



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 14 OF 2013

IN THE MATTER OF: ARTICLES 19, 20, 22, 23, 64 AND 159 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013

BETWEEN

JOYCE MUTHONI WACIUMA.....PETITIONER

VERSUS

- 1. CABINET SECRETARY FOR LANDS, HOUSING AND URBAN DEVELOPMENT.....1ST RESPONDENT**
- 2. NATIONAL LAND COMMISSION.....2ND RESPONDENT**
- 3. CHIEF LAND REGISTRAR3RD RESPONDENT**
- 4. DISTRICT LAND REGISTRAR.....4TH RESPONDENT**
- 6. HONOURABLE ATTORNEY GENERAL.....5TH RESPONDENT**

RULING

1. By this Notice of Motion application dated 31st January 2018, Joyce Muthoni Waciuma (the Petitioner) prays for orders:-

1. That Messrs Kimani Kagwima & Company Advocates be granted leave to come on record in place of Messrs Gitau Gikonyo & Company Advocates being the Advocates on record for the Petitioner /Applicant herein;

2. That this Court be pleased to hold the Respondents in contempt of the Court decree dated 26th June 2015 and issued on 17th September 2015 particularly the Chairman National Land Commission, the Chief Land Registrar, the Kilifi District Land Registrar, the Cabinet Secretary for Lands Housing & Urban Development and the Attorney General for their committal in prison for a period of not exceeding six (6) months for willful disobedience of the decree;

3. That the publication (by) the 2nd Respondent on the Kenya Gazette Vol. CXIX No. 97 of 17th July 2017 purporting to revoke, regularize, dispossess and in whatever manner take away the Applicant's title, grant and or possession over the title Number Chembe/Kibabamshe/424 and such publication be declared as illegal, unlawful and in contempt of the Court's decree issued (on)

17th September 2015;

4. That the Honourable Court be pleased to compel the Respondents jointly and severally to implement this Honourable Court's decree issued on 17th September 2015;

5. That the Costs of this application be provided for.

2. The application which is supported by an affidavit sworn by the Petitioner is premised inter alia on the grounds:-

i) That on 28th November 2013, this Court issued injunctive orders restraining the Respondents from transferring, charging, dealing with, interfering or developing the Petitioner's property pending inter-partes hearing of an application dated 26th November 2013 and eventually the main Petition.

ii) By a Judgment delivered on 26th June 2015, the Hon. Justice Angote, decreed:

a) That the Respondents reinstate and make available land records including the register pertaining to the LR No. Chembe/Kibabamshe/424 as it was on 21st December 1978;

b) That the Respondents do retain the records of the Petitioner in the register pertaining to the property in the Kilifi Land Registry records as the owner thereof as provided under Sections 25 and 26 of the Land Registration Act and Article 40(1) of the Constitution;

c) That the Respondents are prohibited and permanently restrained from interfering with the Petitioner's ownership, occupation, use, and quiet enjoyment of the property; and

d) The Respondents to pay the costs of the Petition.

iii) The Respondents were served with the Decree but to-date, they have ignored and or refused to honour and or obey the same;

iv) In a blatant affront to the authority of this Court, the 2nd Respondent on 17th July 2017 caused to be published in the Kenya Gazette an undertaking to review the grant in respect of the suit property and went ahead to make a determination ordering for revocation, regularization and upholding of the title to another party.

v) That it is fit and proper that the concerned officials be punished for their open defiance to Court orders in order to uphold the dignity and authority of this Court.

3. In response to the application, the 1st, 3rd and 5th Respondents have through an Affidavit sworn by the District Land Registrar Kilifi(4th Respondent) acknowledged that they are aware of the Decree and that it was presented to the 4th Respondent's Registry on 11th November 2015. It is however their case that upon presentation, the 4th Respondent complied therewith by reconstructing the Green Card for the suit property.

