



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

PETITION NO. 234 OF 2018

JANE WANGARI WAITI.....PETITIONER

VERSUS

THE CHIEF LAND REGISTRAR KIAMBU DISTRICT LAND REGISTRY...1ST RESPONDENT

DAMARIS NJERI NGANGA.....2ND RESPONDENT

JUDGMENT

By a Petition dated **3rd September 2018**, the Petitioner filed this Petition against the Respondents and sought for the following reliefs;

- 1. A Declaration that the Petitioner's fundamental rights and freedoms as enshrined under Articles 40(1) and 40(2) (a) of the Constitution of Kenya 2010, have been contravened and infringed upon by the 1st Respondent herein.**
- 2. A Declaration that the Petitioner is the bona fide legal owner of the parcel of land known as title Number Kiambu/Mun/Block 5 (Kiamumbi) 1101.**
- 3. A Declaration that the transfer of the suit property from the name of Jane Wangari Waiti into the name of Damaris Njeri Nganga, was fraudulent and illegal hence null and void.**
- 4. An order of Mandamus do issue directed to the Chief Land Registrar Kiambu District Lands registry to compel the said Chief Land Registrar to cancel the register and recall the title deed in respect of the parcel of land known as Title Number Kiambu/Mun. Block 5 (Kiamumbi) 1101 issued on the 29th December 2017.**
- 5. Any other orders and directions as this Honorable Court may consider appropriate.**
- 6. Costs of this Petition.**

The Petitioner averred that she acquired the suit property as a gift from her mother and (**Mary Wanjiru Chira**). That the property was transferred to her name on **22nd July 1999**. That her mother acquired the suit property vide a ballot allotment **number 1101**, by virtue of her being a member of the **Kiamumbi Farmers Cooperative Society Limited**, and she was later issued with a title deed over the suit property on **16th December 1996**. That the Petitioner has held the Original title deed over the suit property since **1999**, and the same has never been lost or misplaced.

That the Petitioner conducted a routine search on the **19th of December 2017**, which confirmed that she was the registered owner of the suit property. That in **January 2018**, she was informed by her sister that there were people inquiring on the status of the suit property. Further that unknown people offloaded manure on the suit property prompting her to report the matter to the Kiambu Chief's office. That the 2nd Respondent owned up and claimed that she had bought the suit property.

That when she went to the Kiambu Land Registry, the 1st Respondent's staff did not want to handle the matter with each referring her to another and that the specific **Land Registrar** who had dealt with the file was missing from the office, but she confirmed that there was an illegal entry in the records over the suit property and an alleged transfer had been entered in favour of the 2nd Respondent. That her efforts to register a formal complaint were futile as the 1st Respondent failed to investigate or hear her over the issue. That the Petitioner involved the Criminal Investigations Department and investigation was opened. That a further search dated **14th June 2018**, was issued and on inhibitions sections written **fraud suspected**, no dealings a confirmation that the 1st Respondent acknowledged that the transfer to the 2nd

Respondent was irregular and illegal .

That despite ongoing investigations by the Police and the 1st Respondent well aware of the issue of the fraudulent transfer, a further search dated **19th July 2018**, was issued with the entry of fraud on the inhibitions sections removed and thus the 1st Respondent leaving the 2nd Respondent in a position to transfer the property. That the 1st Respondent has refused to cancel the illegal entry transferring the suit property or stop further dealings with the property and the Petitioner is apprehensive that the 2nd Respondent may dispose off the property.

That the 1st Respondent infringed upon the Petitioner's right to own property as envisaged by **Article 40(1)** of the Constitution and unlawfully denying the Petitioner her proprietary rights when it irregularly and illegally caused the registration of a transfer in favour of the 2nd Respondent. Further that the 1st Respondent failed to request original completion documents when the transfer by the 2nd Respondent was presented, which actions infringed on the Petitioner's right not to have her property arbitrarily deprived from her, That 1st Respondent failed to protect her interests by allowing/ being part of the irregular and corrupt scheme.

That the 1st Respondent and its staff refused to deal or lodge a complaint from the Petitioner, that the Land Registrar who made the illegal entry went missing and it only took the intervention of the Police to have the 1st Respondent avail a copy of the green card and the 1st Respondent's actions have been lacking in transparency, integrity, accountability, a clear violation of **Article 10 (2) of the Constitution**. Further that the acceptance of forged and incomplete documents shows lack of Integrity. That the 1st Respondent's actions of accepting transfer documents with full knowledge that the same are improper were actions that were unlawful and unprocedural and in blatant disregard of **Article 47 of the Constitution**. Further that failure to launch an Investigation or set up a hearing is an abuse of administrative powers.

