



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CONSTITUTIONAL PET. NO. 49 OF 2019

BETWEEN

INNOVATIVE PROPERTIES LIMITED.....PETITIONER

AND

- 1. THE NATIONAL LAND COMMISSION**
- 2. THE CHIEF LAND REGISTRAR**
- 3. THE DIRECTOR OF SURVEY**
- 4. THE ATTORNEY GENERAL**
- 5. THE COUNTY GOVT OF MOMBASA.....RESPONDENTS**

JUDGMENT

PETITIONERS' CASE

1. By a petition dated 20th November, 2019 and filed on 21st November 2019 the Petitioner is seeking the following prayers:

- 1. A declaration that the petitioner's PROPERTY NUMBER MOMBASA/BLOCK XVII/1469 is not part of property land reference number is a private PROPERTY NUMBER MOMBASA/BLOCK XVII/1717**
- 2. A declaration that the amalgamation and alienation of the petitioner's PROPERTY NUMBER MOMBASA/BLOCK XVII/1469 as part of PROPERTY NUMBER MOMBASA/BLOCK XVII/1717 is illegal, unconstitutional, null and void and of no legal force.**
- 3. A declaration that the respondent breached the petitioner's legal and constitutional rights by amalgamating the petitioner's PROPERTY NUMBER MOMBASA/BLOCK XVII/1469 with MOMBASA/BLOCK XVII/1717.**
- 4. A declaration that the certificate of lease issued to the 5th respondent, the County Government of Mombasa by the Government of Kenya over PARCEL NUMBER MOMBASA/BLOCK XVII/1717 is illegal, null and void.**
- 5. An order be and is hereby issued revoking the certificate of lease issued to the 5th respondent, the County Government of Mombasa by the Government of Kenya over PARCEL NUMBER MOMBASA/BLOCK XVII/1717.**
- 6. An order be and is hereby issued revoking the Registry Index Map (RIM) reference number S.B 37/D.11.2.3 (201/1) dated 7th August 2015 was created under File Reference Number CT 12/10/97, folio Number 413 and register no.76 regarding PARCEL NUMBER MOMBASA/BLOCK XVII/1717.**
- 7. An order of permanent injunction be and is hereby issued restraining the respondents herein, their agents, assigns, employees, officers or any person acting on their behalf and/or authority from occupying, trespassing or taking possession of PROPERTY NUMBER MOMBASA/BLOCK XVII/1469.**

8. An order of permanent injunction be and is hereby issued restraining the respondents herein or their employees, agents, assigns, officers or any other person acting and/or authorized by them from interfering with the petitioner's title, leasehold interest, ownership, occupation, possession and use of the PROPERTY NUMBER MOMBASA/BLOCK XVII/1469 or that of the petitioner's agents, tenants, assigns or any other person authorized by the petitioner.

9. An order be and is hereby issued compelling the 1st, 2nd and 3rd respondents to rectify the Registry Index Map so as to reinstate the PROPERTY NUMBER MOMBASA/BLOCK XVII/1469 into the official map.

10. Costs of this petition be borne by the respondent.

11. Any further relief or orders that this Honourable Court shall deem just and fit to grant.

2. The petition is supported by the affidavit of Mohamedraza S. Rashid sworn on 20th November, 2019 and a supplementary affidavit of the same person sworn on 4th November, 2020. The petitioner's case is that it is the registered owner of the leasehold interest in the property known as MOMBASA/BLOCK XVII/1469 measuring 0.2641 hectares situate along Abdel Nassir Road in Mombasa (hereinafter "the suit property"). That the petitioner was granted the lease of the suit property by the defunct Municipal Council of Mombasa for a term of 99 years with effect from 1st May, 1997. That the suit property neighbours a property occupied by a public school known as Shariff Nassir Girls Secondary School.

3. The petitioner avers that before being registered in the name of the petitioner, the suit property was registered in the name of a company known as Samu Limited which company then transferred the suit property to the petitioner on 28th November, 2014. The petitioner has annexed a copy of the certificate of lease dated 24th December, 2014, a copy of the transfer of lease dated 28th November, 2014 and a copy of the map.

4. The petitioner states that sometime in 2009, the Ethics and Anti-Corruption Commission (EACC) sued Samu Limited together with other sister companies known as Azani Holdings Limited, Twakal Holdings Limited and Comen Limited in various civil cases in the High Court of Kenya at Mombasa, to wit, HCC Nos.433 of 2009, 434 of 2009, 435 of 2009, 436 of 2009, 437 of 2009, 438 of 2009, 439 of 2009, 440 of 2009 and 246 of 2010 in which EACC had alleged that the said companies had processed titles to the concerned properties illegally. That the said companies and EACC then engaged in negotiations which resulted into the execution of the settlement Agreement dated 28th February, 2014 between EACC, the said companies and the 5th respondent herein pursuant to which Samu Limited and its sister companies surrendered some properties while the companies were allowed to retain other properties, including the suit property. A copy of the Settlement Agreement has been annexed. That after execution of the said Settlement Agreement, Samu Limited, the previous owner of the suit, property engaged the 5th respondent with a view to having the occupants evicted from the suit property. That on 4th June, 2014 Samu Limited wrote to the 5th respondent and requested for its intervention in securing vacant possession of the suit property. That on 20th November, 2015, the petitioner wrote to the 5th respondent and reminded them of the request for vacant possession but without much success. That in reaction to the request by Samu Limited for vacant possession, the 5th respondent on 21st December, 2015 wrote and indicated that a new title deed had been issued by the National Government to the 5th respondent which subsumed the suit property with the larger neighbouring property belonging to Shariff Nassir Girls Secondary School and resulted in the PROPERTY NUMBER MOMBASA/BLOCK XXVII/1717.

5. It is the petitioner's contention that the respondents, in utter violation of the petitioner's right and interests over the suit property, have issued a new title to the County Government of Mombasa, the 5th respondent herein under TITLE NUMBER MOMBASA/BLOCK XVII/1717. That while creating the 5th respondent's property through Registry Index Map (RIM) Number S.B. 37/D 11.23 (201/1) dated 7th August, 2015 under File Reference Number Ct 12 /10/97, Folio Number 413 and Registered No. 76, the respondents merged the petitioner's property with that of the of the School and Technical Institution to form the 5th respondent's property and the petitioner's property was removed from the map. The petitioner avers that its property was subsumed by the newly created 5th respondent' property and thus the petitioner's property has been extinguished in the map, although the same exists on the ground and the title thereof is still reflecting the same names. That the respondent now contends that the suit property is part of this property to be used by public institutions including a school and a technical institution. The petitioner contends inter alia, that the respondents did not follow the due procedure before extinguishing the petitioner's title and merging it with that of the 5th respondent and that their actions are illegal, null and void and driven by malice and intention to deprive the petitioner of its rightful and legally acquired property in fundamental breach of the petitioner's constitutional rights.

RESPONSES

6. Although all the respondents were served the 1st respondent did not enter appearance. The Attorney General entered appearance for the 2nd, 3rd and 4th respondents and filed a reply to the petition dated 2nd November, 2020. They also filed a notice of claim against the 5th respondent. They aver that they were not privy to the settlement agreements dated 28th February, 2014, adding that the 5th respondent and EACC have deliberately withheld the contents of the said Settlement Agreement from the court as well as other parties to this case. That EACC should also have been sued as a respondent. It is their contention that all the survey of the said property was done in accordance with law and that the amalgamation was done after thorough consultation. The 2nd, 3rd and 4th respondents aver that the 5th respondent has not been candid in its dealings with regard to the suit parcel and that its title was obtained under questionable circumstances that require further investigation. The 2nd, 3rd and 4th respondents urged the court to dismiss the petition based on non-disclosure of material information on the part of the petitioner, EACC and the 5th respondent.

7. The petition is opposed by the 5th respondent by way of Answer to Petition dated 2nd October, 2020 and a replying affidavit of Jimmy Waliaula sworn on 2nd October, 2020. The 5th respondent also filed a preliminary objection dated 30th January, 2020 in which it argues that the court lacks jurisdiction to determine the matter as against the 5th respondent for the reasons that it is only the High Court that can sit as a judicial review court; that the proceedings are in contravention with Sections 13A and 16 of the Government Proceedings Act Cap 40 Laws

of Kenya. The 5th respondent avers that the petitioner has not filed any report by a Land Surveyor to confirm that indeed the petitioner's property was subsumed as a result of the amalgamation and what and how many properties were amalgamated to give rise to MOMBASA/BLOCK XVII/1717. The 5th respondent states that the suit property was subject to recovery suits by EACC as government and/or public property that had been acquired through a corrupt scheme and illegally and that the alleged settlement agreement has no indication of having been signed by EACC and does not show any participation of the 5th respondent in the settlement process and that the settlement was not filed in the High Court wherein the suits were filed, hence is null and void. That the petitioner has not enjoined EACC and Comen Limited and its sister companies and that the petitioner has never taken possession of the property. It is the 5th respondent contention that the petition is full of unsubstantiated allegations, vexatious and an abuse of court process and that the same should be dismissed with costs to the respondents.

SUBMISSIONS

8. The petitioner submitted that the orders sought can be granted in a constitutional petition and relied on Article 23 of the Constitution of Kenya 2010 which provides that the High Court, while exercising its jurisdiction in accordance with Article 165 to hear and determine applications for redress of a denial, violation and infringement of right, can issue an order of judicial review. The petitioner reiterated that its property was subsumed by the 5th respondent's property adding that the petitioner knows where its property is located, but the 5th respondent frustrated the petitioner's efforts to occupy the suit property. It is the petitioner's submission that the settlement agreement had to be filed in the Court of Appeal which was a higher ranking court so that it could be binding on the High Court cases, and was procured with full participation of the 5th respondent who duly signed it, is binding and therefore not available for questioning by the 5th respondent. It is submitted that the settlement agreement and the order adopting it are valid to date and confers proper title to the petitioner, and the respondents have breached the petitioner's rights and their actions are illegal, unconstitutional, null and void. The petitioners urged the court to allow the petition with costs.

9. The Attorney General, on behalf of the 2nd, 3rd and 4th respondents submitted that the contents of the settlement agreement were not and have not been made available to the 2nd, 3rd and 4th respondents and that efforts to engage EACC on this matter have been futile. It is their submission that the petitioner and the 5th respondent have not been candid and that there is evident non-disclosure of vital information. They relied on the case of **Brink's –Mat –v- Elombe & Others (1988) 3ALLER 188; Aviation & Airport Services Workers Union (K) –v- Kenya Airport Authority & Another (2014) eKLR, and Kyangavo –v- Kenya Commercial Bank Limited & Another (2004) 1KLR 126**, and cited the principle that says he who comes to equity must come with clean hands and submitted that disclosure of material information is a duty imposed on every party approaching the courts of law and that failure to comply with it leads to certain consequences. Mr. Nguyo Wachira, learned counsel for the 2nd, 3rd and 4th respondents submitted that the 3rd respondent only acted as per the instructions of the 5th respondent. He urged the court to consider the 2nd, 3rd and 4th respondents claim against the 5th respondent for full indemnity because the property that was created through the new RIM benefitted the 5th respondent to the detriment of the petitioner. Counsel suggested the court considers a remedy authorized by the court under the leadership of the land registrar who has authority and who may be asked to avail a report and produce new maps.

10. It was the 5th respondent's submission that the suit is not before the right forum and accused the petitioner of forum shopping. The 5th respondent reiterated the averments in their response to the petition and submitted that the petitioner has failed to prove that there was any amalgamation and that it failed to show and prove infringement and violations of rights and fundamental freedoms. That its title to the suit property is intact based on the official search and should therefore use the right forum to seek appropriate orders to acquire vacant possession of the suit property if at all the same is legally and rightfully theirs. The 5th respondent submitted that the parcel land known as MOMBASA/BLOCK XVII/1717 stands a High School and other educational institutions, and that if any adverse orders sought by the petitioners herein are issued, the same will occasion the people of Mombasa County a great injustice and the public at large. That the suit by the petitioner is full of unsubstantiated allegations, is vexatious and an abuse of court process and the same should be dismissed with costs.

ANALYSIS AND DETERMINATION

11. I have considered the petition, the responses made and the rival submissions. The issues falling for determination are:

i) Whether the suit is before the right forum.

ii) Whether the petitioner is entitled to the prayers sought in the petition.

