



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

PETITION NO. 1 OF 2019

GEORGE M KIMANI.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF KIAMBU.....1ST RESPONDENT

DOMINIC MBUGUA KIRANGA2ND RESPONDENT

REGISTRAR OF LANDS, KIAMBU COUNTY.....3RD RESPONDENT

JUDGMENT

By a Petition dated 3rd January 2019, the Petitioner herein sought for the following orders against the Respondents:-

a. A Declaration that the 1st and 2nd Respondents arbitrary, unilateral acquisition, invasion, trespass and conversion of the Petitioner’s private property, known a Escarpment /Kinari Block 1/2763, to or for public use from on or about the 20th December 2018 has violated the Petitioner’s right to own and freely use his property as guaranteed by Article 40 of the Constitution and has violated the Petitioner’s right to natural justice and fair administrative action.

b. An order of prohibition prohibiting the 1st & 2nd Respondents, their supporters, agents and associates and any person purporting to be a member of the public from entering into, remaining in, using, appropriating, alienating, annexing, disposing of the Petitioner’s property known as Escarpment /Kinari Block 1/2763, and or in perpetuity in any manner whatsoever from interfering with the Petitioner’s proprietary rights over the said property.

c. Costs and Interest.

The Petitioner averred that he became the registered owner of the suit property on 30th June 1997, and he took possession therefore. That on 20th December 2018, the 1st & 2nd Respondents trespassed onto and unilaterally purported to acquire the suit property by claiming that it is public utility and earmarked for public use thereby causing the Petitioner to suffer harm by invasion of his property by people purporting to be members of the public, who are using it and therefore denying him the free use of his property and thus violating his right to own property under Article 40 of the Constitution.

That the 1st Respondent’s actions were carried out without any Notice and without affording the Petitioner any right to be heard and therefore violating his right to natural justice. That the Respondents actions have resulted in appropriating the Petitioner’s land for public use and has violated his right to fair administrative action that requires reason for annexation of his property be given, which is inconsistent with Article 47 of the Constitution.

He particularized Violation of Articles 40 and 47 by the 1st and 2nd Respondents as; trespassing and invading on his land without any lawful authority; converting his land to public use; purporting to unlawfully acquire his land without exercising any power of eminent domain. Allowing trespassers to use his land; appropriating his land without any lawful cause; purporting to re assign the suit property as public property without giving the Petitioner an opportunity to make his representations; disregarding the protection of the land that come with issuance and registration of the grant and Title Deeds; failing to demonstrate that the acquisition of the suit property was necessary.

The Petitioner particularized harm suffered as denial of free use of his property; infringement on his proprietary rights, causing invasion on his land, destroying fencing on the suit property, allowing public to use the land in a manner inconsistent with his private rights, destruction of his livestock and farm produce, Violation of his constitutional rights. That if the acquisition was compulsory, then he is entitled to compensation.

In his Supporting Affidavit, the Petitioner reiterated the contents of the Petition.

The Petition is contested and the 1st Respondent through its County Secretary **Dr. Martin N. Mbugua**, filed a Replying Affidavit sworn on **4th July 2019**, and averred that the suit property is a subdivision from **Escarpment Kinari/2463**, and is public property that was irregularly acquired by the Petitioner between **1987 and 2000**. That the Petitioner has failed to disclose to the Court that there is due process that is being undertaken by the **National Land Commission** for verification of the authenticity of the title.

That as a result of the irregularities in the acquisition of the properties, the Ministry of Lands placed an embargo on issuance of titles and caused the already issued titles to be recalled for purposes of determining authenticity in acquisition of the said titles. Further that the embargo has not been lifted as the verification of clean titles is still ongoing. That the Petition has been presented with the intention of defeating the ends of justice. That the photos annexed to the Petition is a sign post by the **County Government of Kiambu**, indicating the purpose of which the land it is erected was set aside for, and does not prove it is the suit property. Further that the photograph does not disclose any form of trespass or destruction by the 1st Respondent.

