



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL PETITION NO. 22 OF 2017

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS UNDER
ARTICLES 22 (1), 23, 25, 35 AND 40 OF THE CONSTITUTION OF KENYA, 2010.**

BETWEEN

COUNTY GOVERNMENT OF MOMBASA.....PETITIONER

AND

1. SALIM ABEID SAID

2. THUWENA AHMED MUHAMAD

3. DIRECTOR OF SURVEYS

4. DIRETOR OF PHYSICAL PLANNING

5. CHIEF REGISTRAR OF TITLES

6. HON. ATTORNEY GENERAL.....RESPONDENTS

JUDGMENT

The Petition

1. The petition herein dated 11/5/2017 prays for the following orders:

(a) A declaration that the purported allocation of 19.622 hectares of the Applicants property known as L.R. NO. MN/V/290, CR NO. 65843 delineated on Land Survey Plan No. 388953 to the 1st & 2nd Respondents by the 3rd, 4th & 5th Respondents is irregular, unlawful, null and void and of no legal effect.

(b) A declaration that any steps taken by either the 3rd, 4th and 5th Respondents, individually or jointly to demarcate, prepare Part Development Plans, Survey Deed Plans, and or issue any Titles over any portion or part of land comprised in LR No. MN/V/290, CR No. 65843, and delineated on Survey Deed Plan No. 388953, registered in the name of the Petitioner are actions contrary to the law and the Constitution, and a nullity, incapable of depriving the Petitioner of its ownership and rights over the said property, and that all such unlawfully acquired documents including any Titles issued pursuant thereto, be cancelled forthwith.

(c) A declaration that any certificates of Title issued (if any) to the 1st and 2nd Respondents pursuant to the letters of allotment dated 15/1/1998 or any other letters, and accompanying Deed Plans, are all null and void, and that the same be cancelled forthwith.

(d) Pending the hearing and determination of this Petition, a conservatory order be issued for the purposes of preserving the Petitioner's property known as L.R. No. MN/V/290, bearing CR. No. 65843, delineated on Land Survey Plan No. 388953, to preserve the same from being interfered with by either demarcation, being surveyed, and or having the same allocated to either the 1st & 2nd Respondents, or to any other third parties.

(e) A Permanent injunction be issued to restrain all the Respondents, their servants agents and or employees from surveying, demarcating, or allocating, and or in any other manner whatsoever, alienating the Petitioner's property known as LR. No.

MN/V/290, bearing CR No. 65843, delineated on Survey Deed Plan No. 388953, either to the 1st & 2nd Respondents herein or to any other person(s) or legal entities of whatever nature, in violation of the Petitioners rights of ownership of the said property.

(f) An order be issued, pursuant to the provisions of Article 35 of the Constitution, to direct the 3rd, 4th and 5th Respondents to supply to the Petitioner all documents in their possession, namely, part Developments Plans, Survey Deed Plans, any Certificates of Title in the process of being prepared, and any other such documents that are aimed at demarcating, subdividing, and allocating the Petitioner's Property known as L.R. MN/V/290, bearing CR. No. 65843, and delineated on Land Survey Plan No. 388953, to either the 1st & 2nd Respondents, or to other third Parties, to enable the Petitioner take the necessary legal steps in protecting the ownership and rights over its property aforesaid.

(g) The costs of this Petition and all proceedings therefrom be borne by the Respondents.

2. The Petitioner is the County Government of Mombasa established as a body corporate under Article 176 (1) of the constitution.

3. The 1st and 2nd Respondents are adult Kenyans whose addresses as contained in the suit documents herein are P.O Box 81477 and 81999 Mombasa respectively; the 3rd, 4th and 5th Respondents are Directors in the Government of the Republic of Kenya; the 6th Respondent is the legal adviser to the said Government of Kenya.

4. The Petitioner states that it is the Lessee for a term of 99 years with effect from the 1st day of August 2010, of Land Known as MN/V/290, containing by measurement 216.9 hectares or thereabouts (being 600 acres) and comprised in grant number CR 65843, and delineated on land survey Plan number 388953, also deposited in the Survey records office. The Petitioner states that the Land Registrar issued to the Petitioner a Lease over the subject property for the term aforesaid of 99 years; the 5th Respondent then issued to the Petitioner a Certificate of Title, comprised in Grant No. CR 65843, which was registered in the Petitioners name on the 18/9/2015 over the same subject land described above. (For ease of reference the Lease and Certificate of Title, together with copies of the Deed Plan referred to above are all exhibited at Pages 1 to 6 of the annexures to the Supporting Affidavit.)

5. The Petitioner states that the subject property is designated for use for industrial purposes, including, among others, as a truck marshaling yard for the Petitioner's vehicles. The said property is currently valued at a sum of Ksh.60 million per acre, which translates to a total sum of Ksh. 3.6 Billion for all the 600 acres.

6. The Petitioner states that it has now learnt that whereas its Title to the said property still remains in its name, the following encroachments thereto have been made namely:

(a) The 1st Respondent, using two letters of allotment purportedly issued on the 15/1/1998, lays claim over 13.82 hectares of the Petitioner's aforesaid property.

(b) On his part, the 2nd Respondent is also by a letter of allotment purportedly also issued on the 15/1/1998, making claim to 6.540 hectares of the Petitioners property.

(The said letters of allotment are exhibited at Pages 7 to 12 of the exhibits in the Supporting affidavit.)

7. The Petitioner avers that in attempting to actualize the alienation of the suit property from the Petitioner, the Director of Survey and the Director of Planning, sued herein as the 3rd and 4th Respondents, have respectively set out to do the following:

(a) The Director of Planning Prepared a Part Development Plan (PDP) allegedly dated 15/4/1997 in respect of the allotments to the 1st and 2nd Respondents, (which were allegedly issued on 15/1/1998).

(b) On the 17/12/2016, the Director of Surveys was presented with Deed Plans prepared by a Licensed Surveyors for approval concerning the said allotments made to the 1st and 2nd Respondents herein.

8. From the above narrative, the Petitioner avers that it is evident and clearly apparent beyond controversy that the 1st and 2nd Respondents are using letters of allotment, allegedly issued on 15/1/1998, to lay claim over, and alienate to themselves, land already registered in the name of the Petitioner; and that the 3rd and 4th Respondents, in cohort with the 1st and 2nd Respondents, are preparing other Deed Plans, for superimposition over the true Deed Plans of the Petitioner's Property. Accordingly therefore, the 5th Respondent is in the process of issuing Parallel Titles to the 1st and 2nd Respondents, over the Petitioner's property.

9. The Petitioner states that the conduct of all the Respondents as outlined above is illegal, and without any basis in law because the letters of allotment in the possession of the 1st and 2nd Respondents were allegedly issued on the 15/1/1998, a period of 20 (twenty) years ago. Further, the said letters of allotment clearly expressed that the grant will be made under the Government Lands Act (Cap 280) Laws of Kenya. The said Act has since been repealed, and this letter is in the circumstances obsolete. In addition, paragraph 2 of those letters required acceptance of the offer, and Payment of the required Charges to be done within 30 days from 15/1/1998. It cannot be that the Respondents now intend to use those letters in the manner that they now intend to do, nearly twenty years later.

10. The Petitioner further avers that the 3rd and 4th Respondents have no authority in law to prepare part Development Plans and Deed Plans respectively over privately owned Land, such as that of the Petitioner, with the aim and purpose of allocating the same to the 1st and 2nd Respondents, without the Knowledge and Consent of the Petitioner as the registered owner thereof. The Petitioner avers that before any part of the Petitioner's land can be excised and allocated to third parties, the provisions of the Land Act, the Land Registration Act, and other

relevant bodies like the Petitioner in its capacity as a County Government of Mombasa must be consulted. However, and in the averment of the Petitioner, the Respondents herein have completely ignored all statutory enactments relating to alienation and registration of land in the manner they have alienated the Petitioner's property to the 1st and 2nd Respondents. This conduct is contrary to the provisions of Article 47(2) of the Constitution, and this court is called upon to render a remedy.

11. The Petitioner states that Articles 40 of the Constitution protects the Petitioner's right to property. The Petitioner states that so far as it can discern at the time of filing this Petition, a total of 19.622 hectares of its property is in the process of being excised illegally.

The Response

12. The petition is not opposed. All the Respondents were served with the petition but they have not defended the petition. Mr. Makuto, learned Counsel for 3rd to 6th Respondents submitted that he was unable to get instructions from his clients. Counsel submitted that his clients would abide by the Judgment of the Court.

13. The 1st and 2nd Respondents were served through substituted service through Standard Newspaper pursuant to order of court (see Affidavit of Service filed herein on 13/7/2017). However, the 1st and 2nd Respondents have never participated in these proceedings.

14. The petition therefore proceeded unopposed. Mr. Buti, learned Counsel for the Petitioner filed submissions on 2/10/2019 which I have carefully considered.

Determination

15. The only issue for determination is whether or not the orders sought herein can be granted.

16. The petition is supported by Affidavit of Paul Munyala, the Director of Planning and Architecture in the Petitioner. The affidavit was sworn on 11/5/2019. That affidavit has annexures thereto in support of averments therein and in the petition. The annexure at pages 1 to 5 of that affidavit is a Lease for a period of 99 years from the 1/8/2010. This lease is between the Government of Kenya, and the County Government of Mombasa, which at Pages 4 thereof shows that it was executed by the **Chief Land Registrar, on 16/9/2015, on behalf of the Kenya Government**. At Page 5 of the exhibits is a Certificate of Title issued pursuant to the said Lease. This Certificate was issued to the Petitioner herein, and is dated 18/9/2015. When the Petitioner learnt of the attempted irregular allocations of its land to the 1st and 2nd Respondents, by the 3rd to 5th Respondents, it wrote a letter to the Secretary, Ministry of Lands & Physical Planning, on the 25/4/2017. The said letter is exhibited at Pages 16 and 17 of the exhibits of the Petitioner and is self-explanatory. For ease of reference, at Paragraph 3 of that letter, the Petitioner wrote as follows:

“This is to further bring to your attention the ongoing irregular land allocation to unscrupulous private developers and also to request that you take necessary action and stop these irregular dealings and abuse of office by the Director of Survey, Physical Planning and National Land Commission. If this continues unchecked, we regret to inform you that this might be a recipe for insecurity.”

In the last paragraph of that letter, the Petitioner wrote as follows:

“Furthermore, furnish the County Government of Mombasa with a list of allotments or deed plans processed for new grants between the years 2012-2016. This will help us in auditing the land based assets by the County Government and advise accordingly on these allocations.”

17. It is clear that the Petitioner received no response to the issues raised by it, causing the Petitioner to file this petition.

18. This court is satisfied that all the Respondents herein were duly served. None of these Respondents has filed any Response or any Replying Affidavit to either deny or in any other manner controvert the matters of fact raised by the Petitioner. In these circumstances, it is the finding hereof that none of the Respondents contravenes or contradicts or denies any of the factual averments of the Petitioner. This was the position adopted by Sir Udo Udoma, C.J. *Kagenyi vs. Musairamo (1968 E.A.43)* where, at Page 2 thereof, the learned Judge made the following observation concerning an uncontroverted affidavit:

“The application is opposed by the defendants, hereinafter to be referred to as the respondents. Neither the respondents nor their counsel has filed a counter-affidavit to the affidavit sworn to by counsel for the applicant. The allegations of facts contained in the applicant's affidavit are therefore uncontradicted and unchallenged on oath and must be accepted by this court as the truth of the averments therein contained.”

19. The upshot is that the Petitioner has proved the petition on a balance of probability and is accordingly entitled to orders as 1 prayed.

20. The petition is allowed as prayed with costs to the Petitioner.

Dated, Signed and Delivered at Mombasa this 4th day of June, 2020.

HON. E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Tajbhai holding brief Mr. Buti for Petitioner

No appearance for 1st and 2nd Respondents

Mr. Mkok for 3rd – 6th Respondents

Mr. Kaunda Court Assistant