



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC CASE NO. 661 OF 2012

(FORMERLY PETITION NO. 103 OF 2011)

JOSHUA MUNYENYE & 490 OTHERS.....PETITIONERS

VERSUS

TOM OMAMI.....1ST RESPONDENT

NEWSPOINT LIMITED.....2ND RESPONDENT

SUPPLIES & SERVICES LIMITED.....3RD RESPONDENT

LAWI K. KIPLAGAT.....4TH RESPONDENT

ZACHARIA BARASA T/A SIUMA TRADERS.....5TH RESPONDENT

RAVJI PROPERTIES LIMITED.....6TH RESPONDENT

SEEMA PROPERTIES LIMITED.....7TH RESPONDENT

KRUSHIL PROPERTIES LIMITED.....8TH RESPONDENT

LANGATA JUA KALI MUUNGANO

SELF HELP GROUP.....9TH RESPONDENT

HON. ATTORNEY GENERAL.....10TH RESPONDENT

REGISTRAR OF TITLES.....11TH RESPONDENT

COMMISSIONER OF LANDS.....12TH RESPONDENT

JUDGEMENT

1. The Petitioners brought this petition against the Respondents on 23/6/2010 claiming that they were the lawful and legal owners of the parcels of land known as land reference numbers (L.R. No.) 209/11125, 209/11410, 209/11249, 209/11309, 209/11311, 209/11312, 209/12110, 209/11310, 209/11126, 209/11250, 209/11254, 209/11255 and 209/11256 which they claimed to have purchased from the 9th Respondent. They averred that after purchasing their respective plots from the 9th Respondent, they executed sale agreements and were issued identification membership certificates pending issuance of their respective title deeds which was to be facilitated and procured by the 9th Respondent.

2. They averred that after being shown the parcels of land that they had purchased, they enjoyed uninterrupted possession and occupation of the land for a period spanning approximately 18 years from 1982 and that they constructed permanent and semi-permanent dwelling houses, academic and medical institutions as well as churches on the suit land. They claimed that in recognition of their rights the government provided social amenities and other administrative services including security services which in their view demonstrated that they had lawfully and legally resided on the suit land.

3. The Petitioners contended that their efforts to procure titles over their respective plots were frustrated by the callous machinations of the Respondents through collusion and fraud to deprive them enjoyment of the suit land.

4. The Petitioners claimed that on or about 8/12/2010 at about 2.00 a.m., in the company of armed police officers, agents of the Respondents unlawfully and forcefully evicted most of the Petitioners from their plots and proceeded to demolish their houses with the remaining few living in fear, anxiety, untold misery and bewilderment of their imminent and impending fate. They claimed that the Respondents alleged that they were the legal and registered owners of the suit land as follows:

Ravji Properties Limited – L.R. No. 209/11254,

Seema Properties Limited – L. R. No. 209/11255,

Krushil Properties Limited – L.R. No. 209/11256,

Newspoint Limited – L.R. No. 209/11310,

Supplies and Services Limited – L.R. No. 209/11126,

Tom M. Omani – L.R. No. 209/12110 and

Lawi K. Kiplagat – L.R. No. 209/11250

5. The Petitioners claimed that they did not have knowledge of these claims when they purchased the suit land and only got to know when the demolition started in December 2010 and they conducted investigations which confirmed that position. They claimed that the Respondents carried out demolitions based on an ex parte court order which was issued by the Hon. S. A. Okato, Principal Magistrate, on 17/8/2010 to the 3rd Respondent directing the eviction of the occupiers of L.R. No. 209/11126 after suing fictitious persons and obtaining ex parte orders.

6. The Petitioners claimed that the 3rd Respondent including the Officer Commanding Embakasi/Industrial Area Police Station while relying on that court order overstepped their mandate by not demolishing only L.R. No. 209/1126 but also L.R. Nos. 209/11125, 209/11249, 209/11250 and 209/11210 as a result of which the Petitioners suffered loss and damage. They added that some of the Petitioners were still residing in their undemolished parcels of land which include L.R. Nos. 209/11410, 209/11309, 209/11312, 209/12110 and 209/11310 and that they were apprehensive that their structures would be demolished despite their being in lawful occupation of the houses.

7. They averred that the Respondents had been trespassing and interfering with their peaceful enjoyment of the suit land while claiming that the 1st Respondent had allocated the land to them. They claimed that they purchased their respective plots sometime in 1992 which they averred corresponded with the period during which the 6th, 7th and 8th Respondents acquired their respective titles. They claimed that the Respondents only resurfaced to claim their rights over the land after the 9th Respondent disappeared without trace. They added that their efforts to acquire titles over their respective plots had been rendered fruitless because of the Respondents' fraudulent initiatives. They contended that the 6th, 7th and 8th Respondents had the same directorship.

