



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.302 OF 2014

BETWEEN

VIJAYKUMAR SHAMJI PATEL..... PETITIONER

AND

PRINCIPAL SECRETARY TO THE NATIONAL TREASURY.....1ST RESPONDENT

THE CHIEF LAND REGISTRAR2ND RESPONDENT

NATIONAL LAND COMMISSION3RD RESPONDENT

THE DIRECTOR OF SURVEY.....4TH RESPONDENT

THE DIRECTOR OF HOUSING.....5TH RESPONDENT

THE ATTORNEY GENERAL.....6TH RESPONDENT

JUDGMENT

Factual Background

1. The Petitioner, Vijaykumar Shamji Patel, is the alleged registered proprietor of LR No. 27792 situate in Athi River, Mavoko Municipality measuring 6.87 hectares (the property).

The factual background

2. The Petitioner in his Petition dated 2nd July 2014, alleges that he was allocated the property on 21st May 2007 when it was still an unsurveyed residential plot marked 'G' under letter of allotment reference number 39711/XXIX/2. Attached to the letter of allotment was a part development plan dated 21st March 2007 illustrating that plot G was reserved for future housing programmes. The Petitioner accepted the offer in a letter dated 18th June 2007 addressed to the Commissioner of Lands. He also made a payment of Kshs.346, 400 as was required. On 9th November 2007, he made a further payment of Kshs.14,400.00. Subsequently, he was issued with a title deed I.R No.108160 on 16th November 2007.

3. The property was allocated to the Petitioner on condition that it was to be used for developing residential houses and upon acquisition, he commenced an aggressive plan towards developing the same.

With the help of several professionals in the building industry, he developed a housing plan to construct 398 maisonettes. Thereafter, he sought and acquired the requisite approvals from different government departments to enable him begin the construction. As at March 2014, 40 units had been completed and partial certificate of completion/occupation had been given by the Mavoko Municipality. Construction of other units is currently ongoing and to date, the Petitioner states that he has invested over Kshs.1,354,835, 691.25 in the development of the property.

4. On 26th March 2010, the Registrar of Titles published Gazette Notice No. 2932 dated 17th March 2010, seeking to revoke the Petitioner's title over the property and the Petitioner challenged the revocation vide letters dated 7th, 14th May 2010 and 7th June 2010. However, he did not receive any response. Thereafter, in a special Kenya Gazette Notice Number 3454 published on 1st April, 2010, the Registrar of Lands revoked the Petitioner's title on the grounds that the suit land was reserved for public purposes.

5. Allegations have now been made that alterations have been made on the survey plan and an issuance of a new Deed Plan made. An allotment letter has also been issued to the 1st Respondent, the Permanent Secretary, Treasury and transfer executed in his favour, hence this Petition.

The Petitioner's case

6. It is the Petitioner's submission that the suit property was not legally acquired by the 1st Respondent since he had already been allocated the same. That the suit property had all along been reserved for a housing project for the Ministry of Housing and that the Petitioner was the first allottee of the property.

7. It is his other case that the two revocation notices and the subsequent issuance of the letter of allotment to the 1st Respondent, the transfer of his land to the 1st Respondent, the alterations of the survey plan and issuance of a new Deed Plan were all done without any communication or notice him and therefore a violation of his rights under **Articles 47 and 50 of the Constitution.**

8. The Petitioner submits further that despite the fact that the two revocation notices emanated from the same office, they contradicted each other because the first notice allegedly indicated that the property was reserved for 'private purpose' while the second notice indicated that it was reserved for 'public purposes'.

9. The Petitioner also claims that he did not acquire the property through fraud or misrepresentation and instead alleges that he acquired the suit property lawfully and therefore his right to own the suit property has been violated. He states that **Article 40 of the Constitution** protects the sanctity of title he holds on the suit property and it is his position that **Section 23(1) of the Registration of Titles Act (Cap 281 Laws of Kenya) (now repealed)** provides for an indefeasible title. He relies on the case of **Samuel Murimi Karanja and 2 Others v Republic Criminal Application No. 412 of 2003** and **Kuria Greens Limited v Registrar of Titles and Commissioner of Lands Petition No. 107 of 2010** in support of that proposition.

