



**PHILMA FARM PRODUCE & SUPPLIES ....1<sup>ST</sup>PETITIONER**

**PHILIP INDIKA KEYA.....2<sup>ND</sup>PETITIONER**

**MATHEW MBALUKA MUTISYA.....3<sup>RD</sup>PETITIONER**

**JOSEPH MACHARIA MAINA.....4<sup>TH</sup>PETITIONER**

**CHARLES HENRY MANGUA.....5<sup>TH</sup>PETITIONER**

**AND**

**THE HON ATTORNEY GENERAL .....1<sup>ST</sup>RESPONDENT**

**THE COMMISSIONER OF LANDS.....2<sup>ND</sup>RESPONDENT**

**A.A. KAWIR TRANSPORTERS LTD.....3<sup>RD</sup>RESPONDENT**

**ABDI RAHAMAN MOHAMED.....4<sup>TH</sup>RESPONDENT**

**KAHUHO P K.....5<sup>TH</sup>RESPONDENT**

**YELLOW HORSE INNS LIMITED.....6<sup>TH</sup>RESPONDENT**

## **BROOKSIDE STUDIOS LIMITED.....7<sup>TH</sup>RESPONDENT**

### **JUDGMENT**

#### **Introduction**

1. It is not uncommon to find the ownership of a piece of land allocated by the state to one party contested by other parties. The petitioners have brought this petition under **Article 22** of the Constitution to enforce their right to property under **Article 40** which they claim has been violated.

#### **Petitioner's Case**

2. The petitioner's case is set out in the petition dated 7<sup>th</sup> October 2011 and the supporting affidavit of Joseph Macharia Maina sworn on 7<sup>th</sup> October 2012 and a supplementary affidavit sworn on 23<sup>rd</sup> January 2012.

3. The petitioners were issued two allocation letters by the Commissioner of Lands in accordance with the **Government Lands Act (Cap 280 of the Laws of Kenya)**. The letters dated 24<sup>th</sup> July 1995 were addressed to **Philma Farm and Produce Suppliers** and were in respect of two industrial plots along

4. It was a term of the allocation letters that upon payment of the stand premium, land rent and other charges within thirty days of the post mark by banker's cheque, the applicants would be issued with titles either under the **Registration of Titles Act (Cap 281 of the Laws of Kenya)** or the **Registered Land Act (Cap 300 of the Laws of Kenya)**.

5. By letters dated 20<sup>th</sup> July 1997, the 1<sup>st</sup> petitioner wrote to the Commissioner of Lands accepting the allocation of the plots and forwarding bankers cheques for the stand premium for both properties.

6. In order to procure the allocation letters in 1995, the 2<sup>nd</sup> to 5<sup>th</sup> petitioners acquired the name **Philma Farm and Produce Suppliers**. In the year 2005, the 2<sup>nd</sup> to 5<sup>th</sup> petitioners constituted themselves into a limited liability company which was incorporated under the **Companies Act (Cap 486 of the Laws of Kenya)** on 10<sup>th</sup> February 2005.

7. By letters dated 5<sup>th</sup> January 2009, the company, **Philma Farm Produce and Suppliers Limited**, forwarded cheques for stand premium as demanded in the letters of allocation. The cheques issued on that date became stale and the company thereafter paid the stand premium, land rent and other charges by banker's cheque in the year 2011.

8. The petitioners aver that they have been in occupation of the suit properties since 1984. They also claim that they are entitled to the suit properties by virtue of the allotment letters and since the Commissioner of Land is still holding onto their payment, they are entitled to protection by this court.

9. The petitioners claim that the 4<sup>th</sup> respondent has fraudulently acquired the property to their detriment. This fraud, they claim, was facilitated by the 5<sup>th</sup> respondent, the Deputy Commissioner of Lands, who frustrated the registration of the suit properties in the petitioners' favour.

10. Mr Kimathi, counsel for the petitioners, submitted that while the petitioner do not have a titles to the suit properties registered in their favour, they have a legitimate interest demonstrated by allocation letters issued by the Commissioner of Lands and they have been in occupation and are still in occupation. Counsel contended that the petitioners have continued to receive land rent invoices for the years 2009 and 2010 which are evidence of their ownership of the plots.

11. Counsel submitted that the petitioners have a right over the property which must be protected under **Article 40** and that right has been threatened by the 3<sup>rd</sup> respondent who has managed to secure an allocation of the properties in its favour with the assistance of the 2<sup>nd</sup> respondent. The petitioners aver that they were never afforded an opportunity to comment on or raise any objection to this action and therefore they were arbitrarily deprived of their property.

12. Mr Kimathi further submitted that **Article 40(4)** gives recognition to interests of persons who do not have title to land. In this respect the interest need not be registrable. He contended that deprivation has been through acts of the officers of the Ministry of Lands. Counsel relied on the written submissions dated 3<sup>rd</sup> February 2012.

13. The petitioners in their petition seek the following reliefs;

*(a) A declaration that the petitioners have a legitimate claim in and over the suit properties.*

*(b) A declaration that the 3<sup>rd</sup> respondent acquired title to the suit properties by fraud.*

*(c) A permanent injunction restraining and prohibiting the respondents whether by themselves, their employees, servants or agents or any other person or body of persons from occupying, wasting, alienating, meddling in, transferring, attempting to transfer, holding themselves out as owners, dealing with and or in any other manner howsoever interfering with the Plaintiff's parcel of land known as LR 209/11803/2 – FILE NO. 183407 and LR 209/11803/3 FILE NO. 183408.*

*(d) An order compelling the 2<sup>nd</sup> respondent to issue title documents to the petitioners herein.*

*(e) An order that the respondents do pay compensation to the petitioners for infringing upon the petitioners' right to the suit property and for discriminating against them.*

### **1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents' case**

14. The Attorney General has, on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> respondents, opposed the petition based on the affidavit of S. K Mburugu, the Chief Land Administration Officer, sworn on 5<sup>th</sup> December 2011.

15. According to Mr Mburugu, the suit properties were initially planned for oil tanker depots and were allocated to the Nairobi City Council. Subsequently, the Nairobi City Council issued a temporary occupation licence to the 3<sup>rd</sup> respondent, A. A. Kawir Transporters Limited ("A. A. Kawir").

16. A. A. Kawir thereafter applied for allocation of the land and they were indeed allocated the land. Accordingly, grants were prepared in its favour and at the time of registration but before they could be issued, it was found that there were grants registered and issued in the name of 6<sup>th</sup> and 7<sup>th</sup> respondents, that is, Yellow Horse Inns Ltd ("Yellow Horse") and Brookside Studios Limited ("Brookside") respectively.

17. Mr Mburugu states that the grants issued to Brookside and Yellow Horse are the subject of investigation on the ground that they may have been obtained fraudulently.

18. Mr Wamotsa, counsel for the Attorney General submitted that the petitioners did not comply with the terms of the allotment issued in 1995 when they purported to make payment in 1997. The terms of the offer had lapsed and they could not establish any claim to be protected by this court. Based on the matters set out in Mr Mburugu's affidavit, Mr Wamotsa submitted that there is no legitimate interest, legal or equitable, in respect of the suit property and therefore the suit should be dismissed.

### **3<sup>rd</sup> Respondent's Case**

19. The 3<sup>rd</sup> respondent, A. A. Kawir, opposes the petition based on the replying affidavit of Abdi Ahmed Abdi sworn on 10<sup>th</sup> November 2011 and a further one sworn on 15<sup>th</sup> January 2012. Mr Abdi is a director of A. A. Kawir. He deposes that he does not know the 4<sup>th</sup> respondent, Abdi Rahamam Mohamed nor is the person associated with the company.

20. It is the position of A. A. Kawir is that it is the proper owner of the suit properties having been allocated the property. Its position is confirmed by Mr S K Mburugu. As against Brookside and Yellow Horse, it supports Mr Mburugu's assertion that the grants issued to them are forgeries. Mr Abdi confirms that the petitioners have not been in occupation of the premises as alleged as the property is currently vacant.

21. Mr Kang'ethe their advocate submitted that each of the petitioners have not established a legitimate claim to the suit properties. He noted that the claim by the 2<sup>nd</sup> to 5<sup>th</sup> petitioners is based on mere occupation and there is nothing to demonstrate the occupation.

22. Counsel further contended that the petitioners have not produced evidence to show the status of the **Philma Farm Produce and Suppliers** and therefore the status of this body is amorphous. That the letters of allotment were issued to an amorphous entity which cannot assert their rights and they do not have capacity to hold land or agitate this suit. As regards **Philma Farm and Produce Suppliers Limited** counsel pointed to the fact that it was incorporated in 2005, 10 years after the allotment letter were issued. The company, he submitted, could not take advantage of an allocation letter not issued to it.

23. Mr Kang'ethe contended that this court under the provisions of **Article 22** and **23** cannot pronounce on the ownership of the property as the proper forum is in a civil suit. Further that, issues of fraud alleged by the petitioners against the respondents in this suit could not be the subject proceedings to enforce fundamental rights and freedoms.

24. As regard the claim by A. A. Kawir, Mr Kang'ethe stated that the conditions of the 1995 allocation letters were not met by the petitioners and the offer had lapsed by the time payment was made in 1997 and consequently there were no rights to enforce and that the petition ought to be dismissed with costs. A. A. Kawir has, on the other hand complied with the terms of allocation of the suit properties to it and is entitled to them.

### **6<sup>th</sup> and 7<sup>th</sup> Respondents Case**

25. The 6<sup>th</sup> and 7<sup>th</sup> respondents oppose the petition. There are on record two replying affidavits sworn on 2<sup>nd</sup> December 2011 by Mary Njuku and Joseph Gathuku. Eng Ephraim Ruitha and Baptista Kihingo have also sworn affidavits on 2<sup>nd</sup> December 2011 in favour of the 6<sup>th</sup> and 7<sup>th</sup> respondents respectively. Counsel representing the 6<sup>th</sup> and 7<sup>th</sup> respondents, Mr Mubea, relied on separate sets of written submissions filed their behalf on 5<sup>th</sup> March 2012.

26. Both the Yellow Horse and Brookside's position is that they are the indefeasible owners of the suit properties as they hold titles issued to them under the **Registration of Titles Act**. As registered owners they are entitled to legal protection under **section 23** of the **Registration of Titles Act** therefore, the petitioners and any other party cannot assert any right to the suit properties. Both Yellow Horse and Brookside aver that they obtained the property in accordance with the prescribed procedure and their ownership cannot be impugned either by the petitioners or by A. A. Kawir except in accordance with the provisions of the Act.

27. Mr. Mubea, agreed with the submissions of Mr Kang'ethe as relates to the legitimacy of the petitioners' claim and their capacity to agitate these proceedings to enforce fundamental rights and freedoms under **Article 22**.

28. Mr Mubea submitted that the petitioners have not made out a case to warrant the orders sought in the

petition and urged the court to dismiss the petition with costs.

### **Issues for Determination**

29. The proceedings before the Court are commenced under **Article 22** of the Constitution and are for the purpose of enforcing fundamental rights and freedoms of the individual.

30. It is clear from the material facts that I have outlined, there seems to be a claim on the suit properties by A. A. Kawir on one part and Yellow Horse and Brookside on the other part. Those claims do not concern the enforcement of fundamental rights and freedoms by the petitioner under the Bill of Rights and may have to be resolved in another forum. In the circumstances, I shall limit my findings and decision to what is strictly necessary to determine whether there is a violation of the petitioners' rights as set out in the petition.

31. Furthermore, I am aware there may be civil proceedings and or proceedings of a criminal nature and it would therefore be imprudent for me to make findings that may prejudice a fair determination of those issues in another forum.

32. I would point out that contrary to the submission by Mr Kang'ethe, this court when exercising jurisdiction under **Article 22** and **23** is entitled to make any declaration including that of ownership of property or determine the issue of fraud where it is alleged so long as the matters are necessary for the determination of whether the petitioner's fundamental rights and freedoms protected under the Constitution are threatened, violated or infringed.

33. At the pre-trial stage, I framed two issues for determination;

**(i) What is the nature and extent of the petitioner's proprietary interest?**

**(ii) Whether the said interest is being violated or infringed contrary to Article 27, 40 and 64 of the Constitution.**

### **Nature and Extent of Petitioner's Interest**

34. The petition is primarily to enforce the right to property protected under **Article 40** of the Constitution. In order to enforce this right a party must demonstrate that it is entitled to the property in issue and the proprietary interest sought to be protected is defined by existing laws.

35. In the case of *Joseph Ihugo Mwaura and 82 Others v Attorney General Nairobi Petition 498 of 2009 (Unreported)*, the Court referring to **section 75** of the former Constitution observed that, “[46] *Section 75 of the Constitution contemplates that the person whose property is the subject of compulsory acquisition has a proprietary interest as defined by law. The Constitution and more specifically section 75 does not create proprietary interests nor does it allow the court to create such rights by constitutional fiat. It protects proprietary interests acquired through the existing legal framework.*”

36. These sentiments apply equally to **Article 40** of the Constitution which is equivalent to the provisions of **section 75** of the former Constitution.

37. The petitioners' claim is grounded on two letters of allocation of the suit properties. These letters do not confer a proprietary right but only a right to receive property or to be allocated on complying with the terms and conditions stated therein. The right to be allocated the property is a contractual right and must be determined in accordance with the ordinary rules of contract. It is in this respect that the petitioner claim must fail.

38. The letters of allotment were made out to *Philma Produce Farm Produce and Suppliers*. It is not clear whether this was a partnership of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> petitioners.

39. Even if I were to assume in the petitioners' favour that the 2<sup>nd</sup> to 5<sup>th</sup> petitioner's were a partners and that they were entitled to the allotment of the suit property, acceptance of the allocation was a conditional offer to be accepted within the time limited and by payment of all the sums of money demanded within that period.

40. The petitioners did not comply with the terms of the offer contained in the letter and the offer lapsed in 1995. It was therefore not necessary for the Commissioner of Lands to inform them that the offer had lapsed in view of the very clear terms of the allocation letters.

41. I hold that the offer, as contained in the allocation letters, could not be revived ten years later by making the payment. Furthermore, the petitioner could not substitute the offeree in the allocation letter with a limited liability company, ***Philma Farm Produce Suppliers Limited***, incorporated after the allocation letter had lapsed. There were no allocation letters issued to the company and therefore any payment by the company was purely gratuitous. It could not create a legal obligation on the part of the Commissioner of Lands to process titles in the petitioners' favour in accordance with the offer nor confer a proprietary interest in the suit properties.

42. I therefore find and hold that the petitioners do not have any legal or proprietary interest in the suit properties capable of protection or enforcement under the provisions of **Article 40**.

43. Even if I were to find that there was a proprietary interest held by the petitioners, is there a breach of **Article 40** of the Constitution?

### **Right to Property**

44. In order to consider whether the right to protection of property guaranteed under **Article 40** is threatened, violated or infringed, I think it is necessary to set out the provisions 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 or 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.***

45. **Article 40(1)** sets out the general right of every Kenyan to acquire and own property. There is no allegation in the pleadings that the petitioners have been denied the right, either individually or in association with others to acquire or own property of any description in Kenya. In the petitioners' case, they were given an opportunity to own land when they were issued with allocation letter but they failed to comply with the terms thereof.

46. **Article 40(2)** limits the authority of Parliament to pass certain types of legislation affecting property. First, legislation that deprives a person of property arbitrarily and second, legislation that restricts enjoyment of any right to property in a manner that is discriminatory in terms of **Article 27(4)** of the Constitution. The petitioners do not complain of any such breach.

47. **Article 40(3)** and **(4)** deal with the deprivation of property by the state on terms specified, that is, for a public purpose or in the public interest and upon payment of compensation. There is no complaint in this matter to trigger the application **Article 40(3)** or entitle them to compensation.

48. The petitioner has not made out any case that their property is being acquired in the manner contemplated by **Article 40** of the Constitution to trigger application of **Article 40(3)** and **(4)**. I must therefore conclude that there has been no breach of **Article 40**.

### **Conclusion and Disposition**

49. It is clear that the petitioner's case lacks merit and it is hereby dismissed. The interim orders in force are hereby discharged.

50. While the court is always circumspect in awarding costs against unsuccessful litigants in matters of enforcement of fundamental rights and freedoms, I think this case was an attempt by the petitioners to assert their rights of ownership of the suit properties as against the other respondents.

51. Since the petitioners have been unsuccessful, they shall pay the costs of the 3<sup>rd</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents.

**DATED and DELIVERED at NAIROBI this 4<sup>th</sup> May 2012.**

**D.S. MAJANJA**

**JUDGE**

Mr F. Kimathi instructed by Gikunda Miriti and Company Advocates for the petitioners.

Mr S. Wamotsa, Litigation Counsel, instructed by the State Law Office for the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> respondents.

Mr K. Kang'ethe instructed by Kagwimi Kang'ethe and Company Advocates for the 3<sup>rd</sup> respondent.

Mr K. Mubea instructed by Kimondo Mubea and Company Advocates for the 6<sup>th</sup> and 7<sup>th</sup> respondents