



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. PETITION NO. 26 OF 2019

IN THE MATTER OF ARTICLE 21 (1), ARTICLE 22 AND ARTICLE 23 (3)

(F) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL

RIGHTS AND FREEDOMS UNDER ARTICLES 40 AND 47

OF THE CONSTITUTION OF KENYA 2010

BETWEEN

SOUTH EAST DEVELOPMENT CO. LTD.....PETITIONER

VERSUS

REGISTRAR OF TITLES.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. In the Petition dated 4th October, 2018, the Petitioner averred that it acquired land known as L.R. No. 209/27791, Mavoko, for valuable consideration; that the Petitioner was at all material times the registered proprietor of the said land and that under Section 23 of the Registration of Titles Act (*repealed*), the Petitioner was the absolute and indefeasible owner of the suit property.
2. It was averred by the Petitioner that by dint of Gazette Notice 3454, the Registrar of Lands purported to revoke the Petitioner's title to the suit property purportedly in exercise of powers conferred to him under unspecified provisions of the Constitution, the Government Lands Act and the Trust Land Act.
3. It is the Petitioner's case that it was never notified about the actions of the Land Registrar contrary to the provisions of Article 47 of the Constitution and that the decision by the Registrar of Land divests the Petitioner of the subject suit property contra-statute and without any legitimate basis. The Petitioner has prayed for the following reliefs:
 - a. This Honourable Court be pleased to issue a declaration under Article 165 (3) (b) and Article 23 (3) (a) that the rights of the Petitioner to hold and acquire land as enshrined and protected by Article 40 have been violated and infringed by the publication of Gazette Notice 3354 of 1st April, 2010.
 - b. Consequent to the grant of prayer (a) above the Honourable Court do issue a declaration that the revocation of the title in relation to L.R. No. 209/27791, Mavoko issued under the Registration of Titles Act (now repealed) by the Registrar of Titles, the Registrar of Lands or any other officer authorized by them by way of Gazette Notice 3454 under the provisions of the Government Lands Act and the Trusts Land Act in contrary to Article 40 and 47 of the Constitution of Kenya, 2010 is null and void.
 - c. Consequent to the grant of prayer (b) above a declaration be issued that Gazette Notice 3454 of 1st April, 2010 is of no effect and

the Registrar of Titles be directed to cancel, delete, remove and/or purge all or any entries giving effect to or made pursuant to Gazette Notice 3454 of 1st April, 2010 in particular relation to the property held by the Petitioner to wit L.R. No. 209/27791, Mavoko.

d. The Registrar of Titles or any person acting under their authority be restrained from giving effect to or implementing in any manner whatsoever the contents of Gazette Notice 3454 of 1st April, 2010 in particular relation to the property held by the Petitioner to wit L.R. No. 209/27791, Movoko.

e. The Registrar of Titles be directed to publish the orders granted herein in the Kenya Gazette within fourteen (14) days of issuance of the said orders.

f. Such other and/or further orders and/or directions as this Honourable Court may deem just and equitable to grant.

g. The costs of and occasioned by this Petition be awarded to the Petitioner

4. The 2nd Respondent filed Grounds of Opposition in which it averred that the Petitioner has not demonstrated how the Respondents have violated its constitutional rights; that the right of an individual to acquire and own property is not absolute and can be curtailed by law and that the right to own property under Article 40 of the Constitution does not extend to any property that has been found to have been unlawfully acquired.

5. The 2nd Respondent averred that under Section 13(2) of the Environment and Land Court Act, this matter should not have been filed in the High Court but in the Environment and Land Court; that the allegations raised by the Petitioner cannot meet the constitutional test as was held in the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance and 5 Others (2013) eKLR** and that the Petition should be dismissed.

6. In his submissions, the Petitioner's advocate submitted that the right to protection of property is protected under Article 40 of the Constitution; that the suit property was registered under the Registration of Titles Act (*now repealed*) and that under Section 23 of the said Act, the Certificate of Title is conclusive evidence that the person named therein is the absolute and indefeasible owner thereof.

7. The Petitioner's advocate submitted that Section 23 of the Registration of Titles Act prohibited the challenge to a title on any other ground other than on the ground of fraud or misrepresentation to which the registered owner is proved to be a party and that the Respondents have not demonstrated that the Petitioner acquired the suit property fraudulently or by misrepresentation.

8. The Petitioner's advocate finally submitted that the Petitioner has never been accorded a hearing or issued with any summons by the Registrar of Titles contrary to the provisions of Article 47(1) of the Constitution. Counsel relied on the cases of **Satima Enterprises Ltd. vs. Registrar of Titles & 2 Others (2012) eKLR** and **Reverend Harun Komoni Menywa vs. National Land Commission & 2 Others (2015) eKLR**.

9. On his part, the 2nd Respondent submitted that the Petitioner has failed to demonstrate how the 2nd Respondent violated its constitutional rights; that the right to own property stipulated under Article 40 of the Constitution is not absolute and that the Petitioner unlawfully acquired the suit property.

10. It was submitted by the 2nd Respondent that Article 40 of the Constitution is inoperative where the property in question was unlawfully acquired; that the power to revoke titles is vested in the National Land Commission as established under Article 67 of the Constitution and that the Petitioner has not demonstrated that this power was abused.

11. The 2nd Respondent submitted that other than the Petitioner claiming to be the registered owner of the suit property, it has failed to establish how and when it legally acquired the same; that the Petitioner's title was cancelled because it was illegally acquired and that the Petitioner has failed to meet the constitutional test for its purported violation of the rights. Counsel relied on the case of **Henry Muthee Kathurima vs. Commissioner of Lands & Another (2015) eKLR**.

12. The evidence before me shows that on 19th November, 2007, the Plaintiff was registered as the proprietor of land known as L.R. No. 27791 measuring 4.580 Hectares (*the suit property*). According to the grant that was issued to the Petitioner, the suit property was registered under the Registration of Titles Act (*repealed*).

13. The Petitioner has produced in evidence the Kenya Gazette Notice Number 3450 of 1st April, 2010. The said Gazette Notice shows that the suit property, amongst others, was revoked by the Registrar of Titles, Nairobi. The reasons for revocation of the title to the suit property were given as follows:

“Whereas the parcels of land whose details are described under the schedule herein below were allocated and titles issued to private development, it has come to the notice of the Government that the said parcels of land were reserved for public purpose under the relevant provisions of the Constitution, the Government Lands Act and the Trust Land Act. The allocations were therefore illegal and unconstitutional. Under the circumstances and in view of the public need and interest, the Government revokes all the said titles.”

14. As correctly submitted by the Petitioner's counsel, Article 40(1) of the Constitution provides that every person has the right, either individually or in association with others, to acquire and own property of any description in any part of Kenya. The right to own property is qualified by Article 40(6) of the Constitution as follows:

“The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

15. Although the Gazette Notice that purported to nullify the Petitioner’s title to the suit property provides that the suit property was “reserved for public purpose”, the Respondents have not filed any document or evidence to show that indeed the suit property was reserved for public purpose or was acquired by the Petitioner unlawfully. Indeed, the Respondents did not file an Affidavit to dispute the Petitioner’s assertions that it was allocated the suit property lawfully.

16. Furthermore, there is no evidence before this court to show that the Petitioner was heard before its title was revoked. Article 47(1) and (2) of the Constitution provides as follows:

“47 (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

17. In the case of *Pastoli vs. Kabale District Local Government Council & Others (2008) 2 EA 300*, the court held as follows:

“... Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision...”

18. In *Republic vs. The Honourable The Chief Justice of Kenya & Others Ex-parte Moiwo Mataiya Ole Keiwua*, HCMA No. 1298 of 2004, the court held as follows:

“...The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individual or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken... As part of a reasonable, fair and just procedure the court has a cardinal duty to uphold the constitutional guarantees, the right to fair hearing which entails a liberal and dynamic approach in order to ensure the rights enjoyed by an individual is not violated...”

19. In *De Souza vs. Tanga Town Council (1961) E.A 377*, the court held as follows:

“If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. That decision must be declared to be no decision.”

20. Considering that the Petitioner has deponed that it was never heard before the Registrar of Titles cancelled its title, the Respondents should have shown that indeed the Petitioner was heard, or was given an opportunity to be heard. Having not shown that the Petitioner was heard, this court finds that the Petitioner was not afforded an opportunity of being heard before the cancellation of its title was effected.

21. Considering that the Respondents did not prove that the title for L.R. No. 27791 that the Petitioner is holding was procured fraudulently or by misrepresentation, and in view of the provisions of Article 40(1) which protects the right to property, it is my finding that the Respondents breached the provisions of Article 40(1) of the Constitution when they purported to revoke the Petitioner’s title vide Gazette Notice number 3450 of 1st April, 2010.

22. The evidence before this court also shows that the Respondents, having failed to afford the Petitioner an opportunity to be heard before revoking its title in respect of L.R. No. 209/27791 are in breach of Article 47(1) and (2) of the Constitution.

23. For those reasons, I allow the Petition dated 4th October, 2018 as follows:

a. A declaration be and is hereby issued that the right of the Petitioner to hold and acquire land as enshrined and protected by Article 40 of the Constitution has been violated and infringed upon by the publication of Gazette Notice 3354 of 1st April, 2010.

b. A declaration be and is hereby issued that the revocation of title in relation to L.R. No. 209/27791, Mavoko by the Registrar of Titles by way of Gazette Notice 3454 of 1st April, 2010 contrary to Articles 40 and 47 of the Constitution is null and void.

c. A declaration be and is hereby issued that Gazette Notice No. 3454 of 1st April, 2010 in respect of L.R. No. 209/27791 is of no effect, and the Registrar of Titles, or his equivalent, is hereby directed to cancel, delete, remove and or purge all or any entries giving effect to or made pursuant to Gazette Notice 3454 of 1st April, 2010 in relation to L.R. No. 209/27791, Mavoko.

d. Each party to pay its/his own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 23RD DAY OF APRIL, 2021

O.A. ANGOTE

JUDGE