



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 13 OF 2015

IN THE MATTER OF: ARTICLES 2, 3, 19, 20, 21, 22 AND 23 OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 1, 3, 27, 28, 40, 47 AND 50 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF: THE KENYA ROADS ACT, 2007 FO THE LAWS OF KENYA AND LEGAL

NOTICE NO. 86 OF 10TH MAY 2013

AND

**IN THE MATTER OF: DEMOLITION OF PREMISES ON LAND PARCEL TITLE NO. C.R. 42187 AND BEIGN
SUBDIVISION NO. 1667 FOR PURPOSES OF DIGO-CHANGAMWE ROAD 58 KM (A109)**

BETWEEN

KAMLESH PANDYA

***(suing as the legal administrator of the Estate of Lalitchandra Durgashanker Pandya)*.....PETITIONER**

AND

KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT

JUDGMENT

The Petition

1. The petition herein is dated 12/3/2015. Through it the Petitioner **Kamlesh Pandya** (suing as the legal administrator of the Estate of Lalitchandra Durgashankar Pandya) prays for the following orders:

- (a) a declaration that your Petitioners fundamental rights to the protection of its property and from arbitrary deprivation thereof as well as the right to fair administrative action, access to information and to a fair hearing have been or are likely to be infringed;
- (b) a declaration that the deceased is the lawful owner of C.R. No.42187 being Subdivision Number 1667 within the meaning of Article 40 of the Constitution;
- (c) a declaration that the forcible entry, seizure, possession and for proposed demolition of the development on the suit property namely C.R. No. 42187 being Subdivision Number 1667 by the Respondent will amount to a violation of his rights to protection of property under Article 40 of the Constitution;

- (d) conservatory Relief in the form of an injunction be issued restraining the Respondent, its agent, servants and/or nominees from entering into, seizure, confiscation, occupation, alienation and demolition of the improvements and developments carried out on the suit property known as C. R. No. 42187 being Subdivision Number 1667 pursuant to the notice dated 16th February 2015 or any other such notice;
- (e) a declaration that the Respondent's notice dated 16th February 2015 is unlawful and illegal for contravention of the Petitioner's rights and freedoms under Articles 27, 40, 47 and 50 of the Constitution;
- (f) general damages for breach of the Petitioner's rights and freedoms under Articles 27, 28, 40, 47 and 50 of the Constitution;
- (g) costs of this Petition be borne by the Respondents; and
- (h) any further Relief or Orders that this Honorable Court shall deem just and fit to grant.

2. The petition is supported by affidavit sworn by the Petitioner on 12/3/2015.

3. The Respondent is a body corporate established under The Kenya Roads Act (Chapter 408 Laws of Kenya).

Petitioner's Case

4. The Petitioner states that at all material times to the petition the deceased was the registered owner of all that piece of land comprised in the Grant registered as C.R. 42187 being Subdivision Number 1667/V/ Mainland North Mombasa (hereinafter called '*the suit property*') situate within Mombasa County having been so registered on the 13th day of April 2007 when a Certificate of Title was issued to the Deceased. The Deceased still remains the registered owner and the original Certificate of Title for the suit property is in the Petitioner's possession. True copies were annexed and marked as exhibit "KP-2A & 2B" being Certificate of Title and Certificate of Postal Search respectively to prove the averment. The Petitioner avers that suit property has always and over time remained in the possession of the Deceased who has enjoyed uninterrupted use possession and control of the same up until his demise. The Estate of the Deceased now continues to enjoy the same uninterrupted use and possession. However, sometime in the year 2015 the Petitioner received a Notice dated the 16/2/2015 from the Respondent intimating that the suit property had encroached onto a road reserve and requiring that the same be removed/demolished by the Petitioner within the specified period failing which the Respondent would take steps to demolish the same or such part as was allegedly encroaching onto the road reserve. Copy of the said Notice was annexed and marked as "KP-3". The Petitioner was shocked that after all this while, the Respondent now claims that the suit property lies on a road reserve. The Petitioner avers that all the documentation in his possession as pertains to the suit property demonstrates that the said suit property does not encroach onto any road reserve and that the improvements and developments carried out thereon have been done within the boundary of the suit property shown in all the official records relating thereto.

5. The Petitioner avers that pursuant to the provisions of Articles 40 and 47 of The Constitution of Kenya 2010, the Petitioner has the fundamental right to fair administrative action and protection of its proprietary rights which the Respondent is intent on infringing and in breach of which the Respondent wrongfully insists that the developments carried out on the suit property be demolished.

6. The Petitioner avers that following the aforesaid claims by the Respondent, the Petitioner instructed one Mr. Denis Malembeka, a licensed surveyor, to undertake a survey and prepare a report on the question of encroachment raised by the Respondent. The survey report confirmed that the suit property is within its boundaries and not on a road reserve as alleged by the Respondent. A copy of the said report was annexed and marked as "KP-4". The Petitioner avers that unless the Respondent is restricted by a permanent injunction from violating the Petitioner's rights, the Petitioner and the Estate of the Deceased shall suffer great loss and damage. The suit property is currently occupied by a Third Party, Synergy Gases (K) Limited who carry out their entire business operation from there and should this be disrupted, the Estate of the Deceased could potentially be exposed. The said Synergy Gases Limited, a tenant of the Deceased, has invested a substantial amount of money in the suit property and has established a multi-million shillings structure on the suit property and a manufacturing production unit too. The Deceased's Estate will also suffer loss and damage in the form of lost revenue should Synergy's occupation and business activities be interfered with or in any other way hampered by these imminent threats or other unlawful actions.

7. The Petitioner avers that by virtue of the aforementioned provisions of the Constitution as well as Articles 19, 20, 21, 22, 23, 24, 27 35, 40, 47 and 50 of the Constitution, as of 16th February, 2015, the deceased had a fundamental and absolute right to the protection of his property and from arbitrary deprivation thereof as well as the right to fair administrative action, access to information and to a fair hearing. Any breach of the foregoing provisions or interference with the fundamental rights guaranteed under The Constitution or attempt to deprive the deceased of its property arbitrarily and/or otherwise than in accordance with the provisions of the Constitution or other Laws of Kenya would be unlawful, illegal and null and void and, of no consequence whatsoever; that the Deceased's title and right to the suit property has never at any particular point in time been changed, varied and/or relinquished to any one and/or institution or for that matter been challenged as invalid.

8. The Petitioner relies on Article 40 of the Constitution which guarantees protection of one's right to property and provides:

"40 (1) Subject to Article 65, every person has the right, either individually or in association with other, to acquire and own property....."

(2)

(3) The state shall not deprive a person or 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 title to land, in accordance with Chapter Five; or
- (b) is for a public purpose or in the public interest

Further, Article 47 entitles every person to the right

“... To administrative action that is expeditious, efficient, lawful reasonable and procedurally fair.” In addition, in instances where “...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 the reasons for the action.”

9. The Petitioner avers the Respondent’s conduct aforementioned is in breach of the provisions of Articles 40 and 47 by virtue of the notice dated 16/2/2015 having been issued without calling upon the Petitioner to defend his position, in breach of the rules of natural justice and fairness.

Respondent’s Case

10. The petition is opposed vide a response to the petition dated 23/4/2015 and a Replying Affidavit sworn on 20/4/2015 by **Samuel Odoyo**, and a Further Affidavit sworn by **Engineer Jared Makori** on 1/7/2015, and another Further Affidavit sworn on 18/12/2015 also by Engineer Jared Makori.

11. The Respondent denies the content of the petition and states that the suit premises being MN/V/1667 and comprised in the title CR NO. 42187 is a sub-division of two parcels of land namely MN/V/241 and MN/V/243. The two were acquired by the Commissioner of Lands on behalf of the Government of Kenya vide Gazette Notice No. 3581 dated 14/11/1969 for the purposes of building the Digo-Changamwe Road pursuant to Section 6(2) of the Land Acquisition Act, 1968. The Respondent states that the suit premises were thus reserved for public purposes and cannot be lawfully alienated in favour of the Petitioner or any other party. The Respondent states that the title to the suit premises was obtained unlawfully and therefore is not indefeasible. The Respondent avers that the Commissioner of Lands having compulsorily acquired MN/V/241 and MN/V/243, the same parcels of land became public property and reserved solely for the public purpose for which they were acquired. Any subsequent amalgamation of the two parcels of land and sub-division is unlawful and cannot confer title upon the Petitioner, his predecessors in title or at all. Therefore, all the allegations by the Petitioner are totally denied.

12. The Respondent further states that indeed it issued the notice dated 16/2/2015 as stated in paragraph 10 of the Petition. The notice was issued on the basis that the area in question was compulsorily acquired for the public purpose of constructing the Digo- Changamwe Road.

13. The Respondent avers that the said two parcels of land having been compulsorily acquired by the Commissioner of Lands the public interest of constructing the Digo-Changamwe Road overrides any titles issued in respect of the Suit Premises herein; and that this Court ought to declare that the Petitioner’s claim to title cannot defeat the Respondent’s public right to construct the Digo-Changamwe Road on the said property.

The Hearing

14. The petition was heard *viva-voce*. The **Petitioner (PW 1)** relied on his witness statement filed herein on 25/9/2018. PW 1 testimony affirmed the contents of the petition and the supporting affidavit, and emphasized that the suit property belonged to the Petitioner and had never at any one time changed hands.

15. **DW 1, Samuel Odoyo**, testified for the Respondent, affirming the contents of the response to the petition and the Replying Affidavit and Further Affidavits filed by the Respondent. The witness testified that the suit property belongs to the Respondent and that the Petitioner cannot extinguish the overriding interests that existed before the Petitioner acquired title. The Respondent’s case is that among the parcels of land that the Commissioner of Lands acquired were LR No. 241/V containing by measurement some nought decimal six nought four (0.604 ha.) hectares or thereabouts and LR No. 243/V containing by measurement some nought decimal one seven four (0.174 ha.) hectares or thereabouts. The said parcels of land being LR No. 241/V and LR No. 243/V were acquired and reserved for road construction. The relevant compensation was paid in accordance with the provisions of the Land Acquisition Act. It is in view of the foregoing that the Respondent issued the Notice dated 16/2/2015 informing the Petitioner and/or his agents that they were encroaching on the road reserve. The Respondent required of them to comply with the notice within thirty (30) days failure whereof the Respondent would invoke its mandate under Section 49 (5) of the Roads Act. The Petitioner laid claim to the suit premises alleging title issued to the late Lalichandra Durgashanker Pandya sometimes in 2007. After due investigations, the Respondent states that it established that:it was established:

- (a) Several years after the two parcels of lands were acquired by the Commissioner of Lands for purposes of constructing the road, the Petitioner and/or his predecessors in title and/or agents caused the two parcels of land to be merged into one large parcel;
- (b) The merged parcel was thereafter sub-divided into three parcels being LR No. MN/V/1667, MN/V/1668 and MN/V/1669;
- (c) The suit premises is MN/V/1667 and contains by measurement some nought decimal five four four nine (0.5449) hectares or thereabouts.
- (d) The process of sub-division was undertaken sometime in January 1993 as is evidenced by the Deed Plan annexed to the Certificate of Title and the Survey Plan dated 25/1/1993; and
- (e) The Certificate of Title was issued on 13/4/2007.

16. The Respondent states that the suit premises are encroaching on the road and it will be inequitable for the Respondent to make compensation for the same property for the same purpose for which it was compulsorily acquired in 1969. The Respondent is a creation of statute, to wit, the Kenya Road Act, 2007 and is enjoined to promote good management of public funds. The Respondent avers that Petitioner's claim to title cannot extinguish the overriding interest that existed before they acquired title; that the Petitioner knew or ought to have known that the Respondent has interests that override the subsequent title that was issued to it; that the petition lacks merit and should be dismissed and the Respondent allowed to implement the road project.

Submissions

17. Parties filed submissions to the petition. The Petitioner filed submissions on 9/11/2020 and further submissions on 13/11/2020. The Respondent's submissions were filed on 20/7/2020.

18. I have carefully considered the submissions, the pleadings and the authorities cited. In my view the issues for the determination by this court are:

- (i) Whether the suit property was subject of compulsory acquisition in the 1970s.
- (ii) Whether or not the Petitioner holds good title to the suit property.
- (iii) Whether the Petitioner's right to property protected under Article 40 of the constitution has been violated.

(i) Whether the suit property was subject to compulsory acquisition in the 1960s

19. The Respondent submitted that in order for the Court to conclusively determine this matter, the Court must appreciate the history of the suit property. It is the Respondent's position that the suit property was compulsorily acquired in the 1960s and therefore the Petitioner could not acquire any rights over the portion of the property that was acquired. **Mr. Oregu**, learned Counsel for the Respondent submitted that the process of compulsory acquisition was flawless and on 16/1/1970, the government gave notice that it has taken possession of the land in pursuance of sections 19(1) of the Land Acquisition Act after final payment had been made to the seller through their advocates as is shown in Respondent's List of Documents filed in this Court on 19/6/2019 and appearing at page 11. Counsel submitted that it is not in contention that the parcel 241 formed part of the parcels compulsorily acquired as exhibited in the gazette notices appearing in the Respondent's list of documents filed and produced before this Court. What is in contention is whether the suit property encroaches on the road reserve by approximately 0.3485 ha. It is the Petitioner's argument that the portion compulsorily acquired was surrendered to the government. The Respondent on the other hand states that the portion surrendered was less than the portion acquired and that therefore the Petitioner's land still encroaches on the road reserve by about 0.3435 ha.

20. The Respondent maintains that when carefully looking at, the documents produced before this Court clearly show that parcels MN/V/241 measuring 0.604 ha. and parcel MN/V/243 measuring 0.174 ha. were acquired by the government for the purpose of constructing the Digo-Changamwe road hence making the total parcel acquired 1.778 ha. Referring to page 15 of the Petitioner's further list of documents, the Respondent avers that parcels 241, 243/1 and 440 were consolidated to No. 1666, which was further subdivided into sub-divisions No. 1667 and 1669. Subdivision No. 1667 is what is before this Court for determination. Mr. Oregu further referred the Court to page 29 of the further list of document filed by the Petitioner, and submitted that the Certificate of Title clearly indicates that the plot was sub-division number 241 which was the parcel compulsorily acquired by the government, and the Registrar of Titles claims ownership of a portion by compulsory acquisition of 0.604 ha. of the said plot. Counsel submitted that when the property was transferred to John Kunga Kituu the same, was subject to a caveat placed by the Registrar of Titles of the portion measuring 0.604 ha. compulsorily acquired by the government.

21. On his part **Mr. Khagram**, learned Counsel for the Petitioner submitted that from the contents of Pages 15 to 22 of the Petitioner's Further List of Documents filed on 17/9/2018, it is evident that Subdivisions Nos. 1666/V/MN, 1667/V/MN, 1668/V/MN and 1669/V/MN were as a result of Sub-divisions of the property known as Plot No.241/V/MN, 440/V/MN and 243/V/MN which had all been consolidated (see pages 16 to 18 of the Petitioner's Further List of Documents filed on 17/9/2018). The Deceased was proprietor of Plot No. 241/V/MN from 16/4/1980 – (Pages 44 to 45 of the Petitioner's Further List of Documents filed on 17/9/2018) and of Plot No.243/V/MN from 30/5/1979 when it was transferred to it – (Page 39 of the Petitioner's Further List of Documents). Mr. Khagram submitted that it will be noted that the present road (Nairobi – Mombasa) had on consolidation and Sub-division been removed from the Petitioner's property. (See Page 21 of the Petitioner's Further List of Documents). Furthermore, it will also be noted from the contents of Pages 8, 9, 10 and 11 of the Witness Statement of Kamlesh Pandya filed on the 25/9/2018, that the Respondent recognized the Petitioner's proprietorship of the relevant portions by giving Notices of Intention of Compulsory Acquisition of Plot No.1669/V/MN and for Plot No.1667/V/MN which acquisition the Respondent has for some reason failed to pursue. Mr. Khagram submitted that the Respondent's claim of encroachment onto a road reserve is untrue and lacks any foundation or basis particularly in light of the testimony of Mr. Dennis Malembeka and his Experts' Report filed on 1st July 2019 as well as for the following reasons that the current Mombasa-Nairobi road did not exist back in the late 1960's early 1970's and what was on the ground was one large portion of land comprised in the Title known as MN/V/241 measuring 3.4 Acres – (see pages 27 to 33 of the Petitioner's Further List of Documents). This parcel of land measured 3.4 Acres. That as is evident from Page 31 of the Petitioner's Further List of Documents, the suit property was in 1953 registered in favour of Tayebali Karimji Kudrati and by an Entry No. 25, it was later transferred to Mohamed Tayebali Kudrati pursuant to a probate issued – Entry 10 & 11 (Page 32). A caveat was registered by the then acting Registrar of Titles claiming ownership of a portion of this property by compulsory acquisition measuring 0.604 hectares (1.4925 acres) – (see pages 3–14 and 13–14 of the Plaintiff's Supplementary Bundle of Documents). This was in conformity with the acquisition eventually made as is apparent from the documents annexed as Exhibit 1 to the Affidavit of Samuel Odoyo sworn on 2/3/2018. Counsel submitted that effectively, after the compulsory acquisition of 1.4925 acres from MN/V/241, an area of 1.9075 acres remained.

22. As for MN/V/243, it measured a total of 1.86 acres – (Page 23 & 40 of the Petitioner's Further List of Documents, which was subsequently sub-divided into MN/V/243/1 and MN/V/440 (Original No. 243/2) measuring 1.177 acres and 0.687 acres respectively. The total acreage of all these plots thus translated to 5.264 acres before taking into account any of the compulsory land acquisition made. Further

counsel submitted that as is evident from Page 18 of the Petitioners' Further List of Documents (proposed consolidation plan for these three plots), the total area of 2.132 Ha. translates to 5.268 acres (Page 20 of the Petitioners' Further List of Documents). This was then subdivided into the three portions namely MN/V/1667 measuring 1.3464 acres, MN/V/1668 measuring 1.0613 acres and MN/V/1669 measuring 2.8268 acres. (See pages 19-22 of the Petitioner's Further List of Document).

23. Mr. Khagram submitted that from the evidence it is common ground that a total of 1.9214 acres was compulsorily acquired (Page 14 of the Petitioners' Further List of Documents). This considered, then from an original piece of 5.264 acres, a net acreage of 3.343 acres remains in the Petitioner's ownership after deducting the 1.921 acres acquired compulsorily. Counsel submitted that The Deed Plan appearing at Page 21 of the Petitioners' Further List of Documents represents the road which, when the consolidation and sub-division was carried out, was surrendered to the Government (see page 16 of the Petitioners' Further List of Documents). Counsel submitted that this position is verified by the survey carried out by Mashariki Geosurveyors Limited - Exhibit "KP-4" of the Petitioner's Affidavit which confirmed the position of the current road to be in accordance with the surrendered portion and in terms of the records held by the Survey Department showing the road to cover 0.4295 Ha being 1.0613 acres (see Exhibit "KP-4" at Page 19 of the Petitioner's Affidavit);

24. Mr. Khagram submitted that the Report of Mashariki Geosurveys Limited and the evidence of Dennis Malembeka is pertinent in this regard from which it is notable that they relied solely on the datum supplied by Survey of Kenya based on Plan Marked FR No.234/126 and Survey Pillar known as Pillar 198/S/I on the National Grid System. On the other hand, the Respondent relied on their internal departmental record in Road Acquisition Sheet No.10 which does not constitute any official record. Counsel submitted that it is imperative to note that the Respondent has not filed and/or produced in this Court any Official Survey Maps or Deed Plans to show that, indeed the Petitioner has encroached substantially or otherwise onto the road/road reserve as alleged. Further, the documents relied upon by the Respondents were neither signed nor deposited with the Director of Survey nor were they capable of being termed as Survey Plans in accordance with the law; the plans relied upon by the Respondent did not have co-ordinates of any road cutting through it; and no map was produced having co-ordinates to confirm the location of the road.

25. I have carefully considered the evidence and submissions of the parties in relation to this issue. The Respondent produced a copy of the Kenya Gazette dated 21/11/1969 and 28/11/1969 in which the government expressed the desire to acquire part of the suit property being LR No. 241/V and LR No. 243/V acreage 0.604 and 0/174 Ha. respectively. There is no further evidence whether or not the process of acquisition was concluded. However, by a letter from department of lands the department purports to have compulsorily acquired a certain piece of land. The letter found at page 11 of the Respondent's list of documents filed on 19/6/2018 is barely readable. The date is not clear, nor is any money exchanges if at all. Neither does it show the title of land to which it relates. However, Mr. Orege purports it to be evidence of conclusion of the alleged compulsory acquisition.

26. However, there is no denial that some form of compulsory acquisition took place. What is not clear is the title which was compulsorily acquired, and the total acreage of acquisition. Further, it is not clear to what extent the Petitioners land encroaches the road.

27. The issue before this Court is a hugely technical one. The Court at one time directed a joint survey of the suit dispute to determine whether it encroaches the road reserve. However, the parties were not able to agree on a joint methodology. The Survey Report dated 24/6/2019 filed by the Petitioner's surveyor – Mashariki Surveyors Limited relied solely on the datum as supplied by Survey of Kenya, and they returned a finding that the suit property does not encroach the road reserve.

28. On their part the Respondent relied solely on their internal department records and returned a finding that the suit property encroached the road reserve. From the foregoing it was not possible for this Court to ascertain the position as to whether or not the suit property encroaches on the road. In any event that is a determination which would be outside the jurisdiction of this court. This court has no powers to determine any disputes relating to the environment and the use and occupation of title to land, and/or determination of boundaries. Indeed the disputes as to whether or not the suit property was compulsorily acquired, and if so, how much, and when that took place; or the dispute as to whether the suit property encroaches on the road reserve are disputes for the determination of the Environment and Land Court. Further, the evidence purportedly brought to this court by the parties attempt to prove either that there was a compulsory acquisition, the acreage thereof or the position of the beacons are the kind of evidence to be taken to the proper court should that be necessary. It is the finding of this court that quite apart from lacking the jurisdiction to determine those issues, the evidence placed before me especially by the Respondent was not adequate for this court to reach a conclusive finding. That issue must be determined in a court which has the competence and skill and time and the jurisdiction to find an answer.

(ii) Whether or not the Petitioner holds good title to the suit property

29. The Petitioner's claim as against the Respondent is that his right to the protection of his Property guaranteed under Article 40 of the Constitution of Kenya, 2010 has been violated by and/or is threatened by the Respondent who has issued the Notice dated the 16/2/2015 intimating that the suit property has encroached onto a road reserve and requiring that the same be removed/demolished within the specified period failing which the Respondent would take steps to demolish the same or such part as was allegedly encroaching onto the road reserve. What to note in this regard is that pursuant to the provisions of Section 26 of The Land Registration Act, the Certificate of Title issued to a Purchaser upon transfer of Land is *prima facie* evidence that the person named therein is the absolute and indefeasible owner and the title of that owner shall not be subject to challenge except on grounds of fraud or misrepresentation to which the person is proved to be a party or where the Certificate of Title has been acquired illegally or through a corrupt scheme. Under Section 80 of The Land Registration Act 2012, a Court is empowered and has jurisdiction to order rectification of the register if satisfied a registration was obtained, made or omitted by fraud or mistake. In the instant case, not only has no allegation of fraud or illegality been made but none has been proved either. As matters stand, the Provisions of Section 26 of The Land Registration Act referred to above entitle the Petitioner to the absolute and indefeasible right of ownership. In Kenya, the sanctity of private property is protected by law and in the Constitution and no private land can be acquired by the Government compulsorily except in accordance with the law. Such land is private property and has to first be acquired by the state under the powers of eminent domain under the Land Acquisition Act and Land Act 2012. In my view Petitioner has demonstrated that the Deceased and his estate now lawfully holds a good, absolute and indefeasible title to the property in question namely Plot No.1667/V/MN issued by the Government and that this Title has neither been cancelled nor revoked. I refer to the records produced from the Director of Surveys and the Commissioner of Lands which clearly show that the property does not encroach on the road reserve as alleged. Further, the Petitioner's title to the said property has not been impugned nor is there any dispute that the Petitioner was not a bona

fide Purchaser for value. No fraud or misrepresentation has been proved, let alone alleged as against the Petitioner. The Title to the property in question has a traceable root and in the absence of any lawful challenge to this, then the Petitioner's Title remains indefeasible and absolute. It is trite law that the Certificate of Title is conclusive evidence against all other persons including the Government, of all matters contained therein including proof of ownership. In **Republic v Kenya Urban Roads Authority & 2 Others Ex-Parte Tamarind Village Ltd [2015] eKLR** Justice Mureithii while making reference to Sections 21 and 27 of the Land Titles Act held that:

“This means that the Certificate of Title is the final word on the matters touching on that land. Therefore, if the certificate of Title does not show or mention that the property is subject to an encumbrance such as a road reserve it means that the property does not lie on a road reserve.

Moreover, all persons are bound by the contents of the Certificate of Title including the Government. This means that as much as the local authorities have general control of public streets and roads which are within its area, their powers of management are subject to proprietary rights as evidenced by a Certificate of Title.”

30. This means that if this Court finds that the Petitioner holds a legitimate and lawful Title to the property in question, then the Petitioner is entitled to protection of the Constitution under Article 40, from arbitrary deprivation thereof. The Supreme Court in **Rutongot Farm Ltd v Kenya Forest Service & 3 Others [2018] eKLR** held:

“Once proprietary interest has been lawfully acquired, the guarantee to protection of the right to property under Article 40 of the Constitution is then expressed in the terms that no person shall be arbitrarily deprived of property. The same guarantee existed in Section 75 of the repealed Constitution”.

31. The Government, through Land Registrar or Registrar of Titles has no power to revoke a title, and such power only lies with a Court of law – **Emfil, (Republic v The Registrar of Titles, Mombasa & Others Ors Ex Parte Emfill Ltd [2012] eKLR**. This Court, in the Tamarind Case also relied on Court of Appeal's decision in **Gusii Mwalimu Investment Co. Ltd & 2 Others v Mwalimu Hotel Kisii Ltd [1996] eKLR** where it was held that: -

“A Court of law cannot allow such state of affairs whereby the law of the jungle takes over. It is trite law that unless the tenant consents or agrees to give up possession the landlord has to obtain an order of a competent court or a statutory tribunal (as appropriate) to obtain an order for possession. Even if I were to hold that the tenant was at the material times a trespasser and that it had not pleaded holding over I would not sanction a situation such as in this case, that is, obtaining possession without a court order.”

32. This means that the Notice issued by the Respondent and the intended consequent actions of threatened demolitions were not only unlawful but right from the outset illegal. If the Respondent desires to acquire all or part of the Petitioner's property in question, it can only do so in accordance with the provisions of law as relate to the compulsory acquisition of property. See **Mutuma Angaine v M'marete M'muronga Civil Appeal 123 of 2006** where the Court emphasized that:

“...it is trite law that when a person's property is forcefully acquired the Government must fully comply with the law, and follow the laid down procedure strictly and meticulously. No person's property may be acquired compulsorily without due process. Section 6(2) of the Act aforesaid requires that certain critical steps be taken before a person is deprived of his or her property”

Conclusion

33. The Petitioner came to this Court to seek constitutional protection to its property lawfully acquired and waving a clean title as evidence of such acquisition. This court has to been called upon to establish the validity of Petitioner's title. The Petitioner seeks the protection of its title by this court. The Respondent claims that the title of the Petitioner was acquired fraudulently or over a land which had been compulsorily acquired by the Government in 1960s, and asks this Court to quash the said title. However, this Court cannot quash Petitioner's title where there is no evidence that the title is defective or illegal. If the Respondent seeks to impeach Petitioner's title, or challenge its legality, that can be done in the ELC. This Court has no jurisdiction nor the expertise to determine that issue. As long as that has not been done, and as long as the Petitioner has a clean, undefiled title, the Petitioner is entitled to constitutional protection by this Court.

34. It is the finding hereof that the petition before the Court has been proved on a balance of probability.

35. In the upshot the petition orders issue as follows:

(a) a declaration that the Petitioner's fundamental rights to the protection of his property and from arbitrary deprivation thereof as well as the right to fair administrative action, access to information and to a fair hearing have been or are likely to be infringed;

(b) a declaration that the deceased is the lawful owner of C.R. No.42187 being Subdivision Number 1667 within the meaning of Article 40 of the Constitution;

(c) a declaration that the forcible entry, seizure, possession and for proposed demolition of the development on the suit property namely C.R. No. 42187 being Subdivision Number 1667 by the Respondent will amount to a violation of Petitioner's rights to protection of property under Article 40 of the Constitution;

(d) a permanent injunction restraining the Respondent, its agent, servants and/or nominees from entering into, seizure, confiscation, occupation, alienation and demolition of the improvements and developments carried out on the suit property known as C. R. No. 42187 being Subdivision Number 1667 pursuant to the notice dated 16th February 2015 or any other such notice;

(e) a declaration that the Respondent's notice dated 16th February 2015 is unlawful and illegal for contravention of the Petitioner's rights and freedoms under Articles 27, 40, 47 and 50 of the Constitution; and

(f) costs of this Petition be borne by the Respondents;

Dated, Signed and Delivered at Mombasa this 4th day of February, 2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Khagram for Petitioner

Ms. Olendo for Respondent

Ms. Peris Court Assistant