



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC PETITION NO. 1249 OF 2016

SAMUEL CHEMOBO BUNDOTICH.....1ST PETITIONER

DORCAS CHEPKOSGEL.....2ND PETITIONER

LEWISEN ENTERPRISES LIMITED.....3RD PETITIONER

VERSUS

MINISTRY OF LANDS, HOUSING & URBAN DEVELOPMENT

(FORMERLY OF LANDS AND SETTLEMENT).....1ST RESPONDENT

MINISTRY OF WORKS, TRANSPORT & INFRASTRUCTURE

(FORMERLY OF PUBLIC WORKS & HOUSING).....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGEMENT

1. The petitioners herein Samuel Chemobo Bundotich, Dorcas Chepkosgei and Lewisen Enterprises Limited have filed this petition dated 24th January 2014 against the 1st, 2nd and 3rd respondents seeking;

(a) A declaration that the 1st and 2nd respondents' re-assignment, re-possession or acquisition arbitrarily and without notice, and without according the petitioners right to be heard or to make representations of the suit property LR No. 7741/372 from a private property duly allocated and registered to the petitioners to a road reserve for the construction of the Redhil road linking Waiyaki way to Limuru Road Nairobi violated the petitioners constitutional and fundamental rights to protection from the deprivation of their property then safeguarded under Section 75(1) and (2) Constitution (repealed), and now Article 40(1), (2)(3) Constitution 2010 and also their right to a fair hearing, to natural justice and to the secure protection of law then protected then safeguarded under section 77(9) Constitution (repealed), and now article 48 (on the right to access to justice) and Article 50 (right to fair hearing) under Constitution 2010.

(b) A declaration that since deprivation of the petitioners' constitutional right resulted in the loss of their free ownership and use of the suit property, LR No. 7741/372, which could not now be used for its prescribed use as a residential property, the petitioners are entitled to damages equal to the value of the suit property and to damages for general breach.

(c) Kshs.60,000,000/- being the current value of the suit property.

(d) General damages and reparation for breach of the petitioners' constitutional and fundamental rights.

(e) Costs and interest.

2. The grounds are set out in paragraphs 13(a) and (b) of the Petition and are:

(a) By repossessing the suit property and using it as the road network above, the 1st and 2nd respondents violated the petitioners' constitutional right to freely own and use land, and to protection from the deprivation of their property contact to Section 75(1) and (2) Constitution (repealed) and now Article 40(1), (2), (3) Constitution 2010, the particulars of breach which were that:-

(i) Repossessing and rendering unviable for development of suit property without notice or compensation and without gazetting the same;

(ii) Arbitrarily repossessing the suit property for use as road network without regard to current owner and user (the petitioners), and without any notice of when or whether the suit property had been re-assigned/replanned as a road network.

(iii) Arbitrarily re-assigning and repossessing the suit property for use as a road reserve without a formal decision, without any justification for the change of mind having previously surrendered, re-assigned and re-planned the road reserve into a residential property.

(iv) Purporting to re-assign the suit property as a road reserve without notice or giving the petitioners an opportunity to make their representations.

(v) Failing, refusing and neglecting to communicate any decision of the 1st and 2nd respondents, if any, that re-assigned the suit property as a road network, having previously abandoned a 1975 or so design or plan that had deemed it a road design, and having allocated, re-planned or re-assigned or caused the allocation, re-planning or re-assignment of the property for residential use.

(vi) Disregarding the protection of the law that comes with the issuance and registration of the grant and title.

(vii) Failing to demonstrate that the taking of possession or acquisition of the suit property was necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning of the development or utilization of property so as to promote the public benefit.

(viii) Also failing to demonstrate that the necessity of such possession or acquisition of the suit property was such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property, being the value of the suit property.