He averred that he has been informed by his Advocate which advice he believes to be true that it is the mandate of the County Government to hold in trust for the people resident in the County any public land. That it is in the interest of justice that public space within the County be protected. That the Petitioner has not disclosed to the Court how the land was acquired and that title is not absolute where it is shown that there existed an irregularity. Further that the letter and spirit of **Article 40** does not seek to sanctify, sanitize and justify and or protect property unlawfully or irregularly acquired.

The 2nd Respondent **Dominic Mbugua Kiranga**, swore a Replying Affidavit on **22nd May 2019**, and averred that he is the **Member of the County Assembly, Kinale Ward**. That the Petition does not disclose a cause of action founded in law, as he does not have any legal mandate to exercise the acts complained of by the Petitioner. That on **18th to 21st December 2018**, he was in **Sweetlake Naivasha**, at a workshop organized by the County Government of Kiambu, and therefore the Petition is a blatant falsehood. He denied trespassing, invading, converting or compulsorily acquiring the suit property. That there is no **nexus** between the photographs and the copy of title. Further that he made inquiries and it emerged that the land depicted constitutes a well serving Kinale dispensary, and did not belong to the Petitioner; That the Petitioner embarked on trees cutting which is not common of someone laying a legitimate claim. That the Petitioner has not demonstrated the process of acquisition of the suit property.

The Petitioner filed a Supplementary Affidavit sworn on **8th October 2020**, and averred that Respondents have not exhibited any decisions or resolution that his title to the suit property would be cancelled or that the same would be repossessed, hence their interference is in violation of **Article 40 of the Constitution**. That he is a lawful and bonafide purchaser for value, in possession and there is no reason for the trespass. That his title deed is still valid as it has never been impugned. That he had written to the **National Land Commission**, about the 3rd Respondent's failure to release certificate of search over his property and the **National Land Commission**, wrote to the 3rd Respondent and demanded a report on the issue and it is thus clear there is no embargo on his property.

That he purchased his property from **Mr. Yusuf Kimutai**, vide a sale agreement dated **20th March 1997**, and the process went through the Land Control Board. That he took possession upon purchase of the suit property which was a subdivision of **L.R 1/2463**, that had been allocated to **Yusuf Kimutai**. Further that the land had previously been part of **Kikuyu Escarpment Forest**, which was degazetted on **20th January 1998**, and ceased being a public land. That his property is recognized by the government as the District Surveyor excised a water point on his property. That though he reported the matter to the Police, he did not receive help, as the violations are being championed by public officials.

The 3rd Respondent filed Grounds of opposition dated **10th April 2019**, and opposed the Petition on the grounds that it lacks merit as against the 3rd Respondent. That it has not disclosed any cause of action as against the 3rd Respondent. The 3rd Respondent has not violated any of the alleged Constitutional right of the Petitioner.

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, the Affidavits and the relevant provisions of law and finds that the issue for determination is **whether the Petition is merited**.

The Petitioner has sought for a Declaration that the 1st and 2nd Respondents arbitrary, unilateral acquisition, invasion, trespass and conversion of his private property, for public use violated his right to own and freely use his property, to natural justice and fair Administrative action. He has therefore sought for an order of prohibition, prohibiting the 1st & 2nd Respondents their agents from interfering with his proprietary rights over the said property. The Petitioner claims to have bought the suit property and duly acquired registration of the same. That the 1st and 2nd Respondents arbitrarily sought to violate his right to own the suit property, when they acquired the same without following due process.

The Petitioner has produced in evidence a title deed issued to him of **30th June 1997**. **Section 26 of the Land Registration Act** provides that a certificate of title issued to a person is to be taken by a Court to be prima facie evidence that the person is the **absolute and indefeasible** owner of the said property, unless it is proved that the person acquired the same through fraud or unprocedurally. However, it is not in doubt that only a Court of law and or competent tribunal are the authorities in a position to make such a finding. See the case of **Evelyn College of Design Ltd v Director of Children's Department & another [2013] eKLR**, where the Court held that:-

“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 recognized 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.”

Though the 1st Respondent claim that the suit property is public land, as it was set aside for public use, it has not produced any evidence to show that lawful process was conducted and a determination made that the suit property was public land. What has been produced in evidence is a report by a task force which in no way invalidates the Petitioner’s registration and therefore cannot be that the Petitioner’s registration was invalidated. Given that the Petitioner is the registered owner of the suit property, it therefore follows that he holds all the rights and interests unless his title is procedurally impeached.

The Petitioner has accused the 1st and 2nd Respondents of arbitrarily taking away his rights to the suit property and forcibly allowing other members of the public to use his property without affording him an opportunity to be heard. The 2nd Respondent has denied these allegations and further produced in evidence a list of names that he alleges proves that he was away on official duty and therefore could not have been in the suit property on **20th December 2018**, to carry out any acts as alleged by the Petitioner. Though the Court is not satisfied by the list produced by the 2nd Respondent as the list only lists names with no evidence shown of what it is meant for or what the list of names are for, the Petitioner apart from alleging has also not produced in evidence any documents that will satisfactorily lead the Court to find that the 2nd Respondent acted as alleged and or allowed the members of public to trespass on his property.

The Petitioner has produced in evidence an O.B and Chief’s letter confirming that he had reported the trespass. The Petitioner has also produced in evidence a photograph bearing a sign post that states that the land was set aside for a public use. It is not in doubt that the said sign post bears the 1st Respondent’s logo and though the 1st Respondent has alleged that the sign post only shows **caution** and does not prove that it is in the suit land, it has not produced any evidence to counter the allegations by the Petitioner that the same is on the suit land. The Court therefore does not find any reason not to believe the Petitioner that the said sign post is on the suit land considering the circumstances of the case.

The Court therefore finds and holds that the action by the 1st Respondent were arbitrarily. Further the contention by the Petitioner that the said action were a deprivation of his rights to fair administrative actions have also not been rebutted. **Article 47 of the Constitution** is in the following terms;-

47 (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right of 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.

(3)

The Court finds and holds that the 1st Respondent’s actions of erecting the sign post alleging the suit property was set aside for public use and therefore connoting that the same is public land without following due process were a violation of the Petitioner’s rights.

Having now carefully read and considered the Petition, the affidavits and the annexures thereto, the written submissions and the provisions of law, the Court finds and holds that the Petitioner has proved the allegations in his Petition as against the 1st Respondent and therefore the same is merited. However, the case against the 2nd Respondent is dismissed.

Further the Court finds that no orders were sought against the 3rd Respondent and therefore its grounds of opposition are merited and the case against the 3rd Respondent is dismissed. Therefore, the Court makes the following orders;

a. A Declaration be and is hereby made that the 1st Respondent arbitrary, unilateral acquisition, invasion, trespass and conversion of the Petitioners private property, known as Escarpment /Kinari Block 1/2763, to or for public use from on or about the 20th December 2018 has violated the Petitioner’s right to own and freely use his property as guaranteed by Article 40 of the Constitution has violated the Petitioner’s right to natural justice and fair Administrative action.

b. An order of prohibition be and is hereby made prohibiting the 1st Respondent, its supporters, agents and associates and any person purporting to be a member of the public from entering into, remaining in, using, appropriating, alienating, annexing, disposing of the Petitioner’s property known as Escarpment /Kinari Block 1/2763 and or in perpetuity in any manner whatsoever from interfering with the Petitioner’s proprietary rights over the said property.

c. The 1st Respondent will bear the costs of the Petition.

It is so ordered

DATED, SIGNED AND DELIVERED AT THIKA THIS 26TH DAY OF JULY 2021.

L. GACHERU

JUDGE

26/7/2021

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

Mr. Otieno holding brief for Mr. Ombwayo for the Petitioner

No appearance for the 1st Respondent

M/s Osembo for Mr. Wambugu for the 2nd Respondent

No appearance for the 3rd Respondent

L. GACHERU

JUDGE

26/7/2021