



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION 173 OF 2011

BETWEEN

FLEUR INVESTMENT LTDPETITIONER

AND

THE PERMANENT SECRETARY

MINISTRY OF ROADS1ST RESPONDENT

ENGINEER M.S.M. KAMAU 2ND RESPONDENT

COMMISSIONER OF LANDS3RD RESPONDENT

REGISTER OF TITLES 4TH RESPONDENT

THE ATTORNEY

GENERAL

OF THE REPUBLIC OF KENYA 5TH RESPONDENT

JUDGMENT

Petitioner’s case

1. This is another case concerning the demolition of property along the Nairobi Thika Highway to make way for the improved carriageway.
2. The petitioner states that it is the indefeasible owner of LR No. 25535/1 comprising 2.34 acres and LR 25535/2 comprising 0.5 acres. These properties were purchased from Adeita Company Ltd and thereafter with the consent of the 3rd respondent amalgamated, subdivided and new grants issued.
3. The petitioner sought consent from various government ministries to construct three commercial buildings including a hotel, supermarket and petrol station. The value of these developments was in excess of Kshs. 2 billion.
4. On or about 27th April 2008, officials from the Ministry of Roads and Public works paid a visit to the suit premises and marked the buildings alleging that they had been constructed on a road reserve. In order to forestall demolition of the property, the petitioner filed *Nairobi Misc. HC Civil Application No. 884 of 2004* to stop the intended demolition and to quash the 1st respondent’s decision to demolish the property. The court granted leave to apply for orders of judicial review and at the same time issued an order staying the demolition of all buildings located on the suit property.

5. Despite the subsisting court order, the 1st and 2nd respondents demolished all the developments constructed on the petitioner's suit property.

6. The petitioner thereafter filed Nairobi **HCCC No. 596 of 2009** seeking special damages, loss of rent on lease contracts all totalling to Kshs. 2,557,774,900.00, exemplary damages and general damages for the destruction of property.

7. The petitioner has now filed this petition dated 26th September 2011 where it seeks the following reliefs;

(a) *A prohibitory order do issue against the respondents jointly and severally, restraining them whether by themselves or by their agents and or servants whatsoever from trespassing upon, or repossessing and or damaging or wasting or interfering with the petitioner's quiet and peaceful enjoyment of all those properties known as LR. NO. 25535/1 and L.R. NO. 25523/2.*

(b) *A permanent injunction do issue against the respondents restraining whether by themselves or by their agents and or servants whatsoever from depriving the petitioner the right over all those properties known as LR. NO. 25535/1 and L.R. NO. 25523/2.*

(c) *A declaration be made that the petitioner is entitled to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair with written reasons given for any or any intended interference with its proprietary rights over LR. NO. 25535/1 and L.R. NO. 25523/2.*

(d) *A declaration be made that the 2nd respondent is bound to exercise his powers in a manner that is consistent with the purposes and objects of the Constitution, demonstrates respect for the people and that brings honour, dignity and promotes public confidence in the integrity of his office.*

(e) *A declaration be made that the 3rd and 4th respondent is bound to exercise his powers in a manner that is consistent with the purposes and objects of the Constitution, demonstrates respect for the people and that brings honour, dignity and promotes public confidence in the integrity of his office.*

(f) *A declaration that the petitioner's properties registered as LR No. 25535/1 and LR 25535/2 are not situated within 60 metres width of the Thika Road.*

(g) *A declaration that the petitioner's grants and Title to the Suit property registered as LR No. 25535/1 and LR 25535/2 are genuine and valid documents issued by the government of the Republic of Kenya.*

(h) *A declaration that all matters relating to allocation, registration and issuance of Grants/Title Deeds is statutory vested to the 3rd and 4th respondents and not with the 1st and 2nd respondents.*

(i) *A declaration that the 1st and 2nd respondents acts are ultra vires their powers, authority, duty and jurisdiction.*

(j) *A declaration that at all material times the suit property vested with the government and not with the 1st and 2nd respondents.*

(k) *An order that the respondents desist from interfering with the proprietary rights of the petitioner over the suit property in any way, manner and whatever.*

(l) *An order that the 1st and 2nd respondents, their servants and or agents do vacate the suit property forthwith.*

(m) *The Honourable Court do pass such other orders and further orders as may be deemed necessary on the facts and in the circumstances of the case.*

(n) *It be ordered that the respondents be condemned to pay the costs of this petition.*

8. The petition is supported by the affidavit of Mark Ngatia sworn on 26th October 2011, a further affidavit sworn on 3rd October 2011 and a replying affidavit sworn on 26th January 2012. The replying affidavit is in response to the replying affidavit sworn by the 2nd respondent on 16th December 2011.

9. Mr. Omwanza who argued this matter on the petitioner's behalf relied on written submissions dated 8th December 2011. He urged me to allow the petition as the petitioner was the indefeasible owner of the suit properties and as such its property is protected by the Constitution and that the action of the respondents breach the petitioner's right to fair administrative action.

10. Counsel for the petitioner submitted that the petitioner had a title to the property and that the said

title has not been revoked or cancelled. In terms of **section 23(1)** of the *Registration of Titles Act* the petitioner's title to the properties is inviolable and indefeasible and if it is to be defeated a due and lawful process must be followed. He referred to *Ocean View Plaza Ltd v Attorney General [2002] KLR {E&L}*. He further submitted that only the court can cancel or amend registration even if the title was obtained by fraud or other unlawful means. *Kuria Greens Ltd v Registrar of Titles and Commissioner of Lands Nairobi Petition No. 107 of 2010 (Unreported)* was relied upon to support this proposition.

11. Mr Omwanza, in response to the argument the land was originally a road reserve, stated that the petitioner had obtained all consents and authority from the Chief Engineer Roads to construct the access road from the suit property along the Nairobi-Thika Road. As such the respondents knew or ought to have known that in fact the property was not a road reserve.

12. Mr Omwanza also argued that the demolitions and repossessions infringed on the petitioner's rights to property protected by **Article 40** of the Constitution. In so far as the petitioner was the owner of the property, then the state could not act arbitrarily in the manner it did. He was of the view that questions as to legality of acquisition including the questions whether the land was a road reserve must be dealt with prior to and not after the title has been issued. A repossession after title had been issued could only take place by following the *Land Acquisition Act*.

13. The petitioner's counsel contended that the respondents were under a duty to act judicially i.e., reasonably and fairly in accordance with the provisions of **Articles 47** and **50** of the Constitution as the rights of the petitioner to its property were effected.

Respondent's case

14. The 2nd respondent, Engineer Sistus Mwaura Kamau swore a replying affidavit on 16th December 2011 on behalf of all the respondents.

15. According to Engineer Kamau, the parcel of land in dispute was originally under grant LR No. 4921/2 acquired from Joreth Limited by Her Majesty Queen Elizabeth the Second in 1964 for purposes of expansion of Thika Express Highway and more specifically construction of a roundabout. It is part of the surrendered land that was illegally acquired by Adeita Company Limited which was later sold to the petitioner.

16. The 2nd respondent stated that LR No. 25535 was later subdivided and gave rise to parcel LR No. 16510 and 16511 and wherein LR No 16510. Thus the Supermarket was located on a public land acquired for road purposes. Further, the parcel of land in dispute has a water point for Nairobi City Council, service lines for water and Kenya Power and Lighting Company electric lines.

17. The engineer deposed that Kenya Gazette Notice No. 3632 dated 4th June 2001 informed the general public including the petitioner that all buildings on LR 4921 had encroached on a public road and the same were earmarked for demolition. The respondents contend that Gazette Notice No. 3632 gave notice to all and sundry that any such structures shall be demolished and in default the costs of demolition were to be borne by the persons, institutions or company responsible for encroachment. They further contended that the Gazette Notice constituted prior sufficient notice and that the intended demolition was for public interest and use.

18. In the circumstances the respondent contend that the demolition that was carried out was with sufficient notice and in full knowledge of the petitioner, who neglected, ignored, disobeyed and or refused to vacate the said public land.

19. The respondents also argue that the petitioner has filed a multiplicity of suits in respect of the same matter namely; *Nairobi HC Misc. No 885 of 2004* and *Nairobi HCCC No. 596 of 2009* which have never been set down for hearing. Like the suits which have been abandoned, this suit deals with the same cause of action thus, this petition is clearly an abuse of the court process.

20. It is the respondents case that the petitioner's allegations that the allocation was unlawful are false as

the suit parcel of land has always been for public purposes and the same has never been available for allocation and or alienation and as such the orders sought herein should be declined as they would defeat the public interest for which the suit parcels of land were acquired.

21. In addition to the replying affidavit, the respondents filed submissions dated 21st December 2011 which their counsel Mr Kakoi, adopted. Mr Kakoi argued that the issues in these matters were basically matters of a civil nature concerning a private dispute over title and possession. In this respect it would be difficult for the court to determine. Further, there is already in existence a pending civil suit namely **Nairobi HCCC No. 596 of 2009** claiming Kshs. 2,557,744/00 being the value of the land and incidental damages. As that suit is still pending then those issues must be determined in that case. He submitted that in the absence of special circumstances, the pending suit not having been withdrawn or stayed, this petition amounts to forum shopping.

22. Counsel also submitted that the land in issue was obtained fraudulently by breach of law and as such sanctity of title could not be relied upon. In this respect, counsel relied on the case of **Chemey Investments Ltd v Attorney General and Others Nairobi HC Petition No. 94 of 2005 (Unreported)** and **Milan Kumarn Shah & 2 Others v Nairobi City Council & Another. Nairobi HCC No. 1024 of 2005 (OS) (Unreported)**.

23. Finally counsel submitted that the dispute touches on public interest in that the respondents are constructing a highway that cannot be re-located elsewhere. He urged me to dismiss the petition.

Issues for determination

24. This matter primarily concerns the protection of the right to property enshrined and protected under **Article 40** of the Constitution. Ancillary to this right is the assertion that the right to fair administrative action guaranteed under **Article 47** has been breached.

25. However, before considering whether there are breaches of the petitioner's fundamental rights and freedoms, it is important to consider whether this claim is an abuse of the court process as there are two suits pending before this court concerning the matter in issue in this petition.

26. The rule against filing a multiplicity of suits is to be found in **section 6** of the **Civil Procedure Act**. **Section 6** is the statutory expression of the general rule on subjudice that is, no court shall proceed with the trial of any suit or proceeding in which the matter in issue is directly and substantially in issue between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other court having jurisdiction to grant relief claimed.

27. Although proceedings commenced under **section 84** of the former Constitution or **Article 22** of the Constitution are *sui generis* by their nature, I think the principle contained in **section 6** of the **Civil Procedure Act** is one of general application intended to guard the court from the embarrassment of giving inconsistent decisions, saving scarce judicial resources and protecting parties from being vexed by a multiplicity of suits. I will consider whether it applies to these proceedings in the circumstances of this case.

Pending suits in respect of the same subject matter

28. When this matter commenced, I directed counsel for the petitioner to address the court on the existence of other suits in relation to the matters in issue namely, **Nairobi HCCC No. 596 of 2009** and **Nairobi HC Misc. Appl. No. 885 of 2004**. A further affidavit sworn by Mark Ngatia on 3rd October 2011 was filed setting out the details of the aforesaid suits. Mr Omwanza also addressed me on the import of each case supported by authorities.

29. **Nairobi HC Misc. Appl. 884 of 2004, Republic v Permanent Secretary Roads and Public Works, Commissioner of Lands and the Chief Land Registrar ex parte Fleur Investments Limited** is an application for judicial review. In that case, an order was issued challenging the orders of demolition. An order was issued by Justice Makhandia on 13th July 2004 when leave was granted and ordered to operate

as a stay of the demolition or destruction of all the buildings located on the suit properties by the respondents and their agents. The application is still pending determination in this court. The petitioner alleges that demolition of its property proceeded despite the existence of the court order.

30. ***Nairobi HCCC No. 596 of 2009, Fleur Investments Limited v The Permanent Secretary Ministry of Road and the Attorney*** is a case seeking special damages resulting from demolition and destruction of the petitioner's property. What is sought in that suit is special damages amounting to Kshs. 2,557,844,900.00, exemplary damages and general damages for the destruction. The suit is yet to be heard.

31. Mr Omwanza submitted that the present petition unlike the previous suits pleads constitutional breaches and what are raised herein are constitutional issues of public interest. In the circumstances this case is not an abuse of the court process particularly given that this case involves enforcement of fundamental rights and freedoms protected under the bill of rights. Counsel referred me to several authorities to support this position; ***Bulhan & Another v Eastern & Southern African Trade and Development Bank [2004] 1 KLR 147, Rachael Mumbi Mwangi v The Managing Director Apex Security Services & Others Nairobi HC Misc. Civil Appl. No. 191 of 2005, Joseph K Kiume v Makueni County Council, Machakos HC Misc. 106 of 2003 (Unreported) and Withler v Attorney General of Canada [2002] BCSC 820.***

Whether petition is an abuse of the court process

32. The proceedings before me are for the enforcement of fundamental rights and freedoms under **Article 22 and 23** of the Constitution. That right to proceed with a case for enforcement is an independent right and it is my obligation to ensure that such access is unhindered and devoid of obstacles that tend to diminish the rights sought to be enforced (See ***Rashid Allogoh & Others v Haco Industries Ltd Nairobi Civil Appeal No 110 of 2001 (Unreported)*** and ***Maharaj v Attorney General of Trinidad and Tobago (No.2) [1979] AC 385***).

33. In ***Nairobi HC Misc. 895 of 2005***, the petitioner cited **section 75** of the former Constitution as the basis of his application. In ***Nairobi HCC 596 of 2009***, the petitioner seeks special damages for demolition. In both cases, the petitioner will have to establish a proprietary interest as a threshold issue. The respondents will be required to show that the petitioner has no such entitlement. In either case the relief will be declaratory of the proprietary status of the subject property. Damages will be consequential.

34. I also note that in its Statutory Statement in ***HC Misc 885 of 2004*** the petitioner has stated, inter alia, that, ***"The Respondents have not officially informed the Applicant of the reasons for the intended demolition. The Applicant has also not been given an opportunity to be heard in opposition to the intended demolition. The intended demolition is therefore a breach of the rules of natural justice."*** The petitioner further adds, ***"The Applicant's right to use and quiet enjoyment of the property is guaranteed both by statute and also under section 75 of the Constitution. The intended demolition is therefore, illegal, null and void."*** Such averments would in my view fall for consideration under **Articles 40 and 47** of the Constitution.

35. In my view, this petition is another suit filed to litigate the same matter between the same parties seeking similar relief. It is an abuse of the court process to file a multiplicity of suits seeking similar relief in respect of the same subject matter.

36. In considering the rule against filing a multiplicity of suits in respect of the same cause of action, the court in the case of ***Retired Major Sharack Mutia Muia v Prof. Kivutha Kibwana & Others, Nairobi Petition No 281 of 2006 (Unreported)*** stated as follows:

[26]Section 84 of the Constitution is a separate right, the right for a person whose rights are violated, infringed or threatened to move the High Court unhindered. The Court should exercise great circumspection in interfering with the gateway of enforcement lest the rights guaranteed under the Constitution become worth the paper they are written on.

[27]This view is not inconsistent with the power of the Court to prevent abuse of its process or do justice. Allowing of abuse to take root in our system breeds impunity and the direct result is that the efficacy of Court orders is lessened thereby undermining the same rights that are to be enforced.

[28]Under section 84, the Court is entitled to take into account the issue of subjudice and consider whether indeed, it affects the rights to be enforced. The Court is not powerless and cannot gloss over the abuse of its process merely because the matter before it is dressed as an enforcement of fundamental rights action. It must act when called upon to halt an abuse of its process in appropriate circumstances.

37. I must therefore come to the conclusion that the present suit though brought under the Constitution is an abuse of the court process. There are two suits in respect of the suit property. The parties in all the cases are the same. In the judicial review case, the court will be required to make a determination of the legality of the respondents' acts which in terms of the pleadings will include whether there is a breach of **section 75** of the Constitution. In each case, the court will be entitled to reach the same conclusion that the petitioner seeks; that the acts of the respondents are unconstitutional.

38. Bearing in mind that these are proceedings for the enforcement of fundamental rights and freedoms under the Constitution, I think the most important consideration is whether, holding that the suit is an abuse if the court process impedes the petitioners right of access to this court to vindicate its property rights. In *Chokolingo v The Attorney General of Trinidad and Tobago* [1981] 1 WLR 106, Lord Diplock warned that, *"It would be undesirable to stifle the grant of constitutional relief when a claim for relief is established and such relief is unavailable through the ordinary avenue of appeal. As it is a living, so must the Constitution be an effective, instrument."*

39. Both pending cases and the present case are filed in the High Court. The High Court has jurisdiction under **Article 165(3)(b)** of the Constitution to enforce fundamental rights and freedoms in any case before it. This jurisdiction to enforce the provisions of the Bill of Rights is not exclusively exercisable under **Article 22** but is part of the general jurisdiction the court exercises in deciding the case before it. The insistence that the pending cases proceed to their logical conclusion will not impair the determination of the petitioner's grievances in respect of the breach of its rights and fundamental freedoms. Furthermore, I am satisfied that in the pending proceedings, the relief the petitioner seeks in these proceedings is available and has indeed been invoked in those proceedings.

40. I would also add that under **rule 23** of the *Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006*, where a constitutional issue arises in matters before the High Court, the court seized of the matter may treat the matter as a preliminary point and shall hear and determine the same.

41. I regret that I must conclude that these proceedings are an abuse of the court process. The petitioner is entitled to pursue the proceedings it left midstream to vindicate its rights and fundamental freedoms.

Enforcement of court orders

42. Finally, I wish to draw attention to the fact that an order was made by Hon. Mr Justice Makhandia in *Nairobi HC Misc. 885 of 2004*(see paragraph 29 above). It has been alleged that the order was disobeyed. Unfortunately, the petitioner's advocate on record did not pursue contempt proceedings but chose to file two suits in succession where the allegation of disobedience of the court order was repeated and formed the basis of seeking relief.

43. I think that failure to pursue contempt proceedings by an officer of the court as and when the contempt occurs tends to bring administration of justice in disrepute. The impression created in the public mind is that the court is powerless yet it is the officers of the court who fail in their duty to ensure that the matter is brought to the court's attention by moving the court appropriately.

44. I would hold that it is the duty of an officer of the court to bring to the court's attention any instances of disobedience of its orders. In such a case the court will deal with the matter, giving it the seriousness

and urgency it deserves and suspending all other matters in order to preserve its dignity and authority. The fact that allegations of contempt continue to be made, without any action on the petitioner's part in the case in which they arose, is to be deprecated. I say no more on this subject.

Disposition

45. It must now be clear from what I have stated that this petition cannot survive. It must be struck out and it is hereby struck out with no order as to costs.

DELIVERED and **DATED** at **NAIROBI** this 17th day of February 2012.

D.S. MAJANJA
JUDGE

Mr O. Omwanza instructed by Nchogu, Omwanza, Nyasimi Advocates for the petitioner.

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