8. The Petitioners claimed that since purchasing their respective plots, they had lived together as a community and developed religious institutions, schools and other academic institutions on the suit land. Further, that they had undertaken various projects including boreholes and a water tanks project undertaken under the Constituency Development Fund. They claimed that they had carried out vast developments in the area and that they knew the place as their home and place of abode. They claimed that they could not freely enjoy occupation and use of the suit land for fear of harassment and attack having been initially evicted based on court orders which were issued without their knowledge. They claimed to be *bona fide* purchasers for value and holders of membership certificates issued to them in confirmation of their interest as purchasers of their respective plots pending issuance of titles.

9. They claimed that they had the legitimate expectation that they were the rightful owners of the suit land and that the Respondents' rights if any lay elsewhere and not before this court for being substantially guilty of knowledge, passiveness and acquiescence and that they were therefore estopped from asserting any claim adverse or otherwise against the Petitioners' inalienable proprietary rights by reason of possession and uninterrupted occupation for a continuous period spanning approximately 18 years. They added that the Respondents' registered proprietary rights stood extinguished by reason of the Petitioners' lawful and actual possession of the suit land for over 18 years based on the acquiescence and passiveness on the Respondents' part coupled with legitimate expectations on the part of the Petitioners.

10. The Petitioners claimed that unless the Respondents were restrained from harassing them, they stood to suffer irreparably and their right to own, use and enjoy property would be wished away at the instance of the Respondents. The Petitioners submitted that the stance taken by the Respondents to deny them possession and enjoyment of property, secure protection of the law and equal benefit of the law would be a substantial contravention of their inherent Constitutional rights.

11. The Petitioners sought a declaration that their rights of protection of property were likely to be contravened upon fraudulent transactions with the suit land. They sought an order directed at the Registrar of Titles to cancel the certificates of titles over the Suit Properties forthwith and in their place issue certificates of title to the Petitioners. They sought an order of injunction to restrain the Respondents from harassing, threatening, intimidating or adversely interfering with the Petitioners' right respecting the suit land. They also sought a declaration that the government had implicitly acquired and settled the Petitioners on the Suit Property.

12. They also sought a declaration that the Respondents were likely to violate their fundamental freedoms concerning the sale, transfer and ownership of the suit land and that the Respondents were likely to violate their rights and freedoms, and that they would not enjoy the right

to equality before the law, the right to equal protection and equal benefit of the law as enshrined in the Constitution. They also sought a declaration that they were the legal owners of the Suit Property and in the alternative, that they be paid such compensation by the Respondents as may be determined by the court together with damages.

13. The petition was supported by the joint affidavit of Joshua Munyenye Ndeda and Moses A. Onjiri which they swore on 23/6/2011. They reiterated the facts set out in the petition and added that they were never served with the court proceedings and that the enforcement of those court orders went beyond the parameters given in the court orders. They claimed that they were victims of unlawful, inhuman and merciless demolitions executed in the wee hours of the night without any regard to fair administration or procedural fairness. They believed that they had a right to be protected by the government and to be provided with adequate housing. They added that the demolitions that were carried out infringed on their right to fair administrative action and human dignity which are protected by the Constitution.

14. They averred that the manner in which the Respondents had conducted themselves indicated that there was collusion and fraud between the 1st to 9th Respondents based on the fact that since 1992 when the 9th Respondent started selling the plots in the pretext of being the registered owner, the other Respondents were nowhere to be seen and only emerged upon completion of those transactions.

15. They stated that they had filed other suits in court being ELC JR No. 20 of 2011 and ELC JR No. 52 of 2011 which needed the court's direction. They annexed copies of the pleadings in those cases. They also annexed a list of persons entitled demolished parcels L.R. No. 209/11254 to 11256. They attached copies of the certificates of grant issued to Seema Properties Limited and transferred to Ravji Properties Limited, Krushil Properties Limited and other persons. They annexed various sale agreements drawn on the notepaper of Langata Jua Kali Muungano Self Help Group bearing different dates and different purchase prices ranging from Kshs. 120,000/= to Kshs. 355,000/=. They also attached copies of member identification certificates issued by Langata Jua Kali Muungano Self Help Group.

16. The 6th, 7th and 8th Respondents filed grounds of opposition in which they contended that the Petitioners had not demonstrated that they purchased, acquired or occupied the suit land. Further, that they had failed to demonstrate that the Respondents were likely to infringe on any of their rights. They added that granting the orders sought would contradict the judgement and orders given by a competent court in Nairobi HCCC No. 522 of 2004 in which they were declared the absolute and indefeasible owners of the suit land. They added that if the orders sought were granted, they would lead to an infringement of the registered owners' legal rights and would aid the Petitioners and other people to enter and trespass on the Suit Property and thereby defeat the eviction orders which were fully executed in that suit.

17. Lawi Kiplagat, sued as the 4th Respondent filed the response to the petition on behalf of the 3rd, 4th and 5th Respondents. He denied that these Respondents had ever trespassed on the Suit Property. He added that prior to the eviction, those plots had been allocated to the 3rd and 4th Respondents before 1992. He averred that the evictions were conducted by the 5th Respondent pursuant to court orders dated 17/8/2010 and 11/11/2010 which were issued in respect of L.R. No. 209/11126 and L.R. No. 209/11410. He denied that the Respondents had colluded to deprive the Petitioners of their right to own property and stated that the 3rd and 4th Respondents had title documents to prove ownership of L.R. No. 209/11125, 11410, 11126, 11250 and 12110 and that they were in possession of those plots. He urged the court to dismiss the petition and sought declarations that the 3rd and 4th Respondents were the legal owners of these parcels of land and that they were entitled to protection of the law. He attached copies of the titles over these parcels of land.

18. The Petitioners filed two separate sets of submissions on 25/10/2012 and 31/7/2014. At the time of highlighting submissions Ms. Shumillah Advocates informed the court that the Petitioners would rely on the submissions which they filed on 26/9/2018. They submitted that they were issued membership identification cards which by the 9th Respondent was proof of ownership of the parcels of the land and that once they were issued with those cards they enjoyed uninterrupted use of the land for 18 years since 1992. They submitted that prior to their eviction, they had constructed permanent and semi- permanent dwelling houses, churches, academic and medical institutions on the land. They submitted that the government had recognized their possession and that their eviction on 8/12/2010 violated their rights which are protected by the Constitution and international conventions which Kenya has ratified and is bound to protect its citizens. They submitted that it was illegal for 3rd Respondent to claim ownership of the same suit property which they purchased for valuable consideration before getting into legal occupation.

19. They relied on Section 22 of the Limitation of Actions Act and contended that they had been in occupation of the suit land from 1992 until they were evicted in December 2010. They contended that even if they did not have titles over the land, the 3rd to 8th Respondents were estopped from instituting a suit over ownership after the expiry of 12 years.

20. The Petitioners relied on Section 40 of the Constitution in urging that the 3rd Respondent violated their right to own property when it forcefully evicted them from the suit land. They added that their right to housing which is guaranteed by Article 43 of the Constitution was violated by the Respondents. They also relied on Article 25 of the Universal Declaration of Human Rights which provides that everyone has a right to a standard of living that is adequate for health and the well-being of his family including food, clothing, housing and medical care among other rights. They interpreted the right to housing to mean that all persons should possess a degree of security of tenure and should be protected from forced eviction, harassment, displacement and other evictions.

21. They submitted that the actions of the 9th Respondents in overseeing the eviction of the Petitioners violated their right to social security and that the 11th and 12th Respondents violated their right to housing. They questioned how the 3rd to 7th Respondents obtained titles over the parcels of land which the Petitioners were in actual occupation of and over which they had proprietary interests having bought the land for valuable consideration from the 9th Respondent. They averred that the 3rd Respondent's actions in obtaining title over the land violated their right to property. They relied on the African Charter on Human and People's Rights, 1981 and the specific provisions of Article 14.

22. The Petitioners submitted that the Respondents' actions of overseeing the illegal eviction of the Petitioners was unfair and was carried out to defeat the Petitioners' right to own property. They added that they were displaced and subjected to untold suffering yet the Respondents did not acquire the land for public interest or the interest of the community. The Petitioners submitted that as state corporations as state corporations, the 11th and 12th Respondents had a duty to respect the housing found by people and their giving titles to different

people over the same land was fraudulent and defeated the right to own property yet they should have abstained from any action or forceful eviction and displacements.

23. The Petitioners submitted that the 9th Respondent conspired with the 3rd, 4th, 5th, 6th and 8th Respondents to defraud them and that it also deprived them of their money after issuing membership cards to them as proof of ownership and was to issue title deeds to them later. They contended that the 3rd Respondent obtained a court order through deception and crafty means and that they were denied an opportunity to be heard and were not served with the court order before being evicted from the suit land. The Petitioners relied on the case of **Board of Education v Rice** without giving the citation of the case. They submitted that in that case the court explained what the right to be fair entails. They also relied on **Ridge v Baldwin [1964] A.C 40** in which Lord Denning explained the need for legitimate expectation and stated that that it meant that it would not be fair to deprive someone without hearing what he had to say.

24. The Petitioners submitted that they were entitled to the reliefs sought in the petition because they purchased the suit land for valuable consideration and were in peaceful occupation of the land for two decades and had constructed permanent buildings on it. Further, that the 3rd, 4th, 5th, 6th and 7th Respondents obtained titles through fraud and that their Constitutional right to own property had been violated by the Respondents who deceived the court in order to obtain eviction orders.

25. The 3rd, 4th and 5th Respondents submitted that the Petitioners had failed to prove ownership of the suit land and that in the absence of a claim for adverse possession there was nothing to show that the Petitioners were the lawful owners of the suit land. They added that the question of ownership of land was not one that could be determined through a Constitutional petition. They submitted that the Petitioners should have brought an ordinary action for occupation or title to land as opposed to the present petition. They relied on the case of **Gabriel Mutava and 2 others v Managing Director Kenya Airport Authority and another [2016] eKLR** on the contention that where other sufficient and adequate avenues to resolve a dispute existed, a party should not trivialize the Constitutional jurisdiction by bringing actions that could be effectively dealt with in that other forum. They urged that the present petition was not proper because it addressed a dispute relating to ownership of land.

26. On the violation of the Petitioners' rights, the 3rd to 5th Respondents submitted that there was nothing in the petition to show or suggest that they had violated the Petitioner's rights. They added that the right to property under Article 40 of the Constitution could only be protected where a party showed sufficient evidence of ownership of the property sought to be protected and that in this case the petitioners had not shown that they had any right capable of being protected under Article 40. They maintained that the Petitioners had not demonstrated violation of their rights by the 3rd to 5th Respondents.

27. On the contention that the 3rd Respondent obtained eviction orders through deceitful means, they submitted that the orders of the court could not be challenged through a fresh action since orders of a court cannot form a cause of action to be brought in a fresh suit. They averred that if the Petitioners were dissatisfied with the orders of eviction obtained by the 3rd Respondent, the proper remedy would have been to apply to set aside the eviction orders in the same cause in which the orders were granted. They pointed out that since the eviction orders obtained by the 3rd Respondent had never been discharged, set aside or reviewed then they remained lawful and enforceable. The 3rd Respondent maintained that the eviction orders were legally obtained and urged the court to dismiss the petition with costs.

28. The issue for determination is whether the court should grant the orders sought by the Petitioners. The court has to first determine whether the Petitioners have a right to the suit land capable of being enforced in these proceedings.

29. The court notes from the record that Mugambi Mungania and Company Advocates filed an application dated 18/9/2013 seeking to be discharged from these proceedings on the ground that the 6th, 7th and 8th Respondents had been dissolved pursuant to Gazette Notice No. 12936 of 13/9/2013. That application was allowed on 24/6/2014. Only the 3rd, 4th and 5th Respondents participated at the hearing of this petition. Despite the 10th to 12th Respondents' counsel Mr. Kamau informing the court on 17/12/2020 that they had filed and served the submissions for these parties, the court could not trace the submissions not even on the virtual platform. Despite the court granting counsel time to avail their submissions, none were brought to the court.

30. The Petitioners claim to have purchased the suit land from the 9th Respondent and that after purchasing their respective plots, they executed sale agreements and were issued identification membership certificates pending issuance of their respective title deeds which was to be facilitated and procured by the 9th Respondent. The 9th Respondent from whom the Petitioners claim to have purchased the suit land never owned the land and could not have sold land which it did not own to the Petitioners. The Petitioners relied on the certificates of ownership which the 9th Respondent issued to them on purchase of their respective plots. Those certificates do not confer on the Petitioners any rights as these were not the certificates of title contemplated by Section 26 of the Land Registration Act. Without any ascertainable legal rights over the suit land, the Petitioners cannot sustain a claim that their constitutional rights to property were violated by the Respondents.

31. The court agrees with the 3rd, 4th and 5th Respondents that the Petitioners ought to have filed an ordinary suit on their claim for possession of the suit land. A claim for adverse possession cannot be heard and determined as a constitutional petition. If the Petitioners wished to challenge the eviction orders issued by the court in a different suit then they should have challenged the issuance of those orders in that suit and not seek to challenge the orders in a constitutional petition

32. The Petitioners failed to demonstrate violation of their rights by the Respondents. The court declines to grant the orders sought in the petition dated 3/6/2011. The Petitioners will pay the costs of the 3rd, 4th and 5th Respondents.

Delivered virtually at Nairobi this 26th day of April 2021.

K. BOR

JUDGE

In the presence of: -

Ms. C. Shumila holding brief for Dr. J. Khaminwa for the Petitioners

Mr. Boniface Masinde for the 3rd to 5th Respondents

Mr. V. Owuor- Court Assistant

No appearance for the other Respondents