



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**PETITION 8 OF 2019**

**BETWEEN**

**JOHANNES AKELLO OMBOTO.....1<sup>ST</sup> PETITIONER**

**GRADUCE OMBOTO AKELLO.....2<sup>ND</sup> PETITIONER**

**AND**

**KENYA RAILWAYS CORPORATION.....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF INTERIOR &**

**COORDINATION OF NATIONAL SECURITY.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**THE KENYA PORTS AUTHORITY.....4<sup>TH</sup> RESPONDENT**

**NATIONAL LAND COMMISSION.....5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

Johannes Okello Omboto and Graduce Omoto Akelo (*hereinafter referred to as the Petitioners*) have brought the petition seeking the following orders namely; a declaration that the Petitioners are the bona fide registered proprietors of land parcel Kisumu Municipality/ Block 7/ 530 to the total exclusion of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents; a declaration that the decision by the 2<sup>nd</sup> and 4<sup>th</sup> Respondents to destroy the Petitioners perimeter wall and further threaten to demolish the Petitioners buildings on the suit parcel is unlawful and in violation of the Petitioners social and economic rights under the Constitution. An order of permanent injunction restraining the Respondents jointly and severally together with their agents, servants and or whomsoever acting on their instructions from trespassing or proceeding with further demolition of the Petitioners properties on the suit parcel. An order compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents jointly and severally to compensate the Petitioners for the loss occasioned by the destruction on the suit parcel. Costs of the petition.

The Petitioners state that they are the registered proprietors of the suit parcel, and that they acquired the parcel from Hodima Construction Company in 2005 upon which they immediately took possession in 2006. That the 1<sup>st</sup> Respondent sought to be paid rent leading to the Petitioners filing a suit Kisumu HCCC No 53 of 2006, which was transferred to the Environment and Land Court as ELC No. 78 of 2015; and that the case is still pending.

The Petitioners state that in 2009 the predecessor of the 5<sup>th</sup> Respondent, the commissioner of lands illegally cancelled the Petitioners title, leading to the Petitioners filing a judicial review application Kisumu HCC Misc Appl. No. 25 of 2009 where the court granted the Petitioners an order of prohibition prohibiting the commissioner of lands from illegally or irregularly accepting or registering a lease over the suit parcel, which the commissioner of lands complied with.

That however, on the night of 14<sup>th</sup> August 2019, the 2<sup>nd</sup> and 4<sup>th</sup> Respondents sent armed police officers and destroyed the Petitioners' perimeter wall. That the 2<sup>nd</sup> Respondent contention was that they were recovering land and giving it to the 4<sup>th</sup> Respondent who is to operate a new port on the shores of Lake Victoria. That the Petitioners had not been served with any notice on the destruction or compulsory acquisition or compensated for the land. That the 2<sup>nd</sup> and 4<sup>th</sup> Respondents now plan to evict the Petitioners and their tenants at any time.

The Petitioners contend that the 3<sup>rd</sup> and 5<sup>th</sup> Respondent have failed in their constitutional mandate to advise the government that they cannot forcefully take away private property without compensation. The Petitioners have asserted that the Respondents are in violation of Articles 40, 43 and 47.

The 1<sup>st</sup> Petitioner swore an affidavit in support of the petition in which he attached a copies of the certificate of lease in the Petitioners' names, the former certificate of lease in the name of their vendor Hodima Construction Company Limited, a letter from the City Council of Kisumu approving construction on the premises, lease agreements signed with tenants, as well as photographs showing destruction to the perimeter wall. The Petitioner also attached to his affidavit copies of the pleadings in the ongoing case ELC 78 of 2015 and the judgment in Kisumu HCC Misc Appl. No. 25 of 2009.

### **1<sup>ST</sup> RESPONDENT'S RESPONSE AND CROSS PETITION**

The 1<sup>st</sup> Respondent averred that the suit parcel consists of what was part of all that parcel of land comprising unsurveyed land vested in the 1<sup>st</sup> Respondent by operation of the Kenya Railways Corporation (vesting land) Order 1986 contained in Legal Notice No. 24 of 1986 which vested all the land vested in or conveyed to the East African Railways Corporation in the 1<sup>st</sup> Respondent.

The 1<sup>st</sup> Respondent contended that the land was unsurveyed and had no identification but was clearly delineated and referred to as Railway Housing in all early maps and records used by the Survey of Kenya of the Ministry of Lands and Settlement. That the land has never been surrendered to the Government of Kenya for allocation to any party, including the Petitioners. That the 1<sup>st</sup> Respondent was not involved in the transfer of the suit land to Hodima Construction Company and therefore the acquisition of title by the Petitioners was illegal, fraudulent, and null and void. That if indeed the Plaintiff holds any titles over the suit parcel different from the long term leases granted by the 1<sup>st</sup> Respondent then the same must have been acquired illegally. That any developments on the suit property are can only be carried out with the consent and approval of the 1<sup>st</sup> Respondent. That the Petitioners have not demonstrated how the 1<sup>st</sup> Respondent has violated their rights and that they have suffered any loss attributable to the actions of the 1<sup>st</sup> Respondent.

The 1<sup>st</sup> Respondent also filed a Cross-Petition stating that the 5<sup>th</sup> Respondent in the main petition illegally created a 0.5550 Ha parcel excised from the portion vested in the 1<sup>st</sup> Respondent in the petition and creating the suit parcel. That the suit parcel is a creature of fraud, void and of no legal effect. The 1<sup>st</sup> Respondent enumerated the particulars of fraud on the part of the 3<sup>rd</sup> and 5<sup>th</sup> Respondents in the main petition. Therefore the Cross-Petitioner prayed that the leases granted to Hodima Construction Company and the Petitioners in the main petition be terminated and cancelled.

The Senior Legal Officer of the 1<sup>st</sup> Respondent filed a supporting affidavit to the cross petition in which he annexed a copy of the Kenya Railways Corporation (vesting of Land) Order 1986, stating that the 1<sup>st</sup> Respondent was vested with parcels of land within Kisumu Municipality of approximately 237 acres which included the suit parcel. He annexed a copy of the Survey of Kenya plan FR 45/53 of 1935 and a copy of the Uganda Railway Plan 1908 and 1908 showing Railway boundaries. He also attached a copy of the Registry Index Map for Kisumu Block 7 stating that the block is principally a Railways operational area comprising of the port, railways station, staff quarters and port area. The petitioners further filed a supplementary affidavit sworn by the 1<sup>st</sup> petitioner stating the kind of damage to the property.

### **PETITIONERS' SUBMISSIONS**

Counsel for the Petitioners reiterated the pleadings in the petition and supporting affidavits, submitting that the Petitioners had annexed a valuation report on the extent of damage caused by the invasion of the parcel as being valued at Kshs. 27, 131,00/= and loss of monthly rental income of Kshs. 473,974/=. Counsel submitted that the 1<sup>st</sup> Respondent had previously attempted to lay claim to the suit parcel but lost through a legal process, as did the 3<sup>rd</sup> Respondent through the commissioner of lands. That having lost in the courts, the 1<sup>st</sup> to 4<sup>th</sup> Respondents was now embarking on illegal means to take away the property.

Counsel cited Section 24(a) of the Land Registration Act which stated that the registered proprietor of a land has absolute ownership and rights thereof. That the 4<sup>th</sup> Respondent is the benefactor of the violation of the Petitioners rights yet the jurisdiction of the 4<sup>th</sup> Respondent does not permit it to do business in Kisumu, according to the Kenya Ports Authority Act. Counsel contended that the suit parcel was not within the vicinity of the Kisumu Port and no material had been placed before the court to demonstrate this.

In response to the 1<sup>st</sup> Respondent's cross petition, Counsel submitted that the issues they raised were well exhausted in the decision in Kisumu HCC Misc. Appl. No. 256 of 2009 and therefore the cross petition should be dismissed with costs.

### **1<sup>ST</sup> RESPONDENT'S SUBMISSIONS**

Counsel for the 1<sup>st</sup> Respondent submitted that the petition being a constitutional petition, The Petitioners ought to set out with a reasonable degree of precision that of which he complains against the 1<sup>st</sup> Respondent, the provisions alleged to have been infringed and the manner in which they are infringed; as was held in the cases of *Anarita Karimi Njeru v Republic [1976 – 1980] KLR 1272* and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 other [2013] eKLR*. That the Petitioners have failed to do this with regard to the claims against the 1<sup>st</sup> Respondent.

Counsel asserted that there is no evidence to show that the 1<sup>st</sup> Respondent infringed the Petitioners right to property. That the parcel was part of the land vested in the 1<sup>st</sup> Respondent and it was a mystery how the parcel was alienated and allocated to Hodima Construction Company and then the Petitioners. That Article 40 (6) of the Constitution frowns upon property that is acquired illegally and irregularly. Counsel also submitted that no evidence was tendered in support of the allegation that the 1<sup>st</sup> Respondent had a hand in the alleged events of 14<sup>th</sup> August

2019.

## Issues for Consideration

### 1. Whether Petition or the Cross-Petition is merited

Section 26 of the Land Registration Act provides that 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 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.”

The determination in Kisumu HC Misc. Application 256 of 2009 concluded that the Petitioners’ title had been illegally cancelled and the Land Registrar was ordered to reinstate the Petitioners’ as the proprietors of the suit property herein. Therefore, for all effects and purposes, and pending the determination of ELC No. 78 of 2015, the Petitioners remain the registered proprietors of Kisumu Municipality/ Block 7/ 530 unless the same is found to have been illegally acquired.

However, in this petition the 1<sup>st</sup> Respondent has demonstrated that the suit parcel of land is part of the larger land belonging to the Kenya Railways Corporation and duly gazetted as Kenya Railways Corporation Land. The suitland was meant for public use by the Kenya Railways Corporation and not available for allocation for private use. However, the 1<sup>st</sup> respondent has not sufficiently demonstrated fraud and illegality on the part of the petitioners. The 1<sup>st</sup> Respondent produced survey plans and registry index maps showing the extent of the parcels of land vested in Kenya Railways Corporation. The 1<sup>st</sup> Respondent correlated the survey plan and maps to the location of Kisumu Municipality/ Block 7/ 530.

The Petitioners’ averments that the 2<sup>nd</sup> and 4<sup>th</sup> Respondents on the night of 14<sup>th</sup> August 2019, the 2<sup>nd</sup> and 4<sup>th</sup> Respondents sent armed police officers and destroyed the property’s perimeter wall without notice was uncontroverted by the Respondents.

The Petitioners documented the extent of the destruction and quantified the losses in a valuation report. This evidence also remained unchallenged and uncontroverted by the Respondents.

The Respondents’ actions amounted to a violation of the Petitioners’ rights under Article 40(1) of the constitution read with sub articles 2 and 6. Sub Article 6 provides that the rights under this Article do not extend to any property that has been found to have been unlawfully acquired.” There must be a finding that the property has been unlawfully acquired before any person takes action. The respondents ought to have come to court to challenge the title held by the petitioners. By demolishing the petitioners’ buildings that was the source of their income, the respondents were in breach of their Economic and social rights guaranteed by Article 43 of the Constitution of Kenya and by demolishing the petitioners’ structures without following any procedure or court order were in breach of Article 47 of the Constitution.

The respondents actions were ostensibly under the auspices of the 1<sup>st</sup> Respondent which was aware of the pendency of ELC No. 78 of 2015 and that the status of the Petitioners’ as the registered proprietors of the suit property remained unchanged pending the hearing of the suit. The upshot of the above is that the petitioners are entitled to Compensation by the 1<sup>st</sup> respondent for breach of their rights under the provisions of Articles 40, 43 and 47 of the Constitution.

The valuation report was prepared by Add Property Consultants whose considered opinion was that the value of the land was 222,000,000 and that the improvements was Ksh 68,000,000/= and therefore the total was ksh 290,000,000/=. The replacement cost was put at Ksh 22,200,000.

I do find that the petitioners are entitled to the damages for breach of their right to fair administrative action and breach of their economic and social rights equivalent to the cost of replacement. I do find that an award of ksh 27,131,000 as prayed for by the petitioners would be on the higher side but an award to the petitioners of general damages of ksh 5,000, 000 (Kenya Shillings five Million only) for breach of the petitioners right by demolishing the wall and evicting his tenants without affording him a hearing is appropriate and do award the same. The petitioners are also entitled to compensation for loss of monthly rental income of ksh 473,974 from the 14<sup>th</sup> of August 2019 to the date of this judgment. Both amounts to be paid by the 1<sup>st</sup> Respondent.

On the cross petition, I do find that the suit parcel consists of what was part of all that parcel of land comprising un-surveyed land vested in the 1<sup>st</sup> Respondent by operation of the Kenya Railways Corporation (vesting land) Order 1986 contained in Legal Notice No. 24 of 1986 which vested all the land vested in or conveyed to the East African Railways Corporation in the 1<sup>st</sup> Respondent.

The land was un-surveyed and had no identification but was clearly delineated and referred to as Railway Housing in all early maps and records used by the Survey of Kenya of the Ministry of Lands and Settlement.

The land has never been surrendered to the Government of Kenya for allocation to any party, including the Petitioners. The 1<sup>st</sup> Respondent was not involved in the transfer of the suit land to Hodima Construction Company and therefore the acquisition of title by the Petitioners was illegal, null and void. Each party to bear own costs as both succeeded.

**DATED, DELIVERED AND SIGNED THIS 5<sup>th</sup> DAY OF MAY, 2020.**

**A.O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15<sup>TH</sup> March 2019 and with the consent of the parties.

**A.O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**