



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
PETITION 224 OF 2010

**IN THE MATTER OF: SECTION 84(1) OF THE CONSTITUTION OF KENYA AND ALLEGED
CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS, UNDER SECTION 70
AND 75 OF THE CONSTITUTION OF KENYA**

IN THE MATTER OF: TITLE NO. NAIROBI/BLOCK 72/3174

AND

IN THE MATTER OF: REGISTERED LANDS ACTS, CAP 300, CAP 300, LAWS OF KENYA

BETWEEN

**EMANGE SE-SEMATA INVESTMENTS LIMITED
APPLICANT**

VERSUS

THE ATTORNEY GENERAL 1ST RESPONDENT

THE MINISTER FOR LANDS 2ND RESPONDENT

THE COMMISSIONER OF LANDS 3RD RESPONDENT

THE DISTRICT LAND REGISTRAR, NAIROBI 4TH RESPONDENT

BOARD OF GOVERNORS LANGATA HIGH SCHOOL 5TH RESPONDENT

JUDGMENT

1. In its Amended Petition dated 13th January, 2012, the petitioner seeks various orders and declarations with respect to land parcel number **Nairobi/Block 72/3174**. The rules with regard to amendment of pleadings have not been followed as a result of which there is a duplication of prayers and it is not clear which prayers the petition wished to strike out and which to retain. The essence of the petition, however, is that the petitioner alleges violation of its rights under Article 40 and 48 of the Constitution and seeks orders, among others:

(a) **THAT** a declaration that the petitioner herein is the legally registered owner of Nairobi/Block 72/3174.

(b) **THAT** a declaration be and is hereby issued that the Applicant is the *bona fide* and lawful owner of all that parcel of land known as Title No. Nairobi/Block 72/3174

(c) **THAT** a declaration be and is hereby issued that the invasion of title No. Nairobi/Block 72/3174 by employees, agents and or servants of the Respondents is violation of the Applicant's constitutional rights to property as protected by Article 40 of the new Constitution of the Republic of Kenya

(d) **THAT** a declaration be and is hereby issued that the decision by the 4th Respondent to revoke title No Nairobi/block 72/3174 *vide Gazette Notice No. 5563 of 21st May 2010* was unlawful and unconstitutional and it violates the Applicant's right to property as protected by Article 40 of the New Constitution of the Republic of Kenya.

(e) **THAT** a declaration be and is hereby issued that the decision of the 4th 'respondent to revoke title No Nairobi/Block 72/3174 *vide Gazette Notice No 5563 of 21st May 2010* was null and void to the extent that it was in violation of the Applicant's right to property as protected by Article 40 of the New Constitution of the Republic of Kenya

(f) **THAT** a declaration be and is hereby issued that the decision of the 4th Respondent to revoke title No Nairobi/block 72/3174 *vide Gazette Notice No 5563 of 21st May 2010* violates the Applicant's right to secure protection of the law as protected by Article 48 of the Constitution of Kenya.

(g) **THAT** a declaration that the certificate of lease for Nairobi/Block 72/3174 issued to the Permanent Secretary to the Treasury as a trustee to Langata High School on 12th day of October 2010 is null and void and has no effect in law.

(h) **THAT** an order do issue to the Nairobi District Land Registrar for the cancellation of the certificate of lease for Nairobi Block 72/3174 issued to the Permanent Secretary to the Treasury on 12th October 2010 and a cancellation of any entries in the Register relating to this lease.

(i)

(j)

(k) **General damages for trespass and damage to the property.**

(i) **THAT** the Respondents be and are hereby ordered:-

(ii) To revoke Gazette Notice No. 5563 of 21st May, 2010.

(iii) To pay damages for the inconvenience and anguish caused to the Applicant for the unlawful, unconstitutional, whimsical and illegal revocation of the Applicant's Title No. Nairobi Block 72/3174.

2. The petition is supported by the affidavit and further affidavit of **Harun Osoro Nyamboki**, a director of the petitioner, sworn on the 13th of January 2011 and the 12th of November 2011 respectively.

3. The petition is opposed by the respondents. A replying affidavit sworn by **Joseph Kiragu Kariuki** on the 21st of October 2011 was filed on behalf of the 1st- 4th respondent.

4. The 5th and 6th respondents were joined as parties to the suit pursuant to an application by the petitioner dated the 20th of December 2010. They filed an Answer to the Petition and a replying affidavit sworn by **Oscar Beuttah**, both dated the 9th of June 2011. All the parties also filed written submission and the petition was argued before me on the 24th of April 2012

The Petitioner's Case

5. The petitioner's case as presented by Mr. Oyugi is that it purchased land parcel number Nairobi Block/ 72/3174 on the 20th of February 2009 from **David Some Barno, Samuel Wambugu Kimotho and Winifred Nyawira Maina** at Kenya Shillings 68 million after exercising due diligence by carrying out a search of the property which confirmed that the vendors were the registered owners of the suit property. It has annexed a copy of the sale agreement dated the 20th of February 2009 and a copy of the Certificate of Lease in the name of the vendors dated 13th February 2009 as well as a Certificate of Official Search in respect of the property dated the 3rd of March 2009 as '**HON1**'.

6. The petitioner states that after the sale, the transfer to it was registered on the 21st of April 2009 and a Certificate of Lease was issued to it. A copy of this Certificate of Lease is annexed to the affidavit. A Certificate of Official Search issued on the 7th of May 2009 confirmed that the petitioner was the registered proprietor of the property. By a Charge dated the 30th of April 2009, the petitioner charged the property to Equity Bank for Kshs 45m.

7. The petitioner avers that it applied to the National Environment Management Authority for approval to proceed with development of the property and was granted approval. It also obtained approval from the City Council of Nairobi.

8. The petitioner states that by Gazette Notice No. 5563 of 21st May 2010, the 4th respondent purported to revoke the petitioner's title to the property. The revocation was purported to have been done on the basis of powers given by the Constitution, the Registered Land Act and the Government Lands Act.

9. The petitioner contends that there was no basis for the revocation of the title given to the petitioner. It had paid Kshs 2.7 million as stamp duty and the 3rd respondent received Kshs 90,000 when the property was charged.

10. Mr. Oyugi submitted that the respondents purported to revoke the petitioner's title without according it a hearing yet the suit property was governed by the Registered Land Act, Section 28 of which confers protection on the registered owner, and that the registered owner cannot lose the title to the property except as provided under the Act.

11. Mr. Oyugi submitted further that under section 39 of the Act, the petitioner was not required to go beyond the register to inquire how the previous owner got the land; that any challenge of the title has to be done under section 143 (1) which gives the court power to rectify the register; that the power is vested

in the court, not in the respondent.

12. The petitioner submitted that Article 40 of the Constitution has given protection to private property and prohibits the arbitrary taking of property. The revocation of the petitioner's title to the property was therefore unconstitutional.

13. According to the petitioner, the High Court had on 28th June 2010 issued an order restraining the respondents from taking any further steps with regard to the suit property, but in total defiance of that order, the respondents issued a title to the 6th respondent on 12th October 2010.

14. The petitioner relies on the case of **Speaker of the National Assembly –v- Karume (2008) 1KLR (EP) 425** for the proposition that the procedure laid down must be adhered to and on **Pashito Holdings & Another –v- Ndungu & 2 Others KLR (E&L) 1 296** with regard to the right to be heard.

15. Mr. Oyugi submitted that the petitioner is a purchaser for value, not an allottee. The 4th respondent had not given a reason for revoking the petitioner's title, and this was in violation of the provisions of Article 47 of the Constitution. He therefore urged the court to find for the petitioner.

16. On the respondents' contention that Article 40(6) does not protect illegally acquired property, Mr. Oyugi submitted that the section refers to property that has been found to have been illegally acquired; that there must be a finding. If the petitioner's title was invalid as alleged, then there would have been no basis for its revocation. There was no due process in the revocation and the right of the petitioner to be heard had been violated.

The 1-4th Respondents' Case

17. Mr. Wamotsa presented the case for the 1-4th respondents. He relied on the affidavit sworn by **Joseph Kiragu Kariuki**, the Chief Land Administration Officer at the Department of Lands, on the 21st of October 2011 and the written submissions dated 23rd February 2012.

18. Their case is that Title No. Nairobi/Block 72/3174 which the petitioner alleges to be its property was originally Title No. Nairobi/Block 72/2881 which was alienated on the 17th January 1975 and reserved by the government for public use as an administrative centre. A Chief's camp is on a portion of the parcel while the other portion has been in the possession of Lang'ata High School, a public secondary school.

19. The respondents contend that the allocation of the suit land was illegal and unconstitutional since, before public utility land can be allocated for any other purpose, it is required that it be subjected to the legal processes set out in, among others, the Physical Planning Act, the Survey Act, the Environmental Management and Coordination Act, 1999, and the Government Lands Act.

20. The respondents further contend that the documents annexed to the affidavit of Harun Osoro Nyamboki sworn on 18th June 2010 do not constitute change of user, allocation or acquisition of the parcel but relate to development plans for construction of buildings on the parcel after the purported issuance of title to the petitioner without due regard to the law.

21. The respondents submit that the approvals produced by the petitioner do not constitute change of user and all the records at the Department of Lands and the Commissioner of Lands show that there has been no formal surrender of the suit land from public use to unalienated government land available for allocation.

22. The respondents therefore submitted that property that is illegally acquired does not fall under the category of property protected by the Constitution and consequently, the certificate of lease of title No. Nairobi Block 72/3174 issued in the joint names of David Some Barno, Samuel Wambugu Kimotho and Winifred Nyawira Maina and subsequently issued to the petitioner is null and void as a party cannot confer on another a title or interest that it does not have.

23. On the petitioner's claim that it is a bona fide purchaser for value without notice, it was the respondents' case that this was based on a misinterpretation and misapplication of the law as the doctrine only applies to equitable interests in land such as trusts and does not apply to an illegal title to public land such as the suit land which is purchased by a third party. The doctrine only protects the purchasers against claims by those having an equitable interest in the land in question.

24. The respondents referred to various letters annexed to the affidavit of Joseph Kiragu Kariuki, among them the letters dated 7th May and 10th September 2007 respectively. The letter dated **7th May 2007** is from the Provincial Commissioner, Nairobi Area, and sought to know from the Commissioner of Lands the current status of Nairobi Block 72/2881 on which a Chief's camp was located. The letter dated **10th September 2007** is from the Ministry of Lands and is addressed to **Watangula, Adan, Makokha & Co Advocates** and was requiring them to advise their client, one **Job Kiprandi Chebon**, to surrender the title to Nairobi Block 72/2881 as it was already developed with a Chief's camp. Mr. Wamotsa submitted that if the petitioner had exercised due diligence and looked at the correspondence file at the Ministry of Lands, it would have been aware of the correspondence above and would also have known that all was not well with the land.

25. The respondents submitted further that the petitioner has filed parallel proceedings in **HC ELC No. 516 of 2010** involving the suit land and seeking the same orders sought in this suit and contend that filing a multiplicity of suits involving the same issues and parties is an abuse of the court process.

26. With regard to **Gazette Notice No. 5563 of 21st May 2010** the respondents contend that the notice was legal as the Registrar has power under the Registered Land Act to call for a title and rectify it. In this instance there was no valid title as this was a public plot and no change of user so the petitioner's title was invalid from the commencement.

The 5th and 6th Respondent's Case

27. Ms. Mbaabu presented the 6th respondent's case and relied on the Answer dated 9th June 2011 and the replying affidavit sworn by **Oscar Beuttah**, the Chairman of the Board of Langata Secondary School and the written submissions dated 1st August 2011.

28. The position of the 5th and 6th respondents as presented by Ms. Mbaabu was that the 6th respondent was a public secondary school, a fact that had not been questioned by the petitioner. It had applied for allocation of the land from the government for expansion of the school and the land, which was part of Nairobi Block 72/2881 adjacent to the school and on which was a Chief's camp, was allocated to the Permanent Secretary, Treasury, as trustee for the school. Ms. Mbaabu contended therefore that the interests of the public override those of an individual and that Article 40 (6) of the Constitution provides that the constitutional protection of the right to property at Article 40(1) does not extend to illegally acquired property. She therefore urged the court to dismiss the petition.

Issues for Determination

29. While the parties have raised various issues relating to the property and the petition seeks several declarations pertaining to the ownership of the property, I take the view that this matter revolves around whether or not the facts presented to the court show a violation of the petitioner's rights under the Constitution. In particular, the petitioner alleges violation of the right to property under Article 40, violation of the right to be heard, and violation of its rights under Article 48 of the Constitution.

The Right to Be Heard

30. The petitioner alleges that it is the registered owner of the property, and that its title thereto was revoked by the respondent through **Gazette Notice No. 5563 of 21st May 2010**. According to the petitioner, it was not heard before the Gazette Notice was published.

31. The Constitution guarantees to everyone the right to be heard before any administrative action that affects his or her rights is taken. This right is guaranteed at Article 47(1) which provides as follows:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

32. Such administrative action must encompass the right to be heard when a decision that impacts negatively on one's rights is taken.

33. From the facts before me, there can be no doubt that the constitutional guarantee of a right to fair administrative action and the right to a hearing was not observed when the 4th respondent issued *Gazette Notice No. 5563 of 21st May 2010*. This court has in several decisions found that the purported revocation of title to land in circumstances similar to those in the present case amounts to a violation of the right to a fair hearing and fair administrative action. The Court so found in the case of **Kuria Greens Limited v Registrar of Titles and Another Petition No. 107 of 2010 (Unreported); Isaac Gathungu Wanjohi & Another –v- The Attorney General & Others High Court Petition No. 154 of 2011 (Unreported); and Electrical Options Limited -v- The Attorney General & Another High Court Petition No. 23 of 2011 (Unreported)**. More recently, the High Court in **Power Technics Ltd -v- The Attorney General & 2 Others Petition No 178 of 2011**, in determining 23 consolidated petitions on this matter, reiterated that the purported revocation of titles through Gazette Notices was unconstitutional, null and void.

34. In this case, *Gazette Notice No. 5563 of 21st May 2010* was issued prior to the promulgation of the Constitution. However, the right to be heard is a rule of natural justice that is recognised in our law and was so recognised even under the former Constitution. The acts of the 4th respondent in purporting to revoke the petitioner's title to the suit property by way of a notice in the Kenya Gazette and without according it a hearing violated the petitioner's right to be heard and its right to fair administrative action as provided in the Constitution.

35. The respondents contend that the Registrar has power under the Registered Land Act to call for a title and rectify it. This power, contained in Section 142 of the Registered Land Act (now repealed by Act No. 3 of 2012) however, is specific and limited and does not extend to cancellation of titles. The provisions of the section relevant to this matter are as follows:

142. (1) The Registrar may rectify the register or any instrument presented for registration in the following cases –

(a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;

(b) in any case and at any time with the consent of all persons interested;

36. As Counsel for the petitioner correctly pointed out, the power of rectification by cancellation of a title was vested in the Court by section 143 of the Registered Land Act. The purported exercise of this power by the Registrar is therefore insupportable.

The Right to Property

37. The petitioner alleges violation of its right to property, while the respondents take the position that there was no violation as the property was a public utility plot which was illegally and unlawfully acquired. From the facts presented before me by the parties, it is clear that the question of the legality of the title held by the petitioner is one that needs to be addressed. It is not a question that can be addressed in these proceedings as the competing claims of the parties must be subjected to thorough scrutiny.

37. On the face of it, however, there is a possibility that the provisions of Article 40(6) which provide that the protection conferred by Article 40 do not apply to property found to have been unlawfully acquired

may have application to the present case. There is evidence to suggest that as far back as 2007, the party then alleging to have title to Nairobi Block 72/2881 which the suit property is a subdivision of, one **Job Kiprandi Chebon**, had been asked to surrender the title to the property. How the property was then subdivided and a title issued to **David Some Barno, Samuel Wambugu and Winifred Nyawira Maina** on the 13th of February 2009, who then sold the property to the petitioner one week later on the 20th of February 2009 must be investigated before definitive declarations with regard to the legality or otherwise of the petitioner's title can be made.

38. The court addressing these issues will be confronted by the competing claims of the petitioner and the respondents, particularly the 5th and 6th respondents. The issues for determination are best addressed in a forum where evidence can be presented and weighed, and the legality or otherwise of the petitioner's claim considered. The court was informed that the petitioner had filed then withdrawn **HCC ELC NO. 516 of 2010 Emanga Ne-Sementa -v- Teresa Mutegi and Board of Governors Lang'ata High School**. Had the petitioner not withdrawn this suit, it would doubtless have provided the parties with a forum in which the evidence could be considered and a determination made.

39. A court hearing a petition for enforcement of constitutional rights on affidavit evidence as in the matter before me is not in a position to issue the declarations and orders sought by the petitioner in light of the uncertainties surrounding the petitioner's title to the land. Should the land have been acquired illegally, and the court issued the declarations sought, then the court would have been used to sanitise an illegality. This would be contrary to the public interest and fly in the face of the Constitution itself, and as the court observed at paragraph 64 of its decision in the case of **Chemei Investments Limited -v- The Attorney General & Others Nairobi Petition No. 94 of 2005 (Unreported)**-

“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 stated 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.’”

Conclusion

40. I therefore find and hold that the 4th respondent had no power to revoke the petitioner's title by way of Gazette Notice No. 5563 of 21st May 2010 and the said act is unconstitutional null and void for breach of the petitioner's right to a hearing.

41. I must emphasise for the avoidance of doubt that my findings in this matter are confined to the procedural aspects with regard to the revocation of the petitioner's title by Gazette Notice No. 5563 of 21st May 2010. I make no findings with regard to the legality or otherwise of the petitioner's title. The respondents are aware of the proper legal process for the revocation of the petitioner's title should it, as they allege, have been illegally obtained, bearing in mind, in particular, the provisions of Article 68(c)(v) of the Constitution. It is incumbent upon them to initiate the process so that the status of both the suit property and its parent title, L.R. No Nairobi Block 72/2881 can be determined expeditiously.

42. In view of my findings with regard to the revocation of the petitioner's title by Gazette Notice No 5563 of 21/5/2010, the petitioner shall have the costs of this petition against the 1st – 4th respondents.

43. I am grateful to the parties for their well researched arguments and submissions in this matter.

Dated Delivered and Signed at Nairobi this 22nd day of June 2012

**MUMBI NGUGI
JUDGE**

Judgment delivered in the presence of:

Court Clerk: Kazungu

Mr. Oyugi for the Petitioner

Mr. Wamotsa for the 1-4th Respondents

Mrs. Mbaabu for the 5th and 6th Respondents

**MUMBI NGUGI
JUDGE**