



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC PETITION NO. 39 OF 2019

IN THE MATTER OF CONTRAVENTION OF RIGHTS AND/OR

FUNDAMENTAL FREEDOMS UNDER ARTICLE 40, 47 AND 48 AND

IN THE MATTER OF ARTICLE 62, 64 AND 67 OF THE CONSTITUTION

OF KENYA IN RELATOIN TO TITLE NUMBER/NAIROBI/BLOCK 72/2971

BETWEEN

JAMES KEMBI GITURA.....PETITIONER

=VERSUS=

NATIONAL LAND COMMISSION.....1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. The Petitioner herein James Kembi Gitura filed this Petition dated 9th June 2019 seeking the following remedies:-

(a) A declaration that the Petitioner s the legal, lawful and proper owner of the suit property, Title Number Nairobi/Block 72/2971.

(b) A declaration that the decision of the 1st respondent and in particular, the Kenya Gazette Notice published on the 17th day of July 2017, touching on and/or pertaining to Nairobi/Block 72/2971, was irregular, illegal, unlawful and void.

(c) A declaration that the revocation of the Petitioner's title in respect of Nairobi/Block 72/2971 was/is ultra vires the provisions of the National Land Commission Act, 2012 and hence invalid and unconstitutional.

(d) The honourable court be pleased to grant an order of judicial review in the nature of certiorari to quash the gazette notice published on 17th day of July 2017 touching and/or concerning the revocation of the title in respect to Nairobi/Block 72/2971.

(e) A permanent injunction restraining and/or prohibiting the 1st respondent herein either by itself, agents, servants and/or anyone acting on its instructions from conducting and carrying out further proceedings touching and/or concerning the review of the lease over and in respect of Nairobi/Block 72/2971 and/or making any interfering orders with respect to the Petitioner's developments on the suit property in contravention of the National Land Commission Act, 2012.

(f) The costs of tis Petition be borne by the respondents in any event.

2. The Petition is supported by the affidavit of James Kembi Gitura, the petitioner herein sworn on the 9th July 2019 and a further affidavit, sworn on 14th January 2020.

3. Together with the petition the petitioner filed a notice of motion dated 9th July 2019.
4. It appears the 1st respondent did not file any response to the Petition.
5. The 2nd respondent filed a replying affidavit through Milca Muendo, Assistant Director Mapping sworn on the 31st January 2020. She also swore a further affidavit on 5th February 2020.
6. The 3rd respondent filed Grounds of Opposition dated 31st August 2020.
7. On the 10th February 2020, the court with the consent of the parties directed that the petition be canvassed by way of written submissions.

The Petitioner's Submissions

8. They are dated 3rd February 2020. The Petitioner lawfully and validly purchased the suit property known as Nairobi/Block 72/2971 after conducting due diligence and process after which he was registered as the owner of the property. He was issued with a certificate of lease. That a gazette notice issued on 17th July 2017 by the 1st respondent that contended that the suit property was unlawfully and/or irregularly allocated to the petitioner was therefore liable to be invalidated without any basis and/or justification.

9. They have raised five issues for determination. They are:-

(a) Whether the 1st Respondent had jurisdiction to interrogate the acquisition, transfer and registration of the suit property?

(b) Whether the Petitioner acquired lawfully and legitimate rights over the suit property?

(c) Whether the Petitioner was accorded fair hearing before the inclusion of title of the suit property in the offensive list contained in the gazette notice of 17th July 2017?

(d) Whether the decision of the 1st Respondent herein accord with the doctrine of natural justice?

(e) Whether recommendation relating to the revocation of the title of the suit property are ultra vires?

10. The jurisdiction of the National Land Commission was considered in the case of **Republic vs National Land Commission Ex parte Holburn Properties Ltd [2016] eKLR**. Where the court held that the Commission had power to review titles that are privately held where such titles were initially public land and were converted to private holdings with a view of ascertaining whether the title was properly and legally acquired. The gazette notice was deficient to the extent that it did not set out any particulars of facts constituting any alleged illegality, irregularity and/or fraud in the alienation and/or acquisition of the property. The notice did not afford the petitioner the opportunity to know the allegations and/or case he was required to answer.

11. Article 40 of the Constitution provides that every person has the right, either individually or in association with others to acquire and own property of any description and in any part of Kenya. He has put forward the case of **Judicial Service Commission vs Mbalu Mutava & Another [2015] eKLR**. The petitioner was not accorded a fair hearing by the 1st respondent as the 1st respondent failed to furnish him or avail to him the particulars of the allegations of fraud or unlawful acquisition levelled against him. He was not supplied with any information and/or documents the 1st respondent relied on to support their allegations against the petitioner.

12. The Petitioner maintains he is the registered owner of the suit property, his title is indefeasible and could only be impugned as provided under law. He has put forward the case of **Commissioner of Lands & Another vs Coastal Aquaculture Ltd Civil Appeal No 252 of 1996 KLR (E & L 264)**. The 1st respondent's action to revoke his title amounts to forceful acquisition of land which, if so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined. He has also put forward the case of **Republic vs National Land Commission & Tropical Treasure Limited Ex parte Krystalline Salt Ltd [2015] eKLR** and Section 26 of the Land Registration Act, 2012. He has also put forward the cases of **Charles Karathe Kiarie & 2 Others vs Administrators of Estate of John Wallace Mathare (deceased) & 5 Others [2013] eKLR**.

13. Article 40 (6) of the Constitution would apply to a defrauder and there would be no intention to deprive an innocent buyer of his property. This court ought to protect the petitioner's constitutional rights as ascertained under Article 40 of the Constitution. After conducting official search at the land registry he was issued with a certificate of official search showing Ramji Rama Company Limited was the registered proprietor of the suit property. He was an innocent and bonafide purchaser and was entitled to the benefits of the provisions of Section 14 (7) of the National Land Commission Act. He has put forward the case of **Republic vs National Land Commission Ex parte Holburn Properties Ltd [2016] eKLR**. He prays that the prayers in the petition be allowed with costs.

The 2nd Respondent's Submissions

14. They are dated 7th July 2020. The Petitioner's claim does not have statutory underpinnings as to render a breach thereof actionable by way of constitutional petition rather than by way of an ordinary suit. Articles 2, 40 and 47 of the Constitution are enacted in the Land Act, Land Registration Act and National Land Commission Act. These Acts and rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The petition did not use any question of the interpretation or application of the constitution where legislation has been enacted to give effect to a constitutional right. It is not permissible for a litigant to find a cause of action directly on the constitution

without challenging the legislations in question for failing to disclose the cause of action anchored on the constitution. The petition is incompetent and ought to be struck out and/or dismissed with costs.

15. The petitioner has omitted to frame his case or complaint with reasonable precision as required in the case of **Anarita Karimi Njeru – vs-The Republic [1976-1980] KLR 1272**.

16. It does not state the alleged constitutional provisions violated and the acts of omissions complained of with reasonable precision. It has put forward the case of **Mumo Matemu vs Trusteed Society of Human Rights Alliance & 5 Others [2013] eKLR**.

17. The crux of this case is that the suit property title No Nairobi/Block 72/2971 alleged to belong to the petitioner lies on land reserved for the transport corridor for Embakasi-Kibera railway line and Southern Bypass development. It cannot be private property. He said parcel is situated on the Lang'ata Road Junction to the slum upgrading section of the Southern Bypass. The land acquisition for the Southern railway bypass from Embakasi to Kibera was carried out in 1957 with the intention of providing a railway line that would enable trains enroute to Kampala from Mombasa to bypass the city center.

18. The Department of Physical planning (Ministry of Lands Housing and Urban Development) prepared the Nairobi Southern Bypass Structure Plan No 42/28/85/9 of 5th June 1985. The aforesaid structure plan which guides development in that area shows no indication of private property at this location. The suit property was not in existence when the design of the railway line was carried out in 1958 and at the time the detailed design study of the Nairobi Southern Bypass road was carried out by JICA on behalf of the government in 1989/90.

19. On 6th June 2008, he Ministry of Roads Public Works and Housing vide Gazette Notice No 3632 issued a Notice to the general public directing them to remove any illegal structures that existed on road reserves within 30 days. On 6th August 2003 a notice of demolition was issued in the Kenya Times Newspaper. The 2nd respondent forwarded a list of illegal properties including the suit property to the 1st respondent through the office of the Principal Secretary requiring guidance on the legality of titles. On the 17th March 2017, the 1st respondent published a notice notifying the public of hearings on review of grants to be held on 27th March 2017. The hearings were held. It is not true that the petitioner's title was revoked without affording him an opportunity to be heard.

20. Upon completion of the review process the 1st respondent published their determination through the Kenya Gazette Notice No 6866 of 17th July 2017 directing the Chief Land Registrar to revoke the titles as per Section 14(5) of the National Land Act and attendant laws. The suit property lies on land reserved for the transport corridor for the Embakasi Kibera Railway line and Southern Bypass development. The 1st respondent rightfully directed the Chief Land Registrar to revoke the title. It prays that the petition be dismissed with costs to the 2nd respondent.