That despite the Petitioner's complaint, the 1st Respondent has failed to exercise its powers as per **Section 14(1) (b) of the Land Registration Act** requiring him to summon a person to give information or explanation in respect of land, charge, lease thereby leaving the Petitioner with the burden of seeking the court's intervention. That the removal of the inhibition entered in the inhibition section register of the suit property despite complaint by the Petitioner is an abuse of power and unfair administrative action. That despite being aware of Section 31 of the **Land Registration Act**, the 1st Respondent knowingly proceeded with registration of the transfer of the suit property in favour of the 2nd Respondent.

In her Supporting Affidavit, the Petitioner **Jane Wangari Waiti** averred that the 1st Respondent despite being fully aware of the fraudulent transfer, refused and ignored to stop the dealings in the property. That she has been advised by her Advocates, which Advice she believes to be true that the 1st Respondent failed in his/her duty as a public officer in charge of **Kiambu Land Registry**, by knowingly accepting fake, improper and or forged documents to make the illegal entry of a transfer and subsequently issue an illegal title deed. Further that by not requiring the presentation of the Original title deed, the 1st Respondent also failed in its duty as public officer. That she has never applied for consent to transfer the suit property and neither has she transferred the same and the alleged documents presented are forgeries.

The Petition is opposed and the 1st Respondent filed Grounds of Opposition dated **20th June 2019**, on the grounds that the instant Petition is a normal suit disguised as Petition and the issues of ownership cannot be determined in a Constitutional Petition. That the claim in dispute revolves around ownership and it would have been appropriate for the Petitioner to file a main suit where evidence will be produced and witness called to testify. Further that the Petition does not indicate precisely the fundamental rights that have been infringed by the 1st Respondent.

That there is nothing on record to evidence transmission of the suit property from the Petitioner's mother as alleged by the Petitioner. Further that the Petitioner is not entitled to the prayer sought in the Petition as she has not demonstrated how the land was transferred from the original proprietor to her. That the Petition is vexatious, frivolous and an abuse of the Court process and the same ought to be dismissed with costs.

Though duly served, the 2nd Respondent did not Enter Appearance nor file any response and hence the Petition proceeded without her participation.

The Petition was canvassed by way of written submissions which the Court has carefully read and considered. The Court has also read and considered, the Petition herein and the annexures thereto. Affidavit in support, the grounds of opposition and the provisions of law and finds that the issues for determination are;

1. Whether the Petition meets the Constitutional threshold

2. Whether the Petition ought to have been filed as a normal suit and whether the same is fatal

3. Whether the Petition is merited

1. Whether the Petition meets the Constitutional threshold

It is the 1st Respondent's contention that the Petition does not meet the threshold as set out in the case of **Anarita Karimi Njeru....Vs.... Republic (1976-1980)KLR**, which provides that any party who seeks redress for infringement of their fundamental rights is duty bound to demonstrate to the Court in the clearest way possible in which manner rights have been violated. In the said case, the Court held;

“if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, It is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains of, the provisions said to be infringed and the manner in which they are alleged to be infringed.”

This Court has gone through the instant Petition and is satisfied that the Petitioner has set out the Articles of the Constitution that she alleges have been infringed and further set out in what manner the said rights were infringed and therefore meeting the Constitutional threshold of a Constitution Petition. Whether or not the same are merited will be determined by the Court, as the Respondents have been made aware of what is being complained of.

2. Whether the Petition ought to have been filed as a normal suit and whether the same is fatal

In its Grounds of Opposition, the 1st Respondent has contended that the instant Petition ought to have been a normal suit. This Court has gone through the Petition herein and while it is true that the Petition majorly revolves around the issue of ownership of the suit property, the Petition also raised issues as to whether the Petitioner's right **under Article 40 of the Constitution** have been infringed.

