



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 5 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

BETWEEN

PETER GATHUMBI KIRUBI.....PETITIONER

AND

ATTORNEY GENERAL.....1ST RESPONDENT

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

CABINET SECRETARY MINISTRY OF LANDS AND

PHYSICAL PLANNING.....3RD RESPONDENT

CHIEF LAND REGISTRAR.....4TH RESPONDENT

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

AND

DANSON KARIUKI KIMANI.....INTERESTED PARTY

JUDGMENT

BACKGROUND

1. By this Petition dated and filed herein on 29th April 2016, Peter Gathumbi Kirubi (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/441.

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/441;

c) An order compelling the Respondents to register the Petitioners as the proprietor of Lamu/Hindi Magononi/441 and to take all steps necessary for such registration and to issue the Petitioners 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 did not follow the regulations set by the Settlement Fund Trustees on transfers of land in settlement areas.

4. The Respondents further aver that the Petitioner who was an employee of the 2nd Respondent at its Lamu Office did not follow the right procedure in purchasing the suit property from the initial allottee one James Muyesu Kavehi . When an inter-ministerial Task Force appointed to consider the slow pace of settlement in the scheme visited the land, it found that neither the Petitioner nor the original allottee were on the land. Instead, it was one Danson Kariuki Kimani (the Interested Party) who had cultivated two acres of the land and had planted cotton thereon.

5. The said Danson Kariuki Kimani (the Interested Party) is equally opposed to the Petition. In a Replying Affidavit sworn and filed herein on 2nd September 2016, he avers that he is the rightful owner of the suit property having occupied the same sometime in 1996. He avers that when the Task Force visited the ground in 1997, they found him there, entered his name in the Register and allocated the suit property to himself. He was subsequently issued with title to the land in 2006.

THE PETITIONER'S CASE

6. At the trial herein, the Petitioner (PW1) testified as the sole witness in his case. He adopted his Affidavit in support of the Petition as his evidence -in-chief.

7. In the said Affidavit, PW1 avers that he purchased the suit property on 9th May 2002 from one James Muyesu Kavehi, the allottee thereof vide a Sale Agreement dated the same day. He avers that the suit property was initially offered by the Respondents to one Ishaka Bakari Mohamed vide a Letter of Offer dated 1st January 1988.

8. PW1 told the Court that the said Ishaka failed to comply with the terms of the offer and the Respondents then cancelled the allocation and proceeded to offer the Plot to Ali Mahmoud B Mubwarali vide a letter dated 25th May 1989. The said Ali as it turned out also failed to comply with the terms of the offer. On 17th July 1992, the Respondent served him with a "Notice to remedy the breach" but he failed to do so.

9. PW1 further told the Court that the suit property was then allocated to James Muyesu Kavehi vide a Letter of Offer dated 15th June 1993. Muyesu accepted the offer on 23rd August 1993 and executed a Land Charge for the same on the same date. Muyesu was subsequently offered a development loan by the Settlement Fund Trustees (SFT).

10. PW1 further stated that after he bought the suit property from Muyesu, a demand notice in respect of the loan arrears was issued on 1st October 2003. The arrears were regularized. On 6th October 2003, the Respondents being aware that PW1 had purchased the property accepted a payment of Kshs 250/- as conveyance fees and Kshs 1000/- as loan repayment from PW1 and issued him with receipts.

11. PW1 states that on the same date, he signed the terms of offer and a Charge. The Respondents thereby granted to PW1 a development loan in respect of the suit property and PW1 serviced the loan accordingly by making regular payments. PW1 also told the Court that he settled on the property, cleared the bush and started farming activities. He remains on the land to-date.

12. PW1 told the Court that 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.

13. PW1 avers that the Interested Party has never settled on, farmed or developed the property and that he had 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.

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

15. 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 response to the Petition on 3rd October 2016. DW1 states in the Affidavit that indeed the suit property measuring 11.5 acres was initially allotted to James Muyesu Kavehi on 23rd August 1993.