(ix) And further failing to demonstrate that the possession and acquisition was made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

Consequently, the petitioners avers that the acquisition and possession by the 1st and 2nd respondents was arbitrary, in which case, and even in the event that it is deemed as compulsory acquisition, then they are entitled to compensation equal to the current value of the entire property

(b) By failing to give the petitioners notice of any decision, if any, re-assigning the property as a road reserve, or any justification for such re-assignment, or of any decision to possess or acquire the suit property for use as a road network, or by failing to invite the petitioners to make any representations respecting such re-assignment, repossession or acquisition, and by arbitrarily redoing so without regard to the law, and further by failing to give the petitioners notice of such decision or intended action so that they may get an opportunity to lodge any claim prior to the re-assignment, re-possession or acquisition, the 1st and 2nd respondents breached the petitioners' right to a fair hearing, to natural justice and to the secure protection of the law then protected under section 77(9) constitution (repealed), and now article 48 (on the right to access justice) and Article 50(right to fair hearing) under constitution 2010.

3. The petition is supported by the affidavit sworn by Samuel Chemobo Bundotich and Dorcas Chepkosgei (the 1st and 2nd petitioners herein) on 24th January 2014 and a further affidavit sworn on 31st July 2017.

The Petitioner's case

4. It is the petitioners' case that on 22nd February 2002, the 1st respondent through the commissioner of lands granted them (petitioners) through grant number IR 88665, for valuable consideration by way of stand premium received and acknowledged, all that piece of land situated in the City of Nairobi in the Nairobi Area being LR NO. 7741/372 measuring 0.4034 hectares. The grant was for a term of 99 years from 1st January 1998. The same was registered on or about 13th May 2002 pursuant to which the petitioners took possession. They acquired proprietary rights over the aforementioned property capable of protection under the laws of Kenya.

5. The suit property is situated off Kitisuru Road, Kitisuru Estate, Nairobi. Prior to being allotted the suit property, the City Engineer of the Nairobi City Council (now Nairobi County Government) the then allocating authority had sometime or about 28th November 1994 indicated to the 1st respondent that though the suit property had in part or in whole, had previously been part of a road reserve, that had laid within the 60 metre wide proposed link road between Waiyaki way and Limuru road (based on a road design that had been carried out in 1975). The said road reserve had been surrendered to the government of Kenya for purposes of the then construction of the road through sub-division schemes to the then Nairobi City Council for approval and for re-planning.

6. The permanent secretary of the 2nd respondent confirmed to the 1st respondent, sometime on 8th December 1994 that it was no longer feasible to construct the link road joining Waiyaki Way and Limuru road, Nairobi as it had been originally envisaged and that therefore the land in question, which comprised of the suit property, could be re-planned for purposes other than the anticipated road network. Pursuant to the surrender, subdivisions and re-planning authorized about by the 1st and 2nd respondents, with the cooperation of the then Nairobi City Council the 1st respondent issued the grant to the petitioners.

7. On or about December 2003, the 3rd respondents', officers, employees and agents invaded and hived off almost the entire suit property, cutting through its eastern side allegedly while constructing the Red Hill Link Road between Waiyaki Way and Limuru Road, allegedly on the strength of the road design that had been previously abandoned by the 1st and 2nd respondents herein. The portion of the suit property left after hiving off above, left a size and shape incapable of development into a residential property and therefore unavailable for any use.

8. The petitioners aver that they acquired legitimate expectation that the suit property was theirs, that they would freely and lawfully use it for planned purposes being for construction of a dwelling house. In the event that the government intended to acquire it for use as a road network, they would be notified of the same and duly compensated. 9. The 1st and 2nd respondents have breached their constitutional rights protected under law by repossessing the suit property and using it as the road network. The 1st and 2nd respondents vacated the violated the petitioners constitutional rights to freely own and use land and to protection from deprivation of the property contrary to Article 40(1) (2) (3) of the Constitution of Kenya 2010. The acquisition and repossession by the 1st and 2nd respondents was arbitrary in which case and even in the event it is deemed as compulsory acquisition then they are entitled to compensation equal to the current market value of the entire property. The 1st and 2nd respondents failed to give notice of the decision if any re-assigning the property as a road reserve, or the justification for such reassignment or of any decision to re-possess, acquire, the suit property for use as a road network. They failed to invite the petitioners to make any representations in respect of such reassignment, re-possession or acquisition thereby breaching the petitioners' right to a fair hearing, to natural justice and to the secure protection of the law protected under Article 48 and 50 of the Constitution of Kenya 2010.

10. As a result of the violation of their constitutional rights by the 1st and 2nd respondents, the petitioners suffered injury being the loss of their property for which they now claim damages equivalent to the value of the suit property and separately for general damages for breach of their rights.

11. In his further affidavit, the 1st petitioner states that the respondents' claim that LR No. 7741/372 does not exist is false. That the land was re-planned for residential purposes and the petitioners given an allotment letter dated 18th December 1997 Ref 45216/97 for the subject property which was described as UNS Residential Plot B Kitisuru Nairobi together with a part development plan dated 11th August 1994 that demonstrated that the property was for residential purposes. The survey map/plan for the property LR NO. 7741/372 Folio No 400 Register No. 19 that was used in the processing of the grant to the petitioners had verified the existence of the property. Further that verification by the officers of the 1st respondent confirmed that the subject property LR No. 7741/372 existed on the ground and that a new grant to the property IR NO. 88665 was thereafter issued on 22nd February 2002. The respondents have withheld crucial information to the effect that the subject property had after acquisition, been re-planned for residential purposes and thereafter lawfully allocated to the petitioners which could only be acquired for purposes of the development of the subject link road through due process according to the law and the constitution. The respondents have violated their constitutional right for which they are entitled to the remedies sought in the petition.

12. E. W Lupao, a registered and licensed valuer has sworn an affidavit dated 16th October 2015. He states that the petitioners instructed him to value the suit property being LR No. 7741/372. He undertook the valuation and prepared a Report dated 19th March 2013. The same is marked "EWL1". He gave the market value to be Kshs.60,000,000/-.

The Respondents' case

13. By the grounds of opposition dated 20th June 2014 filed by Adow Deiss Mohammed, litigation counsel for the Attorney General, the respondents state that the petition herein is unmeritorious, due to non disclosure of constitutional violations in precise and specific manner. Further that the petition is an abuse of the court process and should be dismissed with costs.

14. There is also a replying affidavit sworn by Peter Kahuhu, Land Secretary Ministry of Lands, Housing and Urban Development, sworn on the 9th February 2016. He states that the petitioners have no legitimate title or any sort of interest to the suit property since the said parcel of land known as LR NO. 7741/372 does not exist and was never available for allocation at the time they claim to have acquired.

15. The construction of the Red Hill Link Road between Waiyaki Way and Limuru Road was based on a lawful land acquisition process done by the government way back in 1975 through gazette numbers 942 and 943 both dated 18th March 1975. Various parcels of lands which the government acquired were registered under the same mother title and were comprised of the following pieces of sub divisions, LR 7741/125-127 34-36, 77, 78, 134, 135 respectively. The alleged LR No. 774/372 is missing from the mother title and the gazette notice. The original mother title where LR No. 7741/372 allegedly lies is LR No. 7741/21. LR No. 7741/21 whose acreage was approximately (6) acres was subdivided into two parcels namely LR No. 7741/134 and LR NO. 7741/135 with approximate acreages of 3.7 and 2.5 acres respectively. The government acquired part of LR No. 7741/134 and the whole of LR No. 7741/135. There was a government house NO. HG 616 on LR No. 7741/135 which was owned by one Mr. Imison. The petitioners alleged title LR NO. 7741/372 is superimposed on LR No. 774/135 which was fully acquired by the government in 1975 by the time the petitioners alleged to have acquired the same, the title to LR No. 774/135 was cancelled.

16. The petitioners' title is not genuine because the same is superimposed on a parcel of land that had already been acquired by the government and the same is a forgery. The assertion that the land was allocated by the then Nairobi City Council is baseless since the same was lawfully acquired by the government and was never available for allocation at the time the petitioners allegedly acquired. The 1st respondent never confirmed to the petitioners the availability of the said parcel of land neither did it contact the petitioners for the surrender of any parcel of land they may have owned. The government did not acquire or authorize the acquisition of any land that belonged to the petitioners for any surrender, subdivision or re-planning.

17. The petition does not disclose any cause of action against the respondents. It does not disclose any constitutional violation against the respondents since the same is grounded on baseless allegations meant to mint money from the government through a court order. They pray that the petition be dismissed.

18. The court on 29th November 2017 with the consent of the parties directed that the petition be canvassed by way of written submissions.

The Petitioners' submissions

19. The petitioners' submissions are dated 16th October 2015 and filed in court on 19th October 2015. They have also filed supplementary submissions dated 3rd July 2018 and filed on 6th July 2018. The 1st and 2nd respondents have breached their constitutional rights protected by law. By repossessing the suit property and using it as a road network, the 1st and 2nd respondents constructively compulsorily acquired the petitioners' property, arbitrarily and without compensation equal to the current market value and violated the petitioners' constitutional right to freely own and use land, and to protection from the deprivation of their property contrary to Article 40(1), (2), (3) of the Constitution. They have put forward the cases of **Isabel Waithira Njoroge vs The Permanent Secretary, Ministry of State for Provincial Administration & Internal Security & 4 Others [2014] eKRL; Arnacherry Limited vs The Attorney General [2014] eKLR; Serah Mweru Muhu vs Commissioner of Lands & Others [2014] eKLR.**

20. The petitioners have specified each and every constitutional violation. In any case, even if they had not, the same could still be cured under Article 159 (2) (d) and (c) of the Constitution, 2010. The violations of Bill of Rights have no limitation of action as the violation by the respondents is still continuing and can be dealt with in the current constitutional dispensation.

21. The grant to the suit property LR NO. 7741/372 exists, and a current search was issued to the petitioners on 13th February 2013 prior to filing of this Petition, that confirmed ownership to the petitioners. The respondents did not adduce evidence to prove that the suit property is superimposed on the acquired and cancelled title, whether by map or otherwise. There is no proof that the suit property was acquired by the government of Kenya.

22. Vide an order given on 2nd August 2016, the court directed the respondents to supply the petitioners with the Land Registry file pertaining to the suit property LR NO. 7741/372 without success despite numerous mentions in court to confirm compliance. The respondents refusal to comply was in bad faith and must be construed to be adversely against them.

23. The correspondences between the Nairobi City Council and the Director of Physical Planning in the 1st respondent's ministry shows that the area around the subject property had in 1975 been planned for a road reserve to construct the Link Road between Waiyaki Way and Limuru Road but because of further allocations for other purposes it was impractical to maintain it as a road reserve. As such a recommendation was made that it be re-planned for other purposes, residential purposes in this case.

24. The petitioners' title is valid and the respondents allegations to the contrary are unfounded and an afterthought. The 2nd respondent's action of repossessing the property jointly with the 1st respondent to construct the subject road is annexation of private property without lawful justification as a consequence of which they violated the petitioners' rights.

The Respondents' Submissions.

25. The petitioners never had any right of the suit property. The genesis of ownership and acquisition of the suit property is explained clearly in the affidavit sworn on behalf of the 1st respondent. The petitioners have no legitimate title or any sort of interest to the suit property since the said parcel of land known as LR No. 7741/372 does not exist hence was never available for allocation at the time they claim to have acquired. Where there is no right existing, no violation of the same can occur under the constitution. The petitioners claim is based on fiction and is totally baseless.

