



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 4 OF 2016

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 22 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS UNDER ARTICLE 10, 22, 23, 40, 47 AND CHAPTER SIX OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF: PRINCIPLES OF FAIRNESS, REASONABLENESS AND LEGITIMATE EXPECTATION

BETWEEN

MICHAEL KIMETET A. KORIR.....PETITIONER

AND

ATTORNEY GENERAL.....1ST RESPONDENT

DIRECTOR OF LAND ADJUDICATION & SETTLEMENT.....2ND RESPONDENT

CABINET SECRETARY MINISTRY OF LAND HOUSING

AND URBAN DEVELOPMENT3RD RESPONDENT

CHIEF LAND REGISTRAR.....4TH RESPONDENT

LAND REGISTRAR, LAMU COUNTY.....5TH RESPONDENT

AND

MERCY KARIMI MUNYASIA.....INTERESTED PARTY

JUDGMENT

BACKGROUND

1. By this Petition dated and filed herein on 29th April 2016, Michael Kimetet Korir (the Petitioner) contends that the five (5) Respondents named herein have infringed on his rights under Articles 40 and 47 of the Constitution by depriving him of his proprietary rights in respect of all that parcel of land known as Lamu/Hindi Magogoni/323.

2. Arising from the alleged infringement, he prays for:-

a) A declaration that there is a violation of the Constitution and an infringement of his property rights as protected under Article 40 of the Constitution and a violation of his right to a fair administrative action as protected under Article 47 of the Constitution;

b) An order nullifying and quashing all entries, transfers and titles issued by the Respondents in respect of the said Lamu/Hindi Magogoni/323;

c) An order compelling the Respondents to register the Petitioner as the proprietor of Lamu/Hindi Magononi/323 and to take all steps necessary for such registration and to issue the Petitioner with title documents in respect thereof;

d) General damages owing to the violation of the Petitioner's Constitutional rights; and

e) Costs and Interest.

3. The Respondents are opposed to the Petition. In a Replying Affidavit sworn by the 2nd Respondent's Lamu Land Adjudication and Settlement Officer A.H. Mohammed, the Respondents aver that the Petition lacks merit as the Petitioner had failed to meet the criteria set for the allocation of land.

4. The Respondents aver that the parcels of land were being allocated to those who were found to be physically occupying and working thereon. In respect of Plot No. 323, it was one Mercy Karimi Munyasia (the Interested Party) who had put up a house and was cultivating the land and not the Petitioner.

5. Mercy Karimi Munyasia (the Interested Party) is equally opposed to the Petition. In a Replying Affidavit sworn and filed herein on 2nd November 2016, she avers that she is the rightful owner of the suit property having occupied the same sometime from 1993 and having been issued with a title thereto in the year 2014.

THE PETITIONER'S CASE

6. At the trial herein, the Petitioner called one witness in support of his case.

7. PW1-Peter Gathumbi Kirubi is the holder of a Power of Attorney donated to him by the Petitioner. He adopted his Affidavit in Support of the Petition as his evidence in Chief. In the said Affidavit, PW1 avers that the Petitioner was allocated the suit property in 1995 by a Plot allocation Committee chaired by the District Commissioner Lamu. Subsequently, by a letter dated 29th February 1996, the Director of Land Adjudication and Settlement (the 2nd Respondent) formally offered the parcel of land to the Petitioner.

8. PW1 further stated that on 7th November 1997 the Petitioner paid the requisite conveyance fees, took possession of the land and started developing the same. He was therefore shocked when on 28th August 2006, a Task Force appointed by the Respondents to look into issues concerning Hindi Magogoni Settlement Scheme instead registered the Interested Party as the Proprietor of the suit property.

9. PW1 told the Court that the Interested Party has never settled on, farmed or developed the property and that the Petitioner had a legitimate expectation that he would be issued with title documents in respect of the property and hence the prayers in the Petition.

THE RESPONDENT'S CASE.

10. The Respondents equally called one witness in support of their case at the trial herein.

11. DW1-Ahmed Hassan Mohammed is the 2nd Respondent's Lamu County Land Adjudication and Settlement Officer. He relied on his Affidavit sworn and filed in reply to the Petition herein on 3rd October 2016. DW1 confirms in the Affidavit that the Petitioner applied for a Settlement Plot in Hindi/Magogoni area of Lamu County in the year 1995.

12. DW1 told the Court that by a Letter dated 29th February 1996, the Petitioner was offered the suit property measuring approximately ten acres. To finalise process of adjudication in the area, a Ministerial Task Force was commissioned in September 1997 to among other things ascertain reasons for the slow rate of the settlement process and to come up with recommendations for accelerating the process. The Task Force visited the ground and made recommendations to the Permanent Secretary Ministry of Lands (the 3rd Respondent).

13. DW1 testified that among the recommendations was that the plots be allocated to those who were found to be physically occupying and working thereon but not the speculators who had applied but were not physically present on the ground. In that respect the Task Force proceeded to allocate the land to Mercy Karimi Munyasia (the Interested Party herein) as she was the one who had put up a house and was cultivating the land. The Interested Party thereafter paid for the allocation on 20th November 2014.

14. DW1 testified that the Interested Party was on 13th October 2015 issued with a Discharge of Charge and transfer for the suit property. On 28th August 2006, a Certificate of Title was issued in her name.

15. DW1 further told the Court that both the Petitioner herein and the donee of his Power of Attorney (PW1) were Senior Officers in the Ministry of Lands, Housing and Urban Development (the 3rd Respondent) and that they were not entitled to the equitable remedy sought herein having concealed their respective roles in the process from the Court.

The Interested Party's Case

16. On her part, the Interested Party called two witnesses at the trial herein.

17. DW2-Mercy Karimi Mnyasia is the Interested Party. She relied on her Replying Affidavit sworn on 2nd November 2016 and a Further Affidavit sworn on 6th December 2016. DW2 told the Court that sometime in 1993, she occupied an area of forest within Hindi Settlement Scheme, cleared an area of about two acres, constructed a house thereon and started growing food crops.

18. DW2 further testified that when in 1997 a Task Force was formed to collect data on the ground situation, they found her on the ground and her name was entered in the Register and she was allocated the land. Later on in 1998, a Mr. Bett who worked at the Prison Department visited the farm and told her that the land she occupied belonged to the Petitioner and that she should vacate.

19. DW2 further told the Court that she sought compensation for the developments she had made on the land but as she was still waiting for the same, a lady by the name Salome Waithera who was married to the said Bett came to the suit property and burnt DW2's house. DW2 filed a case against the said Salome being *Lamu SRMCC No. 72 of 1998* in the name of her mother one Florence Ndiira. The suit was determined in DW2's favour.

20. DW2 told the Court that she was unable to re-build the house immediately and the said Bett then took advantage of her absence, built a house on the land and installed Salome Waithera to live therein. After sometime Salome handed over possession of the land to PW1's wife.

21. DW2 testified that her efforts to pay for the land were frustrated by PW1 who was then an employee of the 3rd Defendant and in-Charge of the Settlement Scheme. She was eventually given her title after she paid for it in 2014.

22. DW3-Danson Kariuki Kimani is a resident of Hindi Magogoni. He testified that he knew PW1 as a Land Settlement Officer in Lamu. He told the Court that at one time he was also sued by PW1 who was claiming his Plot No. 441 Hindi Magogoni.

ANALYSIS AND DETERMINATION

23. I have perused and considered the pleadings filed herein, the oral testimonies of the witnesses and the evidence produced at the trial herein. I have equally perused and considered the Written Submissions as filed herein by the Learned Advocates for the parties.

24. The Petitioner herein accuses the five (5) Respondent Government Departments of infringing upon his rights as enshrined in Articles 40 and 47 of the Constitution by depriving him of his property comprised in all that parcel of land presently known as Lamu/Hindi Magogoni/323.

25. The gist of the Petitioner's claim is that sometime in 1995, the Government allocated him the suit property measuring approximately 10 acres and situated within Hindi Magogoni Settlement Scheme in Lamu. According to the Petitioner, he subsequently made all the requisite payments to the Respondents in respect of the property with a view to ultimately being issued with title documents.

26. To his utter shock and dismay, the Respondents proceeded to register the Interested Party herein as the proprietor of the suit property on 28th August 2006. It is his case that given the history of the Suit Property, he had a legitimate expectation that he would be registered as the proprietor of the suit property and the Respondents actions are thus irregular, arbitrary and made in disregard of the normal procedural requirements.

27. The Respondents do not deny that the Petitioner was initially allocated the land. It is however their case that slightly over a year after the Petitioner was issued with a Letter of Offer, a Ministerial Task Force was commissioned sometime in September 1997 tasked with among other things the responsibility of ascertaining the reasons behind the slow rate of the settlement process within the scheme and coming up with recommendations for accelerating the process.

28. It was the Respondents' case that the Task Force went round the Settlement Scheme in order to identify those who were physically on the ground occupying and working on the land with a view to identifying speculators who had only applied for the land but were not physically present on the ground. When that team reached the suit property, they did not find the Petitioner. Instead, they found a hut built thereon by the Interested Party who was in addition engaged in cultivation of cotton within the property.

29. In light of those findings, the Task Force proceeded to re-allocate the suit property to the Interested Party who was subsequently issued with a Certificate of Title on 28th of August 2006.

30. The Respondents' position was indeed echoed by the Interested Party who told the Court that she is the rightful proprietor of the suit property having been in occupation thereof since 1993. The Interested Party accused the Petitioner of using his position as an employee of the 2nd Respondent and being in-charge of the settlement process to acquire the land to himself by frustrating her efforts to make payments

for the land after it was allocated to herself.

31. From the material placed before me it was clear that vide its letter dated 29th February 1996, the 2nd Respondent offered the suit property measuring approximately ten acres to the Petitioner. The said letter from the Director Land Adjudication and Settlement produced by the Respondents as exhibit 2 reads in the relevant portion as follows:-

“SETTLEMENT PLOT-LETTER OF OFFER

I am pleased to inform you that your application for a Settlement Plot has been successful.

The Government through the Settlement Fund Trustees and with the advice of the District Settlement Plot Selection Committee has offered you Plot No.323 of approximately 10 acres at Hindi Magogoni Settlement Scheme in Lamu District.

In pursuant thereof please note that you are required to report to the District Land Adjudication & Settlement Officer, Lamu District so that you are shown the Plot boundaries and be issued with a letter confirming this before documentation.

This offer is valid for 90 days from the date of this letter. Within this period you should pay the 10% deposit for the Plot and be documented accordingly, failure to which will lead to the cancellation of the offer without further notice.”

32. In fulfillment of the terms, the Petitioner told the Court that he took possession of the property, cleared the bush and engaged a Caretaker who started carrying on some farming activities on the land. While it was not clear to me whether he paid the deposit as required, it was apparent from the documents produced herein that on or about 7th November 1997, he made some payment of Kshs 925/- to the Settlement Fund Trustees (SFT) towards “Deposit and Conveyance Fees” for the suit property and that he continued making other payments periodically.

33. Whatever the case, as at December 1997 when the Task Force went on the ground, the Letter of Allotment issued to the Petitioner remained in force. The undated minutes of that Task Force produced by DW1 (Respondents Exhibit 2) indeed confirm that the Petitioner remained the allottee of the suit property at the time and that the Interested Party was a squatter on the land effective July 1996.

34. In her testimony and the Replying Affidavit filed herein on 2nd November 2016, the Interested Party avers that she cleared and occupied a section of the suit property measuring two acres sometime in 1993. She confirms that when the Task Force visited the suit property in 1997, they found her on the ground, entered her name in the Register and allocated her the land.

35. It was further her case that she only learnt of the Petitioner’s interest on the land later in 1998 when one Mr. Bett who worked at the nearby Prison’s Department informed her that the land belonged to the Petitioner whom he was made to understand was the Director of Settlement . It was her case that she agreed to vacate but subject to her being compensated for the developments she had brought to the land.

36. Testifying herein as DW2, the Interested Party told the Court that as she waited for the compensation, a woman married to the Petitioner’s Caretaker burnt down her house and as she was unable to rebuild it immediately, the Caretaker and his wife moved in and took over the property after which she went back to live with her parents.

37. From the aforesaid Minutes of the Task Force however, it was apparent that the Interested Party had only been in the suit property from July 1996, about one year before the Task Force went to the land. Those minutes further reveal that her parents had been allocated two parcels of land nearby the suit property being Plot Nos. 339 and 354 Hindi Magogoni Settlement Scheme.

38. And while the Interested Party asserted that she only came to learn of the Petitioner’s interests in the land in 1998, it was evident that she knew all along that the property belonged to the Petitioner at the time she occupied the same. At the trial herein, the Interested Party indicated that she sued the wife of the Petitioner’s Caretaker after she burnt down her house.

39. The said suit being ***Lamu SRMCC No. 72 of 1998*** were indeed filed by the Interested Party’s mother Florence Ndira against one Salome Waithera. In her Further Affidavit filed herein on 7th December 2016, the Interested Party has annexed copies of the proceedings that took place before the Honourable J.DC Kombe, SRM Lamu.

40. A perusal of those proceedings reveals that the Interested Party’s mother was aware that the suit property had been allocated to the Petitioner herein in February 1996. The Interested Party herself testifying in those proceedings as PW2 informed the Court that she was a Squatter on the land and that she came to learn that it belonged to the Petitioner.

41. From the material placed before me, it was evident that the Interested Party herein has never applied for nor has she ever been offered the suit property. According to DW1 and the Interested Party, she was given the Certificate of Title because she was found on the ground and after she paid the sum of Kshs 99,540/- on 20th November 2014 for the same.

42. With respect, I did not think that the Task Force had the capacity to allocate the suit property in the manner in which it purported to do herein. The suit property as it were had already been alienated to the Petitioner and the mere fact that the Task Force team found the Interested Party on a portion thereof on the date it went on the ground could not disentitle the person allocated to the same.

43. Indeed, no evidence was placed before me to demonstrate that the Task Force had published a requirement for all property owners to be physically present when they went round the Scheme failure to which they would forfeit their respective parcels of land.

44. In my understanding, unless the Petitioner failed to meet the conditions set out in the Letter of Allotment dated 29th February 1996, Plot No. 323 Hindi Magogoni was unavailable for allocation. As the Court of Appeal stated in **Dr. Joseph N.K. Arap Ng'ok –vs- Moijo Ole Keiuwa & 4 Others, Nairobi Civil Appeal No. 60 of 1997(unreported):-**

“Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of the title document pursuant to provisions held.”

45. In this respect and as Warsame J (as he then was) stated in **Rukaya Ali Mohamed –vs- David Gikonyo Nambacha & Another (Kisumu HCCCA No. 9 of 2009):-**

“Once (an) allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of offer confers (an) absolute right of ownership or proprietorship unless it is challenged by the allotting authority or it is acquired through fraud, mistake or misrepresentation, or that the allotment was outrightly illegal or it was against the public interest.”

46. I am in agreement with the Learned Judge that where land has been allocated, the same land cannot be re-allocated unless the first allocation is validly and lawfully cancelled.

47. The Respondents themselves were aware of this legal position. As it turned out, the suit property had prior to its allocation to the Petitioner been allocated to one Teresiah Njoki. When the said Njoki failed to honour the terms of the Letter of Offer, the Respondents issued her with a “Notice to remedy” the situation. During his cross-examination, DW1 admitted that it was only when the said Njoki failed to remedy her position that the offer to herself was cancelled and an offer was instead made to the Petitioner. DW1 was unable to explain why a similar procedure was not followed in the case of the Petitioner in the event the allocating authorities felt he was in default.

48. Arising from the circumstances herein, the Inter-Ministerial Task Force had no power to allocate the land to the Interested Party in the manner in which it did and to proceed to issue her with title in the year 2006 for a parcel of land she had vacated way back in 1998 without giving the Petitioner who is in occupation thereof a hearing.

49. What the Task Force did in entering the Interested Party’s name in the Register on the basis that she was on the ground when they visited was an illegal transaction. It amounted to no allotment and in totality there was no benefit, no interest and no legal right which could be derived from an act which amounted to nothing.

50. The upshot is that I find merit in the Petition. The Petitioner’s prayers as sought in Prayers (a), (b) and (c) of the Petition are granted to him.

51. He did not however persuade me that he had suffered any and/or that he was entitled to General damages. Prayer (d) of the Petition is thereby denied.

52. The Petitioner shall have the costs of this Petition.

Dated, signed and delivered at Malindi this 29th day of April, 2020.

J.O. OLOLA

JUDGE