



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**CONSTITUTIONAL PETITION NO. 89 OF 2018**

**UMOJA III CENTRAL LIMITED.....PETITIONER**

**AND**

**NAIROBI CITY COUNTY GOVERNMENT.....RESPONDENT**

**AND**

**DIRECTOR OF SURVEY.....1<sup>ST</sup> INTERESTED PARTY**

**CHIEF LAND REGISTRAR.....2<sup>ND</sup> INTERESTED PARTY**

**NATIONAL LAND COMMISSION.....3<sup>RD</sup> INTERESTED PARTY**

**JUDGMENT**

This petition was filed on 20<sup>th</sup> December, 2018. The Petitioner sought the following reliefs;

- a) A declaration that the Respondent had violated and/or was likely to violate the Petitioner's constitutional rights in particular, its rights under Articles 10, 27, 47, 48, 60, 61 and 64 of the Constitution of Kenya.
- b) An order quashing the Respondent's decision contained in its letter dated 21<sup>st</sup> November, 2018 titled "Illegal/Irregular Survey & Registration on Nairobi Block 185 Formerly Umoja III Central Company Limited" in respect of a parcel of land known as L.R. No. 209/13436 (later known as LR. No. Nairobi Block 185 and as subdivided).
- c) An order prohibiting the Respondent or its agents or any other person acting on its instruction from interfering in whatever manner with the parcel of land known as L.R. No. Nairobi Block 185 (hereinafter referred to as "the suit property") as subdivided, the property of the Petitioner and its members.
- d) General damages for breach of the Petitioner's constitutional rights and loss of opportunities.
- e) Any other orders that the Honourable Court shall deem just.

**The Petitioner's case.**

The Petitioner based its case on Articles 2(5), 3, 10, 22(1), 23, 27, 29, 47(1), 48, 50(1), 60, 61, 64, 73, 258 and 259 of the Constitution of Kenya. The Petitioner was aggrieved by the request that was made by the Respondent to 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties through a letter dated 21<sup>st</sup> November, 2018 to cancel the survey of the suit property and to recall and cancel all the titles that had been registered based on the said survey that the Respondent termed illegal/irregular. The Petitioner averred that the Respondent did not consult the people who were likely to be affected by the decision before making the same.

The Petitioner averred that on 11<sup>th</sup> September, 2014 it was registered as the sole proprietor of the suit property (formerly known as L.R. No. 209/13436). On 12<sup>th</sup> August, 2016, the Petitioner applied to the Respondent's Director of City Planning for permission to subdivide the suit property into 308 plots. On 17<sup>th</sup> August, 2016, the Respondent's City Planning Department assessed the fees payable for the approval at Kshs. 1,841,000/-. On 11<sup>th</sup> November 2016, the Respondent raised an invoice for the said amount that was paid by the Petitioner on the same date.

On 13<sup>th</sup> December 2016, the Petitioner was notified by the Respondent through a Physical Planner, Weyusia D. Zinyu whom the Petitioner had engaged to facilitate the subdivision of the suit property that the Petitioner's application to subdivide the suit property had been approved by the County Planning Committee at a meeting that was held on 15<sup>th</sup> November 2016. On 10<sup>th</sup> July 2017, the Petitioner through another physical planner, Silas Mbaabu Gichuru made an application to the 3<sup>rd</sup> Interested Party for approval to subdivide the suit property. On 10<sup>th</sup> July, 2017, the 3<sup>rd</sup> Interested Party wrote to the Respondent and the 1<sup>st</sup> Interested Party seeking comments and/or recommendations on the Petitioner's application. On 12<sup>th</sup> July 2017, the Director of Physical Planning responded to the 3<sup>rd</sup> Interested Party's letter. The Director of Physical Planning recommended the application for approval subject to the Petitioner complying with the conditions that had been imposed by the Respondent. On 13<sup>th</sup> July, 2017, the 1<sup>st</sup> Interested Party also responded to the 3<sup>rd</sup> Interested Party's letter. The 1<sup>st</sup> Interested Party informed the 3<sup>rd</sup> Interested Party that it had no objection to the proposed subdivision provided the suit property was not part of disputed public utility land.

On 18<sup>th</sup> July, 2017, the 3<sup>rd</sup> Interested Party gave the Petitioner provisional approval for the proposed subdivision of the suit property subject to the conditions that had been imposed by the Respondent. On 22<sup>nd</sup> November, 2017, the Respondent wrote to the Ministry of Lands and Physical Planning, informing it that the Petitioner had satisfied all the subdivision conditions to the Respondent's satisfaction. On 14<sup>th</sup> December, 2017, the 3<sup>rd</sup> Interested Party gave its final approval to the proposed subdivision of the suit property.

Through a letter dated 20<sup>th</sup> December, 2017, the 1<sup>st</sup> Interested Party forwarded to the 2<sup>nd</sup> Interested Party, a new Registry Index Map (R.I.M) for the suit property following its subdivision into 310 sub-plots. On 8<sup>th</sup> June, 2018, the 1<sup>st</sup> Interested Party forwarded to the 2<sup>nd</sup> Interested Party the lease in respect of the suit property for registration in favour of the Petitioner.

The Petitioner contended that it followed due process in undertaking the survey and subdivision of the suit property and as such the Respondent had no legal authority to direct the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties to recall and cancel the Petitioner's titles for the sub-plots. The Petitioner contended that the Respondent's directive was ultra vires its powers. The Petitioner contended that the Respondent acted in breach of the Petitioner's legitimate expectation, rules of natural justice and in a discriminatory manner. The Petitioner contended that the Respondent breached its constitutional rights guaranteed under Articles 10, 27, 47, 48, 60, 61 and 64 of the Constitution of Kenya.

#### The Respondent's case.

The Respondent opposed the petition through grounds of opposition and notice of preliminary objection both dated 15<sup>th</sup> January, 2019. The Respondent contended that the Petitioner had not satisfied the requirements for granting the orders sought. The Respondent contended that in issuing the impugned directive to the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties, the Respondent was discharging its constitutional mandate of protecting the public from being duped into purchasing illegally surveyed and registered land. The Respondent contended further that the court had no jurisdiction to entertain the petition in that the right forum for the Petitioner's grievances was the Physical Planning Liaison Committee.

The Interested Parties did not respond to the petition even after time was extended to enable them to do so.

#### The Petitioner's Submissions.

The petition was heard by way of written submissions. The Petitioner filed its submissions on 5<sup>th</sup> October, 2020 in which it outlined the following issues for determination;

1. Whether the Respondent's decision to request for the cancellation of the survey of the suit property as well as the revocation of the titles for the sub-plots arising from the said survey was lawful and legitimate.
2. Whether the Petitioner is entitled to the orders sought.

On the first issue, the Petitioner submitted that the Respondent's said decision was illegal, unlawful and illegitimate. The Petitioner cited Article 40 of the Constitution and Pevans East Africa Limited v Betting Control and Licensing Board & 2 others, and Safaricom Limited & another (Interested Parties) [2019] eKLR, and submitted that the Respondent's said decision infringed on the Petitioner's right to acquire and own property. The Petitioner submitted that the decision was arbitrary and unlawful, and that it deprived the Petitioner of its property. The Petitioner cited Article 60 (1) of the Constitution and submitted that the Respondent's decision undermined rather than promoting the security of the Petitioner's land rights. The Petitioner also cited Article 47 of the Constitution and Section 4(3) of the Fair Administrative Action Act, 2015 and submitted that the Respondent's decision was unlawful for want of written reasons for the same and for failure by the Respondent to give the Petitioner an opportunity to be heard before the said decision was made. The Petitioner also cited Sections 24 and 25 of the Land Registration Act, 2012 and Harun Thungu Wakaba v Attorney General [2010] eKLR, and submitted that the decision by the Respondent infringed on its rights as the registered proprietor of the suit property. The Petitioner submitted further that no evidence had been brought by the Respondent to challenge its title to the suit property. The Petitioner cited Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR and submitted that the Respondent's decision infringed upon its legitimate expectation as it had complied with all the Respondent's and the Interested Parties' requirements for the subdivision of the suit property. On the second issue, the Petitioner submitted that having established the unlawfulness and invalidity of the Respondent's decision, it was entitled to the orders sought in accordance with Article 23(3) of the Constitution. In support of this submission, the Petitioner cited the case of Multiple Hauliers East Africa Limited v Attorney General & 10 others [2013] eKLR.

#### The Respondent's Submissions.

The Respondent filed its submissions on 16<sup>th</sup> February, 2021. The Respondent framed three issues for determination by the court namely;

1. Whether the Respondent violated or threatened to violate the Petitioner's constitutional rights as claimed.
2. Whether the action by the Respondent was in accordance with the requirements of the Fair Administrative Action Act.
3. Whether the petition is before the right forum.

On the first issue, the Respondent cited Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association sued on behalf of Kenya Bankers Association & another [2018] eKLR and Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others [2015] eKLR, and submitted that the Petitioner's grievances do not meet the threshold for infringement or threat of violation of constitutional rights. The Respondent submitted further that there was no infringement of the Petitioner's constitutional rights since its impugned directive was aimed at protecting the rights of the members of the Petitioner guaranteed under Article 40 of the constitution by warding off land urchins, peddlers and grabbers.

On the second issue, the Respondent submitted that it satisfied the requirements of the Constitution and Fair Administrative Action Act in that: First, its decision was communicated to the Petitioner in writing and contained reasons for the decision. Secondly, the decision was reasonable since the approvals that had allegedly been obtained by the Petitioner were skewed. In support of these submissions, the Respondent cited Article 47 of the Constitution, Sections 2 and 4 of the Fair Administrative Action Act, 2015 and Law Society of Kenya v Attorney General & another, and Mohamed Abdulahi Warsame & another (Interested Parties) [2019] eKLR and Republic v Kenyatta University Ex parte Martha Waihuini Ndungu [2019] eKLR.

On the third issue, the Respondent cited section 77 of the Physical and Land Use Planning Act, 2019 and a raft of cases including Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR and Tom Kusienya & Others v Kenya Railways Corporation & others [2013] eKLR and submitted that original jurisdiction in respect of the Petitioner's claim lay with the Physical Planning Liaison Committee. The Respondent submitted that the Petitioners' petition was improperly before the court.

#### The issues for determination.

The issues arising for determination in this petition in my view are the following;

1. Whether the court has jurisdiction to determine the petition.
2. Whether the Respondent violated or threatened to violate the Petitioner's constitutional rights.
3. Whether the Petitioner is entitled to the reliefs sought in the petition.

#### Whether the court has jurisdiction to determine the petition.

The Respondent contended that the Petitioner's complaints relate to the exercise by the Respondent of its powers under the Physical and Land Use Planning Act, 2019 and that the Act has a dispute resolution mechanism which the Petitioner should have exhausted before moving to this court. The Respondent submitted that if the Petitioner was aggrieved by the Respondent's decision, the Petitioner should have filed an appeal to the Nairobi City County Physical Planning Liaison Committee under section 77 of the Physical and Land Use Planning Act, 2019. I find no merit in the Respondent's objection to the petition based on the jurisdiction of the court. The Petitioner is not before this court to challenge the decision of the Respondent made in exercise of its powers under the Physical and Land Use Planning Act, 2019. The Petitioner had already obtained planning approval from the Respondent and had already carried out the subdivision of the suit property. The Petition before the court is challenging the constitutionality of the Respondent's letter dated 21<sup>st</sup> November, 2018 in which the Respondent requested the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties to cancel the survey that had been undertaken by the Petitioner and to recall and cancel the titles that had been issued to the Petitioner in respect of the sub-plots that resulted from the said subdivision on the ground that the said survey was illegal. The Nairobi City County Physical Planning Liaison Committee cannot determine constitutional questions. It is this court that is clothed with jurisdiction to determine the issues raised by the Petitioner in its petition. I wish also to point out that this petition was filed on 20<sup>th</sup> December, 2018. The Physical and Land Use Planning Act, 2019 the provisions of which have been invoked by the Respondent came into force on 5<sup>th</sup> August 2019. The physical planning statute that was in force when this petition was filed was the Physical Planning Act, Chapter 286 Laws of Kenya which also had a similar dispute resolution mechanism. On the whole, it is my finding that this court has jurisdiction to hear and determine the Petitioner's grievances.

#### Whether the Respondent violated or threatened to violate the Petitioner's constitutional rights.

It is now settled that constitutional right violations or threatened constitutional right violations must be pleaded with reasonable degree of precision. This principle was established in Anarita Karimi Njeru v Attorney General [1979] KLR 154 where the court stated as follows:

**“We would however again stress that 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 reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”**

In Trusted Society of Human Rights Alliance v A.G & 2 others [2012] eKLR, the High Court stated as follows with regard to the decision in Anarita Karimi Njeru case:

**“We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.**

**The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”**

When the foregoing decision was challenged in the Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR the court stated as follows:

**We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although 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. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point...Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The Principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”**

In Ledidi Ole Tauta & Others v Attorney General & 2 others [2015] eKLR the court was being called upon to protect 577 acres of land out of a larger portion of 3077 hectares. The court rendered itself as follows:

**“Applying the test established in the case of Anarita Karimi Njeru –vs- Attorney General (supra) as amplified in the case of Mumo Matemu –vs- Trusted Society of Human Rights Alliance & Others (Supra) to the facts of this case it is our view that the petition lacks any specificity such that it is merely of a general nature in that it fails to identify with precision the particular property to which the Petitioners lay claim. Save for stating that they are entitled to 577 hectares of the suit land, the Petitioners have not specified which portion of the 3077.0 hectares gazetted as Ngong Hills Forest they lay claim to. We are satisfied that the petition suffers serious lack of precision and that it is practically not possible for the Respondents to know what the specific claim by the petitioners is such that even if the petitioners claim was to be upheld it would invite a further exercise of determining what the claim relates to.”**

This petition was brought by the Petitioner following a letter dated 21<sup>st</sup> November, 2018 that was addressed to the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties by the Respondent. The letter was not addressed to the Petitioner. A copy of the said letter that was annexed to the affidavit in support of the petition was obtained from the 2<sup>nd</sup> Interested Party’s office. In the letter, the Respondent claimed that the survey that was carried out by the Petitioner in respect of the suit property was irregular and illegal. The Respondent claimed further that the titles for the sub-plots that resulted from the subdivision of the suit property following the said survey indicated that the Respondent was the lessor. The Respondent informed the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties that the suit property was private land and that the same had never been owned by the Respondent. The Respondent stated further in the letter that the Respondent was not involved in the survey and issuance of titles for the said sub-plots. The Respondent stated that it did not also sanction the exercise. The Respondent urged the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties to treat the whole exercise as irregular, illegal and fraudulent unless documentary evidence was produced to the contrary. In conclusion, the Respondent requested the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties to urgently cancel the said survey of the suit property and to recall and cancel the titles of the sub-plots that had been issued pursuant to the said subdivision.

The questions that I have been called upon to answer are, whether this letter amounted to a decision by the Respondent and if it was, whether the decision violated or threatened to violate the Petitioner’s constitutional rights. The Petitioner had contended that in writing this letter, the Respondent violated its constitutional rights under Articles 10, 27, 47, 48, 60, 61 and 64 of the Constitution. As stated in the cases that I have referred to earlier, the Petitioner had a duty to set out clearly how the contents of the said letter violated its constitutional rights.