The 3rd Respondent's submissions

21. They are dated 22nd April 2021. It is clear from the 2nd respondent's replying affidavit that the suit property is a public land reserved for the transport corridor for Embakasi Kibera railway line and Southern bypass development and a buffer zone between the transport corridor and Julia Ojiambo/Southlands/Ngei Estates.

22. The National Land Commission had the mandate to investigate how the instant title was acquired and how the land was converted from public to private use. The petitioner was accorded a fair hearing and there was no violation of his constitutional rights.

23. The petitioner has failed to fulfil the requirements set out in **Anarita Karimi Njeru vs The Republic [1976-1980] and Mumo Matemu vs Trustee Society for Human Rights Alliance and Others [2013] eKLR**. The Petitioner has not cited the constitutional provisions violated and the acts or omissions complained of with reasonable precision. The petition raises no cause of action against the 3rd respondent.

24. Public interest outweighs private interests and the National Land Commission complied with the provisions of the Constitution, the Fair Administrative Action Act and the National Land Commission Act. It has put forward the case of **East African Cables Ltd vs Public Procurement Complaints, Review & Appeals Board & Another [2007] eKLR**. This petition is an abuse of the court process and it ought to be dismissed with costs.

Analysis & Determination

25. I have considered the petition, the grounds and the affidavits in support. I have also considered the replying affidavits and the grounds of opposition, the written submissions filed on behalf of the respective parties and the authorities cited. The issue for determination are:-

(i) Whether the petitioner has set out with reasonable precision the constitutional violations by the respondents.

(ii) Whether the suit property is a public land.

(iii) Whether the 1st respondent had jurisdiction to interrogate the acquisition, transfer and registration of the suit property.

(iv) If so, was the petitioner accorded a fair hearing?

(v) Is the petitioner entitled to the reliefs sought?

(vi) Who should bear costs of this petition?

26. The petitioner alleges that his constitutional rights have been violated. He has quoted Articles 2, 40 and 47 of the Constitution. The crux of this case is the suit property title No Nairobi/Block 72/2971 which the petitioner says he acquired from Ramji Rama & Co. Ltd. It is the 2nd and 3rd respondents' case that the petitioner herein did not frame his case with precision as required under the High Court's Pronouncement in **Anarita Karimi Njeru vs The Republic [1976-1980] KLR 1272**. That the petitioner did not state the alleged constitutional provisions violated and the acts or omissions complained of with reasonable precision. I am guided by the cited case of **Mumo Matemu vs Trustee Society of Human Rights Alliance & 5 Others [2013] eKLR** where the Court of Appeal held thus:-

“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 or 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.

However, our analysis cannot end at the level of generality. It was the High Court's observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting”. Yet the principle in Anarita Karimi Njeru (Supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. 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. What Jessel, M. R said in 1876 in the case of Thorp vs Holdsworth (1876) 3 Ch. D 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules.....was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side of the hearing”.

.....

It is our finding that the petition before the High Court was not pleaded with precision as required in constitutional petitions. Having reviewed the petition and supporting affidavit, we have concluded that they did not provide adequate particulars of the claims relating to the alleged violations of the Constitution of Kenya and the Ethics and Anticorruption Commission Act, 2011. Accordingly, the petition did not meet the standards enunciated in the Anarita Karimi Njeru case (Supra)”.

27. I agree with the 2nd respondent's submissions that the petitioner has not enumerated the particulars to support the alleged violation of his constitutional rights. There is nothing to show that the 1st respondent's notice dated 17th July 2017 has resulted in gross violation of the Petitioner's right to own property as enshrined under Article 40 of the Constitution. He has provided no particulars. Similarly, he has provided no particulars to show that the 1st respondent's act of revoking the title to the suit property violates the principles of Fair Administrative Action Act under Article 47 of the Constitution. For these reasons the petition is incompetent.

28. The petitioner claims to have acquired the suit property from Ramji Rama & Co. Ltd in the year 2008. There is a replying affidavit sworn by Milca Muendo on behalf of the 2nd respondent on the 31st January 2020. In paragraphs 13 -19 she deposes:-

“13. That taking the above into account, the Department of Physical Planning (Ministry of Lands, Housing & Urban Development) prepared the Nairobi South Structure Plan No 42/28/85/9 of 5th June, 1985 (Annexed hereto and marked as exhibit MM-2 is a copy of the Nairobi Structure Plan (Ref 42-28-85-9).

14. That in the aforesaid plan, the railway reserve is to the North while the proposed Trans African Highway (Nairobi Southern Bypass) is to the South.

15. That the aforesaid structure plan which guides development in the area shows no indication of private property at this location.

16. That in the aforesaid structure plan, there is no indication of another land use between Southland/Julia Ojiambo estate to the north and LR NO 209/9727 (shown as neighbourhood D in the structure plan) and LR NO 209/12628 (neighbourhood E-Johnathan Ngeno estate). The same applies to the Southland/Julia Ojiambo estate and NHC. In addition, on Julia Ojiambo/Southlands Estate side, there is a buffer zone of 20 m to separate the two conflicting land uses (residential and transportation). It is therefore not clear how the land became private property.

17. That upon request by the 2nd respondent, the Director of Physical Planning clarified; through a letter Ref, PPD/42/28/XVIII/37 that the Nairobi Structure Plan (Ref. 42-28-85-9) Referred to above has not been amended since its

preparation. (Annexed hereto and marked as exhibit MM-3 is a copy of the letter Ref PPD/42/28/XVIII/37 from the Director of Physical Planning).

18. That the suit property was not in existence when the design of the railway-line was carried out in 1958 and at the time the detailed design study of the Nairobi Southern bypass road was carried out by JICA on behalf of the Government in 1989/90 (Annexed hereto and marked as exhibit MM-4 is a copy of the JICA/GoK Southern bypass designs of 1989/90 sheets 11 & 13).

19. That the properties were created at a later date, after the designs were in place. No approval and/or comments were sought from the department responsible for roads before creation of the parcel despite the fact that the property is located on the transport corridor”.

29. The above averments have not been controverted by the petitioner. It is not in dispute that the plan that guides development in the area shows no indications of private property in that location. This therefore means that the suit property was public land. It means that the suit property was not in existence when the design of the railway line was carried out in 1958 and at the same time the detailed design study of the Nairobi Southern bypass road was carried out by JICA on behalf of the government in 1989/90.

30. The Ministry of Roads, Public Works & Housing issued a public notice in the Kenya Times on the 6th August 2003, notifying the public to remove illegal structures on the Nairobi Southern bypass corridor. The said notice is annexed to the replying affidavit of Milca Muendo and marked “MM-6”. The notice is signed by Engineer B. G. Ariga, Chief Engineer Roads. The petitioner says he acquired the suit property in 2008. Had he done due diligence he would have known that the suit property was on road corridor.

31. By a letter dated 9th November 2016, the Cabinet Secretary, Ministry of Transport Infrastructure, Housing and Urban Development, James W. Macharia wrote to the Chairman National land Commission seeking recovery of public utility land, along the Nairobi Southern bypass, a total of 137 properties were listed including the suit property. The said letter is annexed to the replying affidavit of Milca Maundo and is marked MM-7,

32. The suit property is therefore public land and the 1st respondent had the mandate to review grants and dispositions of public land to establish how the said property became private land and it cannot be faulted. This power is donated by Section 14 of the National Land Commission Act.

33. I find that the petitioner herein was allowed a fair hearing. The 1st respondent published a notice on 17th March 2017 notifying the public of the hearing of review of grants to be held on 27th March 2017. All interested persons were notified. The petitioner herein does not claim that he was not aware of the public hearings, rather that the notice did not accord him the opportunity to know the allegations and/or the case he was required to answer. In my view this sounds far fetched.

34. The procedure would be for the petitioner to attend the hearings and present evidence and documents to show how he acquired the suit property. In my view this amounts to an opportunity to be heard. Having appeared before the 1st respondent nothing could have prevented him from seeking the relevant information. The petitioner’s claim that he was not accorded a fair hearing therefore fails as it is unsubstantiated.

35. Having stated that the suit property was public land and the 1st respondent had a right to review the said Grant, it follows the petitioner is not entitled to the reliefs sought. Upon completion of the review process the 1st respondent published their determination through gazette notice no 6866 of 17th July 2017 directing the Chief Land Registrar to revoke the titles as per Section 14(5) of the National Land Commission Act. The 1st respondent cannot be faulted as the suit property was on land reserved for the transport corridor for the Embakasi-Kibera Railway line and southern bypass development. The 1st respondent cannot be faulted as it did not act ultra vires as alleged by the petitioner.

36. In conclusion, I find no merit in this petition and the same is dismissed with costs to the 2nd and 3rd respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 30TH DAY OF SEPTEMBER 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Nganga for Ms Wambui Gatharu for the Petitioner

Ms N. Mohammed for Caroline for the 1st Respondent

Mr. Mare for the 2nd Respondent

Mr. Njagi for Ms Mwalazi for the 3rd Respondent

Steve - Court Assistant