



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPLICATION NO.412 OF 2003

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF
KENYA

AND

IN THE MATTER OF THE UNIVERSAL DECLARATION OF HUMAN
RIGHTS

AND

IN THE MATTER OF THE INTERNATIONAL COVENANT ON CIVIL AND
POLITICAL RIGHTS

AND

IN THE MATTER OF THE REGISTRATION OF TITLES ACT CAP 281 OF
THE LAWS OF KENYA

AND

IN THE MATTER OF THE TRESPASS ACT CAP 294 OF THE LAWS OF
KENYA

AND

IN THE MATTER OF THE CRIMINAL PROCEDURE CODE CAP 75 LAWS
OF KENYA

AND

IN THE MATTER OF KIAMBU SENIOR PRINCIPAL MAGISTRATE'S

COURT CRIMINAL CASE NO.1139 OF 2003

SAMUEL MURIMI KARANJA & 2 OTHERS.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

This is a Constitutional Reference brought pursuant to the provisions of S.67(1) and 84(3) of the Constitution of Kenya. SAMUEL MURIMI KARANJA, JULIUS NJUGUNA NJERI, and JOHN MBUGUA MICHAEL were charged in the Senior Resident Magistrates Court Kiambu in criminal case No.1139 of 2003 with Trespass contrary to Section 3(1) of the Trespass Act Cap 294 Laws of Kenya. They were arrested without a warrant on 20th May, 2003 and detained in custody at Kiambu Police Station until the next day when they were arraigned in court. The particulars of the charge stated that on the 20th May, 2003 at about 10 p.m. at Village Inn in Kiambu within central province trespassed upon a Government land with intent to annoy. The charge sheet indicates that the complainant is the Republic of

Kenya through the Kenya Police Kiambu and indicates that Mr. William Kariuki the District Forest Officer, Patrick Serem and Bernard both Administration Police as witnesses.

The Applicants were arrested while working on a parcel of land registered as L.R No.21179 situated in Kiambu Municipality which they allege belongs to Messrs Wibeso Investments Ltd where they had been employed to work by one Bedan Mbugua the Company's Managing Director. They allege that they were working within the boundaries of the stated parcel of land as servants of and with the full authority of the owner.

They pleaded with the police to release them since they were on private land with the authority of the owner and not on forest land but the police refused to listen. The acts of the police were unlawful and draconian.

When the matter came up for hearing before the Senior Resident Magistrate on 21st May, 2003 counsel for the applicants raised preliminary objections on points of law and in his lengthy submissions, urged the trial magistrate to refer the issues raised to this court for interpretation in so far as the same touched on the Constitution of Kenya. By his ruling delivered on 21st May 2003 the learned trial magistrate held that the questions raised are substantive and not frivolous and vexatious. He stayed the proceedings and referred the matter under Section 67 of the Constitution to this constitutional court for interpretation and determination of the constitutional issues raised therein.

The defence counsel was ordered by the magistrate to file this application in the High Court within seven days and to serve the Attorney General within this period. The application was filed on 27th May, 2003 and served on the Attorney General as ordered. Having perused this application we are satisfied it raises weighty constitutional issues in respect to protection of property, fundamental rights of a person and the freedom of the individual.

In this application, the Applicants have made reference to Chapter V of the Constitution of Kenya, the Registration of Titles Act Cap 281, Laws of Kenya, Trespass Act Cap 294, Laws of Kenya, The Universal Declaration of Human Rights, and the International Covenant of Civil and Political Rights all of which they have extensively quoted and especially the Sections touching on personal liberty and Fundamental Rights and is supported by the Affidavits of the Applicants and that of Bedan Mbugua the Managing Director of WIBESO INVESTMENTS LTD, the registered proprietor of L.R. No.21179.

The Applicants seek determination of the following issues:-

1. Whether it is the duty of the Government and its agents or servants to respect, protect and observe the freedoms of the governed
2. Whether the Constitution of Kenya provides a contract by which a political power of the state stands security for the sanctity and inviolability of the rights of citizens.
3. Whether the acts of interfering with private land where a person is a proprietor is undemocratic, unconstitutional and an attempt by those individuals propagating and/or using the back door to turn Kenya into a communist state.
4. Whether the fundamental guarantee to ownership to property under Section 75 of the Constitution of Kenya and Section 23 and 24 of the Registration of Titles Act Cap.281 Laws of Kenya are meaningless and nothing more than rhetorical nonsense.
5. Whether it is constitutional for the accused to be molested and prosecuted for working on privately owned land.
6. Whether the Constitution of Kenya guarantees the individual to have the right to acquire, hold and dispose off property.

7. Whether the Constitution of Kenya guarantees that no property moveable or immovable including interests shall be taken possession of or acquired unless the law provides for prompt compensation for the same.
8. Whether any acts of interests, interfering with or forcefully taking possession of any registered property by any person or authority violates the constitutional prohibition and an impairment of the fundamental right guaranteed for such property
9. Whether in law, the duty, powers and authority to deal with land matters under the RTA Cap 281 vests the jurisdiction with the minister or any other person other than the Commissioner of Lands.
10. Whether any attempt by any person or authority of attempting to or extinguishments of the right accruing by virtue of registration of the grant other than by law established shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges the rights conferred by Section 75 of the Constitution of Kenya.
11. Whether constitutionally a person should or can be deprived of liberty or property without due process of law or use without the registered proprietor having been given just compensation.
12. Whether any public servant or authority has jurisdiction and/or authority to restrain a proprietor of a registered property from the use thereof and/or to deprive that person of that said property without authority of law.
13. Whether the registered proprietor of the said parcel of land has suffered a legal injury by reason of violation of his constitutional rights or legally protected interests by the impugned action of the police and their comrades.
14. Whether the government is in contract with its citizens in exercise of its executive powers whether the exercise of those powers is subject to the constitution.
15. Whether there is a law providing for the arrest, detention and Prosecution of a person working as a servant on land belonging to its registered proprietor.
16. Whether alienated land whose grant has been issued by the President and is registered as private property is under the control of a forester.
17. Whether the acts of arresting detaining and prosecuting of the accused is illegal, unjust, vindictive and an abuse of their liberty.
18. Whether it is constitutional guarantee that no person shall be subjected to any judicial interrogation or placed under arrest, or be in any way deprived of his personal liberty, save as provided by law.
19. Whether it is a violation of a person's personal liberty if that person is placed under arrest for an act which does not constitute a crime or offence.
20. Whether the detention of the accused was unlawful and Unconstitutional. 21. Whether the charge against the accused is null and void.
22. Whether Kenya is a democratic country governed by a rule of law.
23. Whether the parcel of land known as L.R. No.21179 belongs to WIBESO INVESTMENTS LIMITED as its registered proprietor.
24. Whether the prosecuting authority acted mala fides and intentionally violated the legal and constitutional rights of the Applicants and the registered proprietor of the said land.

25. Whether the registered proprietor's lease of 99 years with effect From 1st April 1991 can be compulsorily acquired before expiry of the lease without a fair compensation.
26. Whether the constitution and other statutes stipulate that one can only arrest a person who has committed a criminal offence.
27. Whether there was any duty or legal basis in the arresting officer or prosecuting officer or complaining person for detaining the Applicants herein.
28. Whether the prosecution in Kiambu SPMC Criminal Case No.1139 of 2003 violates the Applicants fundamental rights and freedoms as enshrined in Chapter V of the Constitution of Kenya. (Section 70-83 inclusive).
29. Whether the prosecution aforesaid violates the Applicants fundamental rights under Section 77(4) of the Constitution
30. Whether the proceedings in Kiambu aforesaid violate the sanctity of private property as enshrined under Section 75 of the Constitution.
31. Whether a valid title issued under the provisions of the Registration of Titles Act 281 is indefeasible.
32. Whether a holder of a title or his legal agent and servants can be a trespasser in the title holder's land.
33. Whether persons working on a private land with full authority of the registered owner thereof can be accused of trespass.
34. Whether persons can be charged with the offence of trespass to land under Section 3(1) of the Trespass Act without a complaint of the registered owner.
35. Whether the criminal proceedings aforesaid interfere with the constitutional right of the registered owner of L.R. NO.21179 including the violation of protection against search and entry on his property as provided by Section 76 of the Constitution.
36. Whether an occupier as defined by Section 2 of the Trespass Act Cap 294 can be accused of an offence under Section 3(1) of the said Act.

Secondly the Applicants seek or urge the court to make the following declarations/orders:

- i) A Declaration that the institution, maintenance and prosecution of the Applicants in Kiambu SPMC Criminal Case No.1139 of 2003 amounts to violation of their rights to liberty, freedom and subjection to inhuman and degrading treatment as enshrined under the Constitution of Kenya.
- ii) A Declaration that an occupier of land as defined by Section 2 of the Trespass Act is incapable of committing an offence under Section 3(1) of the Act.
- iii) A Declaration that the Applicants are occupiers within the meaning of Section 2 of the Trespass Act and are therefore incapable of committing an offence under Section 3(1) of the Trespass Act.
- iv) A Declaration that a person found on private land with the consent of the occupier thereof as defined by Section 2 of the Trespass Act is incapable of trespass thereon.
- v) A Declaration that a holder of a title issued under the Registration of Titles Act and or his agents are incapable of committing the offence of trespass on the said land.

- vi) A Declaration that Government land is NOT private land within the definition of Section 2 of the Trespass Act on which an offence under Section 3(1) of cap 294 can be committed.
- vii) A Declaration that the charge at Kiambu SPMC Criminal Case No.1139 of 2003 of trespass on government land contravenes the applicant's rights under Section 77 of the constitution which are to the effect that no person shall be guilty of an offence on account of an act or omission that did not at the time it took place constitute an offence and no person shall be convicted of an offence unless it is an offence defined in a written law.
- viii) A Declaration that the prosecution of the Applicants in Kiambu SPMC Criminal Case No.1139 of 2003 amounts to violation of the Applicant's rights to freedom of conscience as enshrined in Section 78 of the Constitution.
- ix) A Declaration that an offence of trespass is unmaintainable in the absence of a complaint by the occupier of land on which any person is alleged to have trespassed.
- x) A Declaration that the prosecution of the applicants as aforesaid, who are agents of WIBESO INVESTMENTS LIMITED whose title under the Registration of Titles Act is indefeasible violates the rights of WIBESO INVESTMENTS LIMITED against deprivation of property and against arbitrary entry and search as provided under Sections 75 and 76 of the Constitution.
- xi) A Declaration that the prosecution of the applicants as aforesaid is illegal and malicious.
- xii) A Declaration that the charge sheet in Kiambu SPMC Criminal Case No.1139 of 2003 aforesaid is unconstitutional, null and void.
- xiii) An Order that proceedings in Kiambu SPMC Criminal Case No.1139 of 2003 be stayed pending the hearing and final determination of this Application.
- xiv) An Order quashing and or terminating the proceedings in Kiambu SPMC Criminal Case No.1139 of 2003.
- xv) An Order prohibiting the Respondent, his agents and or servants or any other person or authority from entering, alienating and or interfering with the quiet enjoyment of L.R. No.21179 by the Applicants and Wibeso Investments Limited.
- xvi) An Order that the duty of control of land, land survey, land registration and recorder of Titles Department is vested with the Commissioner of Lands and that duty cannot be interfered with by any other person or authority.
- xvii) A Declaration that land is granted by the President of the Republic of Kenya.
- xviii) A Declaration that once the President has granted land and the grant registered, the registered proprietor mentioned therein is entitled to all the rights and privileges including quiet enjoyment without interference thereof save as may be provided under the law.
- xix) A Declaration that the grants made by the President are genuine, valid, authentic proper and not questionable in any way save for errors or omissions and any other procedure authorized by law.
- xx) A Declaration that a grant which has duly been registered and/or a title deed has been issued is conclusive and the holder of such title deed constitutionally shall be held to be the proprietor of the land mentioned in that title deed to the exclusion of any other interest, claims or consideration whatsoever save for encumbrances provided under the law.

xxi) An Order that under the Registration of Titles Act Cap 281 Laws of Kenya the Minister is vested with duties provided under Section 86 to the exclusion of any other person and no other duty thereof.

xxii) An Order that a genuine grant made to a person by the President and which has been signed by the Commissioner of Lands and has been registered by the Registrar of Titles shall be valid and shall be taken by all courts as conclusive evidence of proprietorship of that land and shall unless in case of fraud be taken to be absolute and indefeasible.

xxiii) An Order that there is no constitutional or statutory provision for banning the alienation or allocation of land and the Commissioner of Lands is entitled to issue leases and extensions of such leases as he may determine from time to time.

xxiv) An Order that where a grant has been made to a person by the President, and which is signed genuinely by the Commissioner of Lands and which has been registered by the Registrar of Titles and a certificate of title has been issued, that title deed shall be regular and valid for all intents and purposes and the person mentioned therein as the registered proprietor shall be entitled to the possession, use, and shall deal with that land without restriction, interference, obstruction and/or meddling by any other person or authority save as may be provided under the law in force.

xxv) An Order that where there exists statutory powers for a person to grant a lease or an exemption or employment for a term and a right or privilege accrues therefrom, that right shall not be terminated or revoked or interfered with in any manner until the term so granted and/or stated expires, save as may be specifically provided therein.

xxvi) An Order that the arrest, prosecution and the interference with the applicants while remaining or working on the land registered as L.R. NO.21179 was without legal or just cause and is unlawful, unconstitutional, torturous, oppressive and an abuse of the legal process.

xxvii) An Order that the property registered as L.R. No.21179 is a private property owned by Messrs Wibeso Investments Limited for 99 years with effect from 1st April 1991 and since there is no complaint of trespass by the owner thereof, then the charge or offence of trespass is invalid, unconstitutional null and void.

xxviii) An Order that the Magistrate in Kiambu SPMC No.1139 of 2003 is hereby ordered to reject the charge forthwith since it does not disclose a criminal offence.

xxix) An Order that the Applicants herein be set at liberty.

xxx) That the Respondent do pay the costs of this application.

ON THE GROUND THAT:-

(a) The acts complained of herein do not only affect the applicants alone but also violate the constitutional rights of the registered proprietor of the property known as L.R.No.21179.

(b) Unless the High Court determines this matter once and for all the applicants herein and the registered proprietors of the property known as L.R.No.21179 shall never enjoy their constitutional rights, human rights and legal rights to the use of the said property.

(c) On or about 20th May, 2003 WIBESO INVESTMENTS LIMITED the registered owner of L.R.No.21179 situated in South of Kiambu Municipality, instructed the Applicants to undertake work on the said land.

(d) The Applicants were found working thereon where they were arrested and charged with

trespass in Kiambu Senior Principal Magistrate's Court in Criminal Case No.1139 of 2003.

(e) The Applicants were charged as aforesaid under Section 3(1) of the Trespass Act Cap 294 Laws of Kenya.

(f) The Applicants were at all material times on L.R. No.21179 with full authority, consent and permission of the registered proprietor or owner.

(g) The offence that the Applicants have been charged with is unmaintainable against them for the following reasons:-

i) The Applicants being agents of proprietor or owner are occupiers within the meaning of Section 2 of the Trespass Act Cap.294 are incapable of committing an offence under Section 3(1) of Cap.294.

ii) An occupier as defined by Cap.294 is incapable of committing an offence under section 3(1) of Cap.294.

iii) An offence under Section 3(1) of Cap.294 can only be committed without consent of the occupier of land.

iv) The Applicants are not only occupiers by right but also they were in the land in which they are alleged to have trespassed with authority and consent of the registered owner thereof.

(h) The Applicants' prosecution as aforesaid is arbitrary, malicious, degrading, harassing and mala fide for purposes of interfering with the fundamental rights of personal liberty and right against inhuman and degrading treatment.

(i) The Applicants' prosecution as agents of WIBESO INVESTMENTS LIMITED interferes with the sanctity of property and WIBESO INVESTMENTS LIMITED right against arbitrary entry and search.

(j) The WIBESO INVESTMENTS LIMITED is the only capable complainant as the Applicants are said to have trespassed on the former's land and yet it has not made any complaint.

(k) Under Section 65, 67 and 84 of the constitution this Honourable Court has jurisdiction power and authority to check and supervise subordinate courts and to issue any orders to ensure justice is administered in these courts and to uphold the constitutional rights of the Applicants.

(l) The arrest and prosecution of the Applicants without legal or just cause is unconstitutional torturous and oppressive.

(m) A Magistrate has no duty or jurisdiction to preside over unconstitutional or illegal issues.

(n) No person shall be arrested or detained for any purpose other than bringing them to trial on acts done by them which at that particular time constitute a criminal offence.

(o) The presence of the Accused in the land registered as L.R.No. 21179 belonging to and with the authority of Messrs Wibeso Investments Limited who are the registered proprietor is not and did not constitute a criminal offence.

(p) The grant number IR 67273 was granted to Messrs Wibeso Investments Limited by the President of the Republic of Kenya and as such a grant by the President is valid for all intents and purposes save where it is made under fraud.

(q) No person or authority is entitled to interfere with registered land and/or the proprietors' agents or servants including that no harassment of any nature shall be meted to them in any way.

(r) Messrs Wibeso Investments Limited, the registered proprietor of L.R. No.21179 are at liberty and have the sole discretion of employing any person of their choice to work in or on their premises without interference to them by any other person or authority.

(s) If the proceedings before the magistrate's court were allowed to continue, it would be illegal, unconstitutional, against the Universal Declaration of Human Rights and would cause the Applicants substantial injustice.

(t) The right, duty, and jurisdiction to deal, alienate, allocate, survey, plan and registration of land under the Registration of Titles Act Cap 281 Laws of Kenya or the land registered under the said Act vest with the Commissioner of Lands and not any other person or authority.

(u) The Applicants herein entered, were or remained upon and were cultivating or tilling L.R. No.21179 as servants and with full consent and instruction of the registered proprietor.

(v) The suit premises is private land belonging to Messrs Wibeso Investments Limited as defined under Section 2(a) of the Trespass Act Cap 294 Laws of Kenya and it is not forest area or railway land.

(w) Where a person enjoys a right accruing from a term granted and where there is not clearly stated or provided statutory provision for termination whether that person shall enjoy that right so granted until the expiry of the period so stated and where the term or period is interfered with or terminated or revoked or cancelled before that expiry date a fair and prompt compensation shall be paid.

Having taken time to examine and evaluate the Applicants' Application and pleadings, we are satisfied that they do raise fundamental constitutional and legal issues for determination by this court.

After a keen consideration of all the issues framed therein for determination from number 1 to 36 it is evident that they narrow down to the following issues:-

(a) Whether the constitution of Kenya guarantees and provides for the protection of the fundamental rights of the individual liberty and the rights to property.

(b) Whether once a certificate of title has been issued, the Registration of Titles Act Cap 281 guarantees the title to be valid and indefeasible save for fraud and misrepresentation.

(c) Whether the Constitution of Kenya guarantees the individual protection of law i.e. an individual cannot be arbitrarily arrested without just cause and cannot be prosecuted for what does not constitute an offence.

Once these issues have been determined, they will be able to dispose off the application as the genesis of the matter is the ownership of the suit property, the arrest and prosecution of the applicants.

(d) Whether the grant under the Registration of Titles Act Cap 281 Laws of Kenya is made by the President and whether his powers to grant are questionable by any other person or authority.

(e) Whether Wibeso Investments Limited are the registered proprietors of all that parcel of land registered as L.R. No.21179 situated in Kiambu District.

(f) Whether the Applicants were arrested while working on the Land Reference No.21179 and whether the arrest detention and charge was legal and justified.

The Reference came up for hearing on 7th October, 2003 and all the counsels were present. The appearances were as follows: Mr. Kariuki Muigua for the 1st Applicant. Miss Mugo for the 2nd Applicant and Mr. Kamau Karori for the 3rd Applicant while the Attorney General was represented by Miss Nyamosi, a state counsel. The court pointed out to Miss Nyamosi that the Attorney General had not filed any affidavit but in response she stated that the issues of facts raised in the application are not in dispute and that she had a right to reply on points of law raised therein without filing an affidavit. She was granted leave to proceed.

Mr. Muigua counsel for the 1st Applicant submitted that the Constitution of Kenya protects the fundamental rights, freedoms, and the right to ownership of property and cited Sections 60(1), 67(1) 70(1) 72, 75, 74, 77, 84(1) 76 and 3 and 123 (8) of the constitution and rules 3, 8 and 11 including Section 23 of the Registration of Titles Act Cap 281 Laws of Kenya and Section 3(1) of the Trespass Act Cap 294 Laws of Kenya. Mr. Muigua relied heavily on his application and the affidavits of Bedan Mbugua and that of the 1st Applicant which set out the background of the case. Mr. Muigua submitted that land issues and its protection is a world wide concern and referred the court to various articles related to land protection and its being a highly emotive subject. He produced a certified copy of the Grant registered as I.R. No.67273/1 in respect of L.R.21179 showing that the registered proprietor is Wibeso Investments Limited and that Bedan Mbugua had employed the Applicants to work on the suit property. His argument was that an offence of Trespass as defined under Section 2 of the Trespass Act Cap 294 and more particularly Section 3(1) for which the Applicants were charged cannot stand in law and that the Applicants were incapable of committing a criminal offence of trespass for being found working on the suit property with the authority of the registered owner. Mr. Muigua stated that this was a violation of fundamental and constitutional rights of the Applicants.

The arresting of the Applicants was an act of interference with the ownership of the suit land and was in violation of the right to property. The arrest of the Applicants bundling them into a Land Rover and detention in Kiambu Police Station cells and the subsequent arraignment before the Senior Resident Magistrate Court, Kiambu charged under Criminal Case No.1139 of 2003 was unconstitutional and subjected the Applicants to degrading punishment contrary to Section 74 of the Constitution of Kenya.

Miss Mugo counsel for the 2nd Applicant adopted the submissions of Mr. Muigua and went further to submit that it was necessary for the Applicants to have the matter decided by a constitutional court since the acts complained of were in total violation of the constitution which is the supreme law. She pointed out that Kenya is an open and democratic society and a member of the United Nations African Unity and a subscriber to the Universal Declaration of Human Rights to which it is a signatory. She stated that it would be wrong to violate the fundamental rights and rights to property as this would be sending band signals and in her view the Government should not be allowed to go the Zimbabwe way. In Zimbabwe a law was passed legitimizing the seizure of white owned farms by President Robert Mugabe regardless of the provisions in the constitution which protects deprivation of property, or resort to tribal clashes which are all caused by land disputes. People should not be arrested for a non-existing offence and even the Government should not be allowed to trespass on private property. This having taken place the land proprietor and the Applicants who were his servants were aggrieved and hence this application for orders and declarations as sought therein.

Mr. Kamau Karori counsel for the 3rd Applicant also associated himself with the submission by counsel for the 1st and 2nd Applicants and reiterated that the 3rd Applicants rights under Section 70(a) and (c) of the Constitution were violated. The particulars of the charge were that the Applicants had violated on Government land. He submitted that there cannot be an act of trespass on government land as it did not fall under private land within the definition of trespass under Section 2 of the Trespass Act cap 294. He submitted that it was unlawful for the Applicants to be arrested and detained in police cells and the subsequent arraignment in a court of law as they were actively working for lawful gain on private land with the authority of the owner.

He submitted that the Grant to the land was made by the President and a title deed issued under Section 23 of the Registration of Titles Act Cap 281, is conclusive evidence of ownership and is indefeasible. He urged this constitutional court to grant the orders sought and issue declarations which would give sanctity to a title deed. He submitted that it had become fashionable for every person to purport to repossess land and to cancel title deeds under all manner of guises. He also argued that a validly registered title cannot be interfered with except where there is evidence of fraud or misrepresentation which is attributed to the holder of the title.

Miss Nyamosi a state counsel who appeared for the Attorney General conceded that the Attorney General was not contesting the ownership of land parcel L.R. No.21179 as the grant was produced showing that the registered proprietor was Wibeso Investments Limited. But she argued that the issues raised before this court should not have been entertained as they were premature as the same ought to have been raised at the trial before the magistrate where the Applicants should have produced the title to the suit land in their evidence and get acquittal. She further submitted that the state acted correctly as the police are allowed to arrest any person based on reasonable suspicion. She referred the court to Section 72 (1) of the Constitution.

With due respect to counsel we do not agree with her on this point because the applicants did not come to this court seeking acquittal but they sought orders and declarations of their fundamental rights and their rights to property ownership. Even if the case continued and they were acquitted it was still open to them to apply for declarations of their rights before a constitutional court.

A brief history reveals that land issues are emotive and have always been the source of a great deal of controversy in Kenya and the world in general. It is noteworthy that once land issues are mishandled, the results are often devastating e.g. Mau Mau uprising is a good example in point, the tribal clashes in the Rift Valley and Coast Province. It is also a source of major problems in countries like Zimbabwe, the Sudan, South Africa, the Middle East, Ethiopia, and Eritrea conflict etc. For those reasons the courts are duty bound to interpret the law as relates to property ownership and correct situations by enforcing property rights.

Kenya most disputes end up in causing murder, fraud, and most civil cases congesting our courts in one way or another relate to land issues and since land is not elastic, the demand for it shall continue to increase as the population and poverty escalate. Land in Kenya is not free for all as its allocation and grant is regulated by the law. As evidenced by this constitutional reference, the core dispute and centre of the controversy boils down to the ownership of the parcel of land upon which the trespass was committed. For the Applicants to succeed they only require to prove ownership of the land registered as L.R. No.21179 (I.R. 67273/1) and once this point is determined, the balance of the application to be dealt with will be minimal.

This being a constitutional reference for declaration and for orders intended to determine the fundamental rights, property rights and the protection of law in respect to the Applicants, the initial step is for the constitutional court to examine the law governing the land in the trespass contention. The land upon which the trespass is alleged to have been committed is as indicated in the Grant registered under the Registration of Titles Act Cap 281 Laws of Kenya whose purpose is to regulate the alienation, grant, registration transfer and the appointment of officers.

Mr. Muigua produced a certificate copy of the Grant for the land in dispute to the court and after examination, if the court was satisfied that the grant was genuine and valid and if the Attorney General was not disputing the validity of the said grant except for the assumption that the land was irregularly allocated or something to that effect, then it is this state of affairs that require this court to examine the legal process required to be undertaken under the Registration of Titles Act for the court to be able to determine this case.

The commencement date of the Registration of Titles Act is on the 20th January, 1920 save for Part III.

All land belongs to the Government and it is the Government which alienates, grants, leases and

licences any parcel to the individual or company and therefore the purpose of this Act is to control and to regulate all transactions carried out under the Registration of Titles Act Cap 281 Laws of Kenya. Coming back to the ownership of the land in question, it has a valid grant which is also validly registered. This grant was made by the President of the Republic of Kenya to Wibeso Investments Limited for a term of 99 years with effect from 1st April, 1991 and was registered on 26th October, 1995 as IR 67273/1 and measures 25 hectares within Kiambu District. Looking carefully at the provisions of the Registration of Titles Act Cap 281, its principal enforcer is the President and all other officials named therein are only functional facilitators and are three in number and all are appointed by the President himself.

Firstly the Registration of Titles act Cap 281 provides for the duties of the President as to have under his hand and seal powers to divide Kenya into districts, appoint the Principal Registrar and other Registrars and to appoint the Commissioner of Lands under Section 5 which states thus:-

“The President shall appoint an officer to be styled the Commissioner of Lands, who shall be placed in control of Land, Land Surveys, Land Registration and Recorder of Titles Department, and who shall be ex officio Registrar General under this Act.”

There is no doubt that the powers placed on the Commissioner by the President under Section 5 above are not open to sharing and the Act makes the Commissioner only subordinate to the President and not to any other person for the purpose of enforcing the Registration of Titles Act Cap 281 Laws of Kenya.

The counsels referred the court to Sections 20, 21 and 23 of the Registration of Titles Act Cap 281 which we find appropriate to reproduce in order to appreciate the issues involved in this matter. They state as follows:-

“Section “20”. After the commencement of this Act and subject to the provisions of subsection 2 of section 1 all land which is comprised in any grant issued after the commencement of this Act shall be subject to this Act, and shall not be capable of being transferred, transmitted, mortgaged, charged or otherwise dealt with except in accordance with the provisions of this Act, and an attempt to transfer, transmit, mortgage, charge or otherwise deal with, except as so provided, shall be void and of no effect.”

“21” (1) Grants shall be issued in form B(1) or form B(2) in the First Schedule, as the case may be, and every grant in addition to proper words of description, shall contain a diagram of the land on such scale as the Commissioner of Lands may from time to time direct

(2) Every grant shall be delivered out of the Land Office to the Registrar of the Registration District in which the land is situated, who shall, on receiving the prescribed fee-

(a) register the grant in manner hereinafter directed

(b) deliver the grant to the Commissioner of Lands for issue to the guarantee ; and

(c) file a photostat copy of the grant in the register

“23” (1) 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 to which he is proved to be party”.

The issue of land ownership is volatile, it is for this reason that holders of valid titles to land must be protected by the law, the government and this court. The Court of appeal of Kenya has occasionally dealt with this point and therefore once the court is faced with the claim of a valid title issued by the government, it has no obligation to inquire into the reasons or manner in which the title was obtained, unless of course there is clear evidence of fraud against the holder of the title. Courts must shy away from usurping the authority of the grantor or right to question title deeds issued by the President, except in clear cases of fraud or where the title was not issued in accordance with the Governing Act. This strict observance of the property rights of a title holder is necessary to ensure certainty in transactions regarding land.

The Court of Appeal sitting in Nairobi in Civil Application No. 60 of 1997: DR. JOSEPH ARAP NG'OK V. JUSTICE MOIJO OLE KEIWUA and 4 OTHERS (unreported) referring to Cap 281 Laws of Kenya said in their ruling:-

“Section 23(1) of the Act 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.”

And in CIVIL APPEAL NO.185 OF 1997: NAIROBI PERMANENT MARKET SOCIETY AND 11 OTHERS –VERSUS- SALIMA ENTERPRISES & 2 OTHERS (unreported) the learned Judges of Appeal OMOLO, PALL AND BOSIRE (JJA) referring to Cap 281 had this to say:-

“The suit land is admittedly under the operation of Registration of Titles Act. Under Section 23 of that Act a certificate of title issued by the Registrar to any purchaser of land is to be taken by all. Courts as conclusive evidence that the person named therein as the proprietor of the land is the absolute and indefeasible owner thereof and his title is not subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party. The company as the registered proprietor of the suit land therefore is the absolute and indefeasible owner thereof”.

There are numerous authorities from the decisions of the Court of Appeal on the indefeasibility of a title deed.

We find that Sections 20, 21 and 22 are for registration process only and the Act does not lay down the allocation process – which takes us back to the contents of the grant.

The words of the Grant start with a Notice to the whole world as follows:

Know all men by these presents----- the President and Commander in Chief of the Republic of Kenya on behalf of----- Under and by virtue of the powers vested in him hereby grants unto-----

The Grant is in Form B in the First Schedule as provided by Section 21, the above words of the grant are clear that the Grant accords the title holder a right in rem in that it is a notice to the whole world by the President that in exercise of the powers vested in him and on behalf of the Government of Kenya he has on certain consideration made a Grant of a parcel of land to the person or company named in the Grant.

We find that under the Registration of Titles Act it is the President himself and on behalf of the Government who after satisfying himself that certain considerations have been met grants the land. On examining the execution of the title, it is signed by the Commissioner by order of the President and is witnessed by the Registrar of Titles who is another Presidential appointee. This shows the importance of a

grant.

The President referred to in the Grant is the Head of State and this does not mean a particular individual but it refers to any person holding the office of the President from time to time since that office is never in vacuum.

The Executive Powers of the President are derived from Section 23 of the Constitution which states that the President is the Chief Executive of the Government. While he is making the grant, he uses both his executive and political powers and his acts bind the government. These acts can only be questioned or challenged for flouting the law or on allegations of bad faith. Since the exercise of power and actions of the President amount to conduct of an organ of the Government, any acts done therefore binds the government and every other executive political organ based on the fact that the President and all the Ministers swear to uphold and defend the constitution as the Supreme Law of the land collectively.

In our view, we find that once the President has made a Grant to a person and the grant has been validly registered and a genuine title issued in accordance with the laid down lawful procedure then the President and all other functionaries become functus officio to that extent save for the conditions and future entries of the said title. The grant by the President has the overriding effect over anything previously done or omitted from having been done on that parcel of land and that the President's decision to grant is absolute. It cannot be faulted or challenged. This is because any suit resulting out of such exercise of power, the claim will have relief implications and that is prohibited under Section 14 of the Constitution of Kenya which states that:-

14. (1) NO Criminal proceedings shall be instituted or continue against the President while he holds office, or against any person while he is exercising the functions of the Office of President.

(2) NO Civil proceedings in which relief is claimed in respect of anything done or omitted to be done shall be instituted or continued against the President while he holds office or against any person while he is exercising the functions of the Office of President.”

The only circumstances under which the court can entertain proceedings resulting from the President's actions will be on the allegations of bad faith and in the exercise of its powers under Section 123(8) of the Constitution.

The strictness of the Registration of Titles Act Cap 281 demonstrates the spirit of the legislature which is intended to have complete sanctity of the Title. That is why Section 23 provides that once a certificate has been issued to the owner thereof, it is conclusive proof of ownership and the title is indefeasible.

It is from this Title that the owner accrues constitutional rights to that property under Section 75 of the Constitution which states:

“(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 conditions as contained therein are satisfied.”

The sanctity of a Title is very very important as it regulates nearly all ways of our life be it in farming, residences, industries, trade etc including borrowing. For instance, the economy of a country is fuelled by business transactions which are financed by banks. In order for the banks to give money to the borrower they require securities. The most acceptable security to all our banks is immovable property such as land, buildings etc bringing us to the fact that the financial institutions lend money for business and invest on title deeds which they hold as sacred and indefeasible. By the fact that it is the President who makes the grant, that alone provides confidence and trust of the sanctity of the Title to the financial institutions and both local and foreign investors. The banks can redeem their loan by disposing off the security and the

investor is encouraged to invest as much as possible on land.

If the Title deed is therefore allowed to lose its sanctity, it would become a worthless paper and no bank would accept it as security which would result to the actual collapse of nearly all the economic transactions. That would be bad for the country. It is also instructive that the legal capacity to borrow is in the main based on the security offered. The financial industry is controlled and supervised by the government through Central Bank of Kenya which demands that security be given for a proposed advance of loan even though the borrower's financial position may appear to be sound. Since in Kenya the recommended security for loans is immovable property meaning land, it becomes crucial for the court to make the correct declaration that gives a grant or title the legal binding effect.

We find that the Kenyan currency is guaranteed by the government as legal tender. A title deed in our view should have even stronger value on the basis of the fact the currency is issued by the Central Bank of Kenya through the Governor of the Central Bank and the Permanent Secretary in the Treasury, whereas the Title is issued by the President, the Head of State hence its sanctity should neither be questionable nor controvertible once issued.

For an individual who wishes to purchase land, the onus is on him to establish the legal status and the ownership. The laid down legal procedure under the Act is by making a formal official search to the Registrar of Titles who upon receiving the prescribed fees who issues a search certificate which confirms a clean title.

It confirms the ownership and the extent of the encumbrances thereof if any. There is nowhere else to search. This confirmation is based on the sanctity of the Title which should not be abused.

Coming back to the applicants' Application the police found the applicants working on a piece of land where they were arrested, detained in custody and charged them before the court with an offence of trespass on government land.

The Attorney General is the Chief advisor to the Government and he is also the person empowered to institute criminal proceedings under Section 26(3) of the constitution and would have been the best placed person to investigate and establish the ownership of the land the subject matter of this dispute.

The evidence and facts before the court have left no doubt that the parcel of land registered as L.R. No. 21179 Kiambu is owned by Messrs Wibeso Investments Limited. There is also evidence by the Applicants that they were employed by Bedan Mbugua, the Managing Director of Wibeso Investments Limited to work on the said parcel of land and when the police came to arrest them they were given this information but they disregarded it and went ahead and arrested the applicants.

We find and it is conceded that this parcel of land is not government land. Therefore the Applicants were unlawfully arrested while working on privately owned land with the authority of the owner. From the foregoing, we make the following findings:

1. That L.R. No.21179 registered as IR No. 67273/1 was granted by the President to M/s Wibeso Investments Limited and they are the registered proprietors
2. That the Applicants were on the said land with the full permission and authority of the owner.
3. That the presence of the Applicants on the said parcel of land and working thereon did not constitute the criminal offence of trespass.

Having made the above findings, it is important to point out that in order for a magistrate to accept a charge under Section 89 of the Criminal Procedure Code there must be a genuine complaint, which discloses a criminal offence. In this particular instance the magistrate did accept the charge but on close scrutiny of the circumstances surrounding the suit land, the facts did not disclose any criminal offence and

the magistrate ought to have rejected the charge. Further, the offence of trespass as defined and envisaged under the Trespass Act Cap 294 does not include government land.

With due respect we do not agree with the learned state counsel's submissions that the Applicants should have waited for the proceedings before the trial magistrate to continue and then be acquitted for non-disclosure of an offence. The practice of arresting people and arraigning them in court without proper investigations must be discouraged by all means. It is improper to traumatise citizens through criminal process on matters that do not constitute criminal offences and/or ill conceived prosecutions. It is evident therefore that the Applicants fundamental rights and rights of the owner to property ownership have been breached.

This court will be abdicating its responsibility by not addressing those issues accordingly. On the right to ownership of property the constitution is very clear and once a grant has been made and is registered, even the court cannot interfere with it except where there is clear evidence of fraud or misrepresentation by the holder of the title. Such fraud and/or misrepresentation can only occur after the registration of the grant. Section 75 of the Constitution confers absolute right to ownership to property.

The court will lack jurisdiction to investigate the reason and manner on which the grant was made. This is so because the grant is made by the President while exercising the apex powers of his office as provided by the constitution in the course of governing the country.

However, we find that the government can grant a parcel of land in the morning and require it in the afternoon. The government will be lawfully entitled to repossess that land. But however, if it had already been registered and a title issued, the only avenue open to repossess and/or re-acquire the land is the lawful manner explicitly laid down under Section 75 of the Constitution and no other manner. No. policy or practice can be used to interfere with the right to ownership of property, as policy or practice even that of the government organs, cannot qualify as or replace or take away the statutory provisions of the law.

The government derives its authority from the rule of law and its lawful authority for all actions and deeds are governed by law. Otherwise it will not be democratic government which abides to the rule of law.

Once the government has done something, it is estopped from complaining against itself and once it has granted land that has been registered and a title deed issued to the registered proprietor, the government is estopped from interfering with that property henceforth except for the manner provided for within the law. The constitutional rights must at all times be protected.

In order to achieve this. We find that the government has established a police force under Cap 84 Laws of Kenya which clearly states under Section 14 inter alia that the force is employed for the purpose of maintaining law and order, protection of life and property and in performing these functions the police officers are required to act within the framework of fairness, impartiality, the rule of law, and without fear or favour.

Therefore the acts of the police complained of by the Applicants fall out of those basic standards and are therefore unlawful and unconstitutional. The acts by the police and the forest officers of going into L.R.No.21179 belonging to Wibeso Investments Ltd amount to acts of trespass on private property as the grant shows that they were granted a lease of 99 years by the President with effect from 1st April 1991. Until the expiry of this period and/or unless there is a breach of the conditions of the title, the registered proprietor's rights are absolute and cannot be interfered with by any person not even the government itself. It is a well settled point of law that once a person accrues legal rights, running for a period of time, those rights are irrevocable and shall remain in force until the expiry of the term or period stipulated.

We therefore hold that the rights of Wibeso Investments Ltd to ownership of property were violated including the quiet enjoyment and the use and the right to have people of their choice on their land. Miss Nyamosi referred us to Section 72(1) of the constitution and argued that the police men had a constitutional right to arrest any person who they suspect to have committed a criminal offence. With due

respect to Miss Nyamosi, we disagree with this argument on the fact that the constitution did not envisage a situation where the police would just look at somebody and brand him a criminal.

The spirit of this section of the constitution envisaged a situation where initial impartial investigations have been carried out and have established prime facie particulars disclosing offences which in this case are absent. We therefore find and hold that the Applicants' Constitutional rights enumerated in the issues as framed were violated.

We have considered all the declaratory orders prayed for and we are of the opinion that this court being a Constitutional Court is entitled to grant a mere declaration and the Applicants are entitled to reserve their rights for any other action they may deem appropriate to take. The very nature of declaratory proceedings is not compensatory nor does it amount to restitution but are meant as a means of prevention in case of administrative action or inaction. A person may be interested in a mere declaration that the action or inaction is void or is in violation of his constitutional rights.

In all cases where administrative authority lacks, exceeds or abuses jurisdiction or violates the principles of natural justice, declaratory action provides the required relief. It is the best and most effective remedy for enforcing a constitutional right or public right and therefore the benefit and importance of declaration is to state the court's decision, interpretation and to state the correct interpretation of a particular law in order to stop future multiplicity of suits.

Law is legislated for the purpose of regulating peoples' and government conduct and it must be applied and be enforceable as laws on paper are useless unless they are enforced and applied by a recognized authority to the letter. Section 71 of the Constitution is the one that protects life but the same section has a proviso that if a person loses his life as a result of reasonable force being used against him by a person in defending his/her property, that would not be unconstitutional. In our view, out of this section, it becomes mandatory to enforce the law without laxity, for if there is laxity there could be chaos and many people would lose their lives.

We have considered the declarations sought by the Applicants and our answer is in the affirmative but in order to give efficacy to the pertinent issue of land, we find it appropriate only to make and highlight those declarations which are of specific concern to this application.

It is hereby therefore declared:

- (a) **That** Grants made under the Registration of Titles Act are made by the President in exercise of his executive and political power as Head of State and in the course of governing the country.
- (b) **That** Acts done by the President in exercise of his Constitutional Powers cannot be challenged unless they violate the constitution and/or are in bad faith.
- (c) **That** once a Grant has been made, registered and a Title Deed issued to the owner under the Registration of Titles Act, that title deed is indefeasible and is conclusive evidence of ownership.
- (d) **That** once the President and the government issue a grant, the person named therein accrues constitutional rights to that property and the government is estopped from interfering or acquiring that land save for the manner provided for under Section 75 of the Constitution of Kenya.
- (e) **That** a person is empowered by the constitution to use reasonable force in defence of life and property.
- (f) **That** where in exercise of constitutional or statutory powers a person or company is granted a right to run through a term or a period of time, that right is irrevocable until it expires or unless there is a breach of conditions governing that right.
- (g) **That** the government is bound by its own acts and after granting to a person or company a right, once

that right matures, the government is absolutely estopped from interfering or re-acquiring that right save in the manner provided for under the law.

(h) **That** the Constitution of Kenya guarantees freedoms for the governed and there is a contract by which political power of the state stands security for the sanctity and inviolability of the rights of citizens.

(i) **That** the fundamental rights of property ownership are envisaged and guaranteed by Section 75 of the Constitution and Section 23 and 24 of the Registration of Titles Act Cap 281.

(j) **That** the Constitution of Kenya and the Registration of Titles Act cap 281 Laws of Kenya guarantee freedom of right to acquire, hold, peaceful enjoyment of property and the right to dispose of the same.

(k) **That** the Constitution of Kenya guarantees that no private moveable or immovable including interest can be compulsorily acquired by the government unless where the law so provides for acquisition for public interest and prompt compensation is to be provided.

(l) **That** the Registration of Titles Act vests the jurisdiction, power and authority to deal with all matters pertaining to land with the Commissioner of Land. The Minister's powers, duty and responsibility are only those of making rules under Section 86.

(m) **That** no person or authority is entitled to interfere and/or to extinguish rights to property which have accrued by virtue of registration and which are inconsistent with Section 75 of Constitution of Kenya.

(n) **That** no public servant has any authority to hinder or obstruct registered property owners from the use or peaceful enjoyment of their properties and all the rights that accrue from being registered property owners.

(o) **That** no registered proprietors of a property should suffer a legal injury by reason of his constitutional rights or legally protected interest by the impugned actions of the police and their comrades.

(p) **That** no alienated land whose grant has been issued by the President and is registered as private property is under the control of a forest officer and the acts of arresting, detaining and prosecuting the Applicants were unconstitutional, illegal, unjust and an abuse of their liberty, in bad faith and in total disregard of the law.

(q) **That** the Applicants did not commit any crime by working on privately owned property with the authority of the owner.

(r) **That** the prosecuting authority violated the Applicants' fundamental rights and freedoms as enshrined in Chapter V which includes Sections 70-80 of the Constitution of Kenya and specifically Sections 75 and 77(4) of the Constitution.

(s) **That** the title is a valid document issued under the Registration of Titles Act Cap 281, is indefeasible and cannot be arbitrarily revoked, and the holder of such a valid title and/or his agents and servants cannot be trespassers in the title holder's land.

(t) **That** an occupier of land as defined by Section 2 of the Trespass Act Cap 294 cannot be accused of an offence under Section 3(1) of the said Act.

(u) **That** the charges against the applicants are null and void as the same discloses no offence in law.

(v) **That** the lawful owner of L.R No.21179 is Wibeso Investment Ltd.

Having made the above declarations and having made a finding that the lawful owners of L.R.No.21179 is Wibeso Investment Ltd and that the Applicants were working there with the consent and authority of the occupier as defined under Section 2 of the Trespass Act Cap 294, we find that the

Applicants did not commit an offence of trespass under Section 3(1) of the Act and therefore their arrest, detention and arraignment in court was unlawful. Having come to that conclusion we order that the criminal proceedings in Kiambu SPMC Criminal Case No.1139 of 2003 be and are hereby terminated.

Before we conclude our ruling we would like to say that we find this reference well researched and we wish to commend each of the counsels who appeared before us who zealously put forward their respective client's case.

We are indebted to them for their able contributions.

Dated and delivered at Nairobi this 30th day of October, 2003.

J.L.A. OSIEMO

JUDGE

N.R.O. OMBIJA

JUDGE

B.P. KUBO

JUDGE