In my view, the Respondent’s letter dated 21<sup>st</sup> November, 2018 did not amount to a decision that this court can be called upon to review. I have set out the contents of the said letter above. The suit property is within the jurisdiction of the Respondent. The Respondent is responsible for physical planning and development regulation within its jurisdiction. In the letter, the Respondent merely expressed concern that it appeared that the suit property had been surveyed and subdivided irregularly and titles for the sub-plots issued. The Respondent’s main concern was that the titles for the sub-plots indicated that the same were leasehold from the Respondent. The Respondent denied ownership of the suit property and suspected fraud in the whole exercise. In view of the suspected illegality and fraud in the subdivision of the suit property, the Respondent requested the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties to cancel the survey of the suit property and the titles that resulted therefrom. The Respondent has no power to cancel a survey or a title to land. In that letter, the Respondent did not cancel the survey of the suit property or the titles for the sub-plots that resulted from the said survey. The Respondent did not also cancel the approval that it had given for the said survey to be carried out. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties do not act on the directions of the Respondent while discharging their statutory duties. They were under no obligation to accede to the Respondent’s request. I believe that before they acted on the said request, they had to carry out investigations of their own on the allegations that were contained in the Respondent’s said letter in which they had to involve the Petitioner. The Petitioner did not place any evidence before the court showing that the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties had

acted on the Respondent's request or were about to do so. Since the Respondent did not cancel the approval it had granted to the Petitioner for the sub-division of the suit property and did not also cancel the survey or titles for the sub-plots that resulted from the same, I am unable to see how it can be said that it infringed or had threatened to infringe on the Petitioner's constructional rights. I am not persuaded that the impugned letter violated National Values and Principles of governance. I am also not satisfied that the letter violated the Petitioner's; right to equal protection of the law, right to freedom and security of the person, right to fair administrative action, right to access justice, right to have any dispute resolved by the court or competent tribunal and right to equitable access to land and security of land rights. A part from citing various Articles of the Constitution, the Petitioner did not explain how each of the said Articles of the Constitution had been violated by the Respondent in relation to them. Since by writing the impugned letter, the Respondent was not making any decision that was going to affect the Petitioner, it had no duty or obligation to give the Petitioner a hearing. It was the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties which had been requested to cancel the survey of the suit property and the titles for the sub-plots that could not do so without giving the Petitioner a hearing. I am of the view that the court would be putting onerous duty on the Respondent if it was to rule that in every case of suspected fraud touching on land, it has to hear the party suspected of fraud before reporting the fraud to those concerned with the same. I am also not persuaded that the Petitioner's legitimate expectation was violated. As I have stated earlier, neither the survey nor the titles for the sub-plots were cancelled by the Respondent and there is no evidence before the court that the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties have threatened to cancel the same without following the due process.

Due to the foregoing, it is my finding that the Petitioner has failed to establish that the Respondent violated or threatened to violate its constitutional rights.

Whether the Petitioner is entitled to the reliefs sought in the petition.

I have set out at the beginning of this judgment the reliefs sought by the Petitioner in its petition. From my findings above, the Petitioner has not established the grounds upon which its petition is based. The petitioner is therefore not entitled to any of the reliefs sought in the petition.

Conclusion.

In conclusion, I find no merit in the Petition dated 18<sup>th</sup> December, 2018. The petition is dismissed with each party bearing its own costs.

**DELIVERED AND DATED AT NAIROBI THIS 15TH DAY OF JULY 2021.**

**S. OKONG'O**

**JUDGE**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;**

Mr. Muriithi h/b for Mr. Nzaku for the Petitioner

Ms. Kosgey for the Respondent

N/A for the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties

N/A for the 3<sup>rd</sup> Interested Party

Ms. C.Nyokabi-Court Assistant