



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC PETITION NUMBER 7 OF 2018**

**(Formerly Petition No.112 OF 2016)**

**IN THE MATTER OF ARTICLES 22, 23, 40 AND 47 OF THE CONSTITUTION OF KENYA ( 2010 ).**

**AND**

**IN THE MATTER OF CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL TO ACQUIRE, OWN AND USE PRIVATE PROPERTY WITHIN THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF UNLAWFUL ACQUISITION, USE AND OCCUPATION OF PRIVATE PROPERTY BY THE GOVERNMENT OF KENYA WITHOUT COMPENSATION**

**AND**

**IN THE MATTER OF ACQUISITION AND OCCUPATION OF PLOT NO.C 118 – KIAMBIU SETTLEMENT SCHEME, EASTLEIGH SOUTH, NAIROBI BY THE GOVERNMENT OF KENYA**

**BETWEEN**

**BISHIOP PAUL MULATYA MAKULA.....PETITIONER**

**AND**

**THE HON. ATTORNEY GENERAL & 2 OTHERS.....RESPONDENTS**

**JUDGEMENT**

1. The Petitioner is the Founder, Apostolic Bishop and General Overseer of Bible Faith Life Ministries. The Respondent is the Principle Legal Advisor of Government appointed pursuant to Article 156 of the Constitution. The 1<sup>st</sup> Interested Party is a County Government established pursuant to Article 176 of the Constitution.
2. The Petitioner is the beneficial owner of a plot known as plot No. C-118, situate at Kiambiu Settlement Scheme, Eastleigh South in Nairobi (suit property). The suit property which measures 40x80 ft was allotted to the Petitioner following formalization of Kiambiu Settlement Scheme by the City Council of Nairobi under minute No.15 page 1427 of 8<sup>th</sup> February 2000.
3. The Petitioner put up five rooms four of which he rented out and reserved one for his own use. Adjacent to the suit property was a one room office which was occupied by the area Assistant Chief. During the runner-up to the general elections of 2002, there was pre-election violence pitting two outlawed groups.
4. The then Provincial administration was concerned at the escalating violence. It was decided that there was need to bring in more administration police officers to keep peace. The government dispatched about twenty administration police officers who were accommodated at the Assistant Chief's office next to the suit property.
5. The office of the Assistant Chief proved to be too small. The government through the Provincial Administration approached the Petitioner and informed him that there was need to post a Chief to the area and establish an Administration Police Post to accommodate the

Administration Police Officers. The Petitioner was asked to give up the suit property for that purpose in return for allocation of an alternative plot.

6. As the Petitioner had little choice considering the security situation then, he agreed to be given an alternative plot. The task of looking for an alternative plot was given to the District Officer, Pumwani Division, Mrs Kula Hache. The District Officer could not find an alternative plot near Eastleigh area. Her superiors advised her to liaise with her Kibera counter-part to look for a plot at Kibera area within Langata .

7. The Petitioner was put through to the District Officer, Kibera who asked him to look around for a suitable land which could be given to him. The Petitioner who knew Kibera well having worked there with World Vision identified a plot which was next to Friends Church Langata. The District Officer then referred the Petitioner to the Chief of Mugumoini Location who gave him a go-ahead to take possession of the plot he had identified.

8. The Petitioner then took possession and started constructing a church on the plot identified. In the meantime, the Chief who had sanctioned him to build was transferred. A new Chief came who ordered the Petitioner to demolish his church on grounds that District Officers had no authority to allocate plots.

9. The Petitioner went back to the Provincial Commissioner's office where he explained what had befallen him. The Provincial Commissioner referred him to a District Officer who was unable to assist him. When the Petitioner later met the Provincial Commissioner, he told him that he had not been assisted. The Provincial Commissioner then asked his deputy to assist. The Deputy Commissioner identified a plot which he thought was available. The Deputy Provincial Commissioner wrote to the Commissioner of Lands who wrote back and said that the plot in question was not available for allocation as it was private property.

10. The Deputy Provincial Commissioner later on identified plots which had been reserved for special purposes. The Petitioner was asked to settle on one of them. He took possession and started putting up a church. On 30<sup>th</sup> December 2003, the area chief visited the plot and asked him to demolish the structures. The area residents moved into the structures and occupied the same for one week or so. In early 2004, he was served with summons to enter appearance. He had been sued by one Richard Ethan Ndubai who claimed that the Plot where he had built was his. He later recorded a consent settling the matter.

11. The Petitioner reported the incident to the Provincial Commissioner who did not act. As his structures had been pulled down, and he was not getting any help from the Provincial Administration, he resorted to writing letters to all offices including the office of the President but could not be assisted. This is how he seeks the following reliefs:-

***a) a declaration that the Petitioner's rights under Article 40 of the Constitution of Kenya, 2010 relating to the protection of the right to ownership of property and prompt , full , fair and just compensation in the event of acquisition for public use or appropriation have been violated by the state.***

***b) A declaration that the Petitioner's rights and legitimate expectation to fair administrative action under Article 47 of the Constitution of Kenya , 2010 have been breached by the state.***

***c) Special damages under Article 23(3) (e) of the Constitution of Kenya, 2010 in the sum of Kshs.16,445,000.00 being compensation for land plot No. C- 118,Kiambu Settlement Scheme Eastleigh South as at 8<sup>th</sup> February 2016 together with interest thereon at Court rates from the date of Judgement until payment in full.***

***d) General damages, special damages in the sum of Kshs.14,130,000.00 together with interest thereon from 1<sup>st</sup> January 2004 until payment in full.***

***e) Costs of this Petition.***

***f) Such other and/or further orders as the Honourable Court may deem fit.***

12. The Petitioner contends that his rights under Article 40 and 47 of the Constitution have been violated. He argues that his property was taken without any compensation and that promises for alternative land have all come a cropper. He argues that the suit property is now a gazetted administration Police Post and Chief's Office and there is no way he can re-claim it other than seek compensation.

13. The Petitioner argues that he was earning income from the suit property and that in two occasions, the government through the Provincial Administration had given him alternative plot only to turn out that each of the two plots he was given had issues. In the process, he has lost financially due to demolition of the structures which he had put up.

14. The Petitioner's Petition was opposed by the Respondent based on grounds of opposition filed on 25<sup>th</sup> July 2016 and a replying affidavit filed on 24<sup>th</sup> July 2017. The Respondent contends that the Petitioner has no recognizable interest in either the suit property or plots known as LR No. Nairobi Block 60/470, 471 and 472. The Respondent further contends that the issue of ownership of LR No. Nairobi Block 60/470, 471 and 472 was resolved in Nairobi HCCC No. 10 of 2004 and that this Petition is *res judicata*.

15. The Respondent further contends that the suit property does not exist in the records at the Ministry of Lands and that compensation can only be given to a landowner with a title deed. The Respondent further argues that the suit property was allotted to the Petitioner by a councillor who is not an officer of the Ministry of Lands.

16. The 1<sup>st</sup> Interested Party opposed the Petition through grounds of opposition filed in Court on 12<sup>th</sup> March 2019. The 1<sup>st</sup> Interested Party

contends that the Petition is misconceived and an abuse of the process of the Court; that there is no cause of action against the 1<sup>st</sup> Interested Party and that the Petition lacks merit.

17. I have carefully considered the Petition by the Petitioner as well as the opposition to the same by the Respondent and the 1<sup>st</sup> interested party. The 2<sup>nd</sup> Interested Party did not file any pleadings. I have also considered the submissions by the Petitioner, the Respondent and the 1<sup>st</sup> interested party. I must say at the outset that this Petition portrays a picture of how at times, the government can be insensitive to the rights of individuals. There is no doubt that the Petitioner is the beneficial owner of the suit property. There is also no doubt that the Petitioner had not acquired title to the suit property as at the time it was taken over by the then Ministry of Provincial Administration and Internal Security which is now known as Ministry of Interior and Co-ordination of National Government.

18. There is also no doubt that the suit property is occupied by the Chief's office and also houses an Administration Police Post. The issues for determination are firstly whether the Petitioner's constitutional rights under Articles 40 and 47 of the Constitution have been violated and secondly whether the Petitioner is entitled to compensation and the other reliefs sought. I will separately deal with each of the Articles alleged to have been violated.

**Whether the Petitioner's rights under Article 40 of the Constitution were violated.**

19. **Article 40(1) of the Constitution** states as follows:-

***“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.***

**Article 40(3) and (4)** provides as follows:-

***“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 may not hold title to the land.***

20. The Petitioner has elaborately stated how he is the owner of the suit property and how the suit property was taken away from him. The Petitioner was promised that he was going to get alternative land and that is why he did not press for compensation at the time. There are correspondences which show that indeed the Provincial Administration attempted to get him alternative land. However when these efforts did not bear fruits, he was never given any compensation. The Provincial Administration went mum after a second attempt to settle him hit a snag.

21. The number of letters which the Petitioner wrote after this show how insensitive the government can be towards its citizens. The suit property has been taken away yet he cannot be compensated. This is clearly a breach of Article 40 (3) which provides that where the state takes away ones' land, there should be prompt compensation. In the instant case, there were attempts to give the Petitioner alternative land but this did not succeed. The state decided to keep the Petitioner's land without compensation which is a clear breach of the Constitutional Rights of the Petitioner.

22. The Respondent argued in their submissions that compensation can only arise where one has title. This argument is without merit. It is not disputed that the Petitioner had no title but that does not keep him off from his land. The 1<sup>st</sup> Interested party in their submissions acknowledge that they are the ones who formalized the suit property through minutes held by Nairobi City Council the predecessor of the 1<sup>st</sup> Respondent. There is no person claiming that the Petitioner acquired his property in an illegal manner. Article 40 (4) of the Constitution recognizes the fact that compensation may be given to persons who do not even hold title. To this extent, the decisions cited by the Respondent and the 1<sup>st</sup> Interested Party on the issue of allotment and title do not apply to this case. There is none who is challenging ownership and compensation is not confined to only those who have title.

23. The Petitioner has explained in detail on how his rights have been violated and there is no basis upon which the Respondent and interested party can argue as they do in their submissions that the Petitioner has not stated with precision how his rights have been violated. This is why the court of Appeal in the case of **Mumo Matemu Vs Trusted Society of Human Rights Alliance & Others Nairobi Civil**

**Appeal No. 290 of 2012** stated that Precision is not conterminous with exactude. Precision must remain a requirement as it is important, it demands neither formulaic Prescription of the factual claims nor formalistic utterance of the Constitutional Provisions alleged to have been violated.

**Whether the Petitioner's rights under Article 47 of the Constitution were violated.**

24. Article 47(1) and (2) of the Constitution provides as follows:-

*“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.”.*

25. A decision was made by the Provincial Administration that they wanted the suit property where they were to set up a chief's office and Administration Police Post. The Petitioner was given hope that he was to get alternative land. The alternative plot was not forthcoming. The Petitioner has been following up the matter all the way from 18<sup>th</sup> February 2004 when he wrote to the Provincial Commissioner about what had happened to him. There was no response. The Petitioner again made a follow up through letters addressed to various offices. There was no explanation given.

26. The Ministry of interior and coordination of National Government wrote on 4<sup>th</sup> May 2017 to the County Commissioner Nairobi County asking him to give a brief on the Petitioner's issue. There has been no response from the County Commissioner's office. This is clearly in violation of the rights of the Petitioner who is entitled to be told the reasons in writing why he cannot be compensated or given an alternative plot. The decision to take the suit property affected his rights to property as enshrined in Article 40 of the Constitution and he was therefore entitled to Fair Administrative Action which is *fair* and *expeditious*. It cannot be said that the state through Provincial Administration has been fair to the Petitioner. The state has clearly violated the Petitioner's constitutional rights under Article 47 of the Constitution.

**Whether the Petitioner is entitled to compensation and other reliefs**

27. The Petitioner has already lost the suit property to the state. As I have already found that his rights under Article 40 of the Constitution have been violated, the Petitioner is entitled to compensation. In **Arnacherry Ltd Vs Attorney General 92014** eKLR Justice Lenaola ( as he then was) held that violations which occurred during the old Constitution and are still continuing under the new Constitution can still be remedied under the new Constitution because even under Section 75 of the old Constitution, rights to property were protected.

28. In the instant case, the Petitioner sent a valuer who valued the suit property. The valuation report was filed in Court. The value of the suit property was **Kshs.12,000,000/=**. The value of improvements was 250,000/=Loss of rental income was **Kshs.2,050,000/=**. The valuer then put a figure of **Kshs.2,145,000/=** being 15% of the amount provided under the Land Act. The total came to **Kshs.16,445,000/=**. There was no valuation report to contradict this one. I therefore find that this amount is reasonable considering the valuation period of 8<sup>th</sup> February 2016.

29. The Petitioner sought for special damages of **Kshs.14,130,000/=** being the cost of materials at **Kshs.450,000/=** and loss of income at **Kshs.13,680,000/=** . These are special damage claims which ought to have been specifically pleaded and proved. There was no evidence that the Petitioner lost materials or that he incurred loss of **Ksh.13,680,000/=**.The latter claim is only speculative and the former was not proved. The Petitioner merely stated that receipts were lost when there was demolition of one of the structures in one of the two plots he had been shown at Langata.

30. When the Petitioner was sued in Nairobi HCCC No. 10 of 2004, he entered into a consent in which it was stated that he had not constructed any wall and that he had not put up any structure. There is therefore no basis for claiming special damages for lost materials which in any case have not been proved.

31. In Conclusion thereof, I enter Judgement for the Petitioner against the Respondent as follows:-

*(a) A declaration that the Petitioner's rights under Article 40 of the Constitution of Kenya, 2010 relating to the protection of the right to ownership of property and prompt , full , fair and just compensation in the event of acquisition for public use or appropriation have been violated by the state.*

*(b) A declaration that the Petitioner's rights and legitimate expectation to fair administrative action under Article 47 of the Constitution of Kenya , 2010 have been breached by the state.*

*(c) Special damages under Article 23(3) (e) of the Constitution of Kenya, 2010 in the sum of **Kshs.16,445,000.00** being compensation for land plot No. C- 118,Kiambiu Settlement Scheme Eastleigh South as at 8<sup>th</sup> February 2016 together with interest thereon at Court rates from the date of Judgement until payment in full.*

*(e) General damages of **Kshs.1,500,000/=** for breach of Article 47 of the Constitution.*

*(f) Costs of the Petition.*

**Dated, Signed and delivered at Nairobi on this 5<sup>th</sup> day of May, 2020.**

**E.O.OBAGA**

**JUDGE**

In the absence of parties who had been duly notified that judgement was to be delivered virtually through Microsoft teams.

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**