



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

PETITION NO. 822 OF 2017

(CONSOLIDATED WITH ELC No. 254 OF 2018)

**IN THE MATTER OF CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER SECTION 40 (1) AND 40(3) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE PURPORTED WRONGFUL COMPULSORY
ACQUISITION OF LAND REFERENCE NO.TIGONI/KARAMBAINI/43**

BETWEEN

**ELIZABETH WANJIRU KUNGU (*suing on her own behalf of the Estate of the
Beneficiaries of the Estate of JOHN KUNGU KIMWA(deceased) and***

GRACE KUNGU KAROTITU (*deceased*).....PETITIONER

AND

HON.ATTORNEY GENERAL.....1ST RESPONDENT

MBARI YA MUNA COMPANY LIMITED.....2ND RESPONDENT

THE NATIONAL LAND COMMISSION.....3RD RESPONDENT

JUDGMENT

The instant Petition is Consolidation of two suits. One brought as a Petition and another as an Originating Summons. By an Amended Petition dated 12th November 2018, the Petitioner herein brought this suit against the Respondents seeking for the following Order;

- a) A Declaration that the Petitioners fundamental right to protection against arbitrary deprivation of private property under section 40 (1)and 40 (3) of the Constitution of Kenya (and or section 75(I) (a) of the repealed Constitution have been grossly infringed and violated by the Respondents act to compulsorily acquire land parcel Tigoni/Karambaini/43.
- b) A Declaration that the purported compulsory acquisition of the Petitioner's land parcel number Tigoni/Karambaini/43, without issuance of a Kenya Gazette notice was unlawful null and void ab initio.
- c) An order that all consequent dealing by the Commissioner of Lands in respect of land reference Tigoni/Karambaini/43, or any part thereof following the purported compulsory acquisition including issuance of any allotment letters, leases and or titles therefrom to any third party other than the Petitioner are null and void.

d) An order directing the Commissioner of Lands to surrender the titles issued in regards to the said land parcel Tigoni/Karambaini/43, to the Government of Kenya.

e) That an order to issue directing the Land Registrar in Kiambu to issue titles of the land for the land parcel known and identified as TIGONI/KARAMBAINI/43, in favour of the Petitioner to hold in Trust for the beneficiaries of the estate of John KUNGU KAMURA and GRACE KAMOTHO KUNGU.

f) In the alternative and or in addition to the prayer sought above, the Respondent be ordered to pay compensation to the Petitioner for the acquisition of the Land parcel number TIGONI/ KARAMBAINI/43.

g) An order that the Petitioner be paid the cost of this Petition by the Respondents.

h) Any further or other reliefs this honorable Court may deem fit to Grant.

In the Originating Summons dated 11th April 2016, the Petitioner sought for orders that;

1) That the Petitioner is entitled to be registered as the proprietor of the whole of Tigoni/Karambaini/44 in place of the currently registered owner namely Mbari Muna Company Limited pursuant to the provisions of Section 38 of the Limitations of Actions Act Chapter 22 of the Laws of Kenya on the grounds that the Applicant took possession of the aforesaid land parcel and has remained in open, peaceful uninterrupted occupation thereof for a period exceeding twelve years preceding the presentation of this summons.

2) That an order do issue registering the Applicant as the proprietor of the aforesaid L.R No. Tigoni/ Karambaini/ 44 in place of Mbari Ya Muna Company Limited and or successors in title thereof.

3) That the Costs of this Originating Summons be borne by the Defendant.

In her Amended Petition, the Petitioner averred that she brought this suit on her own behalf and the beneficiaries of the estate of **John Kungu Kimura** and **Grace Kamotho Kungu** (both deceased) and she is the daughter of the both deceased and Administrator of their Estates. That her father is the owner of said land parcel **Tigoni/Karambaini/44**, having bought the same from **Mbari Ya Muna Company Limited**, in the early 1970s and was given a share certificate number **18**. That when the land was divided to members, the Petitioner's father was given less what he deserved and had a long standing dispute with the 2nd Respondent Company. That as a result the land was never transferred to **John Kungu Kimura**

That having been in continuous use and occupation of the said land from 1972, she filed a suit for Adverse Possession against the 2nd Respondent's Company being **HCCC No.624 of 2016**, and upon acquiring the map of the land parcel, they discovered that a portion of the same had been designated as **L.R Tigoni/Karambaini/43**. Further that on conducting a search, the said land parcel was indicated to be registered in the name of the Government of the Republic of Kenya. That the same was done in error as they have always been in occupation of the parcel of land and had erroneously believed that the same was part of **L.R Tigoni/Karambaini/44**.

Further that **L.R Tigoni/Karambaini/43**, was acquired Compulsorily by the Government without following due process and that no Gazette Notice was issued and neither did the government purchase the said land from the Petitioner. That no inquiry was ever held by the Respondents to determine the amount of compensation and if such an inquiry was ever held she was not invited. That the children of the estate of **John Kungu Kimura** and **Grace Kamotho Kungu** (Deceased) are the bonafide owners of the suit property.

That the Respondents' illegal actions had the effect of depriving them of their lawful parcel of land which led to loss of user which may have been by error or fraud. The Petitioner particularized fraud by the Respondents as; Respondents had known all along that the Government had no land in the particular area that is the subject matter of this case, but proceeded to forcefully and unilaterally allocate it to the Government, the Respondents knew that there had been no consideration at all or a negotiated consideration and yet purported to claim a right to the land and allocate to the Government; the Respondents acquired the land knowing too well about the land belonging to her. Fourthly, the Government knew the spirit and intent and provision of the **Land Acquisition Act** and the **Constitution** in the realm of **Compulsory Acquisition** of private land, but simply and with impunity, acted contrary to the same Constitution and the law; the government simply ignored the Petitioner and all the deceaseds interests in proceeding to acquire their parcel of land.

The Amended Petition is opposed and the 1st Respondent filed a **Preliminary Objection** dated **12 February 2019**, on the grounds that the Petition is frivolous vexatious and an abuse of the court process. That the Petitioner has not attached any documents to show how **plot number 97** became **L.R Tigoni/Karambaini/43**. That the Petitioner is not clear about the parcel in contention. Further that by the Petitioner's own admission at Paragraph 17 of the Petition, the land belongs to the Government of Kenya and is hence a Public Land. That land belonging to the Government need not be compulsorily acquired, and it is evident that the Petitioner's parents were occupying land registered in the Government's name. Further that the Petitioner is seeking ineffectual orders as the office of the Commissioner of lands no longer exist under the current constitutional dispensation. Further that the Petitioner must provide evidence to support her claim.

The 2nd and 3rd Respondents though duly served did not participate in the proceedings as they failed to respond to the Petitioner's Amended Petition.

The Petition was canvassed by way of written submissions and the Petitioner though ordered by the court to file her submissions, did not file. However, on the other side, the 1st Respondent through the **Office Of The Attorney General** filed its submissions dated **15th March 2021** through state counsel **Fatima Ali** and submitted that the Petitioner has merely alleged that her property was compulsorily acquired by the Government without following any due process and that the Amended Petition is not supported by an Affidavit as to how the Petitioner

acquired the suit property. That the Petitioner has not demonstrated what rights have been infringed. Further that the issue of ownership are best determined in a normal suit. The 1st Respondent relied on various decided cases and urged the Court to dismiss the Petition.

The Court has now carefully read and considered the Petition, the Originating Summons, the Affidavits, the grounds of opposition, the written submissions and the provisions of law and finds and holds that the issue for determination is ***Whether the Petitioner is entitled to the orders sought.***

The Petitioner has sought for various orders including a Declaration that her fundamental right under **Article 40** of the Constitution has been breached, that the purported compulsory acquisition was unlawful, all consequent dealing of the property are unlawful, that the titles issued to be surrendered and further that she be granted compensation for compulsory acquisition.

It is trite that whoever alleges must prove as provided by **Section 107 of the Evidence Act**, which states:-

- 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
- 2. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.***

It is the Petitioner who has alleged that her rights have been violated and that the suit property was compulsorily acquired by the Government. It is not in doubt that the suit property is registered in the Government's name. Though the Petitioner has contended that the suit property belongs to her late parents, there is no evidence produced in Court that the Suit property was ever registered in her parents name. What the Petitioner has produced in evidence is a letter dated **12th January 2004**, from **G.M Muhoro Advocates** to the Commissioner of lands indicating that the said property belonged to the Petitioner's father.

The Law is clear on what documents are to be used to ascertain ownership of land and the said letter is evidently not one of them. Having failed to prove ownership of the suit property, it is the Court's considered view that it cannot in any way hold that the Petitioner's rights have been breached under **Article 40 of the Constitution**.

Further the Petitioner though seeking compensation for compulsory acquisition has not produced any evidence to show that the suit property was registered in the Government's name as a result of compulsory acquisition. Or that the same was ever registered in another entities name and the Government acquired the same. The said prayer is thus not merited. It therefore follows that the Court cannot order for the surrender of the title deed without any justifiable cause.

Consequently, the Court finds and holds that the Petitioner has failed to prove her case as there is no evidence that she is the owner of the suit property, as a letter by an Advocate cannot be such evidence to prove proprietorship and therefore she is not entitled to the Orders sought.

In her Originating Summons, the Petitioner had also sought to be declared as having gained the proprietorship of the suit property by **Adverse Possession**. Though the Petitioner had sued the 2nd Respondent, it is not in doubt that the suit property has been registered in the name of the Government of Kenya. A party cannot claim **Adverse Possession** as against the Government and as a claim for Adverse Possession can only be maintained against a registered owner, the Court finds that the claim by the Petitioner is not merited. See the case of **Chevron (K) Ltd ...vs... Harrison Charo Wa Shutu [2016] eKLR** where the Court of Appeal, opined as follows:-

- 1. "It is a settled principle that a claim for adverse possession can only be maintained against a registered owner. See Sophie Wanjiku John vJane Mwihiaki Kimani Nairobi ELC Civil Suit No. 490 of 2010.***
- 2. Until 1994 the property was Government land hence the period before 1994 does not count for the period to be computed in arriving at the statutory 12 years as there cannot be a claim of adverse possession against public land. See Wambugu v. Njuguna [1983] KLR 172.***
- 3. At the expiration of the twelve-year period the proprietor's title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it."***

Having carefully read and considered the pleadings herein, the annexures thereto, the written submissions, the cited authorities and the relevant provisions of the law, the court finds that the Amended Petition dated **12th November 2018**, herein is not **merited**. Further the Court finds and holds that the **Originating Summons** dated **11th April 2016** is also not merited and the same are dismissed entirely with no orders as to costs.

The Court notes that the suit would have best been filed as a normal suit to determine proprietorship and what interests the Petitioner holds in the same by production of evidence.

It is so ordered.

Dated, signed and Delivered at Thika this 4th day of June 2021.

L. GACHERU

JUDGE

4/6/2021

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

No appearance for the 1st Respondent Though Notice issued

No appearance for the 2nd Respondent

No appearance for the 3rd Respondent

L. GACHERU

JUDGE

4/6/2021