10. It is his further position that a title that has been illegally acquired can only be investigated through legally established processes and that mere allegations cannot be a basis for revoking a title. On that submission he relies on the case of **Isaac Gathungu Wanjohi and another v The Attorney General and 6 others Petition No. 154 of 2011.**

11. The Petitioner in addition submits that the Registrar of Titles had no legal authority to revoke the Petitioner's title as he did and that the Registrar's actions were a violation of **Articles 40 and 47 of the Constitution** and ultra-vires **Sections 20, 21, 22 and 23(1) of the Land Act, 2012**

12. In any event, he claims that a title deed cannot be revoked, cancelled or re-acquired by the State through a Gazette Notice and that the law does not empower the Registrar of Titles or the Commissioner of Lands to revoke or cancel a title deed through a Gazette Notice. That on the contrary, a title deed can only be revoked or re-acquired by the State through a Court order or the process established under **Article 40(3) of the Constitution.** He contends therefore that the Respondents have failed to follow the law in

revoking his title to the suit property and in that context he relies on the case of *Kuria Greens Ltd v Registrar of Titles (supra)* and *Isaac Gathungu Wanjohi v The Attorney General (supra)* where it was held that the Registrar of Titles had no power to revoke a title through a Gazette Notice.

13. The Petitioner in his Petition therefore seeks the following orders;

a. A declaration that the Petitioner is the proprietor and is legally and constitutionally registered and entitled to the suit property known as L.R No. 27792 Mavoko situate in Athi River, Mavoko Municipality within the Republic of Kenya measuring approximately 6.87 hectares by measurement and therefore is legally and constitutionally entitled to enjoy all the rights and privileges accruing and appurtenant thereto.

b. A declaration that Kenya Gazette Notices Nos. 2932 and 3454 published on the 26th March 2010 and 1st April 2010 respectively purportedly revoking the Petitioner's proprietary rights and title deed over L.R No. 27792 are unconstitutional and null and void.

c. A declaration that the second letter of offer dated 11th May 2010 offering the Petitioner's property LR No. 27792 Mavoko to the Permanent Secretary Treasury and the purported registration of the memorandum of registration of transfer from L.R No. 27792 to LR NO. 28455 in favour of the Permanent Secretary Treasury have infringed the Petitioner's fundamental rights and freedoms as enshrined under Articles 40 and 47 of the Constitution and are therefore unconstitutional and are null and void.

d. A declaration that the survey plan Folio Registration No. 345/41 purportedly deleting and revoking the Petitioner's L.R No. 27792 and replacing the same with L.R No. 28455 violated the Petitioner's fundamental rights and freedoms under Articles 40 and 47 of the Constitution. That the same are unconstitutional, illegal and null and void.

e. An order that the Deed Plan Reference No. 309106 issued to the 1st Respondent to facilitate the registration of L.R No. 28455 in the place of the Petitioner's L.R No. 27792 is a violation of the law and the Petitioner's rights and freedoms under Article 40 and 47 of the Constitution and the same be and is hereby cancelled.

f. An order that the Deed Plan Reference No. 280499 issued to facilitate the registration of the Petitioner's LR No. 27792 be and is hereby upheld.

g. An order that the Title Deed to LR No. 28455 issued in favour of the 1st Respondent to hold in trust for the 5th Respondent be and is hereby cancelled and Title Deed to the Petitioner's LR No. 27792 be and is hereby upheld.

h. An order for costs of the Petition together with interests thereon at court rates.

Respondent's case

14. The Respondents did not file any response to the Petition despite having been directed to do so by the Court on various dates and on 3rd December 2014, the Court finally directed the Respondents to file a response to the Petition within 21 days but they failed to do so and they also failed to file submissions on the Petition.

Determination

15. The Petitioner's case against the Respondents is that he is the registered proprietor of the suit land and that he is in occupation thereof and holds a valid title deed to it. He claims further that Gazette Notices No. 2932 dated 26th March 2010 and No. 3454 dated 1st April 2010 revoking his title were issued in violation of his right to property as is protected under **Article 40** of the **Constitution** and that they violate

his right to fair administrative action as the said Gazette Notices were issued in violation of the rules of natural justice.

16. While the Respondents did not file any response to the Petition, I have seen the said Gazette Notices Nos.2932 and No. 3454. The wording of both Gazette Notices are similar unlike what the Petitioner contends and are as follows;

The Constitution of Kenya

The Government Lands Act(cap 280)

The Trust Land Act(Cap 288)

Revocation of Land Titles

Whereas the parcels of land whose details described under the Schedule herein below were allocated and titles issued to private developers, it has come to the notice of the government that the said parcels of land were reserved for public purposes under the relevant provisions of the Constitution of Kenya, the Governments Lands Act (Cap 280) and the Trust Land Act (Cap 288).

The allocations were therefore illegal and unconstitutional.

Under the circumstances and in view of the public need and interest, the government revokes all the said titles.

17. The above Gazette Notices are telling and it has been claimed therein that the suit property was illegally and unconstitutionally allocated and acquired by the Petitioner. As was correctly submitted by the Petitioner however, an allegation that title to land was illegally acquired can only be investigated through a legally established process in law and a finding made on the facts and on the basis of the evidence available. Is this Court the right forum to undertake that investigation?

18. That question must be answered in the negative because **Article 165(5)** of the **Constitution** stipulates that;

(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).

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

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.*

(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”.*

20. 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. This Court has held and said time and again that it does not have jurisdiction to determine disputes relating to title to land. When a claim is made for violation of **Article 40** of the **Constitution** and the title to the property sought to be protected is disputed, the High Court must down its tools for lack of jurisdiction because the jurisdiction to determine matters involving disputes to title to land has been granted to the ELC Court and it matters not whether a Petition raises matters involving violation of the **Constitution** and in particular a denial of fundamental human rights or not. The ELC Court as established, has jurisdiction to deal with violation of fundamental rights and freedoms. (See the cases of *Karisa Chengo v Republic Criminal Appeal No. 44 OF 2014*, *Daniel N. Mugendi -v- Kenyatta University & 3 Others CACA No. 6/2012[2013] eKLR* and *Iginya Limited v National Land Commission Petition No. 154 of 2014*.)

21. It is therefore my finding that this Court does not have jurisdiction to determine this Petition and I say so well knowing that previously in cases such as **Kuria Greens Ltd (supra)**, the High Court (Musinga J.) had gone ahead to interrogate the process by which a title was revoked by the Registrar of Titles and once it found the process to be irregular, it upheld the right of the land proprietor to the property. The said decision and others that followed Musinga J's reasoning are in my new distinguishable. The present Petition in prayer (a) specifically raises the question whether the property was legally and constitutionally registered, a matter this Court has no jurisdiction to determine as I have shown above. Prayer (b) on the validity, legality and constitutionality of the revocation is a corollary issue to the question to title as are

other prayers thereto. The question of title, I reiterate, is not a matter for this Court to address in any circumstance.

Conclusion

22. Having held as I have and bearing in mind that this Petition was unopposed, and in the interests of justice, I am reluctant to strike out the Petition. I would instead make an order that it be transferred to the **Environment and Land Court (ELC)** sitting in Nairobi, for final disposal and determination of the issues raised in the Petition on merit. I make this order by the powers conferred on this Court by **Article 23(2)** of the **Constitution** to make appropriate orders in appropriate circumstances.

23. Since the parties are still litigating the issue of title in the ELC, I shall also not make an order for costs.

24. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER, 2016

ISAAC LENAOLA

JUDGE

In the presence:

Muriuki – Court clerk

Mr. Kagai holding brief for Mr. Wagara for Petitioner

No appearance for Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE