichuru, instructed by Gichuru and Gichuru Advocates for the 2nd interested party.