The Court concurs that the instant Petition would have been best filed as a normal suit as opposed to a Petition as not all suits that state that a right has been violated must be filed as a Petition bearing in mind the instant suit has majorly revolved on ownership of the suit property. However, no prejudice was occasioned to the Respondents as they had an opportunity to respond to the Petition and would have taken directions for the Petition to be heard by way of viva voce evidence if the Respondents so desired. Given that there was no Prejudice occasioned to the Respondents and further that the Petitioner has averred that her rights under the Constitution have been violated which rights have been enumerated, the Court finds and holds that the same is not fatal. See the case of **National Bank of Kenya LtdVs...Tom Mutei T/A Tom Mutei Advocates [2016] eKLR** where the Court held that;

“9. The question that arises in this matter is whether failure of a party to follow the prescribed procedure in the Rules regarding the institution of a suit against an advocate is fatal to such a suit. Put another way, does failure of a party to comply with the prescribed procedure for institution of suit render a suit incompetent? This is the question that this court must resolve in determining the defendant's objection.

10. In the case of Anna Marie Cassiede & Another V Peter Kimani Kairu P/A Kimani, Kairu & Co. Advocates HCC (NRB) No. 39 of 2007 Kimaru J dealt with an almost similar objection where the plaintiffs had instituted a suit against their advocates by way of a plaint seeking a refund of monies allegedly received by their advocate pending further instructions. The Hon. Judge held as follows;

“I accept the defendant's argument that one of the procedures that the plaintiffs can approach the court is by filing an originating summons as provided under Order LII Rule 4(2) of the Civil Procedure Rules. I am however not persuaded by the defendant's submission that that is the only procedure which the plaintiffs are allowed by the law to approach the court. The plaintiffs had the option of filing a suit by way of plaint or by filing an originating motion. The fact that the plaintiff's chose to file suit by way of plaint is not fatal or prejudicial to their case nor does it raise an issue regarding the jurisdiction of this court”.

11. In Cecilia Njoki Njenga & 3 others V James Mburu Ndua & Another HCC NO. 335 of 2009 (Nakuru) (2010) eKLR, Hon. Ouko J (as he then was) when deciding on a similar preliminary point regarding competence of a suit involving a trust commenced by way of plaint instead of an originating summons as provided for under Order 36 rule I of the Civil Procedure Rules expressed himself as follows:-

“The trend of looking at the substance and considering if there would be prejudice to any party has culminated in the enactment of Sections 1A and 1B of the Civil Procedure Act introducing the concept of overriding objective of the Civil Procedure Act. The courts, by those provisions are conferred with considerable latitude in the interpretation of the law and giving effect to the rules at the same time. In concluding this point, the argument raised on the procedure adopted in this matter is not fatal as it has not been shown to be prejudicial to the 1st Respondent ...”

12. I am persuaded by the holdings in the above authorities because in my view, the critical consideration for the court in an objection such as the one before me should be whether failure to comply with the prescribed procedure for the commencement of a suit has occasioned prejudice to the defendant such that if the suit was to proceed to hearing in the manner in which it was filed, there would be a failure or a miscarriage of justice.

13. In the present case, though the suit was instituted by way of a plaint instead of an originating summons as prescribed by the rules, the pleadings and the prayers sought are clear. They fully disclose the claims being made against the defendant and the prayers sought. The defendant is thus aware of the case made against him by the plaintiff. He has indeed responded to the plaintiff's claim by filing a statement of defence. I do not therefore see what prejudice failure to comply with the procedure prescribed by the rules has or may occasion to the defendant if the suit is maintained in the form in which it was instituted. With much respect to Mr. Omondi, I do not also see how failure to comply with procedural rules by itself would oust the jurisdiction of this court as alleged.

14. The situation would have been different and different considerations would have applied if the defendant's complaint was that the suit had been filed in the wrong court or that the claim against the defendant or the prayers sought were not within the court's jurisdiction. This is however not the case here.

As correctly admitted by Mr. Omondi, the objection only challenges the procedure used in instituting the suit. It does not go to

the substance of the suit.”

The Court finds and holds that the filing of the instant suit by way of a Petition is not fatal as the Petitioner has also alleged that her rights have been violated.

3. Whether the Petition is merited

The Petitioner has contended that her rights under **Article 40 and 47 of the Constitution** have been violated when the 1st Respondent first placed a restriction on the suit property without her knowledge and further that the 1st Respondent went to further arbitrarily transfer the suit property to the 2nd Respondent without her knowledge. That despite her pleas to have the 1st Respondent officers to assist her, they kept taking her in circles. The allegations by the Petitioner have not been disputed by the 1st Respondent. The 1st Respondent has only alleged that the Petitioner has not shown how the suit property was transmitted to her from her mother. **Article 40** of the Constitution provides as follows;

40. (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) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(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 may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

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

The law is therefore clear that every person has a right to own property unless the property is found to have been unlawfully acquired. For a property to have been found to have been unlawfully acquired, there is no doubt that due process must then be followed and order of cancellation of the suit property made. That the same should not be arbitrarily and unprocedurally cancelled and or transferred. See the case of *Evelyn College of Design Ltd Vs... Director of Children’s Department & another [2013] eKLR* where the Court held that;-

15. The issue in this case is whether the State, which has issued a title, can assert a right inconsistent with the title without following due process. The State has pointed out that the property was illegally acquired hence it is entitled to occupy the property. The Respondents’ position is that the suit property was illegally and fraudulently acquired and as such, this Court cannot give a seal of approval to the applicant’s title. This proposition is supported by several cases of our courts; *Milan Kumarn Shah & Others v City Council of Nairobi & Others Nairobi HCCC No. 1024 of 2005 (OS)(Unreported)* and *James Joram Nyagah & Another v The Honourable Attorney General and Another Nairobi HC Misc. 1732 of 2004 (supra)*. Article 40 which protect the right to property must be read to exclude property found to have been unlawfully acquired under Article 40(6). This requirement is an extension of the fact that the Constitution protects higher values which are to be found in preamble to the Constitution and Article 10. Values such as human rights and social justice cannot countenance a situation where the Constitution is used to rubberstamp what is in effect unlawful. (See *Chemei Investments Limited v The Attorney General & Others Nairobi Petition No. 94 of 2005 (Unreported)*).

16. While I agree that the Commissioner has no right to alienate land which has been reserved for public purpose, the process of

such a determination must be through a process recognised by the law. Likewise, if the land has been illegally acquired, then the State must use due process to recover it. The requirement of due process is underpinned by several provisions of the Constitution. First, it is implicit in Article 40(2)(a) which prohibits the legislature from passing legislation that arbitrarily deprives a person of any interest in or right over any property of any description. Second, Article 40(6) is clear that rights acquired under this Article do not extend to any property that is found to have been unlawfully acquired. Such “finding” cannot be by any other means other than due process. Third, Article 47(1) guarantees every person fair administrative action which includes due process.

17. I would once again emphasise that a finding of “unlawful acquisition” referred to in Article 40(6) of the Constitution must be through a legally established process and not by forceful occupation of property by State institutions or by preventing a person from enjoying the incidences of ownership of the property. Thus, it was held in the case of Adan Abdirahani Hassan and 2 Others v The Registrar of Titles and Others Nairobi Petition No. 7 of 2012 [2013]eKLR that, “[30] Even if the Respondents held the view that the Petitioners had no right to own the suit property because the property was reserved for a public purpose, which view they were entitled to hold being the custodians of public land, the Petitioners had legitimate expectation in the proprietorship of the property and they should have been accorded a hearing before any administrative action could be taken in respect of the suit property.”

In this instant, the Petitioner has produced a title deed in her favour. She has further denied transferring the suit property to the 2nd Respondent and though the 1st Respondent has submitted that the Petitioner did not show how she acquired the suit property from her mother, the Court has seen the Green card that indicated that the same was transferred as gift. However, the transfer from the Petitioner to the 2nd Respondent which was the transfer that was in dispute has not been shown. The Petitioner having denied transferring the suit property to the 2nd Respondent means that without any rebuttal the same was a fraudulent transfer and the Petitioner was arbitrarily denied ownership of the suit property.

The Court finds and holds that the 2nd Respondent having failed to show the root of title, the Petitioner has been able to prove that the same was acquired unprocedurally. **Section 26 of the Land Registration Act** provides that a registered proprietor’s title to land is absolute and indefeasible unless it has been shown that the same was acquired unprocedurally. In this instant, the Petitioner has been able to prove that the 2nd Respondent acquired the suit property unprocedurally. The 1st Respondent has not shown the instruments that it used to register the 2nd Respondent as the proprietor of the suit property and therefore the Court finds and holds that the Petition is merited and the same is allowed

Having now carefully read and considered the Petition, the Affidavits in support and the written submissions, the Court finds and holds that the Petition dated 3rd September 2018, is **merited** and the same is allowed entirely in terms of **prayers no. 1, 2, 3, and 4** with costs of the Petition to the Petitioner.

It is so ordered

Dated, signed and Delivered at Thika this 17th day of June 2021.

L. GACHERU

JUDGE

17/6/2021

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

No appearance for the Petitioner

Ms Fatma for the 1st Respondent

No appearance for the 2nd Respondent

L. GACHERU

JUDGE

17/6/2021