



Kiserian v District Land Registrar Kajiado & 2 others; Moisasi & 2 others (Interested Parties) (Environment & Land Petition 5 of 2017) [2022] KEELC 15069 (KLR) (24 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15069 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ENVIRONMENT & LAND PETITION 5 OF 2017

CA OCHIENG, J

NOVEMBER 24, 2022

(FORMERLY CONST. PETITION NO. 26 OF 2014 AS CONSOLIDATED WITH PETITION NO. 22 OF 2014 - MACHAKOS)

IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND OR FREEDOMS UNDER ARTICLES 20(1), 21(1), 22(1), 10, 40, 47, 50 AND 64 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: THE REGISTRATION OF LAND ACT CAP 300 (NOW REPEALED)

AND

IN THE MATTER OF: THE LAND REGISTRATION ACT, 2012 AND THE LAND ACT, 2012

AND

IN THE MATTER OF: THE LAND TITLE KAJIADO/KAPUTIEI- SOUTH/1915

BETWEEN

LANTEI OLE KISERIAN PETITIONER

AND

DISTRICT LAND REGISTRAR KAJIADO 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

NKAMA GROUP RANCH LIMITED 3RD RESPONDENT

AND

JOSEPH MOISASI INTERESTED PARTY

DAVID KOIN TOPOIKA INTERESTED PARTY



JUDGMENT

1. What is before Court for determination is the Petition dated the October 28, 2014 where the Petitioner seeks the following orders:-
 - a. A declaration that the allocation and subsequent registration of the 1st, 2nd, 3rd Interested Parties as joint proprietors of Land Reference Number Kajiado/kaputiei South/1915 was fraudulently and/or pursuant to misrepresentation and thus unconstitutional as it infringed on the Petitioner's right to own land and/or to the Petitioner's share of the community land as recognized by the *Constitution of Kenya 2010*.
 - b. An order prohibiting the Interested Parties whether by themselves or by their collective or individual agents or employees from trespassing into or in any manner interfering with the Petitioner's use and enjoyment of Land Reference Kajiado/kaputiei South/1915.
 - c. An order directing the 1st Respondent to recall and cancel the title to Kajiado/kaputiei South/1915 issued to the 1st, 2nd and 3rd Interested Parties and to re-issue the same to the Petitioner herein.
 - d. Any other order as this Honourable Court shall deem fit and just in the interest of justice.
2. The Petition was supported by the Affidavit of Lantei Ole Kiserian the Petitioner herein. He avers that in the year 2010, the 3rd Respondent decided to sub-divide the vast trust land and each member of the group ranch was allocated between 200-250 acres taking into account the land occupied by each member and his family prior to the sub-division. He deposes that he has lived on the disputed land for over 20 years, built a permanent home with stones and corrugated iron sheets roof, dug a well, cultivated approximately eight (8) acres and conserved the area. He claims that when the subdivision was done, the officials cut off some fifty (50) acres from around his home to the Interested Parties and when the titles were issued, he was shocked to find that the entire Parcel Number Kajiado/Kaputiei South/1915 hereinafter referred to as the 'suit land', had been given to the Interested Parties but he was allocated a different parcel that was over 8kms away, being LR Kajiado/Kaputiei-South/1713. He contends that the Interested Parties were strangers in the area and that their parents resided in Kitengela. He argues that, after fruitlessly attempting to sort out the issue with the 3rd Respondent, the Chief's office and the District Officer's office, he filed a claim at the Kajiado Land Dispute Tribunal which awarded him the suit land and ordered him to excise 50 acres from Kajiado/Kaputiei-South/1713 and transfer it to the Interested Parties. He insists that the 3rd Respondent's officials and the Interested Parties did not comply with the orders of the said Tribunal which were adopted as a court order and a Decree issued to that effect but instead filed a Petition seeking to quash the decision of the Tribunal which was dismissed for want of prosecution. He reiterates that he obtained eviction orders from court seeking the forceful eviction of the Interested Parties but the 3rd Respondent sought to have them stayed which application was again dismissed by the court.
3. In opposition to the Petition, the 1st Interested Party, Joseph Moisasi, filed a Replying Affidavit dated the November 13, 2014 on behalf of the Interested Parties where he deposes that the suit land is duly registered in the joint names of the Interested Parties courtesy of their grandmother who was a member of the group ranch and was buried thereon. He contends that the decision of the Land Dispute's Tribunal which was adopted by the court was *ultra vires* hence null and void as they were



not summoned to testify nor served with any notices. He acknowledges that among the factors the 3rd Respondent considered in the allocation of the suit land was wherein the person's family resided. He states that they were not the only orphans who were allocated parcels of land but a total of twenty two (22) orphans were given parcels by the 3rd Respondent. He claims that the Petitioner did not complain upon being issued with the title to his land but quickly took the said title and even sold a portion of the land. He also adopted his Affidavit dated September 24, 2014 as deponed in Petition No 22 of 2014 in opposition to Petition No 26 of 2014.

4. The 3rd Respondent on their part filed a Replying Affidavit sworn by the group Secretary William Nookileti Kayiaa where he deposes that the Group Ranch received approval from the then Ministry of Lands to sub-divide the community land and they engaged a surveyor to undertake the same with the agreement amongst members that this would proceed without interference from any of them. He avers that members were to each be allocated two hundred (200) acres of land, while the orphans were to receive fifty (50) acres. It explains that the Petitioner was allocated land parcel number Kajiado/Kaputei South/1713 while the Interested Parties were allocated the suit land. Further, that the Petitioner did submit his KRA PIN and ID number for registration. He reiterates that over 48% of the members were moved from their residences and that the Petitioner's case was not an exception. He contends that the Petitioner was not living at the ranch but came during the subdivision process and invaded the Interested Party's portion, taking advantage of the communal living of the Maasai people. He reiterates that a meeting was held by the clan elder together with the Petitioner and he was advised to move out of the suit land but he refused. He reaffirms that if the application is allowed, this would lead to an avalanche of suits leading to chaos hence against public policy.

Submissions by the Parties

The petitioner's submissions

5. The Petitioner in his submissions provided a detailed background of this matter. He argued that the Petition was fitting for determination as a constitutional Petition by dint of Article 40 of the *Constitution* and Rule 3 of (*Protection of Rights and Fundamental Freedoms, Practice and Procedure Rules, 2013*) which requires courts to protect the rights of litigants. He further argued that he had a legitimate expectation that the 3rd Respondent would not dispossess its members of land they had earlier possessed. He submitted that his occupation of the suit land preceded the Interested Parties' residing thereon, and relied on evidence of PW1 and PW2 who testified that he had lived on the suit land for over 15 years. Further, that DW1 admitted that they were clan mates and age mates with him having known him for over 15 years. He insisted that the Interested Parties had not adduced any evidence or proof of having lived on the suit land prior to the subdivision nor the alleged burial of their grandmother on the said land. Further, that DW1 testified that the Interested Parties were not on the suit land, prior to the subdivision. He averred that the decision to allocate to the Interested Parties the suit land was an infringement of his Constitutional right to work, develop and occupy the said land as well as his legitimate expectation to fair treatment including allocation of the land, he had initially occupied. He further submitted that evidence by PW1 and DW1 demonstrated that there was no good reason why he was dispossessed from his land and that there was no evidence to support the allegation that other members were also dispossessed from their lands. He reiterated that the allocation of the suit land to the Interested Parties amounted to infringement of his right to dignified and respectful treatment as an elderly person under Article 57(c) of the *Constitution of Kenya*. He was categorical that the title deed issued to the Interested Parties should be annulled, cancelled and re-issued to him and relied on Section 80(1) of the *Land Registration Act* which directs the Registrar to cancel titles obtained by fraud and misrepresentation. He further argued that though he had not particularized fraud, the purposive interpretation of the rules means that the court is not bound by technicalities



while determining a petition under the rules as per Rule 10(3). He averred that he had suffered loss and damage by reason of the conduct of the 3rd Respondent as he incurred costs of litigating from the Land Dispute Tribunal, to Machakos and Nairobi High Courts. To buttress his averments, he relied on the following decisions:

The 3rd respondent's submissions

6. The 3rd Respondent reiterated that the Petitioner did not controvert the averments of their Replying Affidavit and that over 48% of the members got transferred from their initial residences. It argued that vide Petition No 22 of 2014, the proceedings of the erstwhile Land Dispute Tribunal were set aside. It submitted that it had not breached any constitutional rights of the Petitioner and explained that it was not practical to settle all the members of the Group Ranch at their then residences. On legitimate expectation, it averred that it did not promise the members that they would be settled where they resided but only promised them two hundred (200) acres of land each.

The interested parties submissions

7. They reiterated their averments as per their Replying Affidavit dated the November 26, 2014. They submitted that the Petitioner had not particularized any elements of fraud as alleged in his Petition. They further contended that Sections 24 and 26 of the Registered Land Act under which their title was registered provides that such registration is unalienable. To buttress their averments, they relied on the case of John Mbugua Gitau vs Simon Parkoyiet Mokare, Nkama Group Ranch and 5 others (2014) eKLR.

Analysis and Determination

8. Upon consideration of the Petition, respective Affidavits, testimonies of the witnesses and rivalling submissions, the following are the issues for determination: Whether the Interested Parties fraudulently acquired title to land parcel number Kajiado/Kaputiei South/1915. Whether the title to land parcel number Kajiado/Kaputiei South/1915 in the name of the Interested Parties should be cancelled and the same issued to the Petitioner. Whether the Petitioner is entitled to the orders sought in the Petition.
9. As to whether the Interested Parties fraudulently acquired title to land parcel number Kajiado/Kaputiei South/1915.
10. The Petitioner claims the Interested Parties fraudulently acquired title to the suit land which fact the Interested Parties deny. It was the Petitioner's contention that the 3rd Respondent allocated the Interested Parties the suit land yet he had been residing thereon for over 20 years and this was contrary to his legitimate expectation. Further, that the Land Disputes Tribunal awarded him the land and the said Award was adopted as Judgment and Decree of the Court. DW1 representing the 3rd Respondent explained that when the Group Ranch was being subdivided and distributed to its members, each member was supposed to get at least two hundred (200) acres. He testified that different members were allocated parcels of land in different places from where they had initially resided. It emerged in evidence that the Petitioner was allocated two hundred (200) acres of land and he took his title after which he sold a portion of fifty (50) acres to a third party and he is now claiming the suit land. The Interested Parties contended that they had been allocated only fifty (50) acres of land as orphaned members and the said land is where their grandmother was buried which fact was disputed by the Petitioner. The first issue in this instance is whether the Petitioner pleaded fraud as against the Interested Parties. On perusal of the Petition, I note the Petitioner did not plead and particularize fraud as against the Interested Parties. Further, in the evidence tendered in court, the Interested Parties actually demonstrated how



- they were allocated the suit land which averments were supported by DW1, a representative from the Group Ranch.
11. In the case of *R G Patel v Lalji Makanji* [1957] EA 314 the former Court of Appeal for Eastern Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”
 12. See the case of *John Mbugua Gitau vs Simon Parkoyiet Mokare, Nkama Group Ranch and 5 others* (2014) eKLR.
 13. On proof of ownership of land, I wish to make reference to Sections 24(a) and 26(1) of the *Land Registration Act*. Section 26(1) of the *Land Registration Act* provides as follows:

“The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
 14. While Section 24(a) of the *Land Registration Act* stipulates as follows:

“Subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto...”
 15. While in the case of *Joseph NK Arap Ng'ok V Moijo Ole Keiwua & 4 Others* [1997] eKLR, where the Court of Appeal held that:

“Once one is registered as an owner of land, he has absolute and indefeasible title which can only be challenged on grounds of fraud or misrepresentation and such is the sanctity of the title bestowed upon the title holder.”
 16. Further, in Civil Appeal No 246 of 2013 *Arthi Highway Developers Limited Vs West End Butchery Limited and Others*, the Court of Appeal expressly stated thus:

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles



and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

17. In this instance, I note the Petitioner except for complaining that the Interested Parties were allocated land where he used to previously reside, failed to tender any evidence to prove how the Interested Parties acquired title to the suit land fraudulently as required under Sections 107 of the *Evidence Act* and 26(1) of the *Land Registration Act*. From the averments of the Interested Parties including testimony of DW1, I find that they indeed explained the root of their title as the same emanated from the 3rd Respondent. In the circumstances while associating myself with the decisions cited above and relying on the legal provisions quoted, I find that the Interested Parties did not acquire the suit land fraudulently as claimed. On whether the Interested Parties have trespassed on the Petitioner’s land, based on my findings above, I find that they have not trespassed on this land which they own.
18. On whether the Interested Parties title to the suit land should be cancelled and the Petitioner registered as its owner. I will refer to Section 143 of the *Registered Land Act* (repealed) which was in place when the Interested Parties acquired their title, and it provides that:
 - “(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.’ These provisions are replicated in section 80 of the Land Registration Act which provides that: ‘(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
 - (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”
19. The said Section is similar to Section 80 of the *Land Registration Act*.
20. Since the Interested Parties proved that they were allocated the fifty (50) acres of land by the 3rd Respondent which is the Group Ranch. Further, the exercise was undertaken with consent of the members as this was community land, noting that the Petitioner obtained his title for the two hundred (200) acres and has never surrendered it back to the 3rd Respondent but has even proceeded to sell 50 acres therefrom, I opine that the Petitioner seeks to gain twice and has come by way of Constitutional Petition yet his claim falls within the ambit of Civil Law. In the circumstance, I find that the Petitioner has not fulfilled the tenets that require for cancellation of the Interested Parties’ title and will hence not decline to do so.



21. On whether the Petitioner's rights have been violated by the Respondents including Interested Parties, I wish to refer to the case of *Mumo Matemo v Trusted Society of Human Rights alliance* [2014] eKLR, where it was held that:

“...the principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”

22. The Petitioner's claim against the Respondents and Interested Parties contains certain inconsistencies. It is trite that for a party to claim his rights have been violated, he has to plead the same with precision and demonstrate how it was conducted. In this instance, I note the Petitioner actually admits that he acquired title to his two-hundred-acre land and is currently residing thereon. Further, that the Land Disputes Tribunal was actually wrong in their decision to cancel the Interested Parties title. The Petitioner further contends that he had legitimate expectation from the 3rd Respondent to be allocated land where he used to reside.

23. In the 4th Edition, Vol 1(1) at page 151, paragraph 81 of *Halsbury's Laws of England*, legitimate expectation is outlined as follows:

“A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by authority, including an implied representation, or from consistent past practice.”

24. In the case of *Invollate Wacike Siboe v Kenya Railways Corporation & another* [2017] eKLR, it was held that:

“The same position applies to legitimate expectation; no legitimate expectation can arise if effectuating the expectation would result in violation of a statute. The contours of the doctrine are well mapped. Legitimate expectation arises where representation by a decision maker has created a genuine expectation that it is within his power to honour and make good. The law however does not protect every expectation; it protects only legitimate expectations. Where the representation is one, which the decision maker is not competent to make, reliance on it cannot in law give rise to legitimate expectation. Hence legitimate expectation cannot arise when the decision maker is acting ultra vires his or her powers.”

25. Based on the facts as presented while associating myself with the decision cited above, I find that the 3rd Respondent did not expressly state that it would allocate the Petitioner land where he used to reside. The Petitioner in his testimony actually admitted that there were some members who were actually moved when the 3rd Respondent proceeded to allocate land to its members. Further, that he buried his wife in the land he had been allocated. DW1 confirmed that many members were affected by the allocation as they were directed to move to their new parcels of land. In the foregoing, I find that the Petitioner has failed to demonstrate how the Respondents including the Interested Parties violated his rights including the right to legitimate expectation.

26. In the circumstances, I find the Petition unmerited and will proceed to strike it out.



I direct each party to bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 24TH DAY OF
NOVEMBER, 2022**

CHRISTINE OCHIENG

JUDGE

