



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

JR.ELC NO.72 OF 2010

BETWEEN

PETER NJOROGI MUIRURI & 9 OTHERSAPPLICANTS

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

SAMUEL OJOWA ACHIENG.....1ST INTERESTED PARTY

NATIONAL LAND COMMISSION.....2ND INTERESTED PARTY

RULING

Introduction

1. The Originating Motion dated 7th September 2010 herein was filed by the 10 Applicants who all claim to be residents of Mabatini Village of Mathare area within Nairobi County. Their claim is that they have been lawful occupants of L. R. No.219/110 which was allegedly unlawfully alienated by the 2nd Respondent to individuals including the Interested Party, Samuel Ojowa Ochieng.

2. The specific prayers sought are the following:

“1) That this matter be certified urgent and heard during the Court vacation.

2) That an Interim Injunction be issued restraining the Interested Party, his servants or agents from charging, leasing, alienating or disposing of, continuing with further development or otherwise dealing with all that piece of land allegedly known as Land parcel No.219/110 situated in Mathare Mabatini Village pending hearing and determination of this reference.

3) That an Interim Injunction be issued restraining the Interested Party his servants or agents from harassing, evicting or otherwise interfering with the applicants’ occupation and use of all that piece of land allegedly known as Land parcel No.210/110 situated in Mathare Mabatini village pending hearing and determination of this reference.

4) That this Honourable Court to issue a declaration that the alleged alienation and or

allocation by the 2nd Respondent of all that piece of land allegedly known as Land parcel No.219/110 or any part of the land on which the Mathare Mabatini village stands to the Interested Party or to any other party to develop warehouses or any other commercial development is in violation of the Applicants' constitutional right to adequate and accessible housing.

5) That this Honourable Court do issue a declaration that the alleged alienation and or allocation to an individual or individuals of land allegedly known as Land Parcel No. No.219/110 or any part of the land on which the Mathare Mabatini village stands is unlawful and is in violation of the Government policy of upgrading informal settlements and ensuring access to adequate and accessible housing to residents of informal settlements, including the Applicants.

6) That this Honourable Court do issue a declaration that the alleged alienation and or allocation to an individual or individuals of land allegedly known as Land Parcel No.219/110 or any part of the land on which the Mathare Mabatini village stands is unlawful and null and void.

7) That this Honourable Court do issue a declaration that the land allegedly known as Land parcel No.219/110 and all other land on which the said Mathare Mabatini Village is situated is community land as contemplated in Article 63 of the Constitution of Kenya 2010.

8) That this Honourable Court do issue a declaration that the land allegedly known as Land parcel No.219/110 and all other land on which the said Mathare Mabatini Village is situated being Government or City Council of Nairobi land on which the Applicants have been living for over forty years should be allocated to the Applicants and other residents on a communal basis based on their community or interests in priority to any other party.

9) That this Honourable Court do issue an order directing the 2nd Respondent to forthwith cancel the purported alienation or allocation to an individual or individuals of land allegedly known as Land parcel No.219/110 and all the other land on which the said Mathare Mabatini Village is situated and allocate the same to the residents on a communal basis.”

3. From the record, the Interested Party entered appearance on 15th September 2010, filed a Replying Affidavit on the same day and *inter-alia* denied all the claims against him by the Applicants save that he admitted being the registered proprietor of Plot No. C on L.R. No.219/110 measuring 0.0813 hectares or thereabouts. He thereafter, through his advocate, Ms. Betty Rashid, participated in the proceedings until 27th February 2013 when the Originating Motion was dismissed for want of prosecution as neither the Applicants nor their advocate appeared when the same was called for hearing.

4. The Applicants thereafter filed an application for reinstatement of the Motion which was allowed on 14th May 2014. The record of the Court for that day shows as follows:

“14/5/2014

LENAOLA, J

Irene – Court clerk

Miss Njogu for Petitioners

Mrs. Rashid for Interested Party

Mr. Opondo holding brief for Miss Makori for 1st Respondent

No appearance for 2nd Respondent

By Consent

The Application dated 27th February 2013 is allowed and the Petition as against the 1st and 2nd Respondents is reinstated for hearing. No orders as to costs.

Further Order

The Court shall visit the locus in quo on 18/7/2014 at 11.00 a.m. and the Deputy Registrar to make the necessary arrangements.”

5. On 17th December 2014, this Court commenced the hearing of the Motion by taking oral evidence of the Applicants’ witnesses at Mabatini Village. Ms. Rashid for the Interested Party was present and participated in the visit to the locus in quo but on 8th December 2014, pointed out to Court that **“there are no proceedings pending as against the I.P (Interested Party) in view of the orders issued on 14th May 2014”**

6. That Statement prompted the filing of an application, dated 17th December 2014, in which the Applicants sought reinstatement of the Interested Party to the proceedings.

7. I propose to spend very little time with the present Application. I say so because having read the record and heard Counsel for the Parties, it is obvious to me that no Party is to blame for the error in not reinstating the Petition as against the Interested Party on 14th May 2014. The error falls squarely on the part of this Court which error is regretted.

8. I say so because on that day, Ms. Rashid was present when the Petition was reinstated and it was my understanding that the Petition was reinstated as filed and there was absolutely no reason why the Interested Party should have been left out when in fact the substratum of the Petition would otherwise be altered or in fact would completely collapse if his name was or is removed from the proceedings. That is why Ms. Rashid participated in crafting the consent to reinstate the Petition and later participated in the hearing and visit to the *locus in quo*.

9. In the circumstances, I wholly agree with the submission by Counsel for the Applicant that following the decision in **Ruhangi and Anor vs KRA [2012] e KLR**, where an error on the face of the record was defined as including **“an omission which must also be glaring and self-evident”**, the error in the present case is obviously glaring and it requires no more than a reading of the record to see the error.

10. In the event, this matter has been pending for far too long and it is in the interests of justice that the Petition as against the Interested Party is hereby reinstated with effect from 14th May 2015 and all proceedings thereafter in which he and his Counsel participated in are hereby validated.

11. The Application dated 17th December 2014 is hereby determined in the above terms.

12. There shall be no orders as to costs.

13. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JULY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Miss Njogu for Applicants

Mrs. Rashid for Interested Party

Miss Makori for 1st Respondent

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE

Further Order

Hearing on 11/10/2016 and 12/10/2016 at 10.00 a.m.

ISAAC LENAOLA

JUDGE