



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 514 OF 2014

BETWEEN

JEMIMAH NYAMBURA NJUGUNA PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS1ST RESPONDENT

INSPECTOR GENERAL OF POLICE2ND RESPONDENT

MINISTRY OF LANDS AND SETTLEMENT3RD RESPONDENT

NATIONAL LAND COMMISSION4TH RESPONDENT

AND

JOSEPH MWANIKI KIARAHO1ST INTERESTED PARTY

PAULINE NJERI KAMAU2ND INTERESTED PARTY

JUDGMENT

Introduction

1. The petitioner, Jemimah Nyambura Njuguna, has filed the present petition against the respondents alleging violation of her constitutional rights under Article 27 and 40 of the Constitution. The alleged violations arose as a result of various transactions in relation to the property known as Land Reference No. 3734/457 (hereafter “the property”), and the alleged alteration of certain transactions in relation to the title to the property. It is her contention that the mandatory procedural and substantive due process of the law required in cancelling her interest in the property was not complied with, and she seeks various remedies in consequence of the alleged breach of her rights.
2. Pursuant to an application dated 25th February 2015, Mr Joseph Mwaniki Kiaraho and Ms Pauline Njeri Kamau who described themselves as co-directors with the petitioner of a company known as

Chalbi Gardens Ltd, were permitted to participate in the proceedings as interested parties.

The Petitioner's Case

3. The petitioner's case is contained in her petition dated 30th September, 2014 and the affidavit in support, her further affidavit sworn on 22nd January, 2015 and written submissions dated 14th July, 2015. It was presented by her Counsel, Mr. Masafu.
4. According to the petitioner, she and her husband, David Ng'ang'a, now deceased, entered into an agreement for sale dated 2nd September, 2004 for the purchase of the property known as Land Reference No. 3734/457 from Dickinson Abner Wanyama Musinde and Peter Cleophas Musinde. The sale was completed and the property was eventually formally transferred to and registered in their names on 15th October, 2008.
5. She avers that one morning on or about 6th January, 2009 she was arrested and taken to court on the 7th of January, 2009 where she was charged at Chief Magistrate's Court, Kibera Law Courts in Criminal Case No. 69 of 2009, with two counts namely, making a document without authority contrary to section 357 (a) of the Penal Code and uttering a false document contrary to section 357 of the Penal Code. She states that during the pendency of the case, the Inspector General of Police, by a notice dated 13th January, 2009, demanded that she delivers the original certificate of title to him for the purpose of investigations and evidence in the said case. She delivered the title to the then Ministry of Lands and Settlement on 16th January, 2009.
6. According to the petitioner, the criminal case against her dragged on for about ten months. On 30th October, 2009, the prosecution being unable to proceed with the case, the Chief Magistrate's Court on its own motion ordered the termination of the case under section 87A of the Penal Code which termination resulted in her discharge. She alleges that she thereafter sought to take back her certificate of title to the property but the Inspector General of Police was unwilling to release the said document. She also alleges that she wrote a letter dated 9th March, 2010 seeking the intervention of the then Commissioner of Police but she got no response.
7. The petitioner further avers that by her letter dated 28th January, 2013, she sought the assistance of the then Director of Criminal Investigations who in turn directed his subordinate, the then Provincial Criminal Investigations officer in charge of Nairobi Area Province to intervene and resolve the matter. She claims, however, that she was then summoned to the office of the said Provincial Criminal Investigation officer sometime in the month of May, 2013 but instead of being assisted, was subjected to threats, intimidation and insults.
8. The petitioner further avers that a few days after her meeting with the then Provincial Criminal Investigation officer, her residence was raided on the 24th May, 2013 by unknown persons and the guest wing at the residence was completely demolished. She also alleges damage to her motor vehicles and other things.
9. The petitioner alleges that on 16th January, 2009, when she handed over the original certificate of title to the property to the investigating officer, there were a total of 34 entries, the last of which was the one registering her and her late husband as the owners of the property. She contended that she was surprised when the interested parties filed their application to be joined to the proceedings to find that there were 40 entries against the title. She also contended that she was also surprised to find that there had been a cancellation of her proprietorship which had been effected on 30th December 2008.
10. She therefore asked the Court to interrogate the interested parties' allegation that they were part of the company to which the land was to be transferred and that they contributed to the purchase of the property.

11. According to the petitioner, the purchase of the property had been completed on 31st May 2005 yet the company was incorporated on 29th January 2007, way after the purchase price had been paid.
12. It was her contention that she was a complete stranger to the six entries on the original certificate of title to the property, and was gravely apprehensive that the respondents intend to not only arbitrarily dispossess her, but also to arbitrarily deprive her of her lawfully acquired property which would result in violation of her fundamental rights and freedoms protected under Article 40 of the Constitution.
13. The petitioner further contended that the respondents' conduct over the last four years arbitrarily limited and restricted her in the enjoyment and benefit of the title over the property. She also alleged that they were discriminating against her on account of her being a woman and a widow. She asks the Court to allow the petition and grant the following orders:
- a. A declaration that your petitioner's right under Articles 27 and 40 of the Constitution have been breached by the respondents.*
 - b. An award of damages for the breach of the petitioner's rights under Articles 27 and 40 of the Constitution.*
 - c. A mandatory injunction compelling the respondents to restore to your petitioner the original certificate of title and to reverse any or all other entries therein entered after the 34th entry which was/is the registration of your petitioner and her late husband as the joint owners of Land Reference Number 3734/457.*
 - d. A permanent injunction restraining the respondents and any or all persons acting under or for the respondents from interfering in any manner with your petitioner's title to, quiet and peaceful possession of land Reference Number 3734/457.*
 - e. Any other or further orders as may seem meet to the Honourable Court.*

f. Cost.

The 1st and 2nd Respondents' Case

14. In response to the petition, the 1st and 2nd respondents filed an affidavit sworn on their behalf by Sergeant (Sgt) Gilbert Kitalia, a police officer attached to the Directorate of Criminal Investigations Headquarters, Serious Crimes Unit, on 21st January, 2015 and written submissions dated 28th September, 2015. Learned State Counsel, Mr. Ndege, presented their case.
15. According to Sgt Kitalia, in January, 2009, when he was based at the then Criminal Investigations Department Headquarters, Nairobi Area, he was the investigating officer in a case of forgery or transfer of land documents which had been reported by a Mr. Mwaniki on behalf of Mr. Kimani Kairu, Advocate.
16. The complaint by Mr. Mwaniki was that he, the petitioner and another person had bought the property and shared it proportionately according to their contributions. They had then instructed their lawyer, Mr. Kimani Kairu of the firm of M/s Kimani Kairu and Co. Advocates, to subdivide the property among them. They had then handed over to him all the necessary documents.
17. Sgt Kitalia deposes that on one occasion, the petitioner went to the Advocates office and requested for a copy of the certificate of title. As there was a power failure in the building, the Advocate trusted the petitioner as she was one of his clients and a beneficiary of the subdivision of the property, and he gave her the title to go and make copies and return the original. She did not return

the original certificate, and the Advocate later received information that the petitioner had transferred the land to herself and defrauded the other two beneficiaries. The Advocate advised Mr. Mwaniki to report the matter to the police.

18. Upon investigation of the matter, it was established that there was substantial evidence to charge the petitioner, and the certificate of title was recovered from her to be used in evidence. She was also arrested and charged before the Kibera Chief Magistrate's Court with the offence of forgery.
19. Sgt. Kitalia deposes that subsequently, the petitioner approached the complainant, Mr. Mwaniki, who it transpired was her son-in-law, to consider settling the case out of court. As a result, the complainant lost interest in the case, and this resulted in its withdrawal pursuant to section 87 (a) of the Criminal Procedure Code. The certificate of title to the property was also released to the advocate, Mr. Kimani Kairu, and the property was subsequently subdivided amongst the three parties, including the petitioner. According to Sgt. Kitalia, the title to the property was in the custody of the Advocate.
20. The respondents therefore denied that there was any harassment of the petitioner as alleged, nor was there any likelihood that the respondents would restart the criminal case which had been withdrawn. In their view, the petitioner had sued the wrong parties given that she is aware of the whereabouts of the title, and they termed the present petition frivolous and an abuse of the court process.

The 3rd Respondent's Case

21. The Office of the Attorney General also opposed the petition. Learned State Counsel, Mr. Kamunya, who presented the case for the AG, indicated that he had filed grounds of opposition dated 1st December 2015, but there were none on the Court record.
22. In his submissions, Mr. Kamunya argued that there was no cause of action disclosed against the 3rd respondent. He associated himself with the submissions made on behalf of the Office of the DPP, and he urged the Court to dismiss the petition with costs.

The Case of the Interested Parties

23. The interested parties filed an affidavit in opposition to the petition sworn by the 1st interested party, Mr. Joseph Mwaniki Kiaraho. According to Mr. Kiaraho, the petitioner and her late husband sought to purchase the property at an agreed purchase price of Kshs.12, 000, 000/=. The transaction was to be handled by the firm of Kimani Kairu & Co. Advocates. They entered into a sale agreement with the sellers and paid 10% deposit, but they were thereafter unable to pay the balance of the purchase price within the completion period and risked rescission of the agreement and forfeiture of the deposit. They therefore invited their daughter and her husband to purchase the property with them. They had the property subdivided into eight sub plots with the intention of creating eight sub-leases and hence ease transfer to the persons. Upon the assurance of getting long term leases registered against the mother title and a share in Chalbi Gardens Limited, all the persons interested in the eight subdivisions paid for their respective plots and acquired the corresponding number of shares in the management company. All that remained was for the mother title to be transferred to Chalbi Gardens Limited to enable the creation of long term leases for all the parties.
24. Mr. Kiaraho also made averments with regard to the circumstances under which the petitioner had obtained the certificate of title from the Advocate's office. He deposed further that Mr. Kimani Kairu had in November 2008 written a formal complaint to the Principal Registrar of Titles upon learning that the petitioner had fraudulently transferred the title jointly to herself and her husband. It is also his deposition that the Registrar of Titles had, after conducting a hearing, cancelled the fraudulent entry. The police had also instituted criminal proceedings against the petitioner.
25. Following the withdrawal of the criminal case, the title deed to the property had been surrendered

to the Advocates in terms of the parties' discussions and agreement and a transfer was done to Chalbi Gardens Limited on 29th March, 2010. Thereafter, respective leases for the parties involved were registered against the title. The petitioner had, however, refused to execute the leases for her sub-plots and they remain unregistered.

26. It was the interested parties' case therefore that the petitioner has not been deprived of her property in any way and that she has deliberately lied and misinformed the Court. They joined the respondents in praying for dismissal of the petition.

Determination

27. I have read and considered the pleadings of the parties, and heard their respective Counsel in the oral highlights of the respective cases. The petitioner's case is premised on the alleged violation of her rights under Articles 27 and 40 of the Constitution. She alleges that her right to non-discrimination has been violated on the grounds of her being a woman and a widow. She also alleges that her right to property in Land Reference No. 3734/457, guaranteed under Article 40, has been violated.

28. It is useful to consider first the facts that emerge from the pleadings of the parties before examining the question whether there has been a violation of the petitioner's rights as alleged. The pleadings show that the petitioner and her husband, now deceased, entered into a sale agreement for the purchase of Land Reference No. 3734/457. It has been deposed by the respondents and the interested parties, and not disputed by the petitioner, that the petitioner and her husband were unable to raise the funds necessary for the purchase of the land, so they invited others, including the interested parties, to purchase the property with them. The property was intended to be, and was subdivided into several parcels.

29. However, the petitioner took the original title to the property from the firm of Kimani Kairu & Co. Advocates which had custody thereof as the law firm dealing with the sale transaction and had it fraudulently transferred to herself and her (deceased) husband. She was charged with the offence of forgery, but the criminal case was withdrawn following agreement between her and the complainants, the interested parties in this matter.

30. As the Court record indicates, these matters were brought to the attention of the Court on 9th December 2014 by Sergeant Kitalia, who later swore an affidavit that was filed in Court, and whose contents were not controverted by the petitioner.

31. The petitioner has alleged that she does not know anything about the entries to her title, or the transfer of the properties sub-divided out of Land Reference No. 3734/457. She also denies any relationship with the interested parties.

32. The law is clear that a party alleging violation of a constitutional right must plead it, not with mathematical precision, but with a reasonable degree of precision - see **Anarita Karimi Njeru vs The Attorney General [1979] KLR 154** and **Trusted Society of Human Rights and Others vs Mumo Matemu & Others [2012] eKLR**. While the petitioner alleges discrimination against her on the basis that she is a woman and a widow, she has not shown how such discrimination arises, or how it was perpetrated by the respondents.

33. What is before the Court is evidence that she somehow fraudulently obtained a title to property in which she, with others, had an interest; that she had the property transferred jointly to herself and her husband, who was deceased at the time the transfer was effected; that a complaint was made with respect to her actions and she was charged with a criminal offence; but that upon agreement with her son-in-law, the complaint was abandoned and the criminal case withdrawn. There is nothing in that evidence that demonstrates discrimination on any basis.

34. The petitioner has alleged violation of her right to property. As I understand it, however, it is not

her case that the state has compulsorily acquired her property. Rather, her dispute is with private persons, such as the interested parties, who also claim a right to the property on the basis that they too contributed to its purchase. Indeed, the petitioner acknowledges that there are other persons in occupation of the land. That being the case, is there a constitutional issue regarding a violation of the petitioner's right to property for this Court to determine? From what has been placed before me, it appears that the petitioner has a dispute with others over the title and ownership of the property in question. Whether the interested parties are her relatives or not, the matter at issue between them relates to their claiming to have an interest in the subject property. That, in my view, is not a matter within the jurisdiction of this Court.

35. As the dispute revolves around the ownership and title to Land Reference No. 3734/457, it falls for determination before the Environment and Land Court which is vested with jurisdiction to determine questions relating to title to land. Article 165(3) of the Constitution vests original jurisdiction in criminal and civil cases in the High Court, as well as on the question whether there has been a violation or infringement of the Bill of Rights. However, Article 165(5) removes from the jurisdiction of the High Court matters which relate to the environment and land:

The High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162 (2).

36. Article 162 (2) then provides for the establishment of courts with the status of the High Court to deal with disputes relating to employment and labour relations and with the environment and the use and occupation of, and title to, land. Such a court was established in respect of land matters under the provisions of the Environment and Land Court Act, Chapter 12A, Laws of Kenya, 2012. The jurisdiction of the Court is provided for under section 13 of the Act as follows:

1. ***The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.***

2. ***In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—***

a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b. relating to compulsory acquisition of land;

c. relating to land administration and management;

d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e. any other dispute relating to environment and land. (Emphasis added)

37. In my view therefore, not having found anything to demonstrate that there has been a violation of the petitioner's rights under the Constitution, the material before me suggesting only a dispute over the title and ownership of the land between the petitioner and the interested parties, it is my finding that this matter is improperly before me. This Court does not have the jurisdiction to examine the circumstances leading to the entries impugned by the petitioner contained at entry no. 34 to 40 of the title to the property. Such matters fall for determination before the Environment and Land Court which, in addition to having the jurisdiction to determine matters of title, also has jurisdiction to determine whether, in the process of making the entries, there were indeed violations of the petitioner's rights.

38. I am guided in this view by the decision of the Court of Appeal in **Daniel N. Mugendi vs**

Kenyatta University and 3 Others, Civil Appeal No. 6 of 2012. While the case dealt with matters relating to labour and employment, the reasoning of the court as stated by the Court of Appeal, applies, to disputes relating to land which, like labour and employment disputes, are provided for under Article 162 of the Constitution. In that case, the Court of Appeal noted the position taken by Majanja J in *United States International University (USIU) vs Attorney General* (2012) eKLR in which he had stated as follows:

“[41] Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in section 12 of the Industrial Court Act, 2011 or to interpret the Constitution would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law. Litigants and ingenious lawyers would contrive causes of action designed to remove them from the scope of the Industrial Court. Such a situation would lead to diminishing the status of the Industrial Court and recurrence of the situation obtaining before the establishment of the current Industrial Court.

[43] The intention to provide for a specialist court is further underpinned by the provisions of Article 165(6) which specifically prohibits the High Court from exercising supervisory jurisdiction over superior courts. To accept a position where the Industrial Court lacks jurisdiction to deal with constitutional matters arising within matters (within) its competence would undermine the status of the court. Reference of a constitutional matter to the High Court for determination or permitting the filing of constitutional matters incidental to labour relations matters would lead to the High Court supervising a superior court. Ordinarily where the High Court exercises jurisdiction to interpret the Constitution or enforce fundamental rights, its decisions even where declaratory in nature will require the court to follow or observe the direction. This would mean that the High Court would be supervising the Industrial Court which is prohibited by Article 165(6).”

39. The Court of Appeal then went on to observe as follows:

“Believing as we do that the approach taken by Majanja J is the correct one, and in endeavouring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellant’s petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relations matters. It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to Article 165(5) (b). And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim. However, parties should not file “mixed grill” causes in any court they fancy. This will only delay dispensation of justice.

In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects.”
(Emphasis added)

40. I have, however, considered the option of transferring this matter to the Land and Environment

Court as proposed in the **Daniel Mugenda** case by the Court of Appeal. I note that in the circumstances of this case, the petitioner had not lodged its petition against the interested parties, and that they were joined to the proceedings on their own application. Despite the fact that she has not placed before the Court any evidence of violation by the state or its organs, and her grievance is really against the private individuals whose interests are noted against the title to the property at issue, her claim in this petition is entirely against such state entities.

41. In the circumstances, it would be of limited benefit to transfer the matter as it is to the Environment and Land Court. In my view, the best course of action is to strike out the petition with leave to the petitioner to file appropriate proceedings, should she wish to, before the Environment and Land Court.

42. In the circumstances, the petition is hereby struck out as one devoid of merit.

43. The petitioner is however, at liberty to file a suit before the Environment and Land Court. Each party shall bear its own costs of the petition.

Dated, Delivered and Signed at Nairobi this 5th day of April 2016

MUMBI NGUGI

JUDGE

Mr. Masafu instructed by the firm of Mutembei Chabari & Company Advocates for the petitioner.

Ms. Kuria instructed by the firm of Ndung'u Karanja & Co. Advocates for the 1st and 2nd interested party.

Mr. Kamunya instructed by the State Law Office for the 3rd respondent.

Mr. Ndege instructed by the Director of Public Prosecution for the 1st and 2nd respondent.