



REPUBLIC OF KENYA



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Eversweet Bakery Ltd v National Land Commission & 11 others (Environment & Land Petition 4 of 2022) [2022] KEELC 4745 (KLR) (25 August 2022) (Judgment)

Neutral citation: [2022] KEELC 4745 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND PETITION 4 OF 2022

JM ONYANGO, J
AUGUST 25, 2022

BETWEEN

EVERSWEET BAKERY LTD PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

DISTRICT LAND REGISTRAR, KISII 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

BIRIA MORAA 5TH RESPONDENT

PACIFICA MWANGO 6TH RESPONDENT

ESTHER KEMUNTO GICHANA 7TH RESPONDENT

MELLEN MOOCHI ONSONGO 8TH RESPONDENT

KENNEDY AMWOMA SIMEON 9TH RESPONDENT

JANE MORAA SIMEON 10TH RESPONDENT

MARICELA KERUBO NYAANGA 11TH RESPONDENT

CLEMENSIA RUTH SIMEON 12TH RESPONDENT

JUDGMENT

Introduction

1. The Petitioner brought this suit vide an Amended Petition dated April 13, 2021 seeking the following orders against the Respondents.



- a. A declaration that the 1st Respondent violated the provisions of Article 47 of the [Constitution](#) and the provisions of the [Fair Administrative Actions Act 2015](#).
 - b. A declaration that the Petitioners fundamental rights and freedoms more so as set out in Article 40(right to property) has been violated and that any revocation of the title registration No Kisii Municipality/Block 111/289 (hereinafter referred to as the suit property) by the 1st Respondent and the decision of the 1st Respondent to gazette through Kenya Gazette Notice Number 6862 volume CXIX-NO 97 of July 17, 2017 purporting to revoke the Petitioners title and have the same vested in Pacifica Mwangi, the 6th Respondent herein, as personal representative of the estate of Simon Kegesa and the resultant issuance of a grant to the 6th to the 12th Respondents be declared null and void.
 - c. An order of rectification of the register to remove land parcel No Kisii Municipality/Block 111/289 from land parcel No Kisii Municipality/Block 11/648 and have it registered separately. and in the alternative an order adopting the judgment in Judicial Review Application No 3 of 2017, Republic vs The Chairman National Land Commission and 4 others Ex parte Aboko John Samuel Kumanda and another
 - d. Costs of this suit.
 - e. Any other order the court may deem fit to grant.
2. The Petition is supported by the affidavit of Caren Nyaboke Onsongo, the director of the Petitioner sworn on April 15, 2021. Ms Onsongo averred that the Petitioner was the registered owner of the suit property having bought the same on December 17, 2010 and was the original allottee of the same.
 3. Ms Onsongo further averred that in or about the year 2013 a company known as Scaphaso International fraudulently had the suit land transferred to itself. She narrated that the Petitioner reported the matter to the Criminal Investigation Department and a director of the said company one Samuel Keneni Omwando was arrested and charged in Kisii CMC Criminal Case No 1056/2014 and has since been convicted on various counts of forgery and obtaining registration by false pretenses.
 4. She deposed that simultaneously with the fraudulent transfer of the land to the Scaphaso International, the company also filed ELC Case No 439/2013 Scaphaso International vs Eversweet Bakery Ltd which case is pending for hearing before this court.
 5. It was her further deposition that the Petitioner was compelled to lodge a caution in respect of the suit property in 2013.
 6. She deposed that in the year 2015, the 6th to the 12th Respondents lodged a complaint to the National Land Commission (1st Respondent) alleging historical land injustices. They contended that land parcels Kisii Municipality Block 11/599, 600, 601,602, 603, 604, 606, 157, 331, 289 (suit property), 300, 301 and 637 were freehold ancestral parcels of land which were irregularly allocated as they were not free for such allocation.
 7. She deposed that the 1st Respondent took up the matter and purportedly sent various letters to the Land Registrar Kisii, the 3rd Respondent herein and the allottees of the said parcels. She further deposed that the 1st Respondent then recalled all the titles to the stated land parcels which included the suit property and proceeded to cancel the said titles through its decision contained in gazette Notice Number 6992, me CXL NO on July 17, 2017



8. It is Ms Onsongo's contention that the 1st Respondent directed the 2nd Respondent to issue to the 6th to the 12th Respondents with a single title known as Kisii Municipality/Block111/648 which was an amalgamation of all the parcels mentioned above into one parcel.
9. She revealed that one of the pieces of land which was so amalgamated was land parcel No Kisii Municipality/ Block111/ 301. The proprietors of parcel number 302 subsequently moved the court in Judicial Review Application No 3 of 2017, Republic versus The Chairman National Land Commission and 4 others *Ex parte* Aboko Samuel Kumenda and another and the court allowed the application.
10. In that particular suit, the court held that the process leading to the cancellation of the title was without due process as the Applicants had not been properly served through newspaper notices nor had they been served personally.
11. It was her contention that since the Petitioner was complaining in a way similar to the case highlighted above, and since the Petitioner was also never heard by the 1st Respondent before its parcel number Kisii Municipality/Block 111/289 was revoked, the Petitioner deserves the same treatment as the Applicants in Judicial Review Application No 3 of 2017.
12. While referring to letters sent by the 1st Respondent to the Land Registrar Kisii and the Interested Parties dated September 17, 2015, October 6, 2015, October 8, 2015 and October 13, 2016 she averred that none of them referred either to the Petitioner or to Scaphaso International which was the registered proprietor of the suit property at that time.
13. She further averred that Gazette Notice No 6862, Volume CXIX-No 97 dated July 17, 2017 on which the 1st Respondent's verdict was based, only contained the number of the suit property herein and not the names of the registered owners.
14. She deponed that since the Petitioners herein had lodged a caution over the suit property, they had a right under section 14(3) of the *National Land Commission Act* to be heard by the 1st Respondent. She further contends that the Petitioner having lodged a caution over the suit property ought to have been served with the relevant notices as persons who had expressed an interest in the suit property.
15. In response to the amended Petition, the 6th to 12th Respondents filed an amended Response to Petition in which they denied the allegations by the Petitioner. In particular, they denied that the Petitioner was registered as the owner of the suit property. They also denied the allegation that the Petitioner bought the suit property from one Henry Nyangechi who was the allegedly was the original allottee, on December 17, 2010. They pointed out that in as much as the Petitioner is alleged to have bought the suit property on December 17, 2010, the Certificate of Lease that had been attached to the application dated May 28, 2021 showed that the same was issued on June 8, 2006. They further denied violating any of the Petitioner's constitutional rights.
16. The 6th to 12th Respondents clarified that the court in Judicial Review Application No 3 of 2017 only declared that the procedure followed by the National Land Commission was illegal but did not order for the revocation of any titles. They further contend that this court lacks the jurisdiction to hear the Petition. Further, they contend that the Petition as framed by the Petitioner does not meet the threshold of a Constitutional Petition as the orders sought can be granted in a Judicial Review Application.
17. The 1st to 5th Respondents did not file any Responses to the Petition despite being given ample time to do so.



18. On February 15, 2022, the court directed that the Petition be disposed of by way of written submissions. The Petitioner and the 6th to 12th Respondents accordingly filed and exchanged their submissions.

Issues for Determination

19. Having considered the amended Petition, the response by the 6th to 12th Respondents as well as the rival submissions filed by the Petitioner and the 6th to 12th Respondents, the main issue for determination is whether the Petition is properly before this court and if so, whether the Petitioner is entitled to the reliefs sought.

