



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC PETITION NO E015 OF 2020

IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL RIGHT

AND FREEDOMS AS ENSHRINED UNDER ARTICLES 40 & 47 OF

THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO.4 OF 2015

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, NO.3 OF 2021

AND

IN THE MATTER OF: TITLE NUMBER DAGORETTI/RIRUTA/T.738

BETWEEN

VALENTINE AJIAMBO TEBINO.....PETITIONER

=VERSUS=

THE CHIEF LAND REGISTRAR.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

ANDERSON KIGAMBA WAIYAKI.....INTERESTED PARTY

JUDGEMENT

1. This is the Petition dated 2nd October 2020 brought by the Petitioner. The grounds are set out in paragraph (7) to (25).
2. The Petitioner seeks the following prayers:-

(a) A declaration that the Petitioner's fundamental rights and freedoms as enshrined under Article 40(1), 47(1) and 47(2) of the Constitution of Kenya 2010, have been grossly contravened and infringed upon by the 1st Respondent herein.

(b) An order or judicial review in the nature of mandamus ordering and compelling the 1st Respondent to immediately, unconditionally and without fail, release the duly registered discharge of charge, transfer, charge and original title deed in regard to all that land known as Title No. Dagoretti/Riruta/T.738 to the firm of M/s Makori & Karimi Advocates.

(c) An order of judicial review in the nature of prohibition directed towards the 1st Respondent restricting/prohibiting the 1st Respondent, its agents, officers and any person acting under it from adversely interfering in whatever manner whatsoever with

the Petitioner's proprietary interest in all that land known as Title No. Dagoretti/Riruta/T.738.

(d) General, exemplary and aggravated damages under Article 23(3)(e) of the Constitution of Kenya 2010 for the unconstitutional, unfair and callous conduct of the 1st Respondent and its officer one, Choka Berita Ondeyo to be paid personally and collectively.

(e) Any other order and direction as this honourable court may consider appropriate in these circumstances.

(f) Costs of this petition.

(g) Interest.

3. The Petition is supported by the affidavit of Valentine Ajiambo Tebino, the Petitioner herein, sworn on the 2nd October 2020.

4. On the 26th January 2021, Ms Nyawira for the Respondents was present. The court directed that the parties do file responses and/or further documents within sixty (60) days. The matter was set for mention on 8th June 2021.

5. On the 8th June 2021, Mr. Tebino for the Petitioner was present. He confirmed that Petitioner had filed her submissions. The Respondents had not filed any responses and/or the submissions. By the time of writing this judgment, there are no responses and/or submissions on behalf of the Respondents on record.

6. The Petition is therefore unopposed. The facts presented by the Petitioner have not been challenged in any way.

7. It is the Petitioner's case that one of the 1st Respondent's Registrar by the name of Choka Berita Andeyo has callously and obstinately declined and continues to decline to release the Petitioner's documents to the firm of M/S Makori & Karimi Advocates without any justification whatsoever and in sharp contrast to the 1st Respondent's electronic confirmation dated 22nd July 2020, that the Petitioner's documents had been successfully registered.

8. On the 20th August 2020, the Petitioner caused a search to be conducted on the suit property where upon the search confirmed that she was already the registered proprietor and that the charge to Consolidated Bank Limited had been successfully registered as against the Title.

9. By failing to release the Petitioner's documents the 1st Respondent has violated the Petitioner's right to property as envisaged under Article 40 of the Constitution.

Article 47 (1) of the Constitution provides that:-

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

Section 4 (1) of the Fair Administrative Actions Act, No 4 of 2015 provides that:-

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

10. The Petitioner's right to have the documents released to her once they were duly registered has been violated. No reason and or explanation has been given. The 1st Respondent had the opportunity to explain but did not file any response to this petition.

In the case of **Judicial Service Commission Mbalu Mutava & Another [2015] eKLR** the Court of Appeal stated as follows:-

“Article 47(1) of the Constitution does not exclude the application of common law particularly the common law right to fair hearing. As I have endeavoured to show above, natural justice comprises the doctrine of or is synonymous with “acting fairly”. The term “procedurally fair” used in article 47(1) by a proper construction, imports and subsumes to a certain degree, the common law including rules of natural justice which means that common law is complementary to right to fair administrative action, the justice of the common law will greatly influence the future development of the administrative law under the Constitution.

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative action of public officers, state organs and other administrative bodies are now subject by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed”.

11. Article 47(2) of the Constitution provides that:-

“(2) If a right or 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”.

12. Section 4(2) of the Fair Administrative Actions Act, No. 4 of 2015 is worded in the same way as Article 47(2) of the Constitution. The Petitioner is entitled to be given reasons as to why the documents have not been released to her lawyers M/s Makori & Karimi Advocates. In the case of **Republic vs Retirement Benefits Authority Appeals Tribunal & vs 5 Others Exparte Kenya Airport Authority staff Superannuation Scheme (2015) eKLR** Korir J held thus:-

“.....the giving of written reasons where the right of a person is adversely affected by administrative action is now a constitutional imperative-see Article 47(2) of the Constitution. Decision should be backed by reason.....”.

13. I agree with Petitioner’s submissions that the duty to give reasons is considered to be an inextricably bound up with natural justice on the right to be fairly heard and is fundamentally important as a public law principle. In the case of **Serah Mweru Muhu vs Commissioner of Lands & 2 Others [2014] eKLR** Majanja J stated thus:-

“The Petitioner’s concern regarding the renewal of the lease was brought to the Commissioner’s attention by the letter of January 2013. In the written submissions, he Commissioner attributes the failure to renew the lease term owing to a cabinet directive freezing such dealings in public land. The decision was not exhibited to the Commissioner’s affidavit nor was it communicated to the petitioner as the reason for refusal or failure to renew the lease of otherwise complete the transaction. One would expect that a decision of such magnitude and public interest would be contained in some form of documentation. The constitutional duty imposed on the Commissioner is to notify the lessor the reasons why the lease could not be renewed or any expectations or conditions demanded on the part of the petitioner/lessee prior to such renewal or indeed why the modalities of the sale could not be completed. This was not done, in breach of the petitioner’s right to fair administrative action under Article 47(2) which provides that “if a right or fundamental freedom of a person has been or is likely to be affected by administrative action, the person has the right to be given written reasons for the action.” Silence cannot be a substitute for written reasons.”

14. The 1st Respondent’s failure to release the Petitioner’s documents to her advocates has kept the Petitioner in a state of indefinite suspense. She legitimately expected that the documents once registered would be released. In the case of **Keroche Industries Ltd vs Kenya Revenue Authority & 5 Others [2017] eKLR**. The court defined legitimate expectation as follows:-

“...Legitimate expectation is based not only in ensuring that legitimate expectations by the parties are not thwarted, but in a higher public interest beneficial to all including the respondents, which is, the value of the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected plan then lives with a sense of certainty, trust, reasonableness and reasonable expectation.

An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way..... Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised”.

15. I find that the Petitioner has made out a good case for the grant of the reliefs sought. I decline to order any compensation to the Petitioner. She singled out one Choka Berita Andeyo as the one holding onto the documents. However no material was placed before this court to confirm this position. There are no correspondences between the said officer and the firm of M/S Makori & Kirimi Advocates exhibited. I find that the prayer for compensation fails.

16. Accordingly, judgment is entered for the Petitioner as against the Respondent as follows:-

(a) That a declaration that the Petitioner’s fundamental rights and freedoms as enshrined under Article 40(1), 47(1) and 47(2) of the Constitution of Kenya 2010, have been grossly contravened and infringed upon by the 1st Respondent herein.

(b) That order of mandamus is hereby issued ordering and compelling the 1st Respondent to within thirty (30) days, unconditionally and without fail, release the duly registered discharge of charge, transfer, charge and original title deed in regard to all that land known as Title No. Dagoretti/Riruta/T.738 to the firm of M/s Makori & Karimi Advocates.

(c) That an order of prohibition is hereby issued directed towards the 1st Respondent restricting/prohibiting the 1st Respondent, its agents, officers and any person acting under it from adversely interfering in whatever manner whatsoever with the Petitioner’s proprietary interest in all that land known as Title No. Dagoretti/Riruta/T.738.

(d) That each party do bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 25TH DAY OF NOVEMBER 2021.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Ms Tebino for the Petitioner

No appearance for the Respondents

Steve - Court Assistant