



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 640 OF 2011

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 22, 25, 28 & 43 (1) (B) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ARTICLES 2, 19, 21, 22, 23, 25, 40, 43, 50 OF THE CONSTITUTION OF KENYA, RULE 11 © & 12, (PROTECTION OF FUNDAMENTAL RIGHTS AND REEDOMS OF THE INDIVIDUAL PRACTICE AND PROCEDURE

AND

IN THE MATTER OF: ARTICLES 25 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

AND

IN THE MATTER OF: LAND REGISTERED AS TITLES ACT (CAP 281) LAWS OF KENYA

BETWEEN

1. HAMISI BABU

2. ABDILLAHI OMAR ALI

3. ADAM ISSAC WAKO

4. MUNGA CHIMERA [Suing on their behalf and on

behalf of over 100 residents of UTANGE

PLOT NO. 386 SECTION II MN].....PETITIONERS

VERSUS

MSALLAM BIN RASHID

BIN KASSIM ELMANDRY.....RESPONDENT

JUDGMENT

The Petition

1. By a Petition Amended on 26th March 2012, the Petitioners pray for the following orders

(a) A declaration that any intended eviction of the Petitioners and their families from the parcel of land known as Plot No. 386/II/MN Title Number VCR 1270 is unlawful and amounts to breach of the Petitioners fundamental rights to accessible and adequate housing and to reasonable standards or sanitation and an order enforcing the same.

(b) A declaration that the Petitioners have acquired proprietary rights over the parcel of land known as Plot No. 386/II/MN title Number CR 1270 and therefore entitled to be issued with documents of title by the Respondent for the Plots in occupation by them, and an order to effect and in the alternative the Registrar of Titles do issue title deed to the Petitioners on the portion of land that they occupy

(c) A declaration that the Respondent by themselves and/or their agents, servants or representatives be permanently restrained from interfering and/or carrying out any activities on the plots on the suit land occupied by the Petitioners or in any other manner, interfering with the petitioners' occupation of land.

(d) Any other or further orders and/or directions that this Honourable Court deems just and/or necessary to be granted.

2. The Petitioners, comprising of over 100 alleged clan members and their families claim to have at all times lived upon the land known as Plot No. 386/II/MN Title Number C.R. 1270 in Utange village Bamburi sub location in Mombasa County within the Coast Province as their ancestral home where they have also built and developed semi and permanent houses and in which place they have also buried their loved ones. The plot they occupy was allegedly given to their grandfathers, but is registered in the name of the Respondent herein. The Petitioners claim that they were to make periodical monthly payments towards the purchase of the said plots, and that the Respondents agreed, with more than 100 families being petitioners herein, that upon payment of the agreed amounts periodically they would be issued with Title deeds in respect to their individual portions given that their grandparents had established their ancestral home in the said land since time immemorial.

3. The Petitioners aver that they have since finished making payments towards the purchase of the said plots. However the respondent has refused to give them their titles. Further the Petitioners aver that the respondent is instead preparing to sell portions of the said land to 3rd persons and is advertising for sale of the same without considering the initial mutual agreement to sell the land to the petitioners. Further the Petitioners aver that the respondent has stopped them from carrying out any further development on the land or fencing their land contrary to the said agreement.

4. The Petitioners' case is that their right to own property is threatened as is their fundamental right to human dignity under Article 25 (a) of the Constitution. The Petitioners state that under the provision of Article 22 of the Constitution of Kenya, they have a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed and/or is threatened, as is in this case. Further they allege that under the Provisions of Article 25(a) of the Constitution, the Petitioners have a right to freedom from torture and cruel, inhuman or degrading treatment or punishment, which in this case they have been subjected to and are likely to be subjected to in future unless this Court intervenes. Under the Provisions of Article 28 of the Constitution, it is provided that, "**Every person has inherent dignity and the right to have the dignity respected and protected.**" The Petitioners allege that the inherent dignity of the petitioners is threatened and they live in fear and uncertainty. They further aver that under the Provisions of Article 43(i) (b) of the Constitution of Kenya, they have the right to accessible and adequate housing, and to reasonable standards of sanitation. The actions of the Respondent if not checked will render the petitioners homeless and contribute to the increasing number of street families problem already rife in Kenya.

5. The Petitioner avers that the Respondent has denied them the above stated rights and freedoms as he has subjected them to psychological torture and inhuman treatment by indicating to them that they need to vacate the suit land whereas they do not have any other place to go to, nor have they been given audience on the planned demolition and evictions.

6. The Petitioners avers that their lives are in real danger unless this Court issues an injunction stopping the Respondent's actions.

7. The Petitioners by virtue of the mutual agreement with the registered owner and also by virtue of their occupation, possession and development of the same for decades pray to be declared owners of the portions of land they occupy today.

8. The Petitioner allege that the Respondent has been referring to the Petitioners as trespassers on the suit land and is planning to force the petitioners out of the land.

9. The Petitioners aver that it is not in the public interest to deprive them their livelihood, shelter and residence which is their only source of livelihood thus rendering them destitute, and in dignified.

The Response

10. The Respondent oppose the petition vide a Replying affidavit sworn by Msallam Rashid Kassim El-Mandry on 31. January 2012. The deponent states that the MSALLAM RASHID KASSIM EL –MANDRY is the registered owner of all that property known as Plot No. 386 Section II Mainland North who is currently out of the country and that he is in charge of his properties including the suit property herein. The Respondent avers that the petitioners are not candid and have conspired to mislead this Court on questions of facts involved here in that in the petition the petitioners alleges that the registered owner is deceased whereas that is not the position. The registered owner is out of the country and has authorized the deponent herein to act on his behalf. (See annexure YM-1). The Respondent denies that he gave out plots to the Petitioners' grandfathers and who made periodical payments for the purchase of the property, and states that those are baseless allegations and no documentary evidence has been adduced at all in support of the same. The Respondent's case is that the petitioners are tenants and have all along been paying rent and at no point in time has the owner of the plot promised them titles. The alleged mutual agreements are baseless, speculative and imaginary and mere statements that are unsupported and an attempt to grab a private property thus infringing the Constitutional rights of the registered proprietor, whose title is indefensible, and neither has it been challenged in any Court of law. The Respondent states that this is not a Constitutional matter as it can be handled in a normal suit, enjoyment of private rights in not an infringement of others rights.

11. In response the contents of paragraph 9 of the petition the Respondent states that a long stay does not change ownership. Therefore the

Petitioners are still tenants and continue paying rent. The owner licensed the Petitioners to stay but did not at any one time allow them to put on permanent structures. The Constitution as cited in the petition does not discriminate property proprietary rights of the owner who is also protected by the same Constitution and this Court has the duty to protect those rights.

Submissions

12. The Petition was canvassed by way of written submissions. The Petitioners filed their submission on 8th October 2018 while the Respondents filed theirs on 20th August 2018.

13. I have carefully considered the said submissions together with the Petition. In order to determine the petition the court raises the following issues for determination.

(a) Whether the Petitioners have the right to title herein

(b) Whether this is a matter which raises Constitutional issues.

The Determination

14. The Petitioners' case is that they reside in plot No.386/II/MN and were born there. They were paying rent to the Respondent and they were to progressively do so which was to culminate to purchase of the said property. Their grandparents and parents were buried on the said land which according to them meant that indeed they were to purchase the property, else why would the Respondent allow them to bury their people in the suit land? The Petitioners developed permanent and semi-permanent houses as exhibited in the annexures herein. However the Respondent allegedly in disregard of the Petitioners' rights and previous agreement, subdivided the land and threatened to demolish the Petitioners' houses by using the police. The Petitioners aver that the Respondent has never lived in the suit land and the Petitioners have been in possession of the suit land by virtue of their ancestors being born there and as of right therefore, ought to be considered even if the land was to be sold to a third party.

15. However, it before proceeding to the merits of the petition, it is important to trace the source or basis for the issues which are being agitated by the Petitioners. The Petitioners do not dispute that the Respondent is the registered proprietor of the subject property. They however claim that the Respondent cannot alienate the property as that will infringe their right to dignity and their right to housing as provided under the Constitution. The basis of their argument is that their grandfathers had a mutual understanding with the Respondent that they would make periodical payments to the Respondent which will form consideration for the land which would later be transferred to them. It is therefore, the Petitioners' case that they have a claim to the land on that basis. This Court has noted that the Petitioners have not produced or have not even attempted to adduce any evidence to support the claim about the alleged mutual understanding between the Respondent and their grandfathers. Those 'grandfathers' have not even been identified nor have their whereabouts been specified. At best, the Court is dealing with pure unsubstantiated allegations or inadmissible hearsay evidence. However, on the merits of the Petition herein, the Court has the duty to determine the oft-vexed topic about the tension between private ownership of property and the right to housing as a socio-economic right. Given that the issue about ownership of the subject property by the Respondent is undisputed, the Respondent is protected under Article 40 of the Constitution that is, the protection of right to property. Section 24 (a) of the Land Registration Act, 2012 which is consistent with the right to property provides that **"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."**

16. Amongst the rights enjoyed by a proprietor is the right to alienate the property. The Petitioners state that they are apprehensive that the Respondent might sell the subject property. They claim that should that happen, then it will be in contravention of their rights to housing. In essence the Petitioners claim that the Respondent's right to property ought to be subordinated to the Petitioners' right to housing as provided by the Constitution. The Court of Appeal in **Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR** upon considering other cases that have dealt with the subject about the tension between the right to protection of property and the right to housing, states as follows:

"We have surveyed the emerging judicial decisions in Kenya in an attempt to discern the emerging principles to address the seeming tension between private property and realization of socio-economic rights. The Constitution in the Bill of Rights recognizes and protects the right to private property. Whereas socio-economic rights are recognized and are justiciable, the enforcement and implementation of socio-economic rights cannot confer property rights in the land of another. In Latin, socio-economic rights cannot confer rights in alieno solo."

17. It is the finding of this Court that the Respondent has no Constitutional duty to give its land to the Petitioners.

18. The Petitioners, if they so wish, can petition the government to acquire the said land and have the Petitioners settled thereon. This Court finds no entitlement to the Petitioners on the suit land beyond the rights of a tenant which are determinable upon issuance of appropriate notice.

19. For above reasons the petition herein is dismissed with no orders on costs.

Dated, Signed and Delivered in Mombasa this 2nd day of April, 2019.

E. K O. OGOLA

JUDGE

In the Presence of:

Mr. Hassan for Respondent

No Appearance for Petitioner

Mr. Kaunda Court Assistant