Analysis and Determination

20. Central to the determination as to whether a Petition is properly before this court is the determination as to whether the Petitioner has locus standi to institute this Petition.
21. In the case of *Mamdub Mohamed Taib v Kilifi County Council* [2016] eKLR the court observed that;
-It is true that Article 22(1) of the *Constitution* affords every person the right to institute court proceedings claiming that his right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. However, before the Petitioner herein can complain that his right to property and a fair administrative action in respect of the suit property has been denied, violated or is threatened, he must show that he is legally entitled to the property in the first place.
22. In the instant suit, the Petitioner claims to be the registered owner of the suit property. However, the Petitioner's ownership claim is faced with two major hiccups. The first one emerges from its own revelation. He reveals that even though he bought the suit property from one Henry Nyangechi on December 17, 2010, sometime in 2013 the property was fraudulently transferred to a third party known as Scaphaso International whom he has sued in ELC Case No 439/2013 Scaphaso International vs Eversweet Bakery Ltd) which is pending for hearing before this court. From this revelation, it is clear that by the time the National Land Commission made its decision recommending the revocation of several titles including the suit property, the suit property was registered in the name of Scaphaso International. It is therefore clear that the claim that it is the registered owner of the suit property is an issue that is still pending determination before this court.
23. The second hiccup is presented by the discrepancy noted by the Respondents. The Respondents have pointed out that in as much as the Petitioner claimed in an affidavit sworn by its Director Ms Caren Onsongo that the property was bought from a third party on December 17, 2010, the Certificate of Lease exhibited the application seeking to amend this Petition, which exhibit has surprisingly been omitted in the amended Petition shows that the certificate was issued way back on June 8, 2006.
24. Although learned counsel for the Petitioner in his submissions attempted to explain this discrepancy by giving a totally different account of how the suit property was acquired by the Petitioner, he in the end acknowledged that the suit property was bought on March 24, 2006 and a Lease Certificate issued on June 8, 2006. It is trite law that submissions do not constitute evidence upon which the court can base its decision.



25. In the case of *John Katua Mwalula v Daniel Ibulu Muketi* 2021 eKLR the Court relied on the decision in *Erastus Wade Opande v Kenya Revenue Authority & Another* Kisumu HCCA No 46 of 2007 where the Court held as follows:
- “Submissions simply concretize and focus on each side’s case with a view to win the court’s decision that way. Submissions are not evidence on which a case is decided.”
26. The same Judge in *Nancy Wambui Gatheru vs Peter W Wanjere Ngugi* Nairobi HCCC No 36 of 1993 expressed himself as follows:
- “Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court’s view, are a course by which counsel or able litigants focus the court’s attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case.”
27. Similarly, in *Ngang’a & Another vs Owiti & Another* [2008] 1KLR (EP) 749, the Court held that:
- “As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court’s focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.”
28. As stated by the Court of Appeal in *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR:
- “Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”
29. The Court of Appeal in *Avenue Car Hire & Another vs Slipha Wanjiru Muthegu* Civil Appeal No. 302 of 1997 held that no judgment can be based on written submissions and that such a judgment is a nullity since written submissions is not a mode of receiving evidence set out under Order 17 Rule 2 of the Civil Procedure Rules [now Order 18 rule 2 of the *Civil Procedure Rules*]. The same Court in *Muchami Mugeni vs Elizabeth Wanjugu Mungara & Another* Civil Appeal No 141 of 1998 found the practice of making awards on the basis of the submissions rather than the evidence deplorable.
30. From the two notable discrepancies, it is clear that the Petitioner’s interest in the suit property that was subject of a revocation by the 3rd Respondent is questionable. As at the time the 1st Respondent was making its decision to revoke titles including the suit property, the suit property was already in



the hands of a third party and that status has not changed. As revealed by the Petitioner, there is a case pending before this court in which the court will determine whether the said third party acquired the suit property fraudulently in 2013 as alleged by the Petitioner.

31. The above two discrepancies notwithstanding, the Petitioner made a further attempt to demonstrate his interest in the suit property. The Petitioner relied on a caution alleged to have been placed on the suit property sometime in 2013. It is the Petitioner's contention that the 1st Respondent ought to have issued the Petitioner with a notice or granted it a hearing as cautioner in accordance with section 14 (3) of the *National Land Commission Act* before recommending the revocation of the title in favor of 6th to 12th Respondents. However, it is not lost to the court that the Petitioner never bothered to attach any evidence of the alleged caution in his amended Petition. In the absence of such documentary evidence, I find it difficult to establish that such an interest existed.

32. Mativo J observed in *Shamsber Kenya Ltd vs Director of Public Prosecutions & 2 Others* (2018) eKLR 80: -

“Section 107(1) of the *Evidence Act* provides that “whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Constitution* and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of Constitutional rights, is not, a mere technicality; rather, it is essential to a proper consideration of Constitutional issues. Decisions on violation of Constitutional rights cannot be based on the unsupported hypothesis.”

33. In view of the foregoing, I find and hold that that the Petitioner has not established any interest worth being protected by this court and it is therefore not entitled to the prayers sought in the Petition.

34. The upshot is that the Petition lacks merit and it is hereby dismissed. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 25TH DAY OF AUGUST, 2022.

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J.M ONYANGO

JUDGE