12. In its submissions, the 5th respondent contends that the orders sought by the petitioner are judicial review in nature but couched as a claim for infringement and violation of rights and fundamental freedoms thus the constitutional petition filed herein. That since the orders sought are judicial review orders, the same cannot be granted in a constitutional petition. Article 23 of the constitution gives the court authority to uphold and enforce the Bills of Rights. Among the reliefs a court may grant include a declaration of rights, an injunction, a conservatory order, and an order of judicial review. Section 13 of the ELC Act gives this court jurisdiction to deal with the instant petition. It is my finding that the court has the requisite jurisdiction to deal with the matter.

13. In order to be able to appreciate the issues raised in the petition, one has to go through all the paragraphs in the petition, and responses. What I can deduce from the pleadings is that the petitioner is the registered owner of the property known as MOMBASA/BLOCK XVII/1469 while the 5th respondent owns the property known as MOMBASA/BLOCK XVII/1717. I can also deduce from the pleadings that both the petitioner and the 5th respondents hold titles to their respective properties, and the two properties are adjacent to each other. What is not in dispute is that there were previous proceedings both in the High Court and the Court of Appeal which culminated in the Settlement Agreement dated 28th February, 2014 in which some properties were surrendered for public utility while some other properties, including the suit property, MOMBASA/BLOCK XVII/1469 remained as private property. The Settlement Agreement was filed in the Court of Appeal on 12th March, 2014 and was adopted as an order of the court. I have perused the said Settlement Agreement and note that the same as signed by

private companies, the EACC as well as the 5th respondent. Indeed the County Secretary and the Governor signed on behalf of the 5th Respondent. I therefore agree with the petitioners submission that having been adopted by the Court of Appeal in the presence of the counsel for the concerned parties and having been procured with full participation of the 5th respondent who duly signed it, the Settlement Agreement is binding and is not available for questioning in this case. There is no evidence availed to show that the Settlement Agreement has been set aside and I take it that it remains valid.

14. The petitioner's complaint is that its property was subsumed by the 5th Respondent's property. The petitioner has tabled an official map (annexture "A" in the Supplementary Affidavit) which clearly shows the location of the suit property. I have also perused the Deed Plan dated 4th August, 2015 which created the 5th respondent's PROPERTY NUMBER MOMBASA/BLOCK XVII/1717. It is apparent that the said Deed Plan does not contain the suit property. The place previously occupied by the petitioner's PROPERTY MOMBASA/ BLOCK XVII/1469 is now part of the 5th RESPONDENT'S PROPERTY NUMBER MOMBASA/BLOCK XVII/1717. It is therefore clear that the petitioner's property was subsumed at the time the 5th respondent's property was being created. No explanation has been given as to why the petitioner's property was subsumed to be part of the 5th respondent's property. There was no reason given why the petitioner's property was removed from the official map while the petitioner is still holding title. No doubt the respondents' actions are against the law and the constitution and therefore illegal, unconstitutional, null and void.

15. In the petition herein, the petitioner has sought various prayers. Prayer 6 seeks an order seeking the revocation of the registry map index regarding the 5th respondent's property while prayers 7 and 8 are for permanent injunction to issue. Prayer 9 seeks an order compelling the 1st, 2nd and 3rd respondents to rectify the Registry Index Map so as to reinstate the PROPERTY NUMBER MOMBASA/BLOCK XVII/1469 into the official stamp. Section 16 of the Land Registration Act No.3 of 2012 provides for the power to alter boundary lines and to prepare new editions of cadastral maps or any part thereof. Since it is not in dispute that both the petitioner and the 5th respondent hold titles to their respective properties and because the issue of ownership was settled through the settlement agreement, and whereas the 5th respondent's property has subsumed the petitioner's property on the official map, the most appropriate way that this court can remedy the situation is by allowing the petition in terms of prayers 6, 7, 8 and 9 thereof.

16. The upshot is that this court is satisfied that the petitioner has proved its case against the respondents. Accordingly, judgment is entered for the petitioner against the respondents jointly and severally in the terms of prayers 6, 7, 8 and 9 of the petition. Costs of the petition to be borne by the respondents jointly and severally.

17. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 27th day of January, 2021

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant