



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
ENVIRONMENTAL AND LAND LAW DIVISION

PETITION NO 575 OF 2012

WATHANANGU HOLDINGS LTD.....PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

UNIVERSITY OF NAIROBI.....2ND RESPONDENT

NATIONAL LAND COMMISSION.....1ST INTERESTED PARTY

THE CHIEF LANDS REGISTRAR.....2ND INTERESTED PARTY

RULING

1. The petitioner filed this petition dated 14th December 2012 seeking various orders in connection with property number L. R. No. 209/11440 (1.R.65345). Its case is that it is the registered owner of the property, but that the 2nd respondent has trespassed on it and thereby violated its right to property guaranteed under Article 40 of the Constitution. The petitioner seeks the following prayers:

- (a) That a declaration be issued to declare that the petitioner are the lawful owners of L. R. NO 209/11440 (1.R.65345) within the meaning of Article 40 of the Constitution.***
- (b) That a declaration be issued to declare that the forcible entry, seizure, occupation and repossession of L. R. NO 209/11440 (1.R.65345) amount to violation of the petitioner's rights to protection of property under Article 40 of the Constitution.***
- (c) That an order of certiorari be issued to quash the decision/advise/directive of the Minister for lands contained in the letter dated 7th March 2006 for being in contravention of the petitioner's rights and freedoms enshrined in Articles 27,40, 47 and 50 of the Constitution.***
- (d) That a permanent injunction be issued to restrain the respondents either severally and jointly by their agents, officials, servants and representatives from entry into, seizure, confiscation, occupation, alienation and trespass of land parcel L. R. NO 209/11440 (1.R.65345).***
- (e) That a declaration be issued to declare that the petitioner's title to L. R. NO 209/11440 (1.R.65345) is protected by Articles 40 and 50 of the Constitution from arbitrary and unlawful action by the respondents directly or through their officers, agents and servants.***

(f) That a declaration be issued to declare that under Article 40 of the Constitution L. R. NO 209/11440 (1.R.65345) cannot be taken, repossessed or otherwise confiscated by the respondents either jointly or severally unless and until this Honourable Court has found that the petitioner's title to the said land is a nullity or invalid.

(g) That an order of mandatory injunction be issued to compel the respondents to give the petitioner vacant possession of L. R. NO 209/11440 (1.R.65345) and to remove bill boards and any structures or fixtures thereon.

(h) General damages for breach of the petitioner's rights and freedoms under Article 27, 40, 47 and 50 of the Constitution

(i) That the respondents be ordered to bear the costs of this petition in any event.

2. The petitioner states in its pleadings that it was issued with a title to the property on the 22nd of February 1995, after purchasing the property from the original allottee on 8th February 1995. It has not been in possession as it alleges that the 2nd respondent started interfering with its ownership in 1999, and in 2003, the Kenya Medical Training Institute fenced off the access road to the property.

3. In its Cross Petition dated 6th December 2013, the 2nd respondent challenged the petitioner's claim of entitlement to the property. It states that it is and has always been the owner in possession of the suit property and other pieces of land around the Kenyatta National Hospital. It seeks the following prayers in the said Cross Petition:

a. The respondent to this petition, M/s Wathanangu Holdings Limited, its servants or agents be restrained from alienating, disposing off, charging, leasing or any other manner dealing in Grant No 1.R.65345, L.R No 209/12109 Nairobi.

b. A declaration that grant of Grant No 1.R.65345, L.R no 209/12109 Nairobi issued to the Respondent, Wathanangu Holdings Limited, was irregular, illegal null and void.

c. An order that Grant No 1.R.65345, L.R No 209/12109 Nairobi be delivered into court within 14 days and handed over to the 1st and 2nd interested parties for cancellation and or revocation and rectification of the register.

d. A declaration that the Cross Petitioner, the University of Nairobi is the Legal and beneficial owner of the land known as Grant no 1.r.65345, LR No 209/12109 Nairobi.

e. That the 1st and 2nd interested parties do forthwith issue title to the Cross Petitioner, University of Nairobi in respect to Grant No 1.R 65345, L.R No 209/12109 Nairobi in accordance with the letter of allotment Ref. No 24803/V/46 dated 18th December 1996.

f. The Honourable Court do make such further orders as it deems just and ex pediment to meet the ends of justice in this case.

g. The respondent do pay the costs of this petition.

4. The 2nd respondent also filed a notice of preliminary objection dated 17th September 2013 in which it stated that the petition, being premised on a claim for land, is statute barred by operation of the statute of limitation and further, that the petitioner's claim is improperly brought before the court as a petition when it is an action in tort and other civil claims. It appears from the record that the preliminary objection was never canvassed.

