



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC PETITION NO. 9 OF 2016

IN THE MATTER OF ARTICLES 19, 20, 21,22,25,40,47,48,50 AND 159 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER ARTICLES 19, 20, 21,22,25,40,47,48 AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION OF THE RIGHT TO PROPERTY, FAIR ADMINISTRATIVE ACTION, EQUAL TREATMENT BEFORE THE LAW ET AL

BETWEEN

DAVID MORANGA OYUGIPETITIONER

AND

THE COUNTY GOVERNMENT OF KISII.....1ST RESPONDENT

ROBERT MAGARE OMBASO.....2ND RESPONDENT

HESBORN MICHIRA.....3RD RESPONDENT

LAWRENCE RATEMO.....4TH RESPONDENT

VINCENT OBIERO.....5TH RESPONDENT

JUDGMENT

INTRODUCTION

1. The Petitioner commenced this suit against the Respondents by way of a Petition dated 1st April 2016. The said Petition is based on the Petitioner's Supporting Affidavit sworn on the 31st March 2016, a Further Affidavit sworn on the 4th July 2014 and a Supplementary Affidavit sworn on 3rd February 2017. In the said affidavits he averred that he is the owner of plot No. 51B Keumbu Market which he bought from the original allottee, one Machoka Momanyi in 1995, with the approval of the defunct Gusii County Council. He was then issued with a plot card dated 27.4.1995 which he annexed to his affidavit.

2. The Petitioner further deponed that with the approval of Gusii County Council he developed a commercial storey building comprising of shops which he had partially rented out to tenants and previously operated a shop in one of them. He annexed a copy of the development plan and photographs of the incomplete building. He also annexed copies of receipts as evidence that he had been paying the land rent and rates to the defunct Gusii County Council and he only stopped paying when the 1st Respondent refused to accept payment on the grounds that the plot was public land.

3. The Petitioner averred that in 2009 he received a letter from Gusii County Council demanding that he vacates the suit property and demolishes the development thereon failing which the Council would demolish it. He subsequently wrote to the 1st Respondent complaining about the threats to demolish his building and the 1st Respondent responded to him on 8.10.2014 restating the position that the suit property was public land reserved for an open air market under the Economic Stimulus Programme and that the same had been irregularly allocated to him.

4. The Petitioner further averred that the 1st Respondent had through the 2nd Respondent who is its employee surveyed the plots at Keumbu Market including the Petitioner's plot and allocated stalls to various persons traversing the frontage of the Petitioner's building valued at Kshs. 4,050,000/- thus taking over part of the Petitioner's property without any form of compensation as dictated by the Constitution thereby infringing on the Petitioner's rights contemplated under articles 40, 47, 48, 50 of the Constitution. It is the Petitioner's contention that the Respondents have violated Article 2, 3, 19, 20, 22, 23, 25 and 159 of the Constitution.

5. The Petitioner therefore seeks the following orders:

a. A declaration that the action of the Respondents of jointly and severally forcibly entering upon, carrying out construction on and otherwise interfering with the Petitioner's Plot No. 51B at Keumbu Market without affording the Petitioner any form of hearing, due process, fair administrative procedure or compensation has infringed on the Petitioner's rights to property, equal protection of the law and fair administrative action as espoused in Articles 40, 47, 48 and 50 of the Constitution.

b. An order of injunction restraining the Respondents jointly and severally through themselves, their agents and representatives or assigns in law and sympathizers from unlawfully alienating the Petitioner's proprietary rights in plot no. 51B Keumbu Market or in any manner interfering with the Petitioner's ownership, possession and use of the business premises on the said parcel of land by forcible entry or otherwise in any manner whatsoever, cancelling the grant or interfering with the Petitioner's rights over the property aforesaid.

c. A declaration that the 2nd Respondent has violated the provisions of Articles 2, 3, 19, 20, 22, 23, 25 and 159 of the Constitution.

d. Exemplary damages and costs of and incidental to this suit.

6. The 1st Respondent filed a Replying Affidavit sworn by Johnstone Ndege, the County Secretary in which he deponed that he had gone through the records kept by the 1st Respondent and he had not come across the application for allocation of plot No. 51B, Council minutes allocating the said plot to the Petitioner, beacon certificate issued to the Petitioner or any receipt for the consideration paid for the said plot nor was there any document showing the area of the plot in dispute.

7. He further contended that the plot card was not title to property to warrant the Petitioner's claim for absolute ownership and was only a space for temporary use. He deponed that the portion claimed by the Petitioner was part of the open air market. He deponed that whereas the Petitioner's valuation report dated 22.11.2012 indicated that the suit property measures 40 feet by 100 feet, all the plots in the area measure 25 feet by 100 feet which means that the Petitioner has encroached on public land as he has occupied a larger portion than he was allocated. Furthermore, the report indicates that the plot is for commercial/residential purposes contrary to the purpose for which the plot card was issued.

8. Mr. Ndege deponed that the other people who occupied the open air market and who had filed CMCC No. 619 of 2009 jointly with the Petitioner against the defunct Gusii County Council voluntarily moved out of the plots meant for the open air market.

9. He deponed that the Petitioner had not produced the letter of allotment which spells out the conditions to be fulfilled by the allottee to demonstrate that he had complied with the same and contended that granting the Petition would be tantamount to perpetuating an illegality.

10. In his Replying Affidavit sworn on the 2nd October 2018, Robert Ombaso, the 2nd Respondent pointed out that he was wrongly sued as he was an employee of the 1st Respondent and he executed the services of his office as directed by his employer and he was insulated against any civil action by the provisions of section 133 of the County Government Act. He deponed that none of the stalls at Keumbu open air market touches on plot no. 51B. He stated that having worked with the defunct Gusii County Council in various capacities he was aware that the Petitioner had no approved plans for the development on his plot.

11. He further deponed that if the Petitioner was allocated plot No. 51 B then the said allotment was irregular. He maintained that the spaces allotted to other persons in the same area were intended for temporary use in fulfillment of the initial plan for the development of an open air market and it was not intended for the construction of permanent structures. It was his contention that despite being warned about the illegal development, the Petitioner did not bother to rectify the construction on public land. He annexed a letter dated 23rd September 2003 from Gusii County Council to the Petitioner warning him to stop the construction on plot no. 51B which was interfering with the open air market, failing which the County Council would enforce its by-laws. He also annexed a copy of the layout plan for Keumbu open air Market.

12. Vincent Obiero the 5th Respondent swore a Replying Affidavit on 19th May 2016 on his own behalf and on behalf of the 3rd and 4th Respondents. He deponed that the 1st Respondent demolished the developments on plot nos. 48, 49, 50, 51A, 52, 53 and 54 pursuant to a Notice issued by the County Council of Gusii dated 8th October 2009 annexed to the Petitioner's Supporting Affidavit as Annexure "DMO5".

13. He deponed that the space in front of the above-mentioned plots is an open space meant for 32 open market stalls under the Economic Stimulus Programme. The said stalls were allocated to various persons by the County Council of Gusii through minute 36/2011 of 15th September 2011 and 19th April 2013 and he was issued with a letter dated 28th February 2013.

14. He added that following the said allocation, he paid a non-refundable application fee of Kshs. 2,000 and development fee of Kshs. 7,000. He deponed that the 3rd and 4th Respondents do not own stalls as alleged by the Petitioner. He denied that he has obstructed the Petitioner's building. He contended that the Petition does not raise any constitutional issue as alleged by the Petitioner.

15. Although the court was of the view that given the contentious nature of Petition, the same be prosecuted by way of *viva voce* evidence, when the matter came up for hearing on 26.11.20, the Petitioner applied to have it canvassed by way of written submissions. The court considered the circumstances prevailing at the time, particularly the COVID-19 pandemic which affected open court sessions, and directed that the matter proceeds by way of written submissions. The parties subsequently filed their written submissions.

PETITIONER'S SUBMISSIONS

16. In his submissions learned counsel for the Petitioner summarized the pleadings and identified two issues for determination, namely:

i. Who is the owner of plot No. 51B situate at Keumbu Market

ii. If the answer to the first question is the Petitioner, then have the Respondents jointly and severally interfered with the Petitioner's ownership of plot No. 51B situate at Keumbu Market and in the process infringed on the Petitioner's rights guaranteed under the Constitution of Kenya? If so, which rights have been violated and what remedy should the court issue.

17. Counsel submitted that the Petitioner is the owner of plot No. 51B, having purchased the same from one Machoka Momanyi with the approval of the defunct County Council of Gusii after which he was issued with a plot card. He further submitted that by its letter dated 8th October 2014 the 1st Respondent conceded that the council did allocate the Petitioner land though it claimed that the said allocation was unlawful. He therefore urged the court to find that the Petitioner was the lawful owner of the suit property.

18. On the question as whether the Petitioner's rights had been violated, counsel submitted that since the Petitioner had established that he was the owner of the suit property his rights were protected under Article 40 of the Constitution. He contended that the 1st Respondent could not come up and declare that the suit property was public land reserved for an open air market under the Economic Stimulus Programme. He further submitted that if the 1st Respondent intended to take the suit property for public use, they needed to follow the law on compulsory acquisition by paying prompt compensation to the Petitioner.

19. It was his submission that if the 1st Respondent was of the view that the suit property was allocated to the Petitioner irregularly, they should follow the law in order to recover the same by filing suit and setting out the particulars of illegality.

20. It was further submitted for the Petitioner that his rights under Articles 47, 48 and 50 of the Constitution were violated. With regard to Article 47, counsel submitted that the Petitioner ought to have been informed of the action that the 1st Respondent intended to take so that he could adduce evidence on how he acquired the suit property, face his accusers and cross-examine them before a decision was made. He faulted the 1st Respondent for failing to de-gazette the suit property and advertising the same for members of the public to apply for the same as was the case in other plots at Keumbu market. It was his contention that the failure of the 1st and 2nd Respondents to give the Petitioner an opportunity to be heard before the alleged repossession of the suit property was a violation of the Petitioner's right to fair administrative action, access to justice and fair hearing as enshrined in the Constitution of Kenya.

21. Finally, it was submitted that since the Petitioner had demonstrated that his rights were violated he ought to be awarded Kshs. 8,000,000/= exemplary damages in addition to the other reliefs sought in the Petition.

1ST AND 2ND RESPONDENTS' SUBMISSIONS

22. Learned counsel for the 1st & 2nd Respondents stated that he would rely on their submissions filed on 12.6.2019. In the said submissions they contended that the Petition was bad in law as the Petitioner had filed Kisii CMCC No. 619 of 2009 which he said was still pending. He also submitted that the Petitioner had failed to exhibit the application for allotment of plot No. 51B, Keumbu Market, the Council minutes allocating the said plot to the Petitioner or approval of transfer of the plot to the Petitioner, a beacon certificate and the evidence of payment for the plot.

It was his submission that in the absence of an allotment letter the Petitioner's suit was a non-starter.

3RD, 4TH AND 5TH RESPONDENTS' SUBMISSIONS

24. Learned counsel for the 3rd, 4th and 5th Respondents submitted that the orders sought in the Petition could not be granted as the Petitioner had not demonstrated how each of the Articles cited in the Petition had been breached not had he explained how the 2nd to 5th Respondents had breached his Constitutional right to property under Article 40(3) of the Constitution. He cited the cases of **Anarita Karimi Njeru v Republic (1979) eKLR** and **Trusted Society of Human Rights Alliance v Attorney General & 2 Others (2012) eKLR** for the proposition that a Petitioner alleging constitutional infringement must set out the right infringed and the particulars of such infringement or threat in a way that gives notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.

ISSUES FOR DETERMINATION

24. The main issues for determination are:

- i. Whether the Petition meets the threshold of a Constitutional Petition.
- ii. Whether the Petitioner is the owner of plot no. 51 Keumbu market
- iii. Whether the Respondents or any of them have interfered with Petitioner's rights to the suit property.
- iv. Whether the Petitioner is entitled to the reliefs sought.

ANALYSIS AND DETERMINATION

25. With regard to the first question, the Court in the case of **Anarita Karimi Njeru v Republic 1979 eKLR** set out the standard for constitutional matters as follows:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

26. Furthermore, in the case of **Trusted Society of Human Rights Alliance v Attorney General & 2 Others (2013) eKLR** the Court of Appeal observed that:

“We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and save the court from the embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new constitution is whether a Petition as stated raised issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare”

27. In the instant case the Petitioner has in his Petition and Supporting Affidavit clearly stated how the 1st and 2nd Respondents have violated his rights to the suit property. Perhaps what is not clear is how the 3rd, 4th and 5th Respondents have infringed on his constitutional rights.

28. Moving on to the second issue, the Petitioner annexed a copy of plot card in respect of the suit property. The 1st Respondent has conceded that its predecessor, the County Council of Gusii allocated the suit property to the Petitioner and issued him with a plot card on 27.4.1995. The Council then collected land rates rent from the Petitioner for a period of more than ten years. They also approved the Petitioner's building plans for a storey building on the suit property. After he had completed and occupied part of the said building, the council wrote to the Petitioner and demanded that he demolishes the said building on the grounds that the suit property was irregularly allocated to him as the land was public land which was meant for an open air market under the Economic Stimulus Programme. If indeed the suit property was intended for the said purpose, the 1st Respondent ought to have followed due process to have it repossessed after establishing whether the Petitioner or the original allottee was party to the irregular allocation.

