



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC PETITION NO. 3 OF 2020

IN THE MATTER OF ARTICLES 19, 22, 23, 40, 47, 50 & 62 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF LEGAL NOTICE NO. 177 DATED 14<sup>TH</sup> AUGUST 2017 AND PUBLISHED VIDE KENYA GAZETTEE SUPPLEMENT NO. 130 OF 21<sup>ST</sup> AUGUST, 2017 BY HON. JUDI W WAKHUNGU, CABINET SECRETARY FOR ENVIRONMENT AND NATURAL RESOURCES

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, 2012, THE FOREST CONSERVATION AND MANAGEMENT ACT, 2016, THE FAIR ADMINISTRATIVE ACTION ACT, 2015 & THE ENVIRONMENT AND LAND COURT ACT, 2011

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE PETITIONER'S RIGHT TO PROPERTY OVER TITLE NO. NYANDARUA/MURUAI/1575 AND 1576 BEING SUBDIVISIONS OF ORIGINAL TITLE NO. NYANDARUA/MURUAI/1152

BETWEEN

LEONARD GIKARU WACHIRA.....PETITIONER

-VERSUS-

KENYA FOREST SERVICE.....1<sup>ST</sup> RESPONDENT

CABINET SECRETARY FOR ENVIRONMENT AND NATURAL

RESOURCES.....2<sup>ND</sup> RESPONDENT

HONOURABLE ATTORNEY GENERAL....3<sup>RD</sup> RESPONDENT

JUDGMENT

**A. THE PETITIONER'S CASE**

1. By a petition dated 30<sup>th</sup> July, 2020 expressed to be based upon **Articles 19, 22, 23, 40, 47, 50, 62, & 64 of the Constitution of Kenya, 2010, the Land Registration Act 2012, The Fair Administrative Action Act, 2015 and the Forest Conservation and Management Act, 2016 (FCMA)** the petitioner sought the following reliefs against the Respondents:

(a) A declaration that Legal Notice No. 177 dated 14<sup>th</sup> August, 2017 and published by the 2<sup>nd</sup> Respondent vide Gazettee Supplement No 130 of 21<sup>st</sup> August, 2017 is unconstitutional and invalid in so far as it affects the Petitioner's **TITLES NO. NYANDARUA/MURUAI/1575 & 1576**

(b) An order of certiorari do issue to remove to this court and quash Legal Notice No. 177 dated 14<sup>th</sup> August, 2017 published by the

2<sup>nd</sup> Respondent vide Gazette Supplement No. 130 of 21<sup>st</sup> August, 2017 for being unconstitutional and invalid in law.

(c) A permanent injunction do issue restraining the 1<sup>st</sup> Respondent by itself, employees, servants, agents from evicting, demolishing houses or any other developments, entering, using, remaining or in any other manner adversely dealing with **Titles No. Nyandarua/Muruai/1575 & 1576**.

(d) An order for payment of general and exemplary damages by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for violation of the Petitioner's constitutional right to property.

(e) Costs of the petition.

2. The said petition was supported by an affidavit sworn by the Petitioner, *Leonard Gikaru Wachira*, on 30<sup>th</sup> July, 2020 and the various exhibits thereto. The Petitioner contended that he was absolute proprietor of **Titles Nos. Nyandarua/Muruai/1575 and 1576** (*the suit properties*) having acquired the same from the Settlement Fund Trustees (SFT) in a settlement scheme established by the Government of Kenya. He contended that he was allocated the original property known as Parcel 1152 by a letter of offer dated 20<sup>th</sup> June, 2002 which he later sub-divided into the two parcels comprised in the suit properties.

3. It was the Petitioner's case that upon satisfying all the conditions of allotment the suit properties were transferred to him in 2003 and thereafter he took possession and developed them by planting trees and constructing houses thereon.

4. The Petitioner further pleaded that in violation of his legal and constitutional right to own property the 2<sup>nd</sup> Respondent vide Legal Notice No. 177 of 14<sup>th</sup> August, 2017 declared Muruai forest as a gazetted forest under the **FCMA** thereby adversely affecting the suit properties. It was contended that the 2<sup>nd</sup> Respondent had no legal authority to make the said declaration. The Petitioner contended that Muruai forest was not one of the forests listed in the third schedule to the **FCMA** hence it could not be introduced belatedly.

5. The Petitioner further contended that Muruai Settlement Scheme was a Government scheme which was in existence much earlier hence it was protected from declaration as a forest. In particular it was contended that under **Section 77(1) of the FCMA** a public forest shall not include Government Settlement Schemes which were already in existence prior to the coming into force of the Act. It was the Petitioner's contention that the gazettement of Muruai forest was an attempt to expropriate private property without compensation and without due process.

## **B. THE RESPONDENTS' RESPONSE**

6. The Respondents filed a replying affidavit sworn by Frank Juma on 23<sup>rd</sup> October, 2020 in opposition to the petition. He stated that he was a surveyor in the employ of the 1<sup>st</sup> Respondent whose statutory mandate included the development, conservation and management of Kenya's forest resources. It was contended that during the process of land demarcation and settlement in Nyandarua County in the 1970's in Olkalou Salient, the Forest Department requested for gazettement of some sloppy land in Kirima and Muruai farms amounting to 6000 acres in exchange for forest land suitable for settlement which request was approved by the Government.

7. It was further stated that in furtherance of the said exchange the Forest Department surrendered 4,340 ha of Mekar Forest Block for conversion into Geta, Mekar and Leshau Settlement Schemes. In return, the Director of Land Adjudication and Settlement surrendered Parcels Nos. Nyandarua/Muruai/96 and Nyandarua/Kirima/298 which were formerly under Olkalou Salient Settlement Scheme. The two parcels were surveyed and boundary plans registered by the Director of Surveys as F/R No. 175/332 and F/R No. 175/323 respectively in 1992.

8. The Respondents further contended that Vide Gazette Notice No. 3600 of 30<sup>th</sup> July 1993 under **Section 9 (2) of the Forests Acts (Cap. 385)** which was then in force the 2<sup>nd</sup> Respondent published a notice of intention to declare the said parcel Nos. 96 and 298 as forest areas. It was further contended that no objections were ever lodged within 28 days as required by law hence the two parcels effectively became forest areas.

9. The Respondents contended that sometime in 2002 and 2003 some influential people were illegally allocated forest land in Muruai and Kirima forests by the Director of Land Adjudication and Settlement (*the Director*). It was contended that the said allocations were done without the consent or knowledge of the Forest Department and that due process was not followed in allocating forest land. The Respondents therefore contended that the instant petition was an abuse of the court process which was merely intended to sanitize an allocation process which was illegal and void *ab initio*. The court was consequently urged to dismiss the petition.

## **C. DIRECTIONS ON SUBMISSIONS**

10. When the petition was listed for directions on 23<sup>rd</sup> April, 2021 the parties informed the court that they had already filed and exchanged written submissions on the petition. The record shows that the Petitioner filed his submissions on 16<sup>th</sup> February, 2021 whereas the Respondents filed theirs on 27<sup>th</sup> May, 2021. The record further shows that the Petitioner filed supplementary submissions dated 10<sup>th</sup> May, 2021 in reply to the Respondents' submissions.

## **D. THE ISSUES FOR DETERMINATION**

12. The court has perused the petition dated 30<sup>th</sup> July, 2020 the Respondents' replying affidavit in response thereto as well as the material on record. The court is of the opinion that the following issues arise for determination:

(a) Whether the suit properties were lawfully allocated to the Petitioner.

(b) Whether the 2<sup>nd</sup> Respondent violated the law by declaring Muruai forest as a gazetted forest.

(c) Whether the Petitioner is entitled to the reliefs sought in the petition.

(d) Who shall bear costs of the petition.

#### **E. ANALYSIS AND DETERMINATION**

##### **(a) Whether the suit properties were lawfully allocated to the Petitioner**

13. The court has considered the submissions and material on record on this issue. The Petitioner contended that he was lawfully allocated the original Parcel No. 1152 by the Director vide a letter dated 20<sup>th</sup> June, 2002 and that he fully complied with the terms of offer whereupon he was issued with title documents. The Petitioner relied upon the cases of **Evelyn College v Director of Children's Department & Another [2013] eKLR and Republic v Fazul Mohamed & 3 Others ex parte Okiyah Omtatah Okoiti [2018] eKLR** among others in support of his petition.

14. On the other hand, the Respondents contended that the suit properties in Muruai were ceded by the Director in exchange for bigger and more suitable settlement land in Mekaro forest and Leshau forest way back in 1979 hence the same was not available for allocation to private individuals in 2002. It was further contended that the delay in gazettelement of Muruai forest until 2017 could not defeat the Government's interest in the area set aside for forest purposes.

15. The Respondents further contended that since the relevant notices of intention to declare Muruai forest were given under **Sections 4 (a) and 28 of the Forests Act (Cap. 385)** which was then applicable the area effectively became a forest upon expiry of the 28 days notice without any objections being lodged. The Respondents relied upon **Timothy Ingosi & 87 Others v Kenya Forest Service & 2 Others [2016] eKLR; Adan Abdirahani Hassan v 2 Others v Registrar of Lands Kilifi ex parte Daniel Ricci [2013] eKLR; Funzi Island Development Ltd & 2 Others v County Council of Kwale [2014] eKLR; and Chemey Investments Ltd v Attorney General & 2 Others [2018] eKLR** among other authorities in opposition to the petition.

16. It was the Respondents' case that at the time of the purported allocation of the suit properties to the Petitioner by the Director the suit properties were already reserved for a Government forest hence not available for allocation. The Respondents considered the allocation as illegal, null and void *ab initio* hence it could not form the basis of a constitutional petition. The court was consequently urged to dismiss the petition as lacking in merit.

17. The court has noted from the material on record that the Respondents' contention that the settlement land in Muruai and Kirima was surrendered to the Forest Department in exchange for land in Leshau and Mekaro forest was never controverted. In fact, the record shows that the Petitioner obtained leave to file a further affidavit on 21<sup>st</sup> September, 2020 but no such affidavit was filed to controvert the said exchange. The letter dated 23<sup>rd</sup> November, 1979 from the Director to the Chief Conservator of Forests on the exchange which was annexed to the replying affidavit was not refuted by the Petitioner.

18. There is also no dispute that the concerned Minister published a notice of intention to declare Muruai Forest as a forest area under **Section 4 (2) of the Forests Act (Cap. 285)** which was then in force. The notice was published on 30<sup>th</sup> July, 1993. There is no indication that any objections were received by the Minister hence the gazetted area effectively became reserved for gazettelement as a forest under the statute which was then in force.

19. The mere fact that Muruai forest was not included in the **FCMA of 2016** cannot derogate from the fact that it was already reserved as a forest area. The interest of the Director ceased in 1979 when the land was surrendered in exchange for Leshau and Mekaro forests. His interest in the suit property was not revived by the delay in issuing the relevant notices under the then applicable law. The late gazettelement of Muruai forest vide Legal Notice No. 177 on 14<sup>th</sup> August, 2017 could not defeat the interest of the 1<sup>st</sup> Respondent and the people of Kenya in the forest.

20. The court does not accept the Petitioner's submission from the bar that the exchange of 1979 was not successful since Muruai was not gazetted as a forest within a reasonable time. As indicated before, the Petitioner did not file any further or supplementary affidavit to dispute the exchange. There was no further affidavit to demonstrate that the exchange had failed. There is no evidence that Leshau and Mekaro forests reverted to the 1<sup>st</sup> Respondent upon failure of the exchange. Accordingly, the court finds and holds that the purported allocation of the suit properties was irregular and unlawful hence it did not confer upon the Petitioner any ownership of the forest land.

##### **(b) Whether the 2<sup>nd</sup> Respondent violated the law in declaring Muruai forest as a gazetted forest**

21. The court has fully considered the material and submissions on record on this issue. The court has found and held that the suit property had already been surrendered for forest purposes way back in 1979. The court has further found that it was reserved as forest land upon the expiry of the 28 days notice published under **Section 4 of the Forests Act** which was in force at the material time. The Minister was not obligated to publish the declaration of Muruai forest on the 29<sup>th</sup> day although it may be the desirable thing to do.

22. The court is, therefore, of the opinion that the 2<sup>nd</sup> Respondent was legally entitled to declare Muruai as a forest area at any time after 28<sup>th</sup> August, 1993 hence he was entitled to publish Legal Notice No. 177 of 14<sup>th</sup> August, 2017. It must be borne in mind that by the time the notice under **Section 4 of the Forest Act** was published in 1993, the Petitioner had not been allocated the suit properties. In any event, the

court has already found the purported allocation made in 2002 was irregular and unlawful hence void *ab initio*. The second issue is, therefore, answered in the affirmative.

**(c) Whether the Petitioner is entitled to the reliefs sought in the petition**

23. It is evident that the Petitioner sought the various reliefs specified in the petition on the basis that he was the lawful proprietor of the suit properties and that the 2<sup>nd</sup> Respondent had no legal authority to publish the declaration of Muruai forest vide Legal Notice No. 177 of 2017. The court has already found against the Petitioner on both issues. It would, therefore, follow that the Petitioner is not entitled to the reliefs sought in the petition or any one of them.

24. As was held in the case of **Chemey Investments Ltd v Attorney General (supra)** the court has no obligation to protect property which was illegally or irregularly acquired. In the said case, the Court of Appeal whilst dismissing the Appellant’s appeal held, *inter alia*, that:

**“Decisions abound where courts in this land have consistently declined to recognize and protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor. See for example Niaz Mohamed Jan Mohamed v Commissioner for Lands & 4 Others [1996] eKLR; Funzi Island Development Ltd 2 Others v County Council of Kwale (Supra); Republic v Minister for Transport & Communications & 5 others *ex parte* Waa Ship Garbage Collectors & 15 Others KLR (E & L) 1,563; John Peter Mureithi & 2 Others v Attorney General & 4 Others [2006] eKLR; Kenya National Highway Authority v Shalien Masood Mughal & 5 Others [2017] eKLR; Arthi Highway Developers Limited v West End Butchery Limited & 6 Others [2015] eKLR; Munyu Maina v Hiram Gathiha Maina [2013] eKLR and Milan Kumar Shah & Others v City Council of Nairobi & Others, HCCC No. 1024 of 2005. 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 court fully associates itself with the holding of the Court of Appeal in that appeal. The mere fact that a Petitioner is holding a title document to public property which was irregularly acquired cannot entitle him to judicial remedies. The Petitioner submitted that he is entitled to the orders sought because his title documents have never been revoked or cancelled. The court does not subscribe to that view as a correct representation of the law. The court holds the view that the title must have a lawful and legitimate origin for it to be afforded legal protection.

26. Whereas Article 40 of the Constitution protects the right to property, the protection is not absolute. The protection is afforded only to proprietors who lawfully acquired such property. Article 40 (6) stipulates that:

**“The right under this Article do not extend to any property that had been found to have been unlawfully acquired.”**

**(c) Who shall bear costs of the petition**

27. Although costs of an action or proceeding are at the discretion of the court the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful parties should not be awarded costs of the petition. Accordingly, costs of the petition shall be awarded to the Respondents.

**H. CONCLUSION AND DISPOSAL**

28. The upshot of the foregoing is that the court finds no merit in the petition. Accordingly, the Petitioner’s petition dated 30<sup>th</sup> July, 2020 is hereby dismissed in its entirety with costs to the Respondents.

29. It is so decided.

**JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 24<sup>TH</sup> DAY OF JUNE 2021 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Mr. Gakuhi Chege for the Petitioner

Ms. Fatuma Ali for the AG for the Respondents

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**Y. M. ANGIMA**

**JUDGE**