



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

**PETITION NO.154 OF 2014**

**BETWEEN**

**IGAINYA LIMITED.....PETITIONER**

**AND**

**THE NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF NAIROBI.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioner, Igainya Limited, is a company incorporated under the Companies Act (Cap 486 Laws of Kenya) carrying on business in Nairobi City County. It is the alleged registered owner of all that parcel of land known as LR 209/14521 situate along Ring Road, Kileleshwa, within Nairobi City County (the property), having acquired it for value from Francis Karani Elijah and George Njoroge Ndiguthia through a sale agreement executed on 5<sup>th</sup> February 2002. It was thereafter issued with a certificate of title by the Registrar of Titles on 22<sup>nd</sup> February 2002 but the aforesaid certificate of title was revoked by the Senior Registrar of Titles vide Gazette Notice No.9230 dated 29<sup>th</sup> July 2011.

2. It has filed this Petition against the Respondents claiming that the revocation of its title was done in violation of its fundamental right to property as provided for under **Article 40** and fair administrative action under **Article 47** of the **Constitution**.

3. The Petitioner in its Petition therefore seeks the following orders;

- a. A declaration that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents acted illegally, unconstitutionally, unfairly and irregularly in arbitrarily depriving the Petitioner of property that had been acquired lawfully without notice.*

*b. A declaration that the Petitioner is entitled to general and compensatory damages for the losses suffered through the Respondents' violation of guarantee of title.*

*c. A determination of suitable monetary compensation to the Petitioner at current values of the suit property in return for the Petitioner surrendering the title to the Respondents.*

*d. In the alternative to prayer 3 above an order directing the Respondents to avail the Petitioner access to the suit property and to de-gazette the purported cancellation of the title thereof.*

*e. Costs of the suit.*

*f. Such other and/ or further remedy as this Honourable Court may deem fit and just to grant.*

### **The Petitioner's case**

4. The Petitioner's case is as contained in the Petition dated 1<sup>st</sup> April 2014, the affidavit in support thereof sworn on the same date by Engineer Isaac Wanjohi, the Petitioner's director, and its submissions dated 15<sup>th</sup> March 2015.

5. It submits that the objection raised by the 3<sup>rd</sup> Respondent that the suit is *res judicata* cannot stand in light of the provisions of **Article 22** of the **Constitution**. That this Petition cannot be barred by *res judicata* since in the previous suit being referred to, i.e. **HCCC No. 146 of 2002**, the Court did not consider the substantive merits of that suit and only the application for an injunction was dealt with by the said Court. It adds that the suit was in any event finally dismissed for want of prosecution and so *res judicata* cannot be invoked in the circumstances.

6. It is the Petitioner's other submission that its property was registered under the provisions of the now repealed **Registration of Titles Act (RTA) (Cap 281 Laws of Kenya)** which followed the Torrens System of land title. That under the Torrens System, a register of land holdings is maintained by the State to guarantee an indefeasible title to those registered as land owners. On that submission, it relies on the provisions of **Section 23(1)** of the **RTA** which provides that a certificate of title issued by a Registrar to a purchaser of land, upon a transfer, shall be taken as conclusive evidence that the person named in the register is the proprietor.

7. It is its further submission that the Respondents have, in their express promise to the Petitioner via the search, consents, transfer and issuance of the certificate of title, created a legitimate expectation that the Petitioner had acquired good title to the suit property and that the Respondents are estopped from alleging that the title to suit property is irregular.

8. The Petitioner also challenges Gazette Notice No 15580 which cancelled the title to the suit property on several fronts. First, it submits that the Registrar of Titles, in cancelling the titles, merely mentioned the public body concerned but did not state the public purpose for which the suit land was allegedly reserved for. On that submission, it relies on the decision in **Commissioner of Lands v Coastal Aquaculture Ltd (1997) KLR 264**. Secondly, it has submitted that the Registrar did not indicate when it came to the notice of the Government that the land was reserved for public purposes. Thirdly, that none of the Respondents had issued any prior notice to the Petitioner of the intention to cancel its title and neither was it given a hearing before cancellation. Fourthly, that the Registrar concealed the identity of the registered owners affected by the cancellation and lastly, the Respondents did not offer any compensation to the Petitioner as contemplated under **Article 40(3)** of the **Constitution** upon the land being forcefully acquired.

9. It is therefore the Petitioner's submission that the Registrar's decision to revoke its title over the suit property violates the **Constitution** and is also unlawful, void and unreasonable. On that submission, it relied on the cases of **Ocean View Plaza Ltd v Attorney General (2002) 2 KLR**, **Samuel Murimi Karanja and 2 Others v Republic Criminal Application No. 412 of 2003**.

