



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT

AT KISUMU

PETITION NO. 19 OF 2019

BETWEEN

HARJOT SINGH DHANJAL.....PETITIONER

AND

THE HON. ATTORNEY GENERAL..... 1ST RESPONDENT

KENYA RAILWAYS CORPORATION2ND RESPONDENT

JUDGMENT

Harjot Singh Dhanjal (hereinafter referred to as the petitioner) is seeking a declaration that the Petitioner's Constitutional right to human dignity, the rule of law, participation of the people, good governance, fair administrative action and fair hearing as guaranteed by Article 25(c), 27, 28, 29, 47 & 50 of the Constitution have been threatened by the Respondents, their agents, servants and/or employees.

Moreover, a declaration that the Petitioner's right to acquire and own property and the right not to be deprived of his property, Kisumu Municipality/Block 7/446, have been violated by the actions of the Respondents jointly or severally.

Furthermore, a declaration that the Petitioner has been arbitrarily deprived of his property, Kisumu Municipality/Block 7/446, by the actions of the Respondents jointly or severally in violation of Article 40 (3) of the Constitution and that the Petitioner's enjoyment of his rights in Article 40 and 60 (1) (b) to own, access, occupy and use his property, Kisumu Municipality/Block 7/446, have been grossly violated and infringed and that those rights have been limited and restricted by the actions of the Respondents jointly and severally.

He also prays for a declaration that the actions of the Respondents jointly and severally to enter into, invade the Petitioner's property and erect a fence around it with the intention of blocking access and egress onto and out of the property and interfering with the quiet enjoyment thereof without his consent, permission or concurrence and against his will protected by Articles 40 & 60 of the Constitution is a violation of his right, and without following due Constitutional and statutory processes is a violation of the Petitioner's Constitutional right to fair administrative action protected by Articles 47 & 50 of the Constitution.

He seeks a prohibitory injunction prohibiting the Managing Director of the 1st Respondent, the Cabinet Secretary Ministry of Interior and Coordination of National Government, Cabinet Secretary Transport, Infrastructure, Housing and Urban Development and the Cabinet Secretary Public Service, Youth and Gender through the National Youth Service or any of them by themselves, their subordinates, representatives, servants, employees, agents or any other persons acting through them or on their instructions or directions from repossessing, taking possession of, fencing off, blocking ingress or egress into or out of the property of the Petitioner namely Kisumu Municipality/Block 7/446 and from any other way howsoever interfering with the Petitioner's access to occupation and use of the property and buildings thereon and an order of prohibition prohibiting jointly and severally the Chief Land Registrar, the County or District Land Registrar Kisumu, or any other officer acting under them or on their behalf or instructions or directions or in any other way howsoever from revoking, annulling, cancelling, restricting or in any way whatsoever or howsoever interfering with the Petitioner's title to the property Kisumu Municipality/Block 7/446. Last but not least, he prays for Costs incidental to the petition.

The Petitioner's case is that he is the son of the registered owner of the suit property, Satwant Singh Dhanjal (deceased) having properly brought this petition after obtaining a grant of letters of administration ad litem in respect of the deceased estate. That his father is the registered owner of the suit parcel, holding a certificate of lease issued on 14th January 1992 for a term of 99 years from 1st January 1991.

That the root of the title is that he Commissioner of Lands issue Cheramba Enterprises Limited with a letter of allotment dated 17th December 1990 over an unsurveyed commercial plot in plan TP.5/2/XXVI/109A and vide Authority – Govt.F.102749/27/11/163. That Cheramba Enterprises paid the required fees in acceptance of the allotment. That Cheramba Enterprises subsequently transferred the property

to Satwant Singh Dhanjal through a transfer from which was consented and approved by the Commissioner of Lands and a sale agreement dated 11th January 1991.

That vide a letter dated 28th November 1991, the Commissioner of Lands wrote to Satwant Singh Dhanjal informing him that the parcel transferred to him had been surveyed and allocated parcel number Kisumu Municipality/Block 7/446. That the letter was copied to the Director of Surveys Nairobi, District Commissioner Kisumu, District Land Commissioner Kisumu, and the Town Clerk Municipal Council of Kisumu. That a lease was processed and collected by Satwant Singh Dhanjal who subsequently paid land rates and rents diligently ever since.

That Satwant Singh Dhanjal sought the relevant approvals for construction of works and, upon completion of commercial development, continuously used the property for commercial purposes without interference. That the property was rented out to Associated Auto Centre.

