



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC PETITION NO. 9 OF 2019

JANE NAMALWA WAKHUNGU.....PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

JUDGMENT

1. In the petition dated **16/10/2019** which was filed on the same date the petitioner herein seeks the following orders against the respondent:-

(a) A declaration be made and be issued that the petitioner is entitled to protection under the Constitution.

(b) A declaration that the actions or omissions of the respondent herein, including the unilateral decision to revoke the petitioner title constitutes and/or amounts to unfair administrative action and a threat to the petitioner's right to property.

(c) An order of judicial review in the nature of certiorari bring to court and quash the Gazette Notice Vol. CXXI NO. 27 of 1/3/2019 to the extent that it purports to revoke the registration of the petitioner herein as the owner of the land parcel WAITALUK/KAPKOI BLOCK 10/KAPKOI SISAL/404.

(d) Costs of the petition be borne by the respondent.

The Petitioner's Case

2. According to the petition the petitioner is the registered owner of plot number **WAITALUK/KAPKOI BLOCK 10/KAPKOI SISAL/404**. She had peaceful possession thereof till **11/9/2017** when the respondent wrote to the County Land Registrar Trans Nzoia requesting for restrictions to be registered against her title among other titles, claiming that they are subdivisions of government land reserved for a cattle dip. The letter was copied to the petitioner who responded that she had purchased the property without any notice of defect in title. The respondent then requested the petitioner for documents to support her answer through its letter of **19/9/2017** and she availed them vide her letter of **28/9/2017**. Thereafter the respondent communicated to the petitioner the fact of a claim by AIC Sisal Secondary School over the land. The petitioner later learnt through the respondent's letter dated **18/9/2018** that the respondent later sat in Kisumu and determined, in the absence of the petitioner, that the land had been illegally transferred to her which decision has never been availed to the petitioner. She then filed **Kitale Land Case Number 90 of 2018**. In that suit the respondent failed to file a defence after filing an appearance while AIC Kapkoi Secondary School applied to be made co-defendants. However in their bundle of documents the school omitted their complaint lodged with the respondent. They included in their bundle **Gazette Notice Vol CXXI No 27 of 1st March 2019** that stated that the claim by the school was allowed and **Plot No 35**, from which the petitioner's land came, should revert to the school and the titles to the resultant subdivisions be cancelled by the Chief Land Registrar.

3. Reading malice in the manner the matter had been handled, the petitioner avers that **articles 40,47 and 50** of the **Constitution** and provisions of the **Fair Administrative Action Act** had been contravened in the following manner:

(a) Articles 40 and 47 had been contravened as the respondent had entertained a dispute it had already predetermined; further, the said provisions had been contravened by the act of the respondent of making a declaration without hearing the petitioner;

(b) Failing to furnish the petitioner with the reasons for their decision;

(c) Contravening article 68(3) of the constitution as read with section 14 of the NLC Act by failing to adhere to the principles of natural justice in its functions and in being a judge in their own cause;

(d) Ousting the jurisdiction of this court in contravention of **article 165 (5) (b) of the Constitution.**

(e) Having failed to follow the provisions of the law and constitution set out above, the respondent still recommended cancellation of the petitioner's title thus threatening her right to property.

4. On the basis of the foregoing the petitioner sought the prayers in the petition as set out herein before.

5. The petition herein was filed on **16/10/2019**. On **2/12/2019** when the matter came up before court for a mention for directions Mr Karani appeared, holding brief for Mr Wanyama and the court, seeing no affidavit of service on the record ordered that one be filed and set the matter for a mention on **30/1/2020**.

6. On the latter date an affidavit of service was filed sworn by one *Jackson Nyongesa Simiyu* stating that the petition had been served on the respondent on **16/10/2019**. The court then ordered the parties to file written submissions.

7. As at the date of the preparation of this judgment the respondent had not filed any appearance or papers in response to the petition. The petition is therefore not opposed by the respondent.

8. I have considered the petition and the supporting affidavit and its annexures. They include a copy of the plaint in **Kitale ELC 90 of 2018**. The matters set out in this petition appear to have been set out in the plaint in that earlier case.

9. The prayers sought in the plaint are for a *declaration* that the plaintiff therein is the sole rightful and legal owner of the suit land herein to the exclusion of the defendant therein, who is the respondent herein and any other person and a permanent injunction restraining the defendant in that suit from interfering with the plaintiff's use and possession of the suit land and costs of the suit

10. The petitioner filed her written submissions in this petition on **10/3/2020**. I have also considered those submissions.

11. The issue for determination in the instant petition are as follows:

(a) *Whether the jurisdiction of this court has been properly invoked in this petition.*

(b) *Whether the petitioner has established that the acts or omissions of the respondent in dealing with the dispute over the suit land, including the decision to recommend the revocation of the title thereto, amounts to unfair administrative action and a threat to the petitioner's right to own property;*

(c) *Whether an order of certiorari should issue to quash gazette notice no VOL CXXI No 27 of 1st March 2019 to the extent that it purports to revoke the registration of the petitioner as proprietor of the suit land.*

(d) *Who should pay the cost of this petition?*

The issues are addressed as hereunder.

a. Whether the jurisdiction of this court has been properly invoked in this petition.

12. The petitioner's revelation that another suit is pending is a remarkable act of candour. However, one main question that emanates from the existence of that suit must be determined before any other, and that is whether this court should hear and determine this petition while **Kitale ELC Land Case No 90 of 2019**, is still pending and therefore whether this petition is premature.

13. The connection between the two cases herein is that they involve the same parties and the same subject matter and the same decision of the 1st respondent.

14. It is noted that the respondent herein has filed a memorandum of appearance in the earlier case. The defence of the school in the earlier matter is a detailed document alleging illegality *on the part of the plaintiff* in her acquisition of the suit land. It is contended therein that the land remains a public utility, and that was not available for allocation to any person for private purposes. The 2nd and 3rd defendants in the suit also have a counterclaim against the plaintiff for a declaration that the land parcel was acquired irregularly and unlawfully and that the titles be cancelled and an eviction order issue against the plaintiff as well as an injunction.

15. That suit was filed by the plaintiff in the month of September before this petition was filed in the month of October the same year. It is clear that in **Kitale ELC Land Case No 90 of 2019** the legality of titles that resulted from the subdivision of parcel number **WAITALUK/KAPKOI BLOCK 10/KAPKOI SISAL/35**, and which include the suit land, is disputed.

16. The petitioner at first appreciated that there was a dispute over the validity of title before filing this constitutional petition and filed a suit. That suit was filed in the normal manner in which suits in respect of disputes over title are required to be filed, that is, by way of plaint. This means that evidence will have to be availed by each party in that suit and whichever party will show that they have a good claim will be awarded the land. The evidence of the parties will be tested by way of cross-examination and proof of documents as required by the **Evidence Act**.

17. It must be recalled that constitutional petitions are not dealt with in the same manner as suits commenced by way of plaint as the

claimants and the respondents in petitions usually depend on affidavit evidence.

18. Therefore, perchance the court proceeds to pronounce itself on the matters raised by the plaintiff in this case it runs the risk of first, determining by implication that the plaintiff's title is clean and secondly, foreclosing the proof of validity of the title by the recognized means of a legal trial in a properly filed suit involving all the claimants to the land. In using the term "*claimants to the land*" this court is aware that the school and the Attorney General have already swung into action to establish their claim to the land by means of documents in **Kitale ELC Land Case No 90 of 2019**. It is also aware that the respondent has no substantive interest in the suit land and is only mandated under the constitution to manage public land on behalf of the national and county governments.

19. For this court to pronounce an order of *certiorari* as sought by the petitioner, it would be implicitly shutting its eyes to the existence of the earlier suit and counterclaim, and the probability that any of the parties may end up proving their claim or counterclaim against the other in those proceedings.

20. This petition can not be the means by which the validity of title to the suit land can be proved. This court must confine itself to proof of violation of constitutional rights in this petition and only issue related orders and no more.

21. The decision in the case of **Sanghani Investments Ltd -vs- Office in Charge Nairobi Remand & Allocation Prison [2007] 1 EA 35** the ex-parte applicant sought *certiorari*, prohibition and certain declarations. Declarations were found to be untenable in judicial review by the court with the observation that a declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the court to determine the case on the merits before declaring who the owner of the land is.

22. In the same case, the court addressed the difference between the ordinary claims regarding ownership occupation and dealings with land from judicial review proceedings stating that:

"Judicial review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be need for *viva voce* evidence to be adduced on how the land was acquired and came to be registered in the name of the applicant; whether the title is genuine or not. In the case of Rep -vs- Ex Parte Karia Miscellaneous 534 of 2003 Justice Nyamu, Justice Ibrahim and Justice Makhandia held that in cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land, namely occupation, and disposition, there would be need to allow *viva voce* evidence and cross-examination of witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents they would be copies that would not be sufficient to establish the authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced."

23. Certain declarations and a judicial review order of *certiorari* are sought in the instant case. Judicial review proceedings bear a similarity to petitions in that affidavit evidence and not oral evidence is relied on in both.

24. In a recent case, **Isaac Kipleting Kibitok Alias Isaak Kipleting Kibitok vs The Secretary Board Of Governors, Cherangany Primary School, The Principal Secretary Ministry Of Education and The Hon. Attorney General- Kitale ELC Petition No. 4 OF 2018**, this court, not impressed by a claim of a petitioner over land that had been used as a school for decades had this to say:

"The main question that remains is that; if the petitioner's root of title to the suit land is yet to be conclusively adjudicated, on what basis can his claim of violation of rights be determined? In the absence of such a determination how would this court ensure the safeguards against recognition of title to land which has been obtained illegally or fraudulently? This court has in the past declined to recognize such title in numerous cases: Dyno Holdings Ltd -vs- National Land Commission & Another [2018] eKLR; Chemey Investment Ltd -vs- A.G. & 2 Others [2018] eKLR; Niaz Mohamed Jan Mohammed -vs- Commissioner of Lands & 4 Others [1996] eKLR and Funzi Island Development Ltd & 2 Others -vs- County Council of Kwale & Others. Citing some of the above cases, the Court in the Dyno case (*supra*) said as follows:

"The effect of those decisions is that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense..."

No matter from what angle one looks at it, the petitioner's claim remains an ordinary private law claim deceptively cosmeticized with a spattering of constitutional provisions and public law litigation phrases."

25. The instant petition only differs from that cited case in that it appears that the petitioner has been a bit more careful and precise in the definition of the dispute; the only regrettable thing that can be said about this petition in the light of the existence of the suit **Kitale ELC Land Case No 90 of 2019** is that does not raise any constitutional issues, it is premature and unfit for determination at the present as the subject title is still under dispute.

CONCLUSION

26. Owing to the foregoing it is not necessary for this court to delve into an investigation of whether the remaining issues for determination listed above have merit. I find that this petition has no merit and I hereby strike it out with no orders as to costs.

Dated, Signed and Delivered via electronic mail at Nairobi on this 21st day of May, 2020.

MWANGI NJOROGE

JUDGE, ELC, KITALE.