10. It is its further case that as the registered owner of the property, it has a right to peaceful enjoyment of the same and that its right to property is being violated by the actions complained of outside the parameters of the **Constitution**.

11. The Petitioner submits in addition that the Respondents have not tendered any evidence of fraud against the Petitioner and yet they have a duty to establish that fraud had been committed prior to cancellation of title. On that submission, it relied on the case of *Nairobi Permanent Markets Society and Others v Salima Enterprises and Others Civil Appeal No. 187 of 1997* where it was stated that title to land was not subject to challenge except on grounds of fraud or misrepresentation to which the purchaser was a party to. In any event, it is the Petitioner's case that the Registrar of Titles had no power to revoke or cancel its title and that the only power available to the Registrar is that of rectification of title and the Petitioner thus referred this Court to the cases of *Sound Equipment Ltd v Registrar of Titles and Commissioner of Lands Petition No. 106 of 2010* and *Kuria Greens Ltd v Registrar of Titles and Commissioner of Lands Petition No. 107 of 2010* where it was held that the Registrar of Titles does not have power to revoke title to land.

12. It is therefore the Petitioner's position over and above the declarations it has sought, that it is entitled to compensation of Kshs.180m which allegedly is the current value of the property and for the above reasons, it has urged this Court to grant it the orders sought and costs of the Petition.

### **The 1<sup>st</sup> Respondent's case**

13. The 1<sup>st</sup> Respondent, the National Land commission (NLC), in opposing the Petition filed a replying affidavit sworn on 29<sup>th</sup> April 2016, by Silas Mburugu, a Principal Land Administration Officer at NLC.

14. It is Mr. Mburugu averment that under the **Government Lands Act (Cap 280 Laws of Kenya)** (now repealed), the Commissioner of Lands had power to make grants or dispositions over unalienated government land in accordance with the established legal framework of the time. That prior to allocation of any such unalienated and unsurveyed Government land, the same had to be initially planned for allocation through preparation and subsequent approval of a part development plan (PDP). That in that context, the records available at the lands office reveal that the suit land was initially allocated by the Commissioner of Lands to Francis Karani Elijah and George Njoroge Ndigutha as "unsurveyed residential plot No. C" vide a letter of allotment Ref No. 35538/XIV dated 1<sup>st</sup> October 1998 and that the allocation was not based on any approved part development plan duly prepared by the Director of Physical Planning and approved by the Minister for Lands as was required under the **Physical Planning Act**.

15. It is Mr. Mburugu further averment that available records indicate that the area where the suit land is situate overlaps land planned for a 30meter expansion of the Ring Road - Kileleshwa Road vide development plan No. 269 referenced as 42.23.95.36. That the property in question also occupies roughly 21meters out of the 30meter road and claims that there has never been re-planning of the area changing use of the said land from road to a residential purpose. That the allocation of the suit parcel therefore raises serious questions touching on the legality of the now revoked title.

16. He further states that the said land has already been developed into a road by the Kenya Urban Roads Authority which has the statutory mandate of managing, developing, rehabilitating and maintaining all public roads in cities and municipalities in line with **Section 9** of the **Kenya Roads Act**.

17. Mr. Mburugu further depones that **Article 40(6)** of the **Constitution** does not extend to property found to have been acquired in an unlawful manner and claims that if the orders sought by the Petitioner are granted, they would occasion a grave injustice to the greater public interest. He has thus urged the Court to dismiss the Petition for want of merit.

### **The 2<sup>nd</sup> and 4<sup>th</sup> Respondents' case**

18. The 2<sup>nd</sup> Respondent, the Chief Land Registrar and the 4<sup>th</sup> Respondent, the Attorney General, responded to the Petition by the affidavit of Timothy Waiya Mwangi, Deputy Director of Planning, working in the Ministry of Land, Housing and Urban Development sworn on 13<sup>th</sup> March 2015. They also filed written submissions dated 24<sup>th</sup> June 2015.

19. Mr. Mwangi deponed that the suit property has at all times been a road reserve having been set aside and adopted as such by the Ministry of Lands vide base map sheet NE22D. That as a matter of law and procedure, once the road reserve was established and declared to be so, through a part development plan by the Physical Planning Department, the suit land ceased to be subject to any further alienation. He claims therefore that for that reason alone, allotment of the land to any person was unlawful and illegal. That the amendment or alteration of an assigned user of the suit land from a road reserve to residential property would only be valid with the authorization of the Director of Physical Planning, which authorization was never acquired in this case.

20. He further states that there is no material evidence that has been placed before this Court to show how the suit property was converted from public land to private land without invoking laid down processes. That the alleged acquisition and subsequent transfer of the suit property to the Petitioner is therefore irregular and **Article 40** of the **Constitution** does not protect illegally acquired title.

21. In their submissions, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents further submit that the sanctity of title does not extend to titles irregularly acquired and claim that this Court does not have jurisdiction to determine the Petition herein because there is a dispute as to whether the Petitioner holds a valid title or not. They submit in that regard that the Environment and Land Court is the Court established under **Article 162(2)** of the **Constitution** as read with **Section 13 of the Environment and Land Court (Cap 12A of the Laws of Kenya)** to determine title to land and it is their case that under **Article 165(5)** of the **Constitution**, this Court does not have jurisdiction to determine issues relating to title to land.

22. It is the 1<sup>st</sup> and 3<sup>rd</sup> Respondents' further cases that the Petitioner has failed to demonstrate how the suit land ceased being public land and how it was converted to private land and it is its claim that the title to the suit land was unlawfully acquired and that even if **Article 40** of the **Constitution** guarantees the right to acquire and own property, a bad title cannot be sanitized by the doctrine of legitimate expectation or estoppel as argued by the Petitioner. In that regard, he relied on the case of *Henry Muthee Kathurima v Commissioner of Lands and Another Nyeri Civil Appeal No. 8 of 2014*, where it was held that legitimate expectation cannot be used to protect property that has been unlawfully acquired and that the doctrine does not also oust clear statutory provisions of the **Government Lands Act** on how to alienate public land.

23. It is therefore the 2<sup>nd</sup> and 4<sup>th</sup> Respondents' submission that the Respondents have not violated the Petitioner's right to property as alleged and that the revocation of the title was informed by the need to construct a road and in any event the title was inexistent in law and fact and as such there cannot be a violation of **Article 40** as alleged.

24. They have thus urged this Court to dismiss the Petition for want of jurisdiction and merit.

### **The 3<sup>rd</sup> Respondent's case**

25. The 3<sup>rd</sup> Respondent, the County Government of Nairobi, in response to the Petition filed an affidavit sworn on 28<sup>th</sup> October 2014 by Karisa Iha, a lawyer employed in its Legal Department. It also filed written submissions dated 6<sup>th</sup> June 2015.

26. Mr. Iha states that the Petitioner has failed to disclose vital information to this Court in regard to the existence of previous proceedings in *HCCC No. 146 of 2002* in relation to the suit land and in its submissions, the 3<sup>rd</sup> Respondent further contends that the Petitioner has failed to demonstrate how the 3<sup>rd</sup> Respondent has violated its right to property as it merely claims that the construction of a road on the suit

property was undertaken by the **Kenya Urban Roads Authority**, an agency of the National Government. It is its position therefore that the 3<sup>rd</sup> Respondent has nothing to do with the construction or the acquisition of the land, if any, from the Petitioner.

27. Further, according to the 3<sup>rd</sup> Respondent, its mandate is to maintain roads once constructed and therefore no claim can lie against it at this stage. That therefore the Court ought to dismiss the Petitioner's claim against it as it is unmerited.

### **Determination**

28. It is clear that the Petitioner's claim over the suit land is based on a title it acquired on 22<sup>nd</sup> February 2002 and its case is that the Respondents have violated its right to property as guaranteed under **Article 40** of the **Constitution** by revoking its title vide Gazette Notice No. 9230 of 29<sup>th</sup> July 2011. Further, according to the Petitioner, it purchased the suit land as an innocent purchaser for value and any acquisition of it by the Respondents must be in line with **Article 40** of the **Constitution**.

29. In response, the Respondents contend that the suit land has at all material times been public land as it was set aside for a road reserve as per the Part Development Plan prepared by the Director of Physical Planning and approved by the Minister of Lands as is the requirement under the **Physical Planning Act**. It is therefore their submission that the suit land is public property and the title the Petitioner holds was acquired irregularly and illegally.

30. As can be seen therefore, the issue of ownership of the suit land is in contest and before this Court can determine whether the Petitioner's right to property has been violated, there must first be a determination on whether it has a valid title to the suit land. Having said so, it was the submission of the 2<sup>nd</sup> and 4<sup>th</sup> Respondents that this Court does not have jurisdiction to determine the issue of title to land as that is the exclusive jurisdiction of one of the Courts established under **Article 162(2)(b)** of the **Constitution**. This is therefore where I must begin.

