



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.61 OF 2007

BETWEEN

KENYA (RTF) LIMITED.....1ST PETITIONER

AND

PERMANENT SECRETARY

MINISTRY OF LANDS &1ST RESPONDENT

COMMISSIONER OF LANDS.....2ND RESPONDENT

AND

KENYA ANTI-CORRUPTION COMMISSION.....INTERESTED PARTY

JUDGMENT

Introduction

1. On 5th February 2007, the Petitioner herein, Kenya (RTF) Limited filed the present Petition seeking certain orders against the Respondents relating to their alleged action of interfering with the Petitioners' title over land parcel number L.R. No.209/10777 situated in Nairobi.
2. Pursuant to leave granted by this Court on 11th December, 2012, the Petition was amended and the Petitioner introduced the following changes;
 - i) *Reliance on the **Repealed Constitution** was deleted at the heading of the Petition but retained in the body thereof and **Articles 1, 2, 4, 10, 19, 22, 23, 40, 43, 47, 50, 64, 129(2),159, 165(6) and (7)**, as well as **Article 259(2) of the Constitution, 2010** were invoked both in the heading and body of the Petition.*
 - ii) *A statement detailing out the background of facts was introduced and of significance is that during the pendency of these proceedings, and before the leave to amend was granted, the suit property was transferred and registered in the names of a third party who has since leased it to another party.*

iii) *The prayers sought were amended to include a prayer that the revocation of the title in respect of the suit land be declared unconstitutional.*

3. I deliberately picked on the above three issues for reasons that will become apparent later in this judgment.

Case for the Petitioner

4. The Petitioner claims that by letter dated 8/5/1998 it was allotted the suit land by the Government of Kenya and upon paying Kshs.3,767,840/- demanded by the 2nd Respondent, it was issued with a Grant registered as I.R.89464.
5. No developments were made on the land and on 19/9/2003, the Kenya Pipeline Company Limited lodged a complaint with the Director of Criminal Investigations claiming ownership of the said parcel of land and on 26/1/2007, the 1st Respondent published a 'caveat emptor' notice to the public stating that;
- a) *The land was irregularly allocated to the Petitioner.*
 - b) *The title was issued and/or that the land was registered under dubious circumstances.*
 - c) *The matter was under investigation by the relevant arms of the Government for appropriate action.*
 - d) *That any sale transaction in respect to the land would not be processed or approved by the Ministry of Lands.*
6. That on 1/4/2010, the 1st Respondent cancelled the Petitioner's title to the suit land by Gazette Notice No.3460 and the land was subsequently re-surveyed and a new title issued to a third party.
7. It is the Petitioner's complaint that the actions of the Respondents contravened **Sections 70, 75 and 76 of the Repealed Constitution** which protected *inter-alia* the right to property and **Article 40 of the Constitution, 2010** which protects the same right.
8. The Petitioner also claims that it has been denied equal treatment contrary to **Article 27 of the Constitution** as well as the right to fair administrative action contrary to **Article 47 of the Constitution** because it was never given the reasons for revocation of its title and was also never heard before the same was selectively and with discrimination registered in the name of a third party.
9. The specific prayers now sought for the above reasons are;
- a) ***An interim order of prohibition restraining the Respondents' from interfering with the Petitioner's right of ownership or proprietorship of the land including the right to possess, alienate, sell, and transfer or otherwise deal with the land.***
 - b) ***An order of prohibition stopping the Respondents from interfering with the Petitioner's right of ownership or proprietorship of the land including the right to possess, alienate, sell and transfer or otherwise deal with the land.***
 - c) ***An order of prohibition stopping the Respondents from depriving or expropriating the Petitioner of the land.***
 - d) ***A declaration that the Petitioner is the absolute and indefeasible owner of the land.***
 - e) ***An order directing the Respondents' to process transactions of and on the land or***

affecting the title of the land undertaken by the Petitioner as the absolute and indefeasible owner of the land.

f) A declaration that the Gazette Notice No.3460 dated 1st April, 2010 purporting to revoke the Petitioner's title to suit property namely L.R. No.209/10777 unconstitutional, null and void to the extent of its unconstitutionality as it infringes on the fundamental rights and freedoms contained in Articles 19, 22, 23, 40, 47, 50 and 64 of the Constitution.

g) An order of certiorari do issue to bring into this Honourable Court for the purposes of being quashed, the Respondents Gazette Notice No.3460 dated 1/2010 purporting to revoke the Petitioner's title to all that parcel of land comprised in title No.L.R.No.209/10777.

h) An order of prohibition do issue to prohibit the Respondents by themselves, servants, agents or whomsoever from in any manner issuing any title and/or license in respect to the Petitioner's land comprised in title No.L.R.No.209/10777 or registering any encumbrance thereon.