29. Even assuming there was irregular allocation of the suit land to the original allottee, the 1st Respondent has not demonstrated that the Petitioner was party to such irregular allocation. The Applicant lawfully purchased the suit land from Machoka Momanyi and obtained all the necessary documents on the suit land. He also obtained approval from the Gusii County Council for construction of a commercial building. The 1st Respondent could not therefore purport to arbitrarily repossess the suit property without any reason and most importantly without following the due process of law. Due process must be adhered to by the State and its citizens.

30. **Article 47** of the **Constitution** grants every person a right to fair administrative action. **Subsections (1) and (2)** thereof state that:-

(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.”

In addition, **Article 50** guarantees every person a right to a fair hearing. **Article 50 (1)** provides that:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or; if appropriate, another independent and impartial tribunal or body.”

31. The 1st Respondent ought to have given the Applicant an opportunity to state his case before reaching the decision that has such far reaching ramifications. The Applicant ought to have been called upon to explain how he had acquired the suit land notwithstanding the fact that the 1st respondent had issued him with a plot card.

The impugned action by the 1st Respondent violated the Petitioner's aforesaid constitutional rights.

32. Additionally, the 1st Respondent violated the Petitioner's right to property under Article 40 of the Constitution by purporting to acquire the Petitioner's plot for a public purpose without complying with Article 40 of the Constitution.

33. Article 40 of the Constitution provides that:

40.(1) Subject to article 65, every person has the right either individually or in association with others, to acquire and own property-

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall enact a law that permits the state or any person –

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over any property of any description; or

(b) to limit or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

(3) The State shall not deprive a person of property of any description, unless the deprivation –

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land in accordance with Chapter five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this constitution and any act of Parliament that-

(i) requires prompt payment in full, of just compensation to the person; an

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired in good faith of land acquired under clause (3) who may not hold title to land.

34. Having arrived at the finding that the 1st Respondent has violated the Petitioner's rights, the Petitioner is entitled to compensation. In arriving at the quantum of damages, I am guided by the case of **Wilfred Gisebe Gisebe & 2 Other v County Government of Kisii & 2 Others (2017) eKLR** where the court relied on the case of **Siewch and Ramanoop v Attorney General of T&T, PC Appeal No. 13 of 2004**. In the said case the Court held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense.

Per Lord Nicholls at paragraphs 18 and 19:

“When exercising this constitutional jurisdiction, the court is concerned to uphold or vindicate the constitutional right which has been contravened. A declaration by the court will articulate the fact of violation but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation....”

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds extra dimension to the wrong. An additional award, not necessarily of substantial size may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and gravity of the breach and deter future breaches...”

36. Taking cue from the above decision, it is clear that the courts need to send out a clear message that violations of constitutional rights should neither be tolerated nor trivialized. It is therefore important in appropriate cases not just to vindicate the rights violated but award damages aimed at deterring future infringements.

36. In the instant case the Petitioner has demonstrated that his proprietary rights have been violated and his commercial building valued at Kshs. 4,050,000/= standing on plot No. 51B at Keumbu Market has been lying in ruins for more than ten year owing to the fact that it has been blocked by a perimeter wall and market stalls erected by persons who were allocated plots by the 1st Respondent. As a result of the 1st Respondents actions, the Petitioner has been deprived of rental income and he has suffered loss and damage. In the circumstances, I award him a sum of Kshs. 5,000,000/= as damages.

37. The upshot is that the Petitioner has proved his case against the 1st and 2nd Respondents and I enter judgment in favour of the Petitioner and make the following final orders:

a. A declaration is hereby issued that the actions of the 1st, 2nd and 5th Respondent forcibly entering upon, carrying out construction on and otherwise interfering with the Petitioner's plot no. 51B Keumbu Market without affording him any form of hearing, due

process fair administrative action or compensation has infringed on his right to property, equal protection of the law and fair administrative action as espoused in Articles 40, 47, 48, and 50 of the Constitution of Kenya.

b. A permanent injunction is hereby issued restraining the Respondents jointly and severally by themselves, their agents and representatives, assigns or sympathizers from unlawfully alienating the Petitioner's proprietary interest in plot No. 51B Keumbu market or in any manner interfering with the Petitioner's ownership, possession and use of the business premises in the suit property by forcible entry or otherwise in any manner whatsoever or proceeding in any manner whatsoever to cancel the plot card or interfere with the Petitioner's rights over the suit property.

c. The Petitioner is awarded the sum of Kshs. 5,000,000/= as damages which shall be paid by the 1st Respondent.

d. The costs of the suit shall be borne by the 1st Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 2ND DAY OF FEBRUARY, 2022

J.M ONYANGO

JUDGE