31. This Court is established under the provisions of **Article 165** of the Constitution in the following terms;

***“165. (1) There is established the High Court, which***

***a. Shall consist of the number of judges prescribed by an Act of Parliament; and***

***b. Shall be organized and administered in the manner prescribed by an Act of Parliament***

***(2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.***

***(3) Subject to clause (5), the High Court shall have—***

***a. unlimited original jurisdiction in criminal and civil matters;***

***b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***

***c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;***

***d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—***

*i. the question whether any law is inconsistent with or in contravention of this Constitution;*

*(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution”*

*(iii) Any matter relating to constitutional powers of state organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and*

*iv. A question relating to conflict of laws under Article 191; and*

*e. any other jurisdiction, original or appellate, conferred on it by legislation.*

*(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief justice.*

*(5) The High Court shall not have jurisdiction of the matters*

*a. Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or*

*b. Falling within the jurisdiction of the courts contemplated in Article 162(2).*

The Courts contemplated under **Article 162** of the **Constitution** are the Employment and Labour Relations Court as well as the Environment and Land Court (ELC). Under **Article 162(3)**, Parliament is empowered to determine the jurisdiction of the two courts.

32. Pursuant to the above provision, Parliament enacted the **Environment and Land Court Act** as Act **No. 12 of 2012**. **Section 13** of the ELC Act reads as follows:

*‘13. (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;*

*c. relating to compulsory acquisition of land;*

*d. relating to land administration and management;*

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

*any other dispute relating to environment and land.*

*(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.*

*(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.*

**(5) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the court deems fit and just, including: -**

**a. Interim or permanent preservation orders including injunctions;**

**b. Prerogative orders**

**c. Award of damages**

**d. Compensation**

**e. Specific performance**

**f. Restitution**

**g. Declaration or**

**h. Costs”.**

33. The Constitution and Parliament in enacting **Section 13** of the **ELC Act** clothed the ELC with jurisdiction to deal with matters touching on land including disputes as to title and ownership of land. It is therefore clear to my mind that the High Court no longer has original and unlimited jurisdiction in all matters as it used to have under the **Repealed Constitution**. For instance, it cannot deal with matters set out under **Section 13** of the **ELC Act**. (See the case of *Karisa Chengo v Republic Criminal Appeal No. 44 OF 2014*.)

34. It is therefore my finding that this Court does not have jurisdiction to determine this Petition and I make that finding conscious of the fact that the Petitioner alleges a violation of his right to property as enshrined under **Article 40** of the **Constitution**. As can be seen from the provisions of **Section 13** of the **ELC Act** above, the ELC has jurisdiction to deal with matters touching on violation of the Bill of Rights when raised and touching on environment and title to land. On this issue, the Court of Appeal in the case of *Daniel N. Mugendi v Kenyatta University & 3 Others CACA No. 6/2012[2013] eKLR*, held as follows;

***“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 fundamentals rights associated with two subjects”.*** (emphasis mine)

35. I am in agreement and since this Court does not have the jurisdiction to determine the Petition in so far as it relates to validity of title held by the Petitioner over the suit land, all issues now raised can only be determined by the ELC as established under **Article 162(2)(b)** of the **Constitution** and **Section 13** of the **ELC Act**. Similarly, that Court will deal with other issues raised by the Petitioner and emanating from his claim on revocation of his title and in particular whether the Registrar, the 2<sup>nd</sup> Respondent had power to revoke the title of the suit land.

36. In making this decision, I know that the case of **Kuria Greens Ltd (supra)** has generally been followed by High Court Judges as authority to determine that revocation notices in the Kenya Gazette can be an infringement of **Article 40** rights. However, where title and its acquisition thereof are under challenge, it would be an affront to the jurisdiction of the ELC under the Constitution for this Court to purport to determine such an issue as the ELC can and has always properly done so within its mandate. That mandate includes interrogation of the question whether any aspect of the Bill of Rights has been violated (See - **Daniel Mugendi (supra)**).

37. Having so said, and having declined the jurisdiction to determine the dispute, should I strike out the

Petition or send it to the ELC for determination on the merits? To my mind, whereas the latter option is available, once the Respondents have validly raised the issue of jurisdiction which point has been upheld, the right thing to do is to strike out the Petition.

38. In the event, the Petition is hereby struck out. Since the matter remains unresolved, each Party shall bear its own costs.

39. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF OCTOBER, 2016**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Muriuki – Court clerk

Miss Lwandi holding brief for Mr. Githara for Petitioner

Miss Kamande for 3<sup>rd</sup> – 4<sup>th</sup> Respondents

**Order**

Judgment duly read.

**ISAAC LENAOLA**

**JUDGE**