I. An order of mandamus do issue to compel the Respondents by themselves, servants, agents to delete any entry on the Petitioner's Certificate of Title made as a consequence to or in furtherance of all that parcel of land comprised in title No.L.R. No.209/19723 and compel the Respondents to make entry of the Petitioner's name.

j) A declaration that the Respondents purported revocation of the Petitioner's title to all that parcel of land comprised in title No.L.R. No.209/10777 is unconstitutional, null and void.

k) A declaration that the Certificate of Title to the Petitioner in respect to the suit property is conclusive evidence of ownership of the suit property.

- The High Court has supervisory jurisdiction over the Respondents and make any such Orders or give any directions to ensure the fair administration of justice.*

m. Damages.

n) Such other orders, writs, directions as this Honourable Court shall seem just.”

Case for the Respondents

10.The Respondents have made out the case that the Petition is misguided because L.R. No.209/10777 had been cancelled by survey plan No.F.R.250/81 but was “recycled and irregularly allocated to Kenya (RTF) Limited,” the Petitioner.

11.That when investigations were commenced and a case made against the Petitioner, a caveat emptor notice was placed for the benefit of the public because in fact the said land parcel had been allocated to the Kenya Pipeline Company Limited by a letter of allotment dated 15/2/1990 which superseded an earlier one dated 8/1/1988 in favour of the same corporation.

12.Further, that the letter of allotment dated 12/3/2002 relied upon by the Petitioner was “vague, fake and inconsistent given that the letter of allotment Ref. No.44805/IV/129 of 8/1/1988 it purports to supersede had earlier been cancelled by letter of allotment 122059/20 of 5/2/1990.” That therefore the said letter of allotment Ref. No.122059/20 of 15/2/1990 is still valid and the Petitioner has no lawful claim to the suit land.

13.It is also the Respondents' contention that whereas the letter of allotment held by the Petitioner refers to the land as an “*unsurveyed plot*”, the land had in fact been surveyed 10 years earlier, was resurveyed again in February 1994 as L.R. No.209/12044 on Survey Plan F.R. 250/81 as a result of which survey Plan F.R.186/156 was superseded and L.R. No.209/10777 was revoked.

Thereafter, it was reported that Deed Plan No.180439 was lost and so no title could be issued to the Kenya Pipeline Company Limited and subsequently therefore no title could properly be issued to the Petitioner using Deed Plan No.33255 which had in any event been cancelled.

14. Further, that at the time of the filing of the Petition, the rightful owner of the suit land was the Kenya Pipeline Company Limited as proprietor of L.R. No.209/12044 and not L.R. No.207/120777 which does not exist. That therefore the Petition is without merit and should be dismissed with costs.

Interested Party's Case

15. The Kenya Anti-Corruption Commission was enjoined by an order of this Court as an Interested Party and its case is that;

Firstly, there is no entity in law known as the Kenya (RTF) Limited because the said Company although initially registered, was struck off the Register of Companies on 3/9/1999 and was thereafter dissolved.

Not being a legal entity therefore, it is incapable of bringing proceedings to enforce any right allegedly due to it and so there is no proper Petition before the Court and the one filed should be struck off *ab initio*.

Secondly, that from the evidence submitted by the Respondents, it is obvious that title No.209/10777 does not exist and therefore no lawful claim under the Repealed Constitution or the Constitution, 2010 can be made on that basis.

That therefore the Petition is completely lacking in merit and is frivolous and vexatious and should be disallowed.

Determination

16. I am attracted to the Submission by the Interested Party that only two issues require determination in this Petition but I will add two more so that I shall now proceed and determine the following questions;

i) *Whether the entity referred to as Kenya (RTF) Limited exists and whether it is capable of suing as the Petitioner in this matter.*

ii) *Whether land parcel allegedly registered as L.R. No.209/10777, Nairobi exists and whether it is/was properly registered in the Petitioner's name.*

iii) *Whether the constitutional right to property was violated as alleged by the Petitioner and*

iv) *Whether the Petitioner is entitled to the reliefs that it seeks in the Petition.*

17. From the evidence submitted by the Parties, Kenya (RTF) Limited was incorporated on 13/8/1993 and a certificate of registration number C.55254 was issued to the subscribers, M/S. Senators Registrars Limited and Garden Registrar Limited. Both companies were also listed as the Shareholders and Directors of the Company and each held one ordinary share valued at Kshs.20/- and on 28/7/1998, Garden Registrars Limited transferred its one share to M/S Phoenix Registrars Limited to be held in trust for M/S. Kenya Assets Management Limited under a Declaration of Trust dated 31/7/1998.

