



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 11 OF 2015

IN THE MATTER OF: A CONSTITUTIONAL PETITION

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLES 10, 28, 29, 30, 31, 35, 40 AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: BILL OF RIGHTS UNDER CHAPTER FOUR OF THE CONSTITUTION OF KENYA (2010), THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (1984) AND THE AFRICAN CHARTER ON HUMAN RIGHTS

AND

IN THE MATTER OF: ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOM OF INDIVIDUAL (SUPERVISORY JURISDICTION) PRACTICE AND PROCEDURE RULES, 2006 AND PART 5 RULES 19 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: DISREGARD FOR NATIONAL VALUES AND PRINCIPLES, FAIR ADMINISTRATIVE ACTION, SECURITY AND PRIVACY OF PERSONS, DISCRIMINATION AND DISPOSSESSION OF PROPERTY

BETWEEN

- 1. AWESO MOHAMED SHALI1ST PETITIONER**
- 2. THUREYA MOHAMED DAUDI 2ND PETITIONER**
- 3. FUMO MOHAMED FUMO..... 3RD PETITIONER**
- 4. BEATRICE WANGECI4TH PETITIONER**
- 5. MBWARAHAJI BWANA..... 5TH PETITIONER**
- 6. LALI MOHAMED LALI 6TH PETITIONER**
- 7. ALI KUPI MOHAMED7TH PETITIONER**
- 8. ARAFA LACHO BAHORA 8TH PETITIONER**

9. MJAHID SUO LALI9TH PETITIONER

(Suing On Their Own Behalf And On Behalf Of Affected Members Of Magogoni Settlement Farmers)

VERSUS

THE NATIONAL LAND COMMISSION..... 1ST RESPNDENT

THE ATTORNEY GENERAL2ND RESPONDENT

THE MINISTRY OF DEFENCE.....3RD RESPONDENT

JUDGMENT

By a Petition dated 14th July 2015 the Petitioners herein moved the Honourable Court seeking for the following orders:

- 1. A declaration that the Petitioners constitutional right under Article 40 of the Kenya Constitution, 2010 which protects acquisition and ownership of land, freedom from arbitrary deprivation and freedom from discrimination has been infringed since the acquisition of the land for purposes of establishing the Manda Bay Navy Base was not in keeping or in line with the guiding constitutional principles on land policy in Kenya.**
- 2. An order directed to the National Land Commission to issue a policy document on the government Land Policy and in particular how the government intends to resettle and compensate people who were affected by the construction of Manda Bay Naval Base and a plan of action on how the people who gave way and lost their land for the construction of Manda Bay Navy Base are to be compensated.**
- 3. Compensation for damages suffered for trespass, invasion and intrusion of privacy, loss of security and arbitrary deprivation of property, and the violation of other constitutional rights and values cited in this petition.**
- 4. An order for costs to be provided.**

Parties agreed to canvas the petition vide viva voce evidence whereby the Petitioners called 1 witness while the 2nd and 3rd respondents called 2 witnesses.

PETITIONERS' CASE

A brief background to the Petitioner's case is that their forefathers were at all material times settled at Magogoni area, Manda, Lamu County until early 1990's when the 3rd Respondent allegedly forcefully evicted them to build a Navy Base.

PW1 Thureya Mohamed adopted her witness statement filed on 4th August 2015 and produced the bundle of documents filed on 27th August 2018 as pex No.1-23. It was PW1's evidence that the suit property was their family land and they lived thereon until they were forced out by navy officers in 1992.

PW1 further testified that they were never compensated by the government and that other people who are not natives of the suit property got the compensation.

On cross examination by counsel for the 2nd and 3rd respondents, PW1 stated that she was not aware that the government bought the suit property from one About Abdalla. It was her testimony that the said About grabbed the land from the Petitioners when she was young. She agreed that there was compensation done to some of the people, she however did not have a list of those not compensated. PW1 also confirmed that they had not sued the said About Abdalla.

On re-examination, she stated that her parents never received any compensation for the suit land from the government.

2ND AND 3RD RESPONDENTS' CASE

In response to the Petition the 2nd and 3rd Respondents filed a Replying Affidavit sworn by Major G.M. Otieno on 15th August 2018.

DW1 Major George Moses Otieno relied on his replying affidavit and produced documents annexed to the Replying Affidavit as dex No. 1-6. DW1 testified that Kenya Navy acquired the suit property measuring 486.54 Ha from one Abdalla Rafrouf in 1988, thereafter Kenya Navy took possession in 1992, a survey was done and a deed plan No. 210479 issued in 1996 for L.R No. 13601/1 being a subdivision of LR. No. 13601. Subsequently, a certificate of title was issued to the PS Treasury to hold on behalf of the Kenya Navy.

DW1 testified that they found squatters on the suit property and out of pure goodwill, the Kenya Navy decided to relocate them and issued a Cheque for Kshs. 379,000.25 on 29th June 1988 through the DC Lamu. DW1 produced a document that shows the names and acreages that

each squatter got and that Vendor Abdalla has no claim against them.

DW1 produced the following documents in support of defence a certified true copy of the Deed Plan No. 210479, a certified true copy of the certificate of title and the transfer documents, a certified true copy of the Payment Voucher No. 03 to the District Commissioner, Lamu and a copy of the cheque forwarding letter dated 9th June 1988 for Kenya Shillings three hundred and seventy-nine thousand and twenty-five shillings (379,025/-) DW1 urged the court to dismiss the petition with costs.

On cross examination by Mr. Obaga for the Petitioners, DW1 told the court that the list of squatters was given to them by the DC Lamu and that he was not aware whether there were any squatters who were not compensated or deprived of their land.

On re-examination, he confirmed that the compensation was done as per the list of squatters given to them by the DC Lamu. That said list was never at any point contested.

DW2 Samuel Kariuki Mwangi the Mombasa Registrar of Titles testified that the subject land was registered as a new grant being an allocation from the government and a title issued on 18th July 1986 under title number 17700 and produced a copy of the titles as dex No 5.

DW2 stated that the suit land measuring 2584 Ha was registered in the name of Aboud Abdalla Rafrouf. It was DW2's further evidence that there was a charge of the suit land dated 25th July 1986 to AFC for Kshs. 100,000/ which was discharged on 26th November 1990.

DW2 stated that a portion of the land identified as Portion No. 13601/1 was transferred to the Permanent Secretary to hold for Kenya Navy and a Certificate of title No. 31195 was issued on 19th May 2002 measuring 486.14 Ha.

DW2 also stated that the transfer to the Permanent Secretary was proper and legal and there has been no objection raised and that at the time of transfer, there was no overriding interest or encumbrance against the suit property.

The petitioners' counsel did not file submissions as directed by the court.

2ND AND 3RD RESPONDENT'S SUBMISSIONS

Counsel listed two issues for determination by the court as:

- a. Whether the 3rd Respondent infringed on the Petitioners rights under Article 40 of the Constitution.**
- b. Whether the Petitioners are entitled to the orders sought for compensation and resettlement.**

On the first issue as to whether the 3rd respondent has infringed the petitioners' rights under Article 40 of the Constitution, counsel submitted that the respondents have produced documents to show the process of acquisition vide sale from Aboud Abdallah who was the registered owners of the suit land and the subsequent transfer and issuance of title to the respondents hence the issue of violation of the right to property does not arise.

Counsel further submitted that the petitioners have not demonstrated any violation or infringement of Article 40 and as such the petition lacks merit and should be dismissed. Counsel relied on the provisions of sections 24, 25 and 26 of the Land Registration Act and submitted that the 3rd Respondent's title to the suit land is indefeasible.

Ms Munyony cited the Court of Appeal case of **Charles Karathe Kiarie & 2 Others –vs- Administrators of Estate of John Wallace Muthare (deceased) & 5 others**, which restated that the Torrens System was applicable in Kenya and acknowledged that under the system the title of a bona fide purchaser for value without notice of fraud could not be impeached. The judges in the case observed thus:

“The Registration of Titles Act is entirely a product of the Torrens System of registration. The word “Torrens” is derived from Sir Robert Torrens, the third premier of South Australia and pioneer and author of a simplified system of land transfer which he introduced in 1958. This system emphasizes on the accuracy of the land register which must mirror all currently active registrable interests that affect a particular parcel of land. Government as the keeper of the master record of all land and their owners guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration the person affected is guaranteed of government compensation. This statutory presumption of indefeasibility and conclusiveness of title under the Torrens System can be rebutted only by proof of fraud or misrepresentation which the buyer is himself involved.”

Counsel therefore submitted that the respondents 'title is indefeasible and the petitioners filed this suit 15 years after the respondents had acquired a title to the suit land and further that they have not produced any ownership documents to justify their claim.

Ms Munyony also submitted that the petitioners' claimed that their forefathers occupied the suit land but there was no proof any ownership of the suit land and cited the case of **HENRY WAMBEGA & 733 OTHERS -vs- ATTORNEY GENERAL & 9 OTHERS [2020] eKLR** where the Court observed;

37. The argument of the petitioners is that because their forefathers lived on the suit lands, and were dispossessed during the colonial period, or shortly thereafter, then they have a right to these parcels of land. Straight from the blocks,

the respondents have attacked this claim, asserting that there is no evidence to prove such allegations. On this point, I must agree with the respondents. I am afraid that there is absolutely no evidence that any of the forefathers of the petitioners ever resided on the suit lands and I say this after having carefully gone through the evidence tendered by the petitioners. One cannot tell with precision and finality, which forefather of which petitioner resided in which land, and what sort of occupation such person had. Indeed, as pointed out by the respondents, some of the petitioners appear to have roots in Kwale and not within the site of the disputed land. There is a claim of dispossession, but absolutely no evidence of who was dispossessed, by whom, and when exactly this occurred.

Counsel further relied on the case of **JOEL AMDANY & 90 OTHERS -vs- BARINGO COUNTY GOVERNMENT & 3 OTHERS [2021] eKLR** where this court observed thus:

“One cannot purport to assert ownership rights over any land without proof of ownership. Upon perusal of the petitioners’ documents on record, it clear that the petitioners herein have not furnished this Honourable Court with any title documents or ownership documents to demonstrate that they have beneficial interests over the parcels of land in question”

Ms Munyuny submitted that the constitutional protection of the right to property arises only upon demonstration of lawful ownership.

On the second issue as to whether the petitioners’ are entitled to the prayers sought for compensation and resettlement, counsel submitted that the respondents compensated the squatters out of good will via the DC, Lamu. That the Petitioner’s claim is based on selfish private interest and cited the case of **Federation of Women Lawyers (FIDA Kenya) & 4 others v the Attorney General & 2 others [2016] eKLR.**

“85. It is with the above observations in mind that I agree with the 2nd Respondent’s submissions that the Petitioners are inviting the court on a flight of fancy by asking it to find that their ancestors were discriminated against and that the enforcement of the alleged infringed rights should be enforced now. If that were to happen, then almost all Kenyans will be entitled to that order considering that the whole country was colonised and a new legal system of land ownership was put in place.

86. Considering that the 2nd Respondent acquired this property in 1978, and has since subdivided the land with individual title deeds having been issued to its members, I find and hold that they have the constitutional right to own the property. In any event, the Petitioners did not sue the individual members of the 2nd Respondent despite averring that the suit property has been subdivided and Title Deeds issued to the said members.’

Counsel therefore urged the court to dismiss the petition and that the suit land is public land as per Article 62 of the Constitution of Kenya.

ANALYSIS AND DETERMINATION

The issue for determination is whether the petitioners have proved their claim that the respondents have infringed on their right to property as provided for under Article 40 of the Constitution of Kenya, 2010 which provides as follows:

Protection of right to property

1. Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

a. of any description; and

b. in any part of Kenya.

2. Parliament shall not enact a law that permits the State or any person—

a. to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

b. to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

3. The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

i. requires prompt payment in full, of just compensation to the person; and

ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.

4. Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

5. The State shall support, promote and protect the intellectual property rights of the people of Kenya.

6. The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

From the pleadings and the evidence before the court, it is evident that the petitioners claim that their right to property was infringed by the respondents who took occupation of the suit land. They claim that the land belonged to their forefathers but they were never compensated.

It is a well settled principle that the Petitioners in such a constitutional petition ought to demonstrate with some degree of precision, the right they allege has been violated, the manner it has been violated and the relief they seek for that violation (See **Anarita Karimi Njeru vs Republic (supra) and Trusted Society of Human Rights Alliance vs Attorney General and Others Petition No.229 of 2012**).

The question that begs an answer is whether the petitioners have a right over the suit land. It is trite that one cannot claim to be deprived of that which he or she does not have rights over. In the case of **Veronica Njeri Waweru & 4 others v City Council of Nairobi & 2 others [2012] eKLR** the Court observed:

‘The petitioners have readily conceded that they have been occupying public property, a road reserve, for the last ten years. They have licenses to operate businesses, but have no proprietary interest in the land. Clearly, therefore, their claim that their rights under Article 40 have been violated has no basis. They do not own the land, and they therefore cannot be deprived of that which they have no rights over. I therefore find and hold that there has been no violation of the petitioners right to property under Article 40.’

The suit land is currently registered in favour of the 3rd Respondent having purchased the same from one Aboud Abdalla Rafrouf. Both oral and documentary evidence point to the fact that the suit land belongs to the 3rd respondent and that the process for purchase and transfer was done legally. There is also evidence that the squatters who were on the suit land were compensated vide a cheque that was issued to the DC Lamu including a voucher of the beneficiaries to be paid and the acreage.

There was no evidence of any objection or encumbrance to the subdivision or transfer of the suit land to the respondents. The petitioners did not prove any impropriety in the sale and transfer to the respondents. They also did not sue the said Abdalla whom they stated that grabbed the land from them.

This is a straight forward case which should not have taken this long to resolve. I find that the petition lacks merit and is dismissed with each party bearing their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF DECEMBER, 2021

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.