



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.222 OF 2011

BETWEEN

EPHANTUS KIMOTHO KIMANI.....1ST PETITIONER
LASITI MEREU LEPASHA.....2ND PETITIONER
PHILIP KIRWA LAGAT.....3RD PETITIONER
GABRIEL GITHINJI KIMOTHO.....4TH PETITIONER
STANLEY KAIGE KIBE.....5TH PETITIONER
TOM MOGENI MABURURU.....6TH PETITIONER
SABINA NELLY ABURI.....7TH PETITIONER

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT
THE COMMISSIONER OF LANDS.....2ND RESPONDENT

JUDGMENT

1. The Petitioners herein filed a joint Petition on 31st October 2011 premised on the provisions of **Articles 19, 22, 40, 47 and 64** of the **Constitution** and the facts are that;
2. On various dates between the years 2007 and 2009, they purchased land parcels Nos.Ngong Township Block No.2/643, 645, 646, 647, 648, 649, 650 and 651 either directly from one Joyce Nairesiae (*in the case of the 1st, 2nd and 5th Petitioners*) or from persons who had initially purchased the land from the said Joyce Nairesiae (*in the case of the 3rd, 4th and 7th Petitioners*). The land parcels were subsequently transferred to them and titles were issued in their individual names. That thereafter, they commenced developments of their respective parcels of land after obtaining the necessary approvals and sanctions from relevant Government Institutions.
3. That they were therefore surprised when the Respondent issued Gazette Notice No.15587 on 26th November 2011 and purported to cancel their titles and then placed restrictions against each title

register.

4. It is their complaint in the Petition that the Respondent's action violated the Petitioner's rights as follows;
 - i) right to property protected by **Article 40** of the **Constitution**.
 - ii) right to fair administrative action under **Article 47** of the **Constitution**.
5. The reasons for the above complaints are that they were not given notice of, and reasons for, the adverse decision and that the Respondent acted *mala fides*.

They now seek the following orders;

“a) An order of certiorari do issue to bring to this Honourable Court for the purposes of being quashed the decision of the 1st Respondent to revoke and also to place restrictions against the Petitioners respective titles being Ngong Township Block Number 2/643, Ngong Township Block Number 2/645, Ngong Township block Number 2/646 and Ngong Township Block Number 2/647 for the 1st, 2nd 3rd and 4th Plaintiffs respectively and Ngong Township Block Number 2/650 and Ngong Township Block Number 2/651 for 5th Plaintiff and Ngong Township Block Number 2/648 and Ngong Township Block Number 2/649 for 6th and 7th Plaintiffs.

b) An order of mandamus do issue to compel the Respondents by themselves, Servant, Agents to delete the restrictions entered on the register in respect of made as a consequent to the purported unlawful revocation of their respective parcels of land being Ngong Township Block Number 2/643, Ngong Township Block Number 2/645, Ngong Township Block Number 2/646 and Ngong Township block Number 2/647 for 1st, 2nd 3rd and 4th Plaintiffs respectively and Ngong Township Block Number 2/650 and Ngong Township Block Number 2/651 for 5th Plaintiff and Ngong Township Block Number 2/648 and Ngong Township block Number 2/649 for 6th and 7th Plaintiffs.(sic)

c) An order of prohibition, to prohibit the Respondents from taking any further wrongful, unlawful or other action that is adverse to the interest of the Petitioners as the absolute owners of the various parcels of land being Ngong Township Block Number 2/643, Ngong Township Block Number 2/645, Ngong Township Block Number 2/646 and Ngong Township Block Number 2/647 for 1st, 2nd 3rd and 4th Plaintiffs respectively and Ngong Township and Ngong Township block Number 2/650 and Ngong Township block Number 2/651 for 5th Plaintiff and Ngong Township block Number 2/648 and Ngong township block Number 2/649 for 6th and 7th Plaintiffs.

d) A declaration that the certificates of Leases issued to the Petitioners in respect to their respective parcels of land being Ngong Township Block Number 2/643, Ngong Township block Number 2/645, Ngong Township block Number 2/646 and Ngong Township block Number 2/647 for 1st, 2nd, 3rd and 4th Plaintiffs respectively and Ngong Township Block Number 2/650 and Ngong Township Block Number 2/648 and Ngong Township Block Number 2/649 for 6th and 7th Plaintiffs are conclusive evidence of ownership and that the Petitioners are the absolute and indefeasible owners of the suit properties.(sic)

e) Damages.”

6. I note from the record that although the Respondents were served, none entered appearance and there is no response to the Petition and the issues raised therein.
7. This Court therefore lacks the benefit of hearing any explanation to the complaints made. I have in any event read the Supporting Affidavit sworn on 25/10/2011 together with the annexures

thereto and the following facts cannot be contested;

- a) All the Petitioners are the registered proprietors of the respective land parcels above,
- b) All the title documents were issued by the Registrar of Titles.
- c) The titles were cancelled vide Gazettee Notice No.15581 and the same reads as follows;

“Whereas the parcel of land whose details are described under the schedule herein below were allocated and title issued to private developers, it has come to the notice of the Government that the said parcels of land were reserved for public purpose under the relevant provisions of the Constitution, the Government Lands Act (Cap. 280) and the Trust Land Act (Cap.288). The allocations were therefore illegal and unconstitutional.

Under the circumstances and in view of public need and interest, the Government revokes the said titles”

- d) Subsequently a restriction was registered on each parcel of land with the following words inscribed in the register;

“Restriction: Gazettement Notice (Public Utility)

- e) The original parcel of land from which titles Nos.643 – 651 were created was allocated to one Joyce Nairesiae by the 2nd Respondent and I have seen for example that the original leasehold title to Joyce Nairesiae aforesaid with respect to title No.649 was issued on 1/8/2000 by Judith Marilyn Okungu, Commissioner of Lands, on behalf of Olkejuado County Council.
8. Despite the above facts, I have seen no evidence before me that in cancelling the titles, any particular provision of the Constitution or Statute was invoked by the Registrar of Lands, Kajiado as the basis for his decision. That is the first problem I have with the Gazettee Notice. It is not enough to quote the Constitution or Statute which in any event are able to speak for themselves in their language and tenor.
9. The second problem I see is that there is no absolutely no evidence before me that at the very least, the Petitioners were informed of the intended action against them. Majanja, J. in **Geothermal Development Company Ltd vs Kenya Revenue Authority & Anor, Petition 352 of 2012** expressed it well when he stated thus;

“This right is not limited only in cases of a hearing as in the case of a Court or before a Tribunal, but when taking administrative actions as well, (see O'Donoghue v South Eastern Health Board [2005] 4IR 217). Hillary Delany in his book, Judicial Review of Administrative Action, Thomson Reuters 2nd Edition, at page 272, notes that, 'Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision'.”

The learned judge went on to add as follows;

“In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be. (See Charkaoul vs Canada [2007] SCC 9, Alberta Workers' compensation Board vs Alberta Appeals Commission (2005) 258 DLR (4th), 29, 55 and Sinkovich vs Strathroy Commissioners of Police (1988) 51 DLR (4th) 750.”

10. I am in complete agreement and I also note that **Article 47** of the **Constitution, 2010** expects that any administrative action taken must be “*lawful, reasonable and procedurally fair*”. Where is the fairness when no notice of cancellation of titles was given and the reasons given thereafter are not pegged to any constitutional or statutory mandate given to any of the Respondents? **Article 47(2)** specifically demands that where a fundamental right may be adversely effected when an administrative action is taken, “*written reasons for the action must be given.*” No such reasons were given in the present case.

11. It is therefore my finding that in the instant case, the right to property under **Article 40** of the Constitution was clearly breached and of note is **Article 40(2) (a)** and **(b)** which provides as follows;

“(1) ...

(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).”

If no law of the above kind can be enacted, it follows that no action of the above kind can be undertaken. Further, I note of course that the Gazette Notice refers to the cancellation of title as being made because the land was for public purposes. If so, **Article 40(3)** is pertinent. It provides as follows;

“*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.”*

12. There is absolutely no evidence that the above provision was followed or that any procedure known to any Statute was invoked before cancellation of the titles was done. This is what prompted Musinga, J. to state as follows in **Kuria Greens Limited vs Registrar of Titles & Anor [2011] eKLR;**

“*Whereas unlawful acquisition of public property by citizens must be lawfully resisted, the Court will be failing in its constitutional duties if it failed to protect citizens from unlawful acquisition of their property by the State through unlawful decisions taken by public officers. If the respondents were satisfied that the suit land had been unlawfully alienated and that it was in the interest of*

the public that the land reverts to the State or to the Kenya Agricultural Research Institute, appropriate notice ought to have been given to the petitioner and thereafter the respondents ought to have exercised any of the following options:

(a) Initiate the process of compulsory acquisition of the suit land and thus pay full and prompt compensation to the petitioner or

(b) File a suit in the High Court challenging the petitioner's title and await its determination, one way or the other.

Short of that, the respondents' purported action of revoking the petitioner's title is an affront to private proprietary rights which are guaranteed by our Constitution and such an action must be frowned upon by the law."

13. The facts of the above case are similar to those of the present case and I adopt the learned judge's words as if they were mine.

14. Having held that the actions of the Respondents and/or their agents were all unlawful, I can only state that under **Article 23** of the **Constitution** as read with **Order 53** of the **Civil Procedure Rules** this Court is clothed with jurisdiction to grant the reliefs sought by the Petitioners.

15. I do so also because where no response is given to the claim and where no explanation is given as to the reason why the titles were cancelled, this Court's hands are tied. Land set aside for public purposes must be protected at all cost and **Article 40(6)** of the **Constitution** states that the right to property does "not extend to any property that has been found to have been unlawfully acquired".

16. I have seen no evidence that the Petitioners' parcels of land were unlawfully acquired and I have said why. Had that evidence been placed before me, I may well have reached a different decision and in favour of the public but not in the present circumstances.

Lastly, although the Petitioners are entitled to certain orders, the one for damages must fail because no evidence was tendered and no Submissions were made in support of that claim.

17. In the event, I will enter judgment for the Petitioners against the Respondents jointly and severally in the following terms;

"a) An order of certiorari do issue to bring this Honourable Court for the purposes of being quashed the decision of the 1st Respondent to revoke and also to place restrictions against the Petitioners respective titles being Ngong Township Block Number 2/643, Ngong Township Block Number 2/645, Ngong Township block Number 2/646 and Ngong Township Block Number 2/647 for 1st, 2nd 3rd and 4th Plaintiffs respectively and Ngong Township Block Number 2/650 and Ngong Township Block Number 2/651 for 5th Plaintiff and Ngong Township Block Number 2/648 and Ngong Township Block Number 2/649 for 6th and 7th Plaintiffs.

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c) *An order of prohibition, to prohibit the Respondents from taking any further wrongful, unlawful or other action that is adverse to the interests of the Petitioners as the absolute owners of the various parcels of land being Ngong Township Block Number 2/643, Ngong Township Block Number 2/645, Ngong Township Block Number 2/646 and Ngong Township Block Number 2/647 for 1st, 2nd 3rd and 4th Plaintiffs respectively and Ngong Township and Ngong Township block Number 2/650 and Ngong Township block Number 2/651 for 5th Plaintiff and Ngong Township block Number 2/648 and Ngong Township block Number 2/649 for 6th and 7th Plaintiffs.*

d) *A declaration that the certificates of Leases issued to the Petitioners in respect to their respective parcels of land being Ngong Township Block Number 2/643, Ngong Township block Number 2/645, Ngong Township block Number 2/646 and Ngong Township block Number 2/647 for 1st, 2nd, 3rd and 4th Plaintiffs respectively and Ngong Township Block Number 2/650 and Ngong Township Block Number 2/648 and Ngong Township Block Number 2/649 for 6th and 7th Plaintiffs are conclusive evidence of ownership and that the Petitioners are the absolute and indefeasible owners of the suit properties.”*

e) *The claim for damages is dismissed.*

f) *No claim for costs was made and so none shall be awarded.”*

18. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Petitioner present

Mr. Macharia holding brief for Gatheru for Petitioners

No Appearance for Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE