



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

H.C. MISC. APPLICATION NO. 730 OF 1989

HELENA KITHINJI PLAINTIFF

V E R S U S

THE ATTORNEY GENERAL DEFENDANT

J U D G M E N T

This Originating Motion is brought under the provisions of Section 75 (2) & (3), Section 84 (1), (2) & (6) of the Constitution. The applicant has filed this application on her behalf and on behalf of the estate of her deceased husband. She prays for:-

1. A declaration that the Applicant has been deprived of her property rights in Title Nos. KILIFI/MADETENI/410 and KILIFI/MADETENI 414 in contravention of her fundamental right to protection from deprivation of property under section 75 of the constitution.
2. A declaration that the circular ref. 113936/55 through which the Commissioner of Lands purported to cancel her title, in respect of KILIFI/MADETENI/410 and KILIFI/MADETENI/414 is illegal, unconstitutional and null and void as it was issued to breach of section 75 of the Constitution and in breach of the rules of natural justice.
3. A declaration that the Applicant is still the lawful registered owner of Title Nos. KILIFI/MADETENI/410 and KILIFI/MADETENI/414.
4. a declaration that the applicant is entitled to compensation for contravention of her constitutional right under section 75 of the Constitution.
5. An order that the register in respect of KILIFI/MADETENI/410 and KILIFI/MADETENI/414 be rectified to show the Applicant as the absolute proprietor, and she be issued with the title deeds accordingly.
6. An order that the Applicant be paid each compensation under paragraph (4) hereof as this honourable court shall deem fit to grant in the circumstances.
7. An order that the Respondent do pay the applicant's costs of this suit.

According to her she and her late husband were registered as absolute proprietors of two parcels of land known as Kilifi/Madeteneni/410 and Kilifi/Madeteneni/414. The total area of both these parcels is approximately 6.8 hectares. The two certificates of Title issued to them as tenants in common under the Registered Land Act are annexed to the affidavit in support. The valuation of these parcels was made and

it was assessed at Kshs.5,750,000/= as per the report annexed to the supplementary affidavit sworn on 16th February, 1990.

It is further averred by the applicant that the Commissioner of Land issued a circular No. 113936/55 (*it is undated*) informing that the Government had decided to cancel the titles of the properties in the area of Kilifi Madeteni and that another plot would be allocated to those persons who would have their title cancelled, as per the discretion of the Government. The applicant was not allocated any plot of land. When her counsel applied for search of the two plots on 11th January, 1989 he was told that there could not be any search on the Government Lands Plot. The effect of that intimation was that the parcels were acquired by the Government and the titles were cancelled. She was not called to give any response before such cancellation and it is averred and not denied that there was no court adjudication either.

Replying affidavit sworn by one Abdulrahman Farah Osman the Director of Settlement and Land Adjudication states in short that on 29th May, 1981 the Commissioner of Land complained that some Government Lands had been adjudicated and on its receipt the Director of Land Adjudication wrote a letter on 8th June, 1981 asking for urgent investigation of the complaint.

Then he avers and I quote:-

“That it was found as a fact that Government Land in Chembe Kibabamshe, Jimba and Madeteni was wrongly and unlawfully adjudicated under the Land Adjudication Act Cap. 284 and wrongly and unlawfully registered under the Land Act. I have been advised by the Deputy Litigation Counsel and verily believe him th at no title passes to the Applicant upon such unlawful adjudication.....”

It is pertinent to note that the letter of 6th March, 1980 (Annexure. A F 01) annexed to the replying affidavit refers to the boundary between Government Land and Trust Land in Madeteni Adjudication section. That means there were Trust Lands in the area. The complaint from the Commissioner of Lands on 29th May, 1981 was in respect of some (*emphasis mine*) Government land and that too in Chembe/Kibabamehe registration section. In any case, there is nothing before this court that after such investigation, it was as a matter of fact found that the two parcels in question were the Government Land Act. Ms Shah appearing for the Attorney General did concede that indeed there is confusion and that there is no definite proof that the applicant's lands were Government lands. But relying on the finding in the case of Civil Appeal No. 109/93 Michii Kenya Limited V/S A.G. & another, she asked that the application be sent for retrial. I think she misapprehended the difference between an appeal from a suit and the application averring the violation of the constitutional rights.

By her concession and even if I ignore that, it is quite evident that there is no clear proof that the suit parcels were in actual fact the Government Lands.. In spite of that, the registration of the Titles issued in favour of the applicant had been admittedly cancelled reverting those parcels to be Government Lands. That action definitely violates not only Section 75 of the Constitution but also the provisions of Registration of Titles Act.

It was contended by counsel from Attorney General's office that the onus of proving that the parcels are not Government Land lies on the applicant.

To say the least, the said submissions are totally and absolutely misplaced. The applicant has shown that she had the titles to the parcels and if the Government intended to cancel those titles it had an obligation to follow the due process of law.

Then, interestingly, it was contended that the cancelling of the title deeds which were in any event void-ab initio is an administrative action and cannot be challenged before this court. In other words I was told I have no power to interfere. I can only say that this tantamount to keep the cart before the horse. First of all there is no basis or evidence to show that the titles were void ab-initio and I need not deal with these submissions any further.

In all respect the actions of the Commissioner of Land in cancelling the titles of the applicant without hearing the applicant is illegal, invalid and unconstitutional and has to be set aside by this court. The applicant has been wrongfully deprived of her proprietary rights in the two parcels of land by the Commissioner of Lands and I shall have no hesitation to declare so. I also declare that she has been deprived of the proprietorship of the land registered in her name in pursuance of the circular which is unconstitutional and in flagrant violation of the rules of natural justice.

I therefore declare that she is still the registered owner of Title Nos. Kilifi/Madeteni/410 and Kilifi/Madeteni/414. She can pursue her consequent claims under separate proceedings if she deem fit.

I also order that the Respondent do pay costs of this application to the applicant.

Dated and delivered at Nairobi this 14th day of March, 2002.

K. H. RAWAL

J U D G E