



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 228 OF 2013

BETWEEN

EVELYN COLLEGE OF DESIGN LTD..... APPLICANT

AND

DIRECTOR OF CHILDREN'S DEPARTMENT.....1ST RESPONDENT

THE ATTORNEY GENERAL2ND RESPONDENT

JUDGMENT

Introduction

1. This matter concerns the protection of property rights under **Article 40** of the Constitution.

Petitioner's Case

2. It is not in dispute that the petitioner is the registered proprietor of the land comprised in titles LR No. 22359 and LR No. 22360 situated in Kabete Nairobi. The grants were issued to the petitioner upon surrender of title comprised in title LR No. 209/12280 in the year 2008.
3. The petitioner alleges that the 1st respondent, through Kabete Children's Home has taken over the petitioner's land, has prevented it from gaining access to it and has denied it use. It contends that it has been denied its constitutional guarantee to use and enjoy the property.
4. The petitioner has filed the petition dated 29th April 2013 which is supported by the affidavit of Eric Mungai, a director of the petitioner, sworn on the same day. The petitioner avers that it cannot develop the property as it is occupied by the Kabete Children's Home and despite complaints about the invasion to the Ministry of Lands, the 1st respondent has not relinquished occupation of the land.
5. The petitioner lodged a complaint regarding the circumstances of interference with its property. Both parties, the petitioner and the 1st respondent, appeared before the Public Complaints and Resolution Committee where both parties were heard. The result of the Committee's finding was

communicated in a letter dated 31st January 2013 where the Ministry of Lands confirmed that the petitioner was the lawful owner of the suit properties. The letter stated in part that, “An investigation into our records pertaining to this title shows that you procedurally acquired and hold Title to the piece of land. Therefore any party seeking to challenge the Title and/or ownership of the land may do so in a court of law. As of now, the Beacon Certificate, the Boundaries and resultant Title still stands.”

6. As a result of the failure by the 1st respondent to vacate the suit property, the petitioner now seeks the following reliefs;
 1. A declaration that the petitioner’s protected right to property has been violated by the respondents’ acts of trespass and taking possession of the petitioner’s property.
 2. An order for immediate restitution to the petitioner of land comprised in titles LR No. 22359 and LR no. 22360 unconstitutionally appropriated by the respondents;
 3. A permanent order of injunction restraining the respondents their agents, servants or any persons acting under the direction from interfering with the petitioner’s ownership, possession and use of all that land comprised in titles LR NO. 22359 and LR No. 22360;
 4. An order for compensation for the violation of the petitioner’s property right over LR NO. 22359 and LR No. 22360 against the respondents;
 5. An order for mesne profits against the respondents for use of the LR NO. 22359 and LR No. 22360 on indemnity basis to compensate the petitioner for loss of use and loss of profit for the entire period of deprivation;
 6. Any other relief the court may see fit to grant in redress to the clear violation of the petitioner’s right to property;
 7. An order for payment of costs of this petition by the respondents;
7. In support of the petition, its counsel, Mr Echessa submitted the petitioner’s title to the property is not disputed and has been confirmed by the Ministry of Lands in the letter dated 31st January 2013. He submitted that the seizure has not been controverted and the only issue for determination is whether the seizure is procedural and whether due process has been followed.

Respondents Case

8. The respondents opposed the petition on the grounds set out in the affidavit of Ahmed Hussein, the Director of Children Services sworn on 27th June 2013. The respondents’ contention is that the property allocated to the petitioner was reserved for the Department of Children Services in 1960s and was gazetted as such by Gazette Notice No. 751 of 28th November 1963 and given to Kabete Approved School. Thereafter the parcel was registered as LR 189/3 as evidenced by **Legal Notice No. 243 of 1966**.
9. The respondents’ case is that the suit property was illegally acquired and hence the petitioner is not entitled to relief from the court. Mr Kuria, counsel for the respondents, argued that any subsequent allocation was illegal as the Commissioner of Lands had no power to alienate land set aside for a public purpose. He cited several cases in support; **Cycad Properties Limited v Attorney General and Others Nairobi Petition No. 70 of 2010**, **James Joram Nyagah and Another v Attorney General and Others Nairobi HC Misc. Appl. No. 1732 of 2004** and **Niaz Mohammed Jan Mohammed v Commissioner of Lands Mombasa HCCC No. 423 of 1996**.
10. The respondents averred that the issue of subdivision and illegal excision of the land belonging to the Children’s Department had been raised with the Ministry of Lands since 1996 and also before the Commission of Inquiry into the Land Law Systems of Kenya. The Commission of Inquiry recommended that all public institutions obtain titles for their property hence in 2000, then the Director of Children Service wrote to the Director of Physical Planning informing him of the cancellation of land titles allocated to private individuals from the Kabete Approved School Land LR No. 189/3. As a result, the respondents aver that there could be no further allocations to

private individuals. The respondents argue that any further allocations by the Commissioner of Lands were illegal and in utter disregard of previous orders of the Ministry of Lands cancelling all and any illegal allocations of public land.

11. The 1st respondent considers the petitioner a “grabber” without any colour of right to the land and has lodged complaints with the Kenya Anti-Corruption Commission and the Ministry of Land detailing the threats faced by the institutions occupying the suit property. In the July 2011, the 1st respondent requested the Director of Physical Planning seeking acquisition of a Part Development Plan for Kabete Rehabilitation School, Getathuru Reception and Rehabilitation Centre, Nairobi Children Rescue Center and the Nairobi parcel LR No. 189/3 in the Lower Kabete Area. The Director obliged and confirmed that the four institutions occupied the entire property known as LR No. 189/3.

12. The respondent urge the court to uphold the highest ideals of the Constitution and hold that individuals and beneficiaries who subdivided land already alienated cannot benefit from an illegality and that this court should not sanction such illegality through an abuse of the court process.

Determination

13. The issue in this matter concerns the application of **Article 40** of the Constitution which provides as follows;

40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that

property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) *The State shall support, promote and protect the intellectual property rights of the people of Kenya.*

(6) *The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.*

14. The thrust of **Article 40** is to protect proprietary rights under the law. Such rights are governed by statutes, for example, in this case, the title issued is governed by the provisions of the **Registration of Titles Act (repealed)**. The petitioner's case is grounded on the fact that it has an absolute and indefeasible title under the **Registration of Titles Act** that it is capable of being protected under **Article 40** and that once a title is issued under the Act, the holder thereof acquires an indefeasible title which cannot be taken away except in accordance with the Constitution and the law. This position finds support in several cases of our courts; **Wreck Motors Enterprises v The Commissioner of Lands and Others Nairobi Civil Appeal No. 71 of 1997 (Unreported)**, **Nairobi Permanent Markets Society and Others v Salima Enterprises and Others Nairobi Civil Appeal No. 185 of 1997 (Unreported)** and **Joseph N K arap Ng'ok v Justice Moijo ole Keiwa and Others Nairobi Civil Application No. NAI 60 of 1997 (Unreported)**. In the event the State wishes to compulsorily acquire the land, the **Article 40(3)** provides the terms under which the land can be so acquired.
15. The issue in this case is whether the State, which has issued a title, can assert a right inconsistent with the title without following due process. The State has pointed out that the property was illegally acquired hence it is entitled to occupy the property. The respondents' position is that the suit property was illegally and fraudulently acquired and as such, this Court cannot give a seal of approval to the applicant's title. This proposition is supported by several cases of our courts; **Milan Kumarn Shah & Others v City Council of Nairobi & Others Nairobi HCCC No. 1024 of 2005 (OS) (Unreported)** and **James Joram Nyagah & Another v The Honourable Attorney General and Another Nairobi HC Misc. 1732 of 2004 (supra)**. **Article 40** which protect the right to property must be read to exclude property found to have been unlawfully acquired under **Article 40(6)**. This requirement is an extension of the fact that the Constitution protects higher values which are to be found in preamble to the Constitution and **Article 10**. Values such as human rights and social justice cannot countenance a situation where the Constitution is used to rubberstamp what is in effect unlawful. (See **Chemei Investments Limited v The Attorney General & Others Nairobi Petition No. 94 of 2005 (Unreported)**).
16. While I agree that the Commissioner has no right to alienate land which has been reserved for public purpose, the process of such a determination must be through a process recognised by the law. Likewise, if the land has been illegally acquired, then the State must use due process to recover it. The requirement of due process is underpinned by several provisions of the Constitution. First, it is implicit in **Article 40(2)(a)** which prohibits the legislature from passing legislation that arbitrarily deprives a person of any interest in or right over any property of any description. Second, **Article 40(6)** is clear that rights acquired under this Article do not extend to any property that is found to have been unlawfully acquired. Such "finding" cannot be by any other means other than due process. Third, **Article 47(1)** guarantees every person fair administrative action which includes due process.
17. I would once again emphasise that a finding of "unlawful acquisition" referred to in **Article 40(6)** of the Constitution must be through a legally established process and not by forceful occupation of property by State institutions or by preventing a person from enjoying the incidences of ownership of the property. Thus, it was held in the case of **Adan Abdirahani Hassan and 2 Others v The Registrar of Titles and Others Nairobi Petition No. 7 of 2012 [2013]eKLR** that, "[30] *Even if the Respondents held the view that the Petitioners had no right to own the suit property because the property was reserved for a public purpose, which view they were entitled to hold being the custodians of public land, the Petitioners had legitimate expectation in the proprietorship of the property and they should have been accorded a hearing before any administrative action could be taken in respect of the suit property.*"

18. In view of what I have stated, it is clear that even where property is said to be illegally acquired; it cannot be dispossessed without due process. Such dispossession cannot be effected by preventing the petitioner from enjoying the incidents of ownership of the land. Since the issue in this case concerns due process, I have exercised circumspection in commenting on the veracity or otherwise of the claims of illegal acquisition because, the State has the right to assert this position in the proper forum.

Reliefs

19. As regards relief, under **Article 23** of the Constitution the court may grant appropriate relief to indicate the right so infringed. As I have stated, this case is about due process rights and I shall therefore grant orders necessary to secure these rights. I decline to grant compensation or mesne profits as there was no evidence of actual loss or damage but I think the petitioner is entitled to a nominal award and costs of the suit to vindicate its rights.

20. I therefore grant the following orders;

1. The respondents, by themselves, their servants, and or agents are restrained from interfering in any manner whatsoever with the petitioner's property comprised in titles LR NO. 22359 and LR No. 22360.
2. The petitioner is awarded 100,000/00 as general damages for trespass to be paid by the 1st respondent.
3. The 1st respondent shall bear the costs of the petition.

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

D.S. MAJANJA

JUDGE

Mr Echessa instructed by Ochieng', Onyango, Kibet and Ohaga Advocates for the petitioners.

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