16. DW1 further stated that Muyesu applied for a development loan on 25th August 1993 of Kshs 260,000/- from the Settlement Fund Trustees. On 3rd May 1996, the loan was approved at Kshs 50,000/- with a capitalized interest of Kshs 6500/- bringing the loan total to Kshs 56,500/-. DW1 however told the Court that after he obtained the loan Muyesu appropriated the proceeds and ignored to repay the same.

17. DW1 further stated that on 5th August 2003, Muyesu sought the permission of the 2nd Respondent to transfer the suit property to the Petitioner. However in purporting to transfer the same, Muyesu did not follow the regulations set by the Settlement Fund Trustees which among other things required a formal application to be made, payment of requisite fees and transfer of the land to the new owner.

18. DW1 also told the Court that in order to finalize the process of adjudication in the area, a Ministerial Task Force was commissioned in September 1997 to among other things ascertain the reasons for the slow rate of the settlement process and to come up with recommendation for accelerating the process. The Task Force visited the ground and made recommendations to the Permanent Secretary of the Ministry of Lands (the 3rd Respondent herein).

19. DW1 testified that among the recommendations was that the plots be allocated to those who were found to be physically occupying and working on the land and not speculators who had applied but were not physically present on the ground. In that respect, the Task Force proceeded to allocate the land to Danson Kariuki Kimani (the Interested Party herein) who had cultivated two acres of the land and planted cotton thereon. The Interested Party was thereafter on 28th August 2006 registered as the proprietor of the suit property.

20. DW1 told the Court that the Petitioner herein is an employee of the 2nd Respondent who was working in the Lamu Settlement Office and who used his office to disenfranchise genuine settlers from their parcels of land and that the procedure used to restore the ownership of the parcel of land to the Interested Party was legal and transparent.

The Interested Party's Case

21. DW2-Danson Kariuki Kimani is the Interested Party herein. He testified that he resides in Plot No. 452 Hindi Magogoni but stated that he also owns Plot No. 441. He told the Court that sometime in 1996, he occupied an area of forest within Hindi Settlement Scheme, cleared an area of about two acres where he constructed a house and started growing cotton.

22. DW2 further testified that in 1997, the Task Force formed to collect data on the ground found him on the land, entered his name on the Register and allocated him the suit property. However, following a wave of insecurity in the area, he was forced to abandon the land. In 2006 when he was issued with title to the suit property, he tried to visit the same but was surprised to find the Petitioner who was then employed by the Ministry of Lands as the District Land Adjudication and Settlement Officer had invaded the same and refused to vacate.

23. DW2 further told the Court that the Petitioner refused to collect the money that DW2 was required to pay to facilitate the discharge of the property which had been discharged to the Settlement Fund Trustees. DW2 complained to the Petitioner's superiors but he obstinately refused to vacate the land. DW2 told the Court that the Petitioner destroyed his house and cut down his trees. He accused the Petitioner of being a usurper and a serial land grabber who abused his position of trust as the Settlement Officer to manipulate documents in his favour to take other people's land.

ANALYSIS AND DETERMINATION

24. 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.

25. The Petitioner herein accuses the five (5) Respondent Government Agencies 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/441.

26. The gist of the Petitioner's claim is that on or about 15th June 1993, the Government allocated the suit property measuring approximately 11.5 acres situated at Hindi Magogoni Settlement Scheme to one James Muyesu Kavehi. The said Muyesu accepted the offer, paid the 10% deposit and even executed a Charge on the same with the Settlement Fund Trustees (SFT). Subsequently by a Sale Agreement dated 9th May 2002, the Petitioner purchased the suit property from the said Muyesu and continued servicing the loan advanced by the Settlement Funds Trustee with a view of ultimately being issued with title documents.

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

28. The Respondents do not deny that the suit property was initially allocated to the said James Muyesu Kavehi. It is however their case that the said Muyesu did not follow the Settlement Funds Trustee Regulations in transferring the land to the Petitioner and that in any event, a Ministerial Task Force commissioned in 1997 to ascertain the reasons for the slow rate of the settlement process in the area had visited the land with a view to finding out those who were physically on the ground.

29. When the said Task Force visited the suit property, they did not find the Petitioner or Muyesu to whom the land had previously been allocated. Instead, they found the Interested Party who had cleared an area measuring about two acres and was cultivating cotton thereon. Being the one found on the ground, 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 August 2006.

30. The Respondents position was indeed echoed by the Interested Party who told the Court that he is the rightful proprietor of the suit property having taken possession thereof in 1996. He further told the Court that the Task Force formed to collect data on the ground found him on the land in 1997, entered his name on their Register and allocated him the suit property.

31. The Interested Party testified that thereafter, a wave of insecurity hit the area in which the suit property is located and he was therefore forced to abandon the land. In the year 2006 when he was issued with a title, he tried to visit the same but was surprised to find that the Petitioner who was an employee of the 3rd Respondent Ministry had invaded the land and refused to vacate therefrom. He accuses the Petitioner of using his position as such to acquire the suit property for himself and frustrating his efforts to make payment for the same after it was allocated to him.

32. From the material placed before me, it was clear that vide its letter dated 15th June 1993, the 2nd Respondent offered the suit property measuring approximately 11.5 acres to one James Muyesu Kavehi. 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. 441 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.”

33. Again from the material placed before me, it was clear that the allottee fulfilled the obligations and paid the requisite 10% deposit. He thereafter on 25th August 1993 applied for a development loan of Kshs 200,000/- from the Settlement Fund Trustees, charged on the suit property. Subsequently on 3rd May 1996, the Settlement Funds Trustee approved a loan of Kshs 50,000/- with a capitalized interest of Kshs 6,500/- to the allottee.

34. In his Replying Affidavit and in his testimony before the Court, the Interested Party maintained that he occupied an area of forest land within the Hindi Settlement Scheme, cleared an area of about two acres and started growing cotton thereon. He told the Court that when the Task Force visited the land in 1997, they found him on the ground, entered his name in their Register and allocated him the land.

35. Without stating when, the Interested Party told the Court that a wave of insecurity hit the area thereafter and he was forced to abandon the land. When the property was registered in his name in 2006, he tried to visit the land and claims to have been surprised to find the Petitioner occupying the same.

36. Testifying before this Court in support of the Interested Party's case, DW1, a representative of the Respondents herein told the Court that the Task Force arrived at the decision to allocate the land to the Interested Party because the allottee had misappropriated the loan advanced to him. That position does not however appear to me to be supported by any evidence.

37. A perusal of Clause 2(i) of the Loan Agreement between Muyesu (the allottee) and the Settlement Funds Trustees reveals that the loan was repayable within ten years by 20 equal and consecutive half-yearly installments of Kshs 3886/-. The first of such installments was not even due as at the time the Task Force visited the ground in 1997 for the terms clearly show that repayment was to commence on 31st March 1998.

38. That fact was indeed clear from the Minutes of the Task Force Report produced herein by DW1 which confirm that the suit property had a development loan of Kshs 50,000/-. There was no indication whatsoever that Muyesu had defaulted in repaying the loan.

39. From the material placed before me, the fact that the Interested Party herein ended up with a Title Deed for the suit property in his name is as mysterious as it can ever get. By his own tacit admission, he had never applied for nor had he ever been offered the land by the Settlement Fund Trustees. According to DW1, and the Interested Party himself, he was allocated the land because he was found on the ground by the Task Force when it went round.

40. 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 to whom the property had been allocated to the same.

41. 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 on the ground on the said date failure to which they would forfeit their respective parcels of land.

42. In my understanding, unless the Allottee had failed to meet the conditions set out in the Letter of Allotment dated 15th June 1993, Plot No. 441 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.”

43. In this respect and as Warsame J (as he then was) stated in **Rukaya Ali Mohamed –vs- David Gikonyo Nambacha & Another (Kisumu HCCC 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 out rightly illegal or it was against the public interest.”

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

45. The Respondents themselves were aware of this legal position. As it turned out from the record, the suit property had prior to its allocation to James Muyesu Kavehi been allocated to two other individuals. The first allottee was one Ishaka Bakari Mohamed who was offered the same vide a Letter dated 1st January 1988. When he failed to comply with the terms thereof, the property was subsequently allocated to Ali Mohamed Mbwarali on 25th May 1989.

46. When Ali Mohamed Mbwarali failed to comply with the terms of the offer, the Respondents served him with a Notice to Remedy the Breach of Conditions dated 17th July 1992. When he still failed to remedy the breach his allocation was cancelled vide a letter addressed to him dated 1st March 1993. It was only then that Muyesu was subsequently offered the Plot of land by their letter dated 15th June 1993 aforesaid. DW1 admitted these facts during his cross-examination herein and he was unable to explain why a similar procedure was not followed in Muyesu's case in the event it was felt he had misappropriated the funds loaned to him or was in default.

47. Indeed given DW1's position that the Task Force allocated the land to the Interested Party on the ground that he was found on the land in 1997, it was clear to me that the claim that Muyesu and the Petitioner herein had not followed the right procedure in transferring the suit property to the Petitioner when he purchased the same on 9th May 2002 was nothing but subterfuge.

48. A perusal of the Terms of the Loan Agreement executed between Muyesu and the Settlement Fund Trustees on 6th May 1996 reveals that that was not a ground for the Fund to take over the property and hand over to another person. Clause 3 of the Agreement bound the allottee in the following terms:-

“If you fail to observe any of the conditions or terms the Trustees may forthwith and without further notice withhold payment of the balance of any money still due hereunder and may give you notice requiring you to remedy such a failure or default and if you do not remedy the same within one month of the date of such notice then immediately upon the expiration of such notice the whole of the money for the time being advanced hereupon together with interest thereon shall become immediately due and repayable to the Trustees and shall be recoverable by them without further Notice”.

49. In this respect, it was interesting to note that contrary to DW1's averments herein, as at 1st October 2003, the Settlement Fund Trustees still considered Muyesu the allottee of the suit property. By a Demand Notice dated that day the Fund through the Permanent Secretary of the 3rd Respondent addressed the allottee as follows:-

“Arrears of Loan Repayment Plot No. 441

I wish to draw your attention that a total sum of Kshs 3,343/= is outstanding in respect of arrears of loan repayment to the Settlement Fund Trustees. This is a breach of conditions on which the land was allocated to you.

Notice is hereby given that unless the total outstanding amount shown above is paid within 30 days from the date hereof, appropriate legal action for the recovery of the said amount which may include the repossession of the land in accordance with the Provisions of Section 174(3) of the Agriculture Act (Chapter 318) of the Laws of Kenya will be taken.

You may remit the demanded amount to the nearest District Land Adjudication Settlement Office on production of the Notice.”

50. From the material placed before me by the Petitioner, it was evident that the said default was regularized and there is no evidence whatsoever that the Fund has moved to repossess the suit property in accordance with Section 174(3) of the Agriculture Act cited in the said letter.

51. Arising from the circumstances herein, I have no hesitation to declare that 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 him with title in the year 2006 for a parcel of land he had

never occupied since 1997 and without giving the Petitioner who is in occupation thereof a hearing.

52. The Petitioner was put in possession of the land by the rightful allottee and proprietor of the land and his occupation thereof cannot be said to be illegal. While the Interested Party and the Respondents have alleged that the Petitioner being a person who worked at the Adjudication Office in the Settlement Scheme should not have been allocated the property and/or that he used his position to frustrate their acquisition, I did not find any evidence to back those claims.

53. The history of the suit property clearly reveals that the land was allocated to three different individuals. The Petitioner was not allocated the same but purchased the same from the third and lawful allottee James Muyesu Kavehi. Neither the Interested Party nor the Respondents adduced any evidence to show that the Petitioner abused his office in order to purchase the land.

54. What the Task Force did in entering the Interested Party's name in their Register on the basis that he was on the ground when they visited the land 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 in actual fact amounted to nothing.

55. 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.

56. 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.

57. 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