



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

PETITION NO. 23 OF 2019

DR. CHESANG KIPRUTO.....PETITIONER

VERSUS

NATIONAL POLICE SERVICE COMMISSION1ST RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF INTERIOR AND COORDINATION

OF NATIONAL GOVERNMENT.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

THE ATTORNEY GENERAL4TH RESPONDENT

JUDGMENT

1. The petitioner herein moved the court on 13th January 2015 through petition dated 6th October 2014. The petitioner described himself in the petition as a citizen of the Republic of Kenya and a resident of Nakuru County. He brought these proceedings against the 1st respondent, a body corporate established pursuant to **Article 246 (1)** of the **Constitution of Kenya**; against the 2nd respondent, a state officer under **Article 155** of the **Constitution** who he described as the Chief Accounting Officer of the Ministry of Interior and Co-ordination of National Government; against the 3rd respondent, a state officer under **Article 245** of the **Constitution** and finally against the 4th respondent, a state officer whose office is established under **Article 156** of the **Constitution**.

2. It was averred in the petition that the petitioner was on 23rd November 1998 allocated the parcel of land known as Nakuru Municipality Block 12/93 (the suit property) by the Commissioner of Lands. That the respondents trespassed into the suit property in or about the year 2001 after which they continued to use it as residence for various senior police officers and that they deployed armed police officers at the property thus locking the petitioner out of his private property.

3. The petition further averred that the suit property had neither been purchased by the respondents nor compulsorily acquired by the National Land Commission and that the respondents' actions were a threat to rule of law and constitutionalism. The petitioner therefore prayed for judgment as follows:

a. A declaration that the respondents' actions of using the police to keep off the petitioner from his property violate the right to property, right to dignity, equality and the security of person and therefore unconstitutional.

b. An order that the respondents do pay the Petitioner — general damages for violation of his right to property, right to dignity, equality and the security of person.

c. A declaration that Kenya is not a police state but a multiparty democratic republic under the rule of law and constitutionalism.

d. An order of mandamus compelling the respondents to pay kshs.10,000 per month from January 2002 to date within a period of 30 days from the date of judgement and to vacate the property being Land Reference Number Nakuru Municipality Block 12/93 forthwith failure of which they be committed to jail for 6 months for contempt of Court.

e. A declaration that the respondents and the Government of Kenya are escapists and have abdicated their role to Protect the citizens of Kenya.

f. The petitioner be paid costs of this Petition.

4. The respondents opposed the petition through Grounds of Opposition filed on 30th March 2015 wherein it was averred that no basis had been laid for the determination of the right to own the suit property; that the petitioners' case was not corroborated by documentary evidence; that the case was an abuse of the court's process; that the constitutional court does not determine convoluted disputes that require viva voce evidence; that the issues raised had been determined by other courts and the matter was therefore *res judicata* and that **Article 40** of the **Constitution** does not protect illegally acquired property.

5. The petition was heard partly through oral evidence and partly through affidavit evidence.

6. The petitioner testified and adopted his supporting affidavit sworn on 7th December 2014 and his witness statement dated 19th February 2018. He stated that he is the owner of all the parcel of land known as Nakuru Municipality Block 12/93 which was allocated to him by the Commissioner of Lands. That a certificate of lease was issued to him on 23rd November 1998 after he signed a lease. That the Commissioner of Lands wrote a letter to the District Land Officer Nakuru informing him that the suit property had been allocated and asking him to arrange for boarding of the house and valuation of the structures on the plot. That on 13th July 1998, the District Land Officer Nakuru wrote a letter to the Commissioner of Lands stating that the structures on the plot were valued at KShs 265,000. That he was issued with a letter of allotment Ref: No. 40473/V) in relation to the property on 20th July 1998.

7. The petitioner further stated that he paid a total of KShs 387,350 to the Department of Land on account of stand premium, registration, conveyancing, survey fees, rent, stamp duty, approval and value of the building. That the Commissioner of Lands forwarded to the Land Registrar Nakuru a lease for execution and that he paid for registration. He further stated that he has been paying rates in relation to the property and that all the foregoing show that the suit property belongs to him. He added that the respondents however trespassed onto the suit property around the year 2001, as a result of which he filed Nakuru HCCC No. 273 of 2002 against the then Provincial Police Officer A.K. Rono and that the court delivered judgment in his favour on 11th June 2003. That he was awarded vacant possession, an eviction order, mesne profits at KShs 10,000 per month from October 2002 till vacant possession and costs of the suit.

8. He stated further that subsequently, another Provincial Police Officer by the name Francis Munyambu moved in and he filed Nakuru HCCC No. 221 of 2009 and that judgement was also granted in his favour on the 18th January 2010. That notwithstanding the judgments, the respondents continue to deploy armed police officers on the suit property who have stopped him from accessing it even though it is private property. He added that his title has never been challenged by anyone and that the respondents' actions are a threat to the rule of law and constitutionalism.

9. On cross examination and re-examination, he confirmed that he did not have any document to show that he was a civil servant or that he had applied to buy the suit property. He further stated that there was no sale agreement or transfer between him and the government in respect of the property.

10. The petitioner's case was then closed.

11. The respondents' witness was Hassan Rashid Barua. He stated that as at the date of his testimony he was County Police Commander Kakamega and that previously, he was County Police Commander Nakuru from 30th April 2015 to 31st January 2019. He adopted his replying affidavit sworn on 18th August 2016. He stated in the affidavit that he was an occupant of the suit property until around February 2016 and that as at the date of his affidavit the suit property was occupied by the Regional Police Administrator. He added that records in the respondents' possession regarding the suit property include Physical Development Plan for Nakuru Ref. 7/68/6 and approval Number 106 of 1968 and that the plan indicates that the area was zoned for low density residential development which justifies the existence of the senior police residence in the area as such areas are usually planned for government administrative offices and institutional houses. He added that there is no part development that informed the alleged allotment of the property in favour of the petitioner on 20th July 1998 and that the alleged allocation of the suit property on 20th July 1998 was not supported by physical planning process which should have included an approved Part Development Plan. According to him, the suit property remains as planned in the approved plan number 106 of 1968.

12. Mr Barua further stated that since there is no recent Part Development Plan to support the allocation, the petitioner was allocated the suit property in total disregard of the required procedure and the law. That the suit property has been the official residence of several Provincial Police Officers since 1941 without any interruption. He relied on a letter from the County Commander Nakuru dated 31st March 2015 showing occupants from 2nd December 1972 to the date of the letter. He added that the suit property was not available for alienation when the petitioner was registered as the owner and that it should remain with the National Police Service for national interest. He also stated that the structures on the suit property were constructed by the Government of Kenya and that the National Police Service Nakuru through the Ministry of Interior and Co-ordination of National Government has future developments or strategic plans for the suit property which may be halted to the disadvantage of the national interests if the petitioner takes it over. That the suit property is located in the prime Milimani residential area of Nakuru that the mesne profit claim of KShs 10,000 per months is a gross under valuation of the property by the petitioner.

13. On cross examination and re-examination, he stated that the suit property is guarded by armed police officers since it has been the residence of several provincial police officers and that the government does not generally have titles for its properties.

14. The respondents' case was thereby closed.

15. Parties then filed and exchanged written submissions. The petitioner in his submissions reiterated his testimony before the court and submitted that the court has jurisdiction to hear and determine this matter pursuant to **Articles 22, 27(1), 47, 50(1), 65 and 162 (2)(b)** of the Constitution. Arguing that he is the lawful owner of the suit property, the petitioner submitted that the actions of the respondents aim at depriving him of his lawful interests and rights in the suit land thereby denying him the use of the subject property for his survival, dwelling and economic gain. He cited **Sections 24(a) and 26(1)** of the **Land Registration Act** and submitted that his certificate of lease vested

proprietorship to him on 23rd November 1998 and that his title to the suit property remains unchallenged. He relied on the cases of **Mucuha vs. the Ripples Ltd CA No. 106 of 1992**, **Kibusia Arap Konga v Evans Obonyo Obiero & another [2017] eKLR** and **Elijah Makeri Nyangw'ra vs. Stephen Mungai Njuguna & another [2013] eKLR** among others.

16. The petitioner further argued that the respondents acted contrary to the constitutional requirements applicable to those who hold public office and thereby violated his constitutional rights. He relied on the case of **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd & 2 others, Supreme Court Application No. 2 of 2011** and submitted that the respondents have violated various constitutional provisions including **Article 27**, **Article 29**, **Article 40** and **Article 47**. He further cited **Article 260** and **Article 244** of the Constitution and submitted that the respondents are bound to the standards set by the Constitution. He thus urged the court to grant the orders sought in the petition.

17. The respondents argued in their submissions that the suit property is public utility which was not available for alienation and therefore the certificate of lease issued to the petitioner did not confer any title to him. Relying on **Section 107** of the **Evidence Act**, they submitted further that acquisition of a valid title to land is a process and that the petitioner has not demonstrated that he obtained any valid title. They cited the cases of **Norbixin Kenya Limited v Attorney General [2014] eKLR** and **Henry Muthee Kathurima v Commissioner of Lands & another [2015] eKLR** and urged the court to dismiss the petitioner's case with costs.

18. I have carefully considered the petition, the evidence on record and the submissions by the parties.

19. There is no dispute that the petitioner holds a certificate of lease which asserts that he is the registered proprietor of a leasehold interest in respect of the parcel of land known as Nakuru/Municipality Block 12/93. The certificate of lease was issued to him on 23rd November 1998 and it indicates that the term of the lease as 99 years from 1st July 1998. It is further not in dispute that prior to being registered as such, the Commissioner of Lands issued to the petitioner a letter of allotment dated 20th July 1998 pursuant to which he was offered a grant in respect of the property. The letter of allotment was signed by P. Amiani for the Commissioner of Lands. The petitioner accepted the terms of the offer and a lease dated 4th November 1998 was executed by the Commissioner of Lands on one part and the petitioner on the other. Ultimately, the aforesaid certificate of lease was issued.

20. Equally, the petitioner confirmed in his evidence that as at the date of allotment to him, there was a government house standing on the suit property which was in fact valued by the District Land Officer Nakuru at KShs 265,000. He further confirmed that he has never been able to access the property or take possession since it has always been occupied by different senior police officers as their official residence. Indeed, there is uncontroverted material placed before the court by the respondents giving a list of senior police officers who have occupied the property as official residence uninterruptedly from 2nd December 1972 to the date of filing of this petition and beyond. In a bid to get possession, the petitioner sued some of the occupants in their private capacities.

21. Only two issues arise for determination: whether the respondents have violated the petitioner's rights particularly under **Article 40** and whether the petitioner is entitled to the reliefs sought in the petition.

22. Rights of a lawfully registered proprietor of land are guaranteed by **Article 40** of the **Constitution** which provides:

40. Protection of right to property

(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) ...

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, 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; and

(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 under clause (3) who do not hold title to the land.

(5)

(6) **The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.**

23. Additionally, further protection is granted to such a proprietor under **Section 26** of the **Land Registration Act** which provides:

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) ...

24. A reading of **Article 40 (6)** makes it clear that the protection secured by the **Constitution** and indeed the **Land Registration Act** do not extend to property that is unlawfully acquired. There are ample authorities in that regard. For example, in **Chemey Investment Limited v Attorney General & 2 others [2018] eKLR**, the Court of Appeal stated:

... However, we must hasten to add that title to property that is obtained fraudulently or illegally in violation of the provisions of the statute is and was not sacrosanct and did not enjoy protection of the law under the repealed Act. ...

Decisions abound where courts in this land have consistently declined to recognise and protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor. ... The effect of all those decisions is that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense.

25. The petitioner's claim to the suit property traces its roots to the letter of allotment dated 20th July 1998, issued to him by Commissioner of Lands. The letter stated on its face that it was issued under the **Government Lands Act** (now repealed). The petitioner has been aware that the respondents took the position that its title is invalid since the suit property was not available for alienation. As noted earlier, there is uncontested evidence that the suit property has been and remains the official residence of senior police officers. In those circumstances, one would have expected that the petitioner would demonstrate that the Commissioner of Lands lawfully issued the letter of allotment to him.

26. I have looked at the material that the petitioner has placed before the court and I see nothing which shows that the President had authorized the Commissioner of Lands to alienate the suit property. There are many authorities to the effect that the Commissioner of Lands had no power to alienate public land. In **Henry Muthee Kathurima v Commissioner of Lands & another [2015] eKLR**, the Court of Appeal stated:

... We have examined the evidence on record; there is nothing on record to show that the President had authorized the Commissioner of Lands to alienate the suit property. We have examined the provisions of Sections, 3, 7, 9 and 12 of the Government Land Act and we are satisfied that the Commissioner of Lands had no power or authority to alienate the suit property and issue the Certificate of Lease. ...

... We have considered the submissions by the appellant in this appeal and have no hesitation to state that we concur with the findings and decision of the trial court. The Commissioner of Lands had no power to alienate public land and any action taken without due authorization is a nullity. We cite the case of Said Bin Seif v. Shariff Mohammed Shatry, (1940)19 (1) KLR 9, and reiterate that an action taken by the Commissioner of Lands without legal authority is a nullity; such an action, however, technically correct, is a mere nullity, and not only voidable but void with no effect, either as legitimate expectation, estoppel or otherwise.

27. The petitioner is essentially seeking protection of his right to property in so far as the suit property is concerned. He claims that he has right to property in regard to the suit property and that those rights have been violated. His claim of ownership is founded exclusively on the certificate of lease that he holds. His said title has been challenged. In those circumstances he must do more than simply waving the very same title. See **Munyu Maina v Hiram Gathiha Maina [2013] eKLR**. He ought to have demonstrated that he got a valid title arising from the letter of allotment. On my part, I am not persuaded that the petitioner has a valid title to the suit property. Even though there is no cross petition herein seeking nullification of his title, the petitioner is no doubt aware of the statement of Lord Denning in **Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169**:

If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. ... And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

28. A void title is a nullity with no effect. A court of law does not act in vain. Any judgment in the petitioner's favour on the basis of a void

title would equally be void. As the Supreme Court stated in **Republic v Karisa Chengo & 2 others [2017] eKLR**, an act which is void cannot be the basis of any legal proceedings.

29. In view of the foregoing discourse, I am not persuaded that the respondents have violated the petitioner's rights under **Article 40** in regard to the suit property. I am also not persuaded that the petitioner is entitled to the reliefs sought.

30. In the result, the petition is dismissed. Each party shall bear own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 27TH DAY OF MAY 2021

D. O. OHUNGO

JUDGE

In the presence of:

Mr Koigi holding brief for Mr Ouma for the petitioner

Mr Ondieki for the respondents

Court Assistants: B. Jelimo & J. Lotkomoi