26. The issue for determination is whether the petitioners' right to property under Article 40 of the Constitution have been violated and, if the answer is in the affirmative, then the next issue to determine is whether the orders sought can be granted. In order to enforce their rights, the petitioners must demonstrate that they are legally entitled to the property in issue and clearly prove the proprietary interest sought to be protected. They have put forward the cases of **Joseph Ihugo Mwaura & 82 Others vs Attorney General, Petition No. 498 of 2009; Philma Farm Produce & Supplies & 4 Others vs Attorney general & 6 Others Petition No. 941 of 2011; Paul Mutwiwa Wambua vs Komarock Ranching & Farming Society [2016] eKLR.**

27. Article 40 which protects the right to property must be read to exclude property found to have been never or unlawfully acquired under Article 40(6). This requirement is in extension of the fact that the constitution protects higher values which are to be found in the preamble of the constitution and Article 10. Values such as human rights and social justice cannot countenance a situation where the constitution is used to rubberstamp what is in effect unlawful and never acquired (see **Chemei Investments Limited vs The Attorney General & Others Nairobi Petition No. 94 of 2005 (UR)**). They reiterate that the petition be dismissed with costs.

28. I have considered the petition, the affidavits in support together with annexures. I have considered the replying affidavit and the annexures, the written submissions made on behalf of the parties and the authorities cited. The issues for determination are:-

(i) Whether the petitioners' rights to property protected under Article 40 have been violated by the respondents.

(ii) Whether the suit property was the subject of land acquisition by the government of Kenya in 1975.

(iii) Are the petitioners entitled to the reliefs sought?

(iv) Who should bear costs?

29. It is the petitioners' claim that the 1st and 2nd respondents have breached their constitutional rights protected by law. That by repossessing the suit property and using it as a road network the 1st and 2nd respondents constructively acquired the petitioners' property, arbitrarily and without compensation and violated the Petitioner' right to freely own and use land and to protection from deprivation of the property contrary to Article 40(1) (2) and (3) of the constitution. The respondents on the other hand contend that the petitioners have no legitimate title or any sort of interest in the suit property since the said parcel known as LR No. 7741/372 does not exist.

30. The genesis of ownership and acquisition of the suit property is explained clearly in the affidavit of the 1st respondent sworn by Peter Kahuhu on the 9th February 2016.

In paragraph 4 he depones

“That the construction of the Redhil link road between Waiyaki Way and Limuru road was based on a lawful acquisition process done by the government way back in 1975 through gazette numbers 942 and 943 both dated 18th March 1975 annexed hereto and marked PK1 are copies of the Gazette notice dated 18th March 1975 and other various correspondences showing the genesis of the acquisition)”.

In paragraph 5 he states

“That the various parcels of land which the government acquired were registered under the same mother title and were comprised of the following pieces of subdivisions

(i) LR 7741/125

(ii) 7741/126

(iii) 7741/127

(iv) 7741/34

(v) 7741/35

(vi) 7741/36

(vii) 7741/77

(viii) 7741/78

(ix) 7741/134

(x) 7741/135”

In paragraph 6 he states

“That what is evidently missing from the mother title and the gazette notice is the alleged LR no. 7741/372

In paragraph 7 he depones

That the background of the suit property is as follows:-

(i) The original or mother title of the land where LR NO. 7741/372 allegedly lies is LR No. 7741/21.

(ii) LR NO. 7741/21 whose acreage was approximately 6 acres was subdivided into two parcels namely LR No. 7741/134 and LR No 7741/135

(iii) The government acquired part of LR No. 7741/134 and the whole of LR no. 7741/135.

(iv) There was a government house number HG 616 on LR No. 7741/135 which was owned by one Mr. Imison.

(v) The Petitioners' alleged Title number on LR No. 7741/372 and claim is superimposed on LR No. 7741/135 which was fully acquired by the government by the time the petitioners' allegedly to have acquired the same.

(vi) Thereafter in 1976, in the Title No Lr No. 7741/135 was cancelled.”

31. In my view, the 1st respondent has explained how the suit property was acquired. These averments were not challenged at all by the petitioners. It appears the petitioners title was not genuine as the same was superimposed on a parcel of land already acquired by the

government of Kenya.

32. **Article 40** of the Constitution provides as follows:-

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.

2. Parliament shall not enact a law that permits the State or any person:-

a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

3. The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation:-

a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that:-

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

4. Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

5. The State shall support, promote and protect the intellectual property rights of the people of Kenya.

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

33. The petitioners have also submitted that Article 47 and 50 of the Constitution guarantees a right to fair administrative action and fair hearing respectively. That the respondent ought to have given the petitioners an opportunity to make representations before the suit property was repossessed. To this submissions the respondents state that the 1st respondent never confirmed to the petitioners the availability of the said parcel of land. The government did not acquire or authorize the acquisition of any land that belonged to the petitioners for any surrender, subdivision or re-planning.

34. In the case of **Isaac Gathungu Wanjohi & Another vs Attorney General & 6 Others [2012] eKLR** Majanja J stated thus:-

“Article 40 must be read as a whole so that protection afforded by Article 40 which protect the right to property must be read to exclude property found to be unlawfully acquired under Article 40 (6). This requirement is in exclusion of the fact that the constitution protects higher values which are to be found in the preamble of the constitution and Article 10. Values such as human rights and social justice cannot countenance a situation where the court is used to rubber stamp what is in effect unlawful.”

The petitioners herein were not able to challenge the 1st respondent’s averments that the suit property had been acquired by the Government of Kenya way back in 1975. If this were the case then the City Council of Nairobi had no mandate to alienate the said land to private individuals.

35. In the case of **Cycad Properties Ltd vs The Attorney General & Others H. C. Petition No 70 of 2010 consolidated with Elizabeth Wambui Githinji & Others vs the Kenya Urban Roads Authority & 3 Others NO. 69 of 2010** Hon. Lady Justice Mumbi Ngugi in her decision held that *third parties could not challenge a compulsory acquisition that was carried out by the government in 1971 whereby the original owners had been compensated and inter alia the Honourable Judge held that the third parties had no privity of contract as they were not a party to the acquisition. Additionally, the Honourable Judge held that public lands acquired through compulsory acquisition would fall among the overriding interests stipulated under section 30 of the Registered Land Act (now repealed) that need not be noted on the Register and would operate to qualify the indefeasibility of a registered proprietor’s title acquired under the Act.”*

I am guided by the above authority.

36. I find that the suit property was not available for allocation to the petitioners as the same had been lawfully acquired by the government of Kenya.

37. The onus was on the petitioners to establish which of their rights have been violated. In the case of **Anarita Karimi Njeru vs The Republic [1976-80] I KLR 1272** it was held that:-

“This court is at a loss in so far as any declaration of infringement of the petitioners’ right can be made. The claimant provides little or no particulars as to the allegations and the manner of the alleged infringements.....”

I find that the petitioners herein have failed to demonstrate what violation they have suffered specifically and precisely.

38. In the case of **Chemei Investments Limited vs The Attorney General & Others Nairobi Petition 94 of 2005** it was held:-

“The constitution protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of Milan Kumar Shah & 20 Others vs City Council of Nairobi & Another (Supra) where the court stated as follows; ‘we hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest”.

I find that the petitioners herein have failed to prove that their title was acquired legally. They have failed to prove proprietary interest hence this petition must fail.

39. In conclusion I find that the petitioners are not entitled to the reliefs sought. The petition herein is not merited and the same is dismissed with costs to the 1st and 2nd respondents.

It is so ordered.

Dated, signed and delivered in Nairobi on this 28TH day of MAY 2020.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Ombwayo for the Petitioners

No appearance for the Respondents

Kajuju-Court Assistant