That on 19th August 2019, the Petitioner received a letter dated 13th August 2019 by the Ethics and Anti-Corruption Commission addressed to the late Satwant Singh Dhanjal stating that the commission was investigating the irregular acquisition of Kenya Railways land and that the suit property was irregularly registered in the name of Satwant Singh Dhanjal. Satwant Singh Dhanjal was asked to attend an interview and record a statement at the commissioner's regional offices on 15th August 2019.

That the Petitioner attended the and was advised that the relevant officers had returned to Nairobi, and the other officer they were referred to communicated that he would be away for a week and would call on his return. That on the 29th August 2019, the EACC published in the Daily Nation a public notice listing a number of parcels including the suit parcel as being under investigation for allegedly having been irregularly allocated and allegedly belonging to Kenya Railways.

That on 3rd September 2019 the Petitioner travelled to Nairobi with his Advocate to the EACC office and recorded a statement and availed to the officer copies of the documents in respect of the property. That on 4th and 5th September 2019, National Youth Service personnel, ostensibly on instructions emanating from the Ministry of Interior and Coordination of National Government, Ministry of Transport, Infrastructure, Housing and Urban Development, and Kenya Railways Corporation attended at the property and commenced digging holes around the property with a view to erecting concrete poles for fencing off the property. That the tenants were told in no uncertain terms to vacate the property as it was likely to be demolished.

The Petitioner asserted that the property does not belong to Kenya Railways Corporation and since time immemorial the boundary has been clearly marked by the Kenya Railways fence even prior to Satwant Singh Dhanjal acquiring it. That the original fence is outside the boundary of the suit property.

The Petitioner stated that on 26th September 2019 officers from the Kenya Railways Corporation and the ethics and anti-corruption commission visited the property and verbally informed the Petitioner's tenant that the suit parcel belongs to Kenya Railways Corporation and that they were in the process of forcibly recovering it for the said Corporation. That the Kenya Railways Corporation published notices in the Daily Nation newspaper to the effect that the Corporation was through the EACC reclaiming and possessing its properties. That the government and the 2nd Respondent have been undertaking a wave of demolition of structures across the city on the claim that they were built on the 2nd Respondent's land. That the Petitioner is justifiably apprehensive that unless the Respondents are restrained they will demolish and bring down the Petitioner's building.

The Petitioner asserted that the actions of the government, its officers and the 2nd Respondent offend the provisions of Articles 47, 50 and Sections 4 and 12 of the Fair Administrative Actions Act. That the Respondents have been acting and continue to act with gross impunity without any regard for the rights of citizens and for the provisions of the Constitution and statutes. That the Petitioner's right to a fair hearing has been violated by his being punished without being heard. That he has been subjected to severe anxiety mental torture suffering and indignity in violation of Articles 10 and 28 of the Constitution.

That the suit parcel has not been compulsorily acquired by the government and that the 2nd Respondent intends to deprive the Petitioner of his property forcefully and without compensation. That the anxiety and lack of communication from the Respondents has led to the Petitioner's tenant verbally informing him that it intends to acquire the property which location the Petitioner loss and nine the Petitioner livelihood derived from the rental income which is an affront to his right under Article 19 and 43 of the Constitution.

That the property was acquired and developed using astronomical sums of money which the Petitioner stands to lose should the Respondents not be brought to account and should they not be stopped from continuing the illegal and unlawful acts. That if as alleged the property originally belonged to the 2nd Respondents, which is denied, that 2nd Respondent did absolutely nothing with it for countless years. That it is in an equitable and unlawful for the 2nd Respondent to now to rear its head and contend that it is the owner of the property beside which Satwant Singh Dhanjal is the bona fide purchaser for value of the property, not party to any fraud and without any knowledge of fraud and therefore, the 2nd Respondents are statutorily barred from claiming ownership. That in terms of Sections 24, 25 and 26 of the Land Registration Act, the registration of Satwant Singh Dhanjal as the proprietor of the leasehold comprised in the same title is vested indivisible rights and privileges for the residue of the term of the lease.

That due to the unlawful actions of the government officers and the 2nd Respondent, the Petitioner has been constrained to seek the protection and security of the court in line with the provisions of Articles 22, 23, 159, 162, 258 and 259 of the Constitution.

2nd Respondents Reply

Through the replying affidavit of Geoffrey Wekesa, the cartographer for the 2nd Respondent, the 2nd Respondent stated that the suit parcel was amongst the properties identified to have encroached on the land alienated to Kenya Railways, based on Registry Index Maps and

Residential Area maps.

That the 2nd Respondent issued a public notice in the national dailies to the public and especially those who illegally occupy and acquired public land to surrender their titles and documents to the 2nd Respondent. That the Petitioner never heeded to the notice until he was summoned by the Ethics and Anti-Corruption Commission over the illegal occupation of the 2nd Respondents land and rushed to court.

That the 2nd Respondents have never surrendered their land for allocation to private entities individuals or companies and they are therefore stranger to the alleged allottee Cheramba Enterprises and the Petitioner herein. That if at all any transaction was done on the property by the Ministry of Lands then correspondences ought to have been copied to the 2nd Respondent for approval and consent before any transfer was undertaken.

That the irregular transfers on the suit property are a nullity and should be cancelled for the purposes of reclaiming occupied public land. That the letter dated 28th November 1991 is a nullity as the 2nd Respondent was not aware as the legal owners of the property. That Cheramba Enterprises had no right to transfer public land to the Petitioner who are private individuals neither does the Ministry of Lands without the authority or consent from the owners who are the 2nd Respondents. That the provisions of Article 62 (1) b of the Constitution classifies public land whereas there was a provision for conversion of public land into private land.

It was in the interest of justice that the Petitioner surrenders the lease document that was irregularly acquired to Kenya Railways as earlier advised to allow the Corporation to reclaim back its property for its own development. That the petition was premature as it disclosed no reasonable cause against the 2nd Respondent.

Petitioner's Submissions

Counsel for the Petitioner Asserted that the actions of the government and the Respondents in gross and egregious violation of his fundamental rights and protection enshrined in Article 40 and 47 of the Constitution, Section 4(3) of the fair Administrative Actions Act and the land registration act. Counsel cited the case of **R v National Police Service Ex Parte Daniel Chacha [2016] eKLR** for the proposition that procedural fairness is now a Constitutional requirement in administrative action even in cases where there is no express requirement heard before a decision is made. Counsel also cited **Kuria Greens Limited v Registrar of Titles & another [2011] eKLR** for the proposition that the Petitioner in that case should have been given an opportunity to state its case before reaching the decision to revoke the Petitioner's title.

Counsel submitted that there are no powers bestowed on the Respondents under the registered land act and the land control act to revoke a valid land title. That the Petitioner's father was a bona fide purchaser for value not a party to any fraud and without knowledge of any fraud hence the Respondent the statutorily barred from claiming ownership. That the title could only be impeached if the same was acquired through fraud misrepresentation, illegality or through a corrupt scheme. Counsel cited the case of **Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR** where the Court of Appeal held that a bona fide purchaser will not be bound by any interests of which he or she does not have actual, constructive or implied notice as long as he or she did reasonable due diligence before purchasing.

Issues for Determination

1. Whether the Petitioner's right to own property was violated

Article 40 of the Constitution provides:

“(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.

...

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

From the totality of the evidence on record, it is clear that the Petitioner was a bona fide purchaser of the suit parcel without notice of any fraud or irregularity in the title, meeting all the requirements enumerated in **Katende v. Haridar & Company Limited [2008] 2 E.A.173:**

“...it suffices to describe a *bona fide* purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the *bona fide* doctrine, (he) must prove that:

a. he holds a certificate of title;

b. he purchased the property in good faith;

c. he had no knowledge of the fraud;

- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

Both the letter of allotment of the suit parcel to Cheramba Enterprises and the letter from the Ministry of Lands informing the Petitioner’s father (informing him that the suit parcel had been allocated a parcel number and that plot had been surveyed and reduced in size) were copied to the Director of Surveys and other relevant officials. A survey having been carried out by the relevant government bodies and the transfer of the parcel having been apparently green lit by the relevant government bodies without objection, there was no further due diligence that ought to have been carried out by the Petitioner that would have revealed that the land had been vested in the 2nd Respondent. The 2nd Respondent has also not disputed that the original Kenya Railways fence had been erected outside the boundary of the suit parcel long before the Petitioner’s father acquired it.

Section 26 (1) of the Land Registration Act provides:

“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.”

In *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] eKLR the majority decision of the Court of Appeal reasserted the unimpeachable nature of titles of bona fide purchasers for value who carried out sufficient due diligence before acquiring land.

“The law has never intended to punish the innocent as to punish the innocent would break down all the trust and respect for the law and legal system... It has long been accepted beyond debate that the land registration process in Kenya is a product of the **Torrens system**... Under that system, the title of a bona fide purchaser for value without notice of fraud cannot be impeached; that the land register must mirror all currently active registrable interests that affect a particular parcel of land; that the Government, as the keeper of the master record of all land in Kenya and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world; and that in case of loss arising from an error in registration, the Government guarantees the person affected of compensation. Finally, the statutory presumption of indefeasibility and conclusiveness of title based on the register can be rebutted only by proof of fraud or misrepresentation which the buyer is himself shown to have been involved...”

In order to discharge the burden on them and for them to secure their titles, it was enough for the appellants to show that they acquired interests to their properties from the vendors who were registered owners; that they did so in good faith, without notice and did not participate in any fraud. This burden was discharged. It was not their duty to ensure the accuracy of the information contained in the register.”

The respondents ought to have challenged the petitioners title in a court of law rather than The upshot therefore is that the actions of the Respondents indeed taking the law unto their hand and violating the Petitioner’s right to own property as enshrined in Article 40 of the Constitution. No court of law has found that the petitioners title was obtained unlawfully.

2. Whether the actions of the Respondents amounted to a violation of the right to fair administrative action

Article 47 of the Constitution provides:

- “(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or 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 written reasons for the action.”

Section 4(3) of the Fair Administrative Actions Act also provides that where an administrative action is likely to affect the rights and fundamental freedoms of any person, the administrator shall give the person affected prior notice of the proposed action, an opportunity to be heard, right to internal review where applicable, statement of reasons, notice of right to legal representation, right to cross-examine where applicable, and information, materials and evidence forming the basis of the action.

The EACC wrote to the Petitioner’s father on 13th August 2019 inviting him for an interview and to submit documents in its inquiry into the

irregular registration of the suit property to the Petitioner's father. The Petitioner attended with his Advocates on 29th August 2019 where his statement was taken and his documents relating to the suit parcel received. However, it is not shown how the Ethics and Anti-Corruption Commission came to the conclusion that the Petitioner obtained registration of the suit property illegally. There is no evidence that the petitioner was afforded a hearing before the determination was made.

This is not the right forum to determine the ownership of the suit property and whether the same was obtained illegally or unprocedurally. Article 40(6) envisages proceedings where evidence is called and authors cross examined and re-examined.

There is evidence that the suit property vests in the Kenya Railways Corporation vide legal notice number 24 of 1986 wherein it was declared that all land of the East Africa Railways Corporation vested in the corporation by any written law as well as any land conveyed to that corporation or otherwise placed at that corporations disposal whether such land was in use or reserved for use by that corporation including premises used for the administration and control of the services provided by the administration, railway lines, workshops and training schools together with the curtilage thereof or other land then enjoyed therewith.

I have scrutinised the copy of survey plan FR/43/53 and the legal notice no 245 of 1963 and 24 of 1986 and do find that the suit property falls within land vesting to The Kenya Railways Corporation. The suit property is part of public land vested to Kenya Railways.

However, I do find that the actions of the Respondents jointly and severally to enter into, invade the suit property registered in the petitioners name and erect a fence around it with the intention of blocking access and egress onto and out of the property and interfering with the quiet enjoyment thereof without his consent, permission or concurrence and against his will as protected by Articles 40 & 60 of the Constitution was a violation of his right, and without following due Constitutional and statutory processes is a violation of the Petitioner's Constitutional right to fair administrative action protected by Articles 47 & 50 of the Constitution.

I do grant a prohibition prohibiting the Managing Director of the 1st Respondent, the Cabinet Secretary Ministry of Interior and Coordination of National Government, Cabinet Secretary Transport, Infrastructure, Housing and Urban Development and the Cabinet Secretary Public Service, Youth and Gender through the National Youth Service or any of them by themselves, their subordinates, representatives, servants, employees, agents or any other persons acting through them or on their instructions or directions from repossessing, taking possession of , fencing off, blocking ingress or egress into or out of the property of the Petitioner namely Kisumu Municipality/Block 7/446 and from any other way howsoever interfering with the Petitioner's access to occupation and use of the property and buildings thereon and an order of prohibition prohibiting jointly and severally the Chief Land Registrar, the County or District Land Registrar Kisumu, or any other officer acting under them or on their behalf or instructions or directions or in any other way howsoever from revoking, annulling, cancelling, restricting or in any way whatsoever or howsoever interfering with the Petitioner's title to the property Kisumu Municipality/Block 7/446 without following due process of the law. Costs incidental to the petition to the petitioners as the respondents did not follow due process in their quest to recover the land.

DATED, DELIVERED AND SIGNED THIS 29th DAY OF APRIL, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

This ruling is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15TH March 2019 and with the consent of the parties.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE