



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC PETITION NO. 14 OF 2019

IN THE MATTER OF ARTICLES 10, 21, 22 (1), 23, 27 (1), 48, 50 & 165 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (2010) (CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 40, 47 & 258)

BETWEEN

KENNETH OUMA AKECH.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF SIAYA.....1ST RESPONDENT

HON. CORNEL RASANGA AMOTH.....2ND RESPONDENT

JUDGMENT

Kenneth Ouma Aketch (*hereinafter referred to as the petitioner*) has come to court against County Government of Siaya and Hon. Cornel Rasanga Amoth (*hereinafter referred to as the respondents*) claiming to be the legal owner of Land known as Siaya Township Block 1/276 situated within Siaya County. That the above mentioned parcel of land was allocated to and initially owned by the late Michael Alex Akech the petitioner's father and who died on 27/04/1992 and that the late Michael Alex Akech acquired the subject Land by way of an allotment letter dated 21/9/1990 from the Commissioner of Lands of the Government of Kenya after making an application to the District Commissioner, Siaya District for a business plot to put up a medium class hotel. The said parcel of land was at the time unsurveyed.

He claims that the recommendations for the allotment to the said Michael Alex Akech of the said parcel of land were made by Siaya District Development Committee at a meeting held on 24.08.1987, chaired by the District Commissioner Mr. Mbuo Waganagwa. The aforesaid letter of allotment dated 21/09/1990 was issued by the Commissioner of Lands on behalf of the County Council of Siaya and the said allottee Michael Alex Akech was to pay Kshs. 40,650/= for the said allotment.

Pursuant to the said allotment, payments were made to Siaya Town Council for Kshs. 22,750/= on 21/06/1993 and Kshs. 35,000/= on 23/07/1993 on account of the said Michael Alex Akech. That after the death of the said Michael Alex Akech, his widow Susan Adhiambo Akech applied for Letters of Administration in SIAYA Resident Magistrates Court Succession Cause No. 20 of 1996. Letters of Administration were granted to the said widow, Susan Adhiambo Akech on 14/5/1996. Survey was undertaken and concluded and by a letter dated 3/05/2016 the National Land Commission which had taken over the responsibilities of the Commissioner of Lands, requested the Director of Surveys to supply a deed plan.

The said widow of the late Michael Alex Akech Susan Adhiambo Akech later died on 04/01/1997 and on 10/07/2019, she was substituted by their son Kenneth Ouma Akech as the personal representative of the estate of Michael Alex Akech and the grant of confirmation issued. The said parcel of land was surveyed by the survey of Kenya allocated the number L. R. No. 1204/25 under the Registration of Titles Act (Cap. 281) (Repealed) and subsequently converted to Registered Land Act (Cap 300) (Repealed) and given the Title Number SIAYA MUNICIPALITY BLOCK 1/276.

Prior to Confirmation of Grant, a lease was prepared in the name of the allottee Michael Alex Akech over the converted Title No. SIAYA MUNICIPALITY BLOCK 1/276 over the said land. The lease was dated 17th April, 2019 and was signed on 17th July, 2019 by Kenneth Ouma Akech who was the Personal Representative of the Estate of the late Michael Alex Akech.

Subsequently, the Petitioner Kenneth Ouma Akech was registered as the proprietor of the said parcel of land pursuant to the confirmation in Siaya Resident Magistrates Succession Cause No. 20 of 1996 in which he was the sole beneficiary and he was with a certificate of Lease dated

17/7/2019. That the estate of the late Michael Alex Akech has been paying land rent and land rates and the 1st Respondent has been issuing the estate of the late Michael Alex Akech with receipts for the payments made and clearance certificates. It is therefore that at all material times, it has been within the knowledge of the 1st Respondent, that the estate of the late Michael Alex Akech Petitioner and subsequently the Petitioner were the owners of the suit land having acquired the said land through allotment and inheritance respectively.

On or about the 28th July 2019 the Respondents illegally, unlawfully, wrongfully and without any colour of right entered the parcel of land, removed the fence put up by the estate of the late Michael Alex Akech and proceeded to fence the subject land claiming it belonged to the County Government of Siaya who are the 1st Respondent herein and who announced that it was planning to allocate a parking space to equity Bank and Co-operative Bank which are the tenants on premises adjacent to the parcel of land and owned by the 2nd Respondent. That it is also within the Petitioner's knowledge that the 2nd Respondent has an undisclosed interest in the suit land and he is using his position to achieve his selfish ambitions as the suit land borders the premises owned by the 2nd Respondent.

Demand and notice of intention to sue was issued upon the 1st Respondent by the firm of J. D. Oduor and Company Advocates by letter dated 29/07/2019. However, the 1st Respondent replied through the County Attorney denying liability via a letter dated 29/08/2019. That the estate of the late Michael Alex Akech erected a fence on the land and have been in possession of the land since allotment. That the petitioner seeks the protection of this Court so that his rights under the Constitution are protected. The Petitioner prays for a declaration that the Respondents have unlawfully encroached and/ trespassed, fenced and wrongfully assumed ownership of the Petitioner's land goes against the Petitioner's right to property and a declaration that the Petitioner's fundamental right to property has been violated and/or infringed upon in total contravention of article 40 of the Constitution of Kenya, 2010.

He seeks an order of certiorari to remove into this court and quash the Respondents' decision to encroach and/or trespass, fence and assume ownership of the suit land known as SIAYA/TOWNSHIP BLOCK 1/276 and an order directed at the Respondents to remove from the land any fencing material or any other material or structure placed by them on the suit land and default the Petitioner be at liberty to remove the material and/or structures therefrom.

Lastly, he seeks a permanent injunction to restrain the respondents, its agents and/or servants from, interfering with the petitioner's lawful ownership an possession of land parcel SIAYA/TOWNSHIP BLOC 1/276.

On the 14/11/2019 this court gave the respondents 7 days to respond and the petitioner to file supplementary affidavit with submissions within 7 days. The respondent was to file submissions with 7 days of service. Judgment was to be delivered on 28/2/2020 as it is being delivered today. The respondent failed to file replying affidavit and did not file submissions.

I have considered the submissions by the Petitioner and do find that it is not controverted that he is the proprietor of the suit parcel of land. It is not controverted that the county Government of Siaya is the intermeddling in the property.

Article 40 of the Constitution of Kenya protects the right to property thus:

40.(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.

Section 24 of the Land Registration Act provides.

“(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

Section 25 proves:

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee. Certificate of title to be held as conclusive evidence of proprietorship.

Section 26 provides:

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

The petitioner has demonstrated that he is the legally and lawfully registered proprietor of the suit property and that the respondents are interfering with his proprietorship. The respondents have not demonstrated any right whatsoever on the parcel of land in dispute. There is no evidence that title was unprocedurally or illegally procured.

The petitioner succeeds on the petition and therefore I do not grant a declaration that the Respondents have unlawfully encroached and/r trespassed, fenced and wrongfully assumed ownership of the Petitioner’s land goes against the Petitioner’s right to property and that the Petitioner’s fundamental right to property has been violated and/or infringed upon in total contravention of article 40 of the Constitution of Kenya, 2010.

I do direct the Respondents to remove from the land any fencing material or any other material or structure placed by them on the suit land and default the Petitioner be at liberty to remove the material and/or structures therefrom.

Lastly, I do grant a permanent injunction to restrain the respondents, its agents and/or servants from, interfering with the petitioner’s lawful ownership an possession of land parcel SIAYA/TOWNSHIP BLOC 1/276.

The prayer for certiorari is declined as there is no decision capable of being quashed. Costs of the petition to the Petitioner to be paid by the 1st respondent. Orders accordingly.

DATED AND DELIVERED THIS 28th DAY OF FEBRUARY, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

In the presence of:

M/S KEMBOI FOR NYAIRO FOR PETITIONER

N/A FOR THE RESPONDENTS