4. The 1st, 3rd and 4th Respondents assert that any other action they may have taken in relation to the suit property were taken in good faith and there was no element of any willful disobedience or disrespect of their part to warrant the grant of the orders sought by the Petitioner.

5. Despite being granted an opportunity to do so, the 2nd Respondent failed to file a response to the application within the timelines granted by the Court. As at the time the matter came up for submissions, the first limb of the Petitioners prayers had been sorted out after the Petitioners former Advocates M/s Gitau Gikonyo & Company Advocates agreed by a consent order dated 8th April 2019 and filed herein on 10th April 2019, to allow M/s Kimani Kagwima & Company Advocates to come on record for the Petitioner.

6. The Petitioner herein is the registered proprietor of all that parcel of land known as Chembe/Kibabamshe/424 (the suit property). Through her Petition dated 23rd November 2013, she moved this Court seeking declaratory orders that the Respondents had contravened her right to ownership of the suit property under Article 40 (1) of the Constitution.

7. It was the Petitioner's case that sometime in the year 2008, she conducted an official search in respect of the suit property only to be informed that the property did not exist and that accordingly, neither the register, file or Green Card was in existence at the District Land Registry, Kilifi.

8. In a Judgment delivered on 26th June 2015, the Honourable Angote J allowed the Petition and ordered that:-

a) The Respondents do reinstate and make available land records, including the register pertaining to land known as Chembe/Kibabamshe/424 as it was on 21st December 1978;

b) The Respondents do retain the records of the Petitioner in the register pertaining to Chembe/Kibabamshe/424 in the Kilifi Land Registry records as the owner of the suit property as provided under Section 25 and 26 of the Land Registration Act and

Article 40 (1) of the Constitution;

c) The Respondents are hereby prohibited and permanently restrained either by themselves, agents, servants or other land official acting under them from interfering with the Petitioner's ownership, occupation, use, proprietorship and quiet enjoyment of rights to the suit property;

d) The Respondents do pay the costs of the Petition.

9. In the application before me, the Petitioner avers that the Respondents have breached the decree and Judgment issued as aforesaid and that they have failed to comply with the terms thereof.

10. The rationale behind contempt proceedings is that any deliberate disobedience of Court orders ought to be punished to ensure that the rule of law is upheld. As the Court of Appeal stated in ***Shimmers Plaza Ltd –vs- National Bank of Kenya Ltd(2015) eKLR:-***

“It is important however that the Court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty...”

11. In the matter before me, the 1st, 3rd, 4th and 5th Respondent deny that they have breached the decree arising from the Judgment of the Court issued on 26th June 2015. According to the 4th Respondent, they were served with the said decree on 11th November 2015 and they immediately proceeded to comply therewith.

12. In support of their case, the said Respondents have annexed a Copy of a Green Card bearing the Petitioner's name. A perusal thereof indicates that the card was reconstructed pursuant to the decree issued by this Court as aforesaid. It further shows that the Petitioner is the registered proprietor of the suit property effective 21st December 1978.

13. It is therefore clear to me that as at the time this application was filed, the 1st, 3rd, 4th and 5th Respondents had taken steps to reinstate the records as at 21st December 1978 in accordance with the decree of the Court and I am unable to see in which manner they could be said to have breached the same.

14. On the other hand, the Petitioner accuses the 2nd Respondent of publishing a Gazette Notice on 17th July 2017 in regard to the suit property. I have perused the said notice as attached to the Petitioner's Supporting Affidavit. The impugned notice informs the members of the public the findings made by the 2nd Respondent in relation to a number of parcels of land within the Chembe Kibabamshe Adjudication Section.

15. In regard to the suit property, the determination made by the 2nd Respondent simply reads “*under Court Injunction*”. Those findings in my view do not revoke or interfere in any way with the Petitioner's ownership and quiet possession of the suit property.

16. In the premises, I am not persuaded that the application before me has any merit. The same is dismissed with costs.

Dated, signed and delivered at Malindi this 6th day of May, 2020.

J.O. OLOLA

JUDGE