18. On 7/12/1998, a resolution of the aforesaid Directors of Kenya (RTF) Limited was presented to the Registrar of Companies seeking dissolution of the company for reasons that "*the company*

does not carry out any trade nor does it intend to do so in the future.” The Registrar acted on the said resolution and by Gazette Notice No.697 dated 12/2/1999, he gave three (3) months' notice of intention to dissolve the company unless a notice to show cause to the contrary was given. Apparently, no objection was raised and on 3/9/1999, seven (7) months' after the initial notice to show cause was published, the Registrar of Companies published Gazette Notice No.4999 formally striking off the company from the Register of Companies. The Company was then dissolved pursuant to **Section 339(5)** of the **Companies Act**.

19.The above evidence is partly contained in an Affidavit sworn on 12/3/2007 by Nzioki wa Makau, then an advocate and now a Judge of the Industrial Court. I have combed the record and I have seen no specific response to this evidence but in Affidavits sworn on 5/2/2007, one Juliet Dorcas Ng'etich and one, Jacob Cheruiyot Baliach deponed that they are the subscribers to the Memorandum and Articles of Association and are also the Directors of Kenya (RTF) Limited. No evidence save that averment has been placed before me. All documents placed before me by the Interested Party show that on the contrary, and in its corporate lifetime, none of the said persons had anything to do with the Company and were certainly not shareholders or Directors thereof.

20.Under the **Companies Act, Cap.486, Section 16 (2)** provides as follows;

“From the date of incorporation mentioned in the certificate

of incorporation, the subscribers to the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company, with power to hold land and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act.”

Regarding the members of a Company, **Section 28** provides as follows;

“(1) The subscribers to the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members.

(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company. ”

21.It is obvious from a casual reading of the above **Sections** of the **Act** against the uncontroverted facts tendered by the Interested Party that both Juliet Dorcas Ng'etich and Jacob Cheruiyout Baliach are strangers to Kenya (RTF) Limited and even if they were not, **Section 339** of the **Companies Act** provides as follows;

“(1) Where the registrar has reasonable cause to believe that

a company is not carrying on business or in operation, he may send to the company by post a letter inquiring whether the company is carrying on business or in operation.

(2) ...

(3) If the registrar either receives an answer to the effect that the company is not carrying on business or in operation, or does not within thirty days after sending the second letter receive any answer, he may publish in the Gazette, and send to the company by post, a notice that at the expiration of three months from the date of the notice the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved: Provided that the registrar shall not be required to send the letters referred to in subsections (1) and (2) in any case where the company itself or any director or the secretary of the company has requested

him to strike the company off the register or has notified him that the company is not carrying on business.

(4) If, in any case where a company is being wound up, the

registrar has reasonable cause to believe either that no liquidator is acting, or that the affairs of the company are fully wound up, and the returns required to be made by the liquidator have not been made for a period of six consecutive months, the registrar shall publish in the Gazette and send to the company or the liquidator, if any, a like notice as is provided in subsection (3).

(5) At the expiration of the time mentioned in the notice the

registrar may, unless cause to the contrary is previously shown by the company, or the liquidator, as the case may be, strike the name of the company off the register, and shall publish notice thereof in the Gazette, and on the publication in the Gazette of this notice the company shall be dissolved: Provided that—

(i) the liability, if any, of every director, officer and member of the company shall continue and may be enforced as if the company had not been dissolved; and

(ii) nothing in this subsection shall affect the power of the court to wind up a company the name of which has been struck off the register.

(6) If a company or any member or creditor thereof feels

aggrieved by the company having been struck off the register the court on an application made by the company or member or creditor before the expiration of ten years from the publication in the Gazette of the notice aforesaid may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and upon a certified copy of the order being delivered to the registrar for registration the company

shall be deemed to have continued in existence as if its name had not been struck off; and the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.

(7) ... ”

22. Again a casual reading of the above Section together with the evidence tendered before this Court would only lead to one conclusion; that on 3/9/1999, the legal entity known as Kenya (RTF) Limited ceased to exist and was incapable of holding land in the language of **Section 16(2)** above. More fundamentally however is the fact that the present Petition is partly premised on the **Bill of Rights, Chapter Four of the Constitution, 2010**. If that be so, “person” is defined in **Article 260** thereof to include;

“a company, association or other body of persons whether incorporated or unincorporated.”

23. It is obvious that a company that was dissolved on its own application cannot resurrect in the name of Ng'etich and Baliach aforesaid and purport to enforce the right to property under **Article 40** of the **Constitution, 2010**. If it is dead, then it is dead and has no rights otherwise reserved for living persons including juristic persons. I have seen no evidence that any party including the named persons ever moved to resurrect Kenya (RTF) Limited and so it remains non-existent.

The above finding alone would have been sufficient to dispose of the Petition but there is need to

say more.

Whether Land Parcel Number 209/10777 exists

24. Elsewhere above, I have detailed out both the evidence tendered by the Respondent and the Interested Party as to the history of the land parcel in dispute.

25. In that regard, I have seen an Affidavit sworn by Juliet Dorcas Ng'etich on 5/2/2007 and at paragraph 17 thereof she depones that *“the land was originally allotted to the Kenya Pipeline Company Limited but the Kenya Pipeline Company Limited was allotted a different piece of land measuring 2.023 hectares in exchange and as an alternative offer to the Petitioner's land on 12th March 2002 by a letter of allotment under reference No.122059/39”* and that *“it is also known to the Petitioner that the Kenya Pipeline Company Limited has now completed construction of its headquarters on other land near their Nairobi terminal.”*

26. The above assertion on oath is however not borne by evidence before me. I have for example seen a letter dated 28/8/2003 from the acting Managing Director of the Kenya Pipeline Company Ltd. He states as follows on the above subject;

“The purpose of this letter is to inform you that Kenya Pipeline Company will not agree to the exchange of its Upper Hill plot with the Embakasi plot or any other plot. The allotment letter dated 12th March 2002 should therefore be cancelled. We now look forward to receiving the title document for the Upper Hill plot that was allocated to us vide allotment letter Ref.44805/IV/129 and dated 8th January 1988.

As we suspect this may have criminal implications, we are copying this letter to the Director of C.I.D.”

27. Pausing here for a moment, it is obvious that the statement by Ng'etich reproduced above was an outright lie and points to the illegality of the title purportedly held by the Petitioner.

28. Further, in his Affidavit sworn on 18/9/2007, Kombo Mwero, the then Permanent Secretary, Ministry of Lands, after detailing out the history of the said land parcel concluded as follows;

“That the rightful owner of the suit parcel of land and in consistence with the land records represented as L.R. No.209/12044 and Deed Plan No.180439 held in the Ministry is Kenya Pipeline Company Limited.”

29. I believe the Respondents and even if the Petitioner was alive and kicking after September 1999, there was no title capable of being allotted to it as the suit land had long been surveyed and registered in the name of Kenya Pipeline Limited as title No.209/12044. There is no evidence that title No.209/10777 exists in the lawful records of the custodian of all titles; the Commissioner of Lands and the title was obviously fraudulently acquired and it is null and void *ab initio* and was incapable of vesting any title and proprietary rights to a non-existent Petitioner. How can a dead company purport to own land that is not available for it to own? Ghosts cannot own land that belongs to the living.

I have elsewhere above reproduced the evidence of Nzioki wa Makau and coupled with that of Kombo Mwero, it is clear that there is no land registered as L.R.No.209/10777. I need not say more.

Has Section 75 of the Repealed Constitution and Article 40 of the Constitution, 2010 been violated?

30. Elsewhere above, I have shown that the Petitioner does not exist as a legal entity and that title No.209/10777 does not exist in the manner argued by the Petitioner. How then can any rights under the Constitution have been violated in that case?

In any event, **Article 40(6)** of the **Constitution, 2010** is pertinent as it provides as follows;

“(1) ...

(2) ...

(3) ...

(4) ...

(5) ...

(6)) The rights under this Article do not extend to any property

that has been found to have been unlawfully acquired.

31. It is my view that looking at all the evidence placed before me, the Petitioner's surrogates, Ng'etich and Baliach aforesaid clearly manipulated records to obtain title to the suit land unlawfully. They cannot expect this Court to aid them in their illegality. That is all to say and issue no (iv) above must be answered in the negative.

Conclusion

32. I have shown above that there is no merit to the Petition before me but I have two other things to say in any event;

i) *The present proceedings had a big lacunae; how come the Kenya Pipeline Company Limited was never enjoined as an Interested Party? It would have been difficult for this Court to make orders in favour of the Petitioner without hearing from it.*

ii) *Similarly, in the Petition, a third party who is the present registered owner of the suit land was not enjoined. Even if the Petitioner had any rights to the land, and it has none, how could this Court fairly determine ownership that would affect presently registered interests? In fact, the third party was not named directly but I gather at paragraph 31 of the Petition that it may be the Judiciary of Kenya but nothing was said of its interests at all.*

32. Lastly, this Court, having considered all the issues placed before it, can only reach the decision that the Petition before me is misguided and is struck off with costs to the Respondents and Interested party.

33. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 19TH DAY OF SEPTEMBER, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Miss Ng'ania holding brief for Mr. Osundwa for Petitioner

Mr. Wamotsa for Respondent

Mr. Murei for Interested Party

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE