



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc Appli 663 of 2006

DENNIS KURIA & OTHERS.....PETITIONERS

Versus

THE MINISTER FOR ROADS & PUBLIC WORKS & OTHERS.....RESPONDENTS

RULING

On 7th November 2006 the 11 Petitioners, Tulimani Holdings Ltd, Daniel Mutuku Mbevi, Timothy M. Muta, Mboo Kakuli, Pius Mbindyo, John T. Mukiri, Stanley M. Rutere; Kennedy Mwathe Museka; Juda Mwongela Muasya, Mercy Mbuba (as administrator of the estate of the late Eustus Mbuba) and Dennis Kuria came to this court by way of petition under Sections 70, 75 and 84 (1) of the Constitution. The Petitioners seek the following four declarations:-

1. A declaration that the eviction Notice issued by the 1st Respondent on or about 2nd November 2006 violates the petitioners property protected under Section 75 of the Constitution and is, therefore null and void.
2. A declaration that the new development plan developed in the area between Mlolongo area in or around 2004 was unconstitutional to the extent that it violated the Petitioner's rights to property and did not comply with the law regarding compulsory acquisition of property.
3. A declaration that the notice issued by the 1st Respondent on or about 2nd November 2006 infringes on the petitioners right to the equal protection of the law of the person and property as guaranteed by Section 70 of the Constitution.
4. An order restraining the 1st Respondent from executing the contents of the notice issued on 2nd November 2006 together with any other notice that may be issued in similar circumstances regarding the property, the subject of this suit.

Filed along with the petition is the Chamber Summons dated 6th October 2006 and brought under S. 84 (1) of the Constitution of Kenya

ule 20 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006, also known as the Gicheru Rules. The Application was brought under certificate of urgency and seeks two orders.

- 2) That pending the hearing of this Application inter partes, conservatory orders be issued

that the status quo in respect of the subject matter be maintained, that is, there should be no execution of the contents of the Notice issued by the Ministry of Roads and Public Works on or about 2nd November 2006 or such other notice as may be issued in future with like effect as the one issued on 2nd November 2006.

3) That pending the hearing and determination of the substantive Constitutional petition, conservatory orders be issued that the status quo in respect of the subject matter be maintained, that there should be no execution of the contents of the notice issued by the Ministry of Roads and Public Works on or about 2nd November 2006 or such other notice as may be issued in future with the effect as the one issued on 2nd November 2006.

Mr. Ongoya and Mr. Mativo appeared on behalf of the Petitioners/Petitioner, the Respondents by Mr. Muiruri and the 1st Interested Party was represented by Mr. Kahonge.

The Petitioner's case is that they are owners and hold interest in land situate in Mavoko Municipality which area borders the Nairobi-Mombasa Road. On 15th September 2006 the Petitioners saw a notice in the press that was released by the effect that those who had encroached on the road reserve on Outering Nairobi-Mombasa Road had 30 days to demolish that building and structures, failing which the Respondent would carry out the demolition at Petitioners expense.

Following that notice, the Petitioners filed a Constitutional Petition No. 617/06 challenging the Constitutionality of the notice but when the Application came up for hearing on 2nd November 2006, the 1st Respondent withdraw the 1st Notice that was subject of the case before the court and issued a fresh notice which is similar in content and gave Petitioners upto 27th November 2006 to remove their buildings or face similar consequences as the first Notice. The said notice is titled "**Press Notice on the Encroachment on Classified Road Reserves along Road A104 Mlolongo Area and Outering Road**" and was issued by the Minister for Roads and Public Works. The second Petitioner swore an Affidavit in support of the Application. It is dated 6th November 2006. In the Affidavit, the 2nd Petitioner explained how him and the other Petitioners came to own the property now in dispute. He deponed that in 1988, some twelve families had erected structures along the fence of the Directorate of Civil Aviation on Mombasa Road. By a presidential direction, a committee comprising the District Lands Officer, Machakos, the Town Clerk Mavoko County Council, District Planning Officer Machakos were asked to settle the squatters in a safer place. Between 1995 and 2000, a physical development plan was prepared and the squatters were resettled on the now disputed land. The Petitioners amongst others, were allocated the land that remained. The other Petitioners have also sworn Affidavits confirming that they acquired their properties in the same manner as did the 2nd Petitioner. The Petitioners have exhibited title documents and other evidence of ownership – by way of contracts of sale, Allotment letters, Approvals from Mavoko County Council to carry out construction works. on the land in dispute, as DW II and DW III The Petitioners contend that the notice impugned is a violation of their rights under S. 75 of the Constitution which guarantees them right to property and S. 70 which guarantees them right to equal protection of the law. It is their contention that they hold documents of ownership which are issued by the 1st and 2nd Interested Parties who are agencies of the Respondents. It was one of the conditions of the titles that they develop the land which they have complied with. It is the Petitioners case that there is no fraud that has been proved against them in terms of S. 23 of Registration of Titles Act to warrant a cancellation of the titles. Besides, the Petitioners have not been given a forum where the said fraud can be proved. It was further submitted that the Minister for Roads who issued the Notice has not procured the cancellation of titles and he is not the one concerned with the process of Land acquisition. It is urged for the Petitioners that prima facie, they have made out a case for issuance of conservatory orders otherwise their titles will be rendered useless.

In rebuttal Mr. Muiruri Counsel for Respondents, urged that the Petitioners have failed to demonstrate that they have a prima facie case with probability of success, or that they would suffer irreparable harm that cannot be compensated by way of damages.

Mr. Muiruri relied on the Affidavit of Mr. Mohamed Maalim Mahamud dated 15th November 2006. He is the Permanent Secretary in the Ministry of Road & Public Works.

Briefly, the Respondent's case is that the land, the subject matter of this Petition is LR 1504/7 which was compulsorily acquired by the Government pursuant to the Land Acquisition Act Cap 295. The said acquisition process commenced on 30th June 1972 and the registered owner of that land was one Margaret Wamaitha Humphrey who was duly compensated on 11th August 1972. The acquisition involved several other properties. The said properties were acquired for purposes of construction of a road and the Respondent exhibited (Ex 5 a and b) being proceedings of meetings that discussed matters pertaining to construction of roads and is dated 12th May 1971 and maps and structural drawings of the road concerned. There were plans to built a dual carriage way as early as 1972.

It is the Respondents contention that the said land was legally acquired as per provisions of S. 75 of the Constitution and the Respondents have never relinquished the land to anybody else. Mr. Muiruri further submitted that the Government has now accorded a tender to a private company to start reconstruction and rehabilitation of the Machakos Turn off and JKIA Section of Mombasa Road (Anx 6 a) A Contract has been signed for Kshs.4.258 billion (Anx 7) and works were supposed to commence 28 days after 12th September 2006 after the contract was signed. (Exh 8). It is urged for the Respondents that the Respondents hold the said land in trust for the Kenyan Public whose interest is equally provided for under S. 75 of the Constitution.

Counsel questioned the authenticity of the documents which were annexed by the Petitioners as titles as all of them were incomplete leaving out conditions that the Petitioners were to abide by. (Ex DW 3). He submitted that failure to exhibit the proper documents amounts to non disclosure of material facts.

Counsel also questioned the locus of the 1st, 4th and 3rd Petitioners in the matter, and the genuineness of the 2nd Petitioner in the matter. Mr. Muiruri concluded that the Petitioners had not demonstrated that they had a prima facie case and the notice that was issued and which they challenge is lawful.

On the 2nd limb, Counsel argued that the Petitioners had not shown what harm they would suffer but that the Respondent has however shown that Kshs.4.2 billion, tax payers money is at stake if the contract for construction of the Road is not honoured. He urged that the private rights of the Petitioners should not override the public interest.

Mr. Kahonge for the Interested Party did not have anything to say at that stage.

In brief reply, Mr. Ongoya argued that S. 84 (1) of the Constitution gives the court an unfettered jurisdiction to make all manner of orders in order to do justice and that S. 3 of the Constitution makes the Constitution the Supreme Law of the land so that any law governing contracts would have to bow to the Constitutional Provisions. Counsel also argued that the court has an opportunity to stop a threatened violation of fundamental rights and should not wait till it is too late in the day. Counsel said that that the history of the suit land as demonstrated by the Respondent's Counsel is not relevant because no fraud has been proved as against the present title holders, and the Petitioners are prima facie the owners of the land. Counsel denied that there was material non-disclosure by the Petitioners as relates to the titles exhibited by the Petitioners.

The Petitioners seek conservatory orders to maintain the status quo meaning that the notice of

2nd November 2006 should not be effected to demolish the buildings/structures put up by the Petitioners and commence the intended construction of the road on the suit land, pending hearing of the main petition. I believe that the principles applicable to grant of injunctions to maintain the status quo would be applicable. They are that;-

1. The Petitioners should demonstrate that they have a prima facie case with a probability of success;
2. That they will suffer irreparable harm that cannot be compensated in monetary terms;
3. If in doubt, the court to decide the case on balance of convenience.

The Petitioners' claim herein is fortified by their titles issued under Registration of Titles Act, Letters of Allotment and Contracts entered between the parties. S. 23 of the Registration of Titles Act, Cap 281 Laws of Kenya provides as follows:-

“The certificate of title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation in which he is proved to be a party.

2. A certified copy of any registered instrument signed by the Registrar and sealed with his seal of office, shall be received in evidence in the same manner as the original”

From a reading of the above provision a title issued under the Registration of Titles Act is deemed to be absolute and indefeasible to the holder subject to challenge only on grounds of fraud or misrepresentation.

I have had occasion to look at the documents of ownership or evidence of the Petitioners interests exhibited by the Petitioners as 'DW 2' and 'DW 3' . They are copies of title deeds issued by the Land Titles Registry in Nairobi, in respect of Daniel Mbevi, Timothy Musau Mutua and Eustus Mbuba who are the 2nd, 3rd and 10th Petitioners. Included amongst the titles is one for the Catholic Diocese of Machakos who is not a party to this suit and that title should not have been exhibited at all. All the copies of titles that have been exhibited (DW 2 & 3) are incomplete documents. The conditions which should appear on the face of the documents have all been omitted from the documents and only the 1st page and another showing when the title was issued are annexed. Though Mr. Ongoya dismissed it as a simple anomaly, that cannot be the case. The exhibition of incomplete titles must have been intentional so that the court cannot tell whether what is before the court is a genuine title or not it was a mistake, at least one of the Petitioners would have exhibited a complete title. It is important that the conditions upon which a title is issued are known and whether the Petitioners have complied with them. What is exhibited before the court as titles cannot be described as titles issued under Registration of Titles Act. Failure to exhibit proper titles if any amounts to material non disclosure.

Exhibited by the Petitioners as part of annexure 'DW 3' were letters of temporary allotment, letters of transfer from one person selling to another or contracts of sale between two persons and Approved Construction plans issued by 2nd Interested Party. These were in respect of the rest of the Petitioners. They are not titles to land protected under the Registration of Titles Act or any other known statute.

Those documents do not tell the court much since letters of allotment do not confer title to land. For one to have title to land after issuance of letter of allotment and the Petitioner meeting

the conditions stated in the letter of allotment, and actual issuance thereafter of a title document pursuant to provisions of the Act under which the property is held no one can claim to have title to the land. For example, one of the letters of Allotment that is exhibited is dated 8th September 1992 and it is not clear why it has taken so long to procure the title in respect of the said plot. The Petitioners who have exhibited letters of allotment or contracts between them and other parties have not demonstrated that they have any interest in the suit land that can be protected.

The Respondent has adduced evidence that the suit land, was compulsorily acquired from one Margaret W. Humphery as far back as 1972.

The Respondents exhibited the Gazette Notice No. 47/1968, dated 23rd June 1972, the award that was made pursuant to the acquisition and possession taken on 31st July 1972. Annexure MNN 3 shows the various plots that were acquired and how much was paid. Annexures 4, 5 show that the land was acquired for purposes of construction of a road. Having been compulsorily acquired, would the same Government or its agents have the right to allocate the land to private individuals?

S. 75 of the Constitution provides for compulsory acquisition of land but there are conditions attached thereto.

It reads:-

“75 (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied:-

(a) The taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and

(b) The necessity therefore is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and

(c) Provision is made by law applicable to that taking of possession or acquisition for the prompt payment of full compensation.”

It seems from the annexures filed by the Respondents that the correct procedure was adopted in the acquisition of the now disputed land. Once acquired, it was held by the state in trust for the general public. S. 75 (1) of the Constitution stresses the fact the land will be so acquired only for the public good or benefit but not private. The Petitioners now purport to have been allotted the said land which was acquired for the public benefit or interest and they were even issued with titles. The question is whether the Petitioners' rights guaranteed under S. 70 of the Constitution can supplant those of the general Kenyan Public to land that was acquired for the general public? The rights guaranteed under S. 70 of the constitution are also subject to the rights and freedoms of others and the general public.

In the case of COMMISSIONER OF LANDS V COASTAL AQUACULTURE LTD CA 252 OF 1996 THE Court of Appeal observed that any alienation of land contrary to the principle of Public Trust is void and any alienation made contrary to S. 75 of the Constitution is also void. In another case of NIAZ MOHAMED M MOHAMED V COMMISSIONER OF LANDS HCC 423/96 where the Plaintiff's land had been compulsorily acquired for purposes of construction of Nyali Bridge in 1979, Part of the portion acquired was not covered by tarmac and the uncovered portion of land was allocated to other parties to which the Plaintiff objected and the court held that once land was acquired compulsorily, it must be used only for the purpose for which it was acquired. In that instance, it was for construction of a Public Road which is same as the case before this court.

Unlike what Mr. Ongoya submitted that history of the land is not relevant, I find that history is very relevant to enable the court establish whether or not the allotment of the suit land to the Petitioners or issuance of the titles is legal. The fact that agents of the Respondents did the allocation does not confer legality to the titles as the same was unconstitutional.

Contrary to Mr. Ongoya's submissions that the existence of a contract between the parties arises from statute as opposed to the Petitioners' Rights guaranteed in the Constitution, I do observe that indefeasibility of a title is a concept of statute (Registration of Titles Acts) or a statutory provision which is subject to the Constitutional Provisions on public trust and S. 75 of the Constitution.

Are the Petitioners properly before this court to be entitled to the conservatory orders?

The courts' attention was drawn to three affidavits sworn by the 2nd Petitioner, Daniel Mbevi dated 6th November 2006 which supports the petition, another dated 19th October 2006 sworn in support of the Application of 6th July 2006 which was withdrawn and is annexed on another affidavit dated 6th November 2006 in support of this Application. Each of the Affidavits bears a different signature though sworn by the same person. There is indeed no bar to one having different signatures, yet it is a wonder why one would sign documents in support of the same Application in different signatures. We would expect consistency. In my view the signatures do raise doubt as to whether they are made by the same hand.

Mr. Muiruri also challenged the existence of the 1st Petitioner Tulimani Holdings. I do agree with Counsel that no certificate of incorporation showing the directors and articles of Association was exhibited to prove the 1st Petitioner's existence and whether it can bring such Application under Chapter 5 of the Constitution.

Also questioned is the appearance of Mboo Kakuli (4th Petitioner) as a party to this suit. There is exhibited a death certificate of Josephat Mboo Kakuli who died on 4th January 2004. The administrators of his estate are Mary Syombua Mboo and Judy Mungai Mboo. None of them is a petitioner. The deceased has no capacity to bring such an application and would not be entitled to the orders sought. There is no evidence that the names Mboo Kakuli refers to grantees of letters of administration. This is because the deponent of the affidavit in support of the Application and who describes himself as Mboo Kakuli says he acquired the property in the same manner as did the 2nd Petitioner. The person does not say he inherited the property from the deceased. Mr. Ongoya would want the court to believe, that the deponent is the wife of the deceased. To my mind, there is no Petitioner before this court by name of Mboo Kakuli.

The 10th petitioner is Mercy Mbuba suing as the administrator of Eustus Mbuba. No letters of administration were exhibited to show that she is the administrator of the deceased's estate. The 10th Petitioner has therefore not demonstrated that she has the legal capacity to approach the court on behalf of the Estate of the deceased Eustus Mbuba and the court would not grant the orders she seeks at this stage.

The Petitioners exhibited photographs of their buildings which are marked for demolition. The court does note that they must be buildings that cost the Petitioners substantial sums to put up. However the court was not told how much. The Petitioners failed to demonstrate that they will suffer irreparably if the orders sought are not granted.

In any event if we were to consider loss that may be suffered by the few individual Petitioners vis a vis the Kenyann public and the purpose for which the land was set aside, that is construction of a road, the public interest far outweighs that of the Petitioners and the public would suffer a greater loss than the Petitioners. The road is a public utility that will be beneficial to all Kenyans.

Whereas S. 84(1) of the Constitution gives the court an unfettered discretion to grant whatever remedies available in order for the ends of justice to be met, in this case the court has to balance the interests of the Petitioners and the general public before granting the appropriate orders. The justice of this case at this stage requires that the interests of the Petitioners bow to those of the general public.

In sum, I do find that the Petitioners have not demonstrated that the land in question belongs to them, there is material non disclosure of facts by the Petitioners in their failing to exhibit the proper title documents; the court finds involvement of 1st, 2nd, 4th and 10th Petitioners questionable as observed earlier in this ruling and the court will not grant conservatory orders in their favour in any event. The Petitioners have failed to demonstrate that they will suffer irreparably. Even if the Court were to consider the balance of convenience, that convenience tilts in favour of the Respondents. The land in question was acquired compulsorily, tax payers money were expended in compensating the owners of the land and a Ksh.4,2 billion contract for construction of a road is at stake. The money also belongs to the public and the use to which the money will be put is for the benefit of the general public.

For the aforestated reasons the court declines to grant the conservatory orders sought in the Chamber Summons dated 6th October 2006 and the application is dismissed.

The costs to abide the outcome of the petition.

Dated and delivered at Nairobi this 23rd day of November 2006.

R. P. V. WENDOH

JUDGE