



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURT)

PETITION No. 334 of 2009

KHIMJI BHIMJI SEYANI.....1ST PLAINTIFF

HIRJI SEYANI.....2ND PLAINTIFF

KARSAN KHIMJI SEYANI.....3RD PLAINTIFF

-VERSUS-

THE MINISTER OF HOUSING.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

THE COMMISSIONER OF LANDS.....3RD RESPONDENT

JUDGMENT

Introduction

- 1.The petitioners have filed the petition dated 29th May, 2009 seeking various declarations and orders pertaining to what they allege is the taking of their property L.R. No. 209/3217 in contravention of their rights under Section 75 of the old Constitution.
2. The petition was supported by an affidavit sworn by **Hirji Seyani** on the 29th of May 2009 and a further affidavit also sworn by Hieji Seyani on the 30th of June 2011.
3. The petition was opposed by the state. A replying affidavit sworn by **Salim Ali Molla** on the 20th of November 2010 and a further affidavit sworn by **Tirop Kosgey** on the 11th of February 2011 was filed on behalf of the respondents.
4. The petitioner filed written submissions dated 6th October, 2010 and further submissions dated 8th July 2011. The respondent filed written submissions dated 23rd May 2011. Both parties highlighted their submissions before me on the 8th of December 2011.

The Petitioners' Case

5. The petitioners' case as presented by their counsel, Mr. Munyu, is that they are the registered proprietors of property known as L.R. No. 209/3217. They have a title to the property issued by the Lands Officer on 13th December, 2000. A copy of the title was annexed to the supporting affidavit as

HS1.

6. The petitioners purchased the property from one **Peter Kipchirchir Magut** who had earlier been allocated the property by the government.
7. When they purchased the property, they found that there was a civil servant in occupation of the property. They therefore filed **High Court Civil Case No. 639 of 2004** against the civil servant staying in the house one **Winston J.O. Orege** and the Registrar of Titles. The High Court gave an interlocutory mandatory injunction to evict Mr. Orege. Their efforts to execute the order failed as there was resistance from the tenant and subsequently the Attorney General applied to set aside the order but the application was never heard.
8. The respondents thereafter entered into the property and commenced construction through the Ministry of Housing. A number of proceedings namely Misc. Civil Application No. 80 of 2008, Misc. Civil Appl. No. 84 of 2008, and Petition No. 772 of 2008 were filed to try and stop the construction but failed. The petitioners then withdrew all the proceedings including HCCC No. 639 of 2004 and commenced the present proceedings.
9. The petitioners are therefore seeking in this petition various declarations among them that they are the lawful owners of the property, their title to the suit property has never been cancelled or nullified and that the takeover of the property by the respondents is unlawful and amounts to compulsory acquisition without compensation.
10. They argue that the takeover of their property by the state is a violation of their right to property and to a hearing which are protected by the old Constitution at section 75 and 77 and now by Articles 40 and 50 of the current constitution.
11. They also relied on section 23 of the Registration of Titles Act and submitted that the Certificate of Title issued by the Registrar is conclusive evidence that the person named on the title is the proprietor. They referred the court to the case of ***Gitwany Investments Ltd. –v- Tajmal Ltd and 3 Others High Court Civil Suit No. 1114 of 2002 and the Attorney General –v- Kenya Commercial Bank Limited and 3 others High Court Civil Suit No. 260 of 2004*** which deal with the issue of the sanctity of title. They argued that to date the allocation to the original owner or the petitioners has not been revoked so the process of the respondent's entry into the property without due process is irregular and amounts to compulsory acquisition.
12. They also argue that the process of taking over the land was in breach of the right to a fair hearing as they were never heard and no notice was issued to them before the Ministry started construction. The process of land acquisition set out in the Land Acquisition Act at section 5, 9 and 19 was not followed.
13. The petitioners submit further that the principle of legitimate expectations was breached as they expected that any legitimate acquisition would follow the due process and they referred the court to the case of ***Council of Civil Service Unions & Others –v- Minister for Civil Service. (1984) 3 ALL ER.***
14. In response to the position taken by the respondents that the title deed was issued unprocedurally, the petitioners argued that the title was never revoked, and that if the respondents wished to correct any alleged anomaly in the issuance of the title, then it should have followed due process.
15. With regard to the argument by the respondent about the proper process for enforcement of the petitioners' rights, it was the petitioners' submission that under Article 22 of the Constitution, the court should not be restricted by procedural technicalities. The court has jurisdiction under Article 23 in suits such as this for enforcement of fundamental rights to give appropriate reliefs including injunction and an order for compensation.
16. While conceding that the public interest should prevail as submitted by the respondents, the petitioners argued that where individual rights have been taken away for the sake of the public, there

should be compensation to the individual as the principle of public interest does not operate in limbo.

17. The petitioners submitted that it was now obvious that it is not possible for them to go back on the land, but they were asking that the court redress the wrong done in the compulsory taking of the land.

18. The petitioners therefore prayed for an order for damages for compensation for the unlawful acquisition. They tendered a valuation report on the property which shows the market value of the property as Kshs 120,000,000 which they claim as the loss they suffered as a result of the acquisition. They also claimed loss of projected income from 20 housing units which they were to construct and loss of projected profit of Kshs.80,000,000.00.

The Respondents' Case

19. The respondents case is set out in the Replying Affidavit of **Salim Ali Molla**, the Director of the Civil Service Housing Scheme and the Further Replying Affidavit of **Tirop Kosgey**, the Permanent Secretary, Ministry of Housing, sworn on the 11th of February 2011 and filed in court on the same day, as well as the written submissions filed in court on the 23rd of May 2011.

20. According to the respondents, the property in question was a government house in which a Mr. Orege, then a civil servant, had been residing since 1981. The property was illegally allocated to a Mr. Peter Magut who then transferred it to the petitioners in 1999. The petitioners then filed HCCC 639 of 2004 against Mr. Orege and the Registrar of Titles, but withdrew their claim against the Registrar of Titles. They did not serve the Attorney General even though they were aware that the property had belonged to the government and the person residing in it was a civil servant.

21. The respondents have set out in the affidavit of **Tirop Kosgey** the chronology of events leading to the present petition. According to the averments set out in that affidavit, the petitioners filed **Nairobi HCCC 639 of 2004** against one Winston Orege and the Chief Land Registrar on 15th April, 2002. The petitioners neither served the office of the Attorney General nor the Chief Land Registrar with summons to enter appearance and the plaint.

22. Thereafter, the petitioners withdrew their claim against the Chief Land Registrar without having served either the summons to enter appearance or the plaint. The petitioners then filed an application seeking a mandatory injunction against Mr. Winston Orege. Mr. Orege was working in the Office of The Auditor and Controller General and was occupying the government house as a civil servant. He had not been allocated the house.

23. The respondents state that the court ruled in favour of the petitioners in its ruling dated 14th January 2004. They have annexed a copy of the ruling to the affidavit. When the petitioners got orders in their favour, they attempted to demolish the house whereupon the Attorney General sought to be enjoined in the proceedings to protect the government's rights to the property and sought an order to set aside the mandatory injunction issued in favour of the petitioners.

24. The petitioners raised a preliminary objection to the joinder of the Attorney General which was heard and dismissed by Visram, J (as he then was). The Attorney General then filed a statement of defence in the matter raising issues of fraud against the petitioners but the petitioners instead of fixing the matter for hearing as they had a right to do withdrew the suit before it was heard on its merits.

25. Basically, therefore, although at least four other suits have been filed in various divisions of this court by the petitioners, the issue of the petitioners' entitlement to the property the subject matter of this suit has never been determined.

26. In light of the above factual situation, Mr Onyiso for the respondents submitted that the procedure adopted in bringing this matter to court was improper. It should not have been brought by way of petition but by way of ordinary suit as the central issue was whether the property was legally acquired.

27. It was the respondents' position that the property was acquired fraudulently and the proper way to deal with the issue was by way of ordinary suit. In view of the contested title to the property, the petitioners had no sound constitutional basis for bringing a constitutional petition rather than an ordinary suit.

28. The respondents also argued that in view of the improper acquisition of the suit property, neither special nor general damages can issue in favour of the petitioners. Mr. Onyiso referred to Article 10 of the Constitution which sets out the national values and principles and submitted that improper acquisitions of public property would run contrary to those values. Public interest also demands that one should not benefit from illegally acquired public property.

29. Mr. Onyiso also argued that the Constitution ought to be interpreted in a very liberal manner as set out in the case of *Njoya & Others -v- The Attorney General & Others (No.2) [2004] 1 KLR 261*. Liberal interpretation can only be in favour of the public as opposed to individual interest and where the two clash, the public interest prevails. He relied on the doctrine of public trust as enunciated in the case of *Joram Nyagah -v-The Attorney General*.

30. He argued that the petitioners were not without a remedy as they should be able to recover their loss from the person who sold the land to them.

Issues for Determination

31. This petition brings to the fore the need to balance the competing interests of the public against the claims of individuals with regard to the highly contested issue of public land that falls into private hands. The purchaser argues that it acquired the property from a person whose title has never been revoked or nullified, and argues that the taking of the land by the respondents amounted to a violation of its constitutional rights as it did not follow the laid down procedure for compulsory acquisition of land for public purposes.

32. Upon a consideration of the respective pleadings and submissions of the parties as set out above, I take the view that three issues emerge for determination in this petition:

- i. Whether the petitioners are the lawful owners of the property**
- ii. Whether their rights under sections 75 and 77 of the old Constitution or Articles 40 and 50 of the Constitution have been infringed by the respondents.**
- iii. What remedy they are entitled to from this court.**
- iv. Ownership of the Property**

33. The petitioners ask this court to issue a declaration that they are the lawful owners of the suit property, L.R. No. 209/3217. In my view, however, the power vested in this court by the Constitution is to enforce protection of constitutional rights that are clearly vested in a petitioner before the court. It is not to embark on an examination of facts to establish entitlement before adjudicating on whether the rights have been violated. If, therefore, in the present case, the petitioners' rights to the property are still in doubt, then it is not within the mandate of this court to pronounce as to who is the rightful owner of the property in dispute.

34. The petitioners argue that they purchased the subject property from one **Peter Kipchirchir Magut**. They have a title which they submit is indefeasible by virtue of section 23 of the Registration of Titles Act, Cap 281 Laws of Kenya. I have noted the decisions referred to by the petitioners with regard to the indefeasibility of title namely *Gitwany Investments Ltd. -v- Tajmal Ltd and 3 Others and Attorney General -v- Kenya Commercial Bank Limited and 3 others High Court (supra)*.

35. However, I am inclined to the view taken by the court in the case of *Chemei Investments Limited v*

The Attorney General & Others Nairobi Petition No. 94 of 2005 (Unreported) where the court stated at paragraph 64 that -

“The Constitution protects a higher value, that of integrity and rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of Milan Kumarn Shah & 2 Others v City Council of Nairobi & Another (Supra) where the Court sated as follows, ‘We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relied on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.’”

36. The petitioners had filed a civil suit in respect of the land in order to obtain possession from the civil servant then in occupation of it but withdrew the case before it was determined and after the Attorney General applied to be enjoined as a party. The case of the Attorney-General in the civil suit, as it is in this petition, is that the land was government land which was irregularly acquired and that it still belongs to the government.

37. The petitioners have not disputed the fact that the suit property was government land. For them to have valid title to the property therefore, it should have been allocated to them or to the party from whom they acquired it in accordance with the law. The law that governs the alienation of government land is contained in the Government Lands Act, Cap 180 Laws of Kenya.

38. As stated above, one cannot simply claim indefeasibility of title when the acquisition of such title is doubtful and may have been done in violation of the law and the very constitution which the party seeks protection under.

al to defeat it

In the case of **Joram Nyagah –v-The Attorney General** the High Court held that-

1. Whether the procedure required for the alienation of government land was followed in the current case has not been established. All that the petitioners have to establish their entitlement is the title and the transfer from the alleged allottee, Mr. Magut. This court is not in a position to determine whether or not the original alienation to the said Magut was lawful. That was what the court in HCCC 639 of 2004 had jurisdiction to do by taking evidence and weighing the competing claims of the parties. This court cannot make such a determination on the basis of affidavit evidence.

2. In the circumstances therefore, this court is unable to made a determination on whether or not the petitioners are the lawful owners of the suit property and therefore decline to issue the declaration sought in this regard.

Violation of the Petitioners’ Constitutional Rights

39. Violation of the right to property under section 75 of the old Constitution or Article 40 of the Constitution, or of the right to a hearing with regard to the acquisition of the property can only occur if one has a lawful claim to the property in question. In light of my findings that the petitioners’ rights to the suit property have not been established, I make no finding with regard to the alleged violation of their rights under the constitution. Indeed, if it were to be found that the property in question was unlawfully acquired as alleged by the respondents, then Article 40(6) would apply and the petitioners would not have any constitutional protection.

40. With regard to the right to a hearing, the petitioners have had no less than four opportunities to articulate their claim to the property. They have chosen not to exercise this right by withdrawing, in particular, HCCC No. 639 of 2004 where their claim could have been ventilated and appropriate orders

made.

41. In the absence of a right to the property and therefore no violation of the petitioners' constitutional rights, they are not entitled to any remedy from this court.

43. I therefore dismiss this petition with costs to the respondents.

44. I am grateful to the Counsel appearing for the parties in this matter for their diligence in prosecuting their respective cases.

Dated and delivered at Nairobi this 24th day of February, 2012

Mumbi Ngugi

Judge