5. During a mention of the matter on 3rd November 2014, Mr. Wachira, who was holding brief for Mr. Kibe Mungai for the petitioner, informed the court that in light of a recent judgment of Odunga J in **JR**

Misc. Civil Application No. 808 of 2005 808 of 2005 – Republic –vs- Land Registrar Murang’a & Others ex parte Isaac Maina Kahacho & Another, Mr. Kibe wished to take directions and instructions on whether the matter should be transferred to the Environment and Land Court(or ELC). Mr. Lutta for the 2nd respondent indicated that he had always maintained that the matter belongs to the Environment and Land Court and should be transferred, as it was also a matter in which viva voce evidence should be taken to determine the petitioner’s title. The question of transfer was not canvassed on that date, and when the matter came up for a mention on 1st December 2014, the matter was fixed for hearing on 4th February 2015.

6. Upon perusing the file prior to the hearing, the court enquired from the parties, when the matter came up on 4th February 2015, whether the matter should not be transferred to the Environment and Land Court, and asked the parties to address it on the issue of jurisdiction.

7. Mr. Kibe took the position that the matter was properly before this court. He submitted that the court had the jurisdiction to deal with the specific reliefs sought by the petitioner since, at the time the petitioner filed the petition, it was simply seeking to secure its right to property protected by this court. He submitted further that there was no argument about a disputed title as that issue had been disposed of in a Judicial Review Application concluded in favour of the petitioner.

8. Mr. Kibe submitted further that the 2nd respondent had filed a cross-petition under the Mutunga Rules which are not ELC Rules. It was his submission that if the 2nd respondent truly believed this is a matter for the ELC it should have filed its claim before the ELC Court, but by filing a cross petition, it acknowledges this court’s jurisdiction.

9. Counsel argued further with regard to the 3rd respondent that if the National Land Commission, had a claim with respect to the land, it should have presented the claim before the court which it believes has jurisdiction. It was his submission that it would be absolutely bad faith if after being in court for close to three years, the parties would need to go to another court, and he urged the court to consider the petition and determine it if it deals with matters within the jurisdiction of this court; and if the 2nd respondent believes that it filed its cross-petition in the wrong court, its cross-petition can be determined in that court.

10. Finally, Mr. Kibe urged the court, should it find that this matter should be determined in the Environment and Land Court, to recommend that the matter be determined in the course of this term to avoid further prejudice to the petitioner, and that the petitioner be compensated with costs for the delay in disposing of the petition.

11. Mr. Lutta for the 2nd respondent submitted in reply that under Article 162(2) of the Constitution, the proper court clothed with jurisdiction to hear this matter is the Environment and Land Court. This is because the issue of title has come up and needs to be determined before any other issue. He relied on the decision in **Abdullah Mangi Mohamed -vs- Lazarus Beja & 5 Others [2012]eKLR** to the effect that before an issue under the Bill of Rights can be determined, title to the land must be determined first, and the proper place to determine the issue of title is the Environment and Land Court.

12. Mr. Lutta submitted further that the 2nd respondent had filed, on 17th September 2013, a preliminary objection raising the propriety of the petition before this court; and that the matter should have come by way of a normal suit as the petitioner alleges trespass, which is a tort. It was his submission also that the matter involves public land, which belongs to a public institution, and that the court seized of the matter will be required to investigate the propriety of the title issued to the petitioner.

13. With regard to the submission by Counsel for the petitioner that the 2nd respondent has acknowledged the jurisdiction of the court by filing a cross petition, Mr. Lutta submitted that the rules of pleadings are that every ground of attack or defence by any party should properly be raised by the parties and determined simultaneously to avoid the issue being said to be *res judicata*. It was also his submission that this petition could not be heard by this court and the cross-petition by the ELC as this would lead to a splitting of the litigation and the likelihood of the courts arriving at different decisions on the issues

raised. It was also his submission that the petitioner was not entitled to costs as he had only come to court in 2012 though he obtained title in 1995, and could not therefore ascribe the delay to anyone.

14. Mr. Kuria for the 1st and 3rd respondents supported the submissions made by Mr. Lutta. He submitted that under Article 165(5), the High Court has no jurisdiction on matters contemplated under Article 162(2), which bars the jurisdiction of the High Court in matters of title to, use and occupation of land.

15. Counsel submitted further that section 13 of the Environment and Land Court Act gives jurisdiction to the ELC in such matters, and also empowers it to deal with fundamental rights issues relating to land. Counsel relied on the decision of Majanja J in the case of **United States International University –vs- The Attorney General & Others Petition No. 170 of 2012** with regard to the jurisdiction of the courts with the status of the High Court established under Article 162(2). He submitted that in accordance with the decision in the case of **The Owners of Motor Vessel “Lillian S” -vs- Caltex Oil Kenya Ltd, [1989] KLR 1**, once the issue of jurisdiction is raised, the court must down its tools.

16. Counsel agreed with Mr. Kibe that the petition be fast-tracked, while conceding that Counsel for the parties had been indolent in raising the issue of jurisdiction even though he had reservations in that regard. It was his submission with regard to costs that the issue should be left to the court dealing with the matter.

17. In his reply, Mr. Kibe submitted that under Article 40, anyone with a title however acquired, is entitled to the protection of the court and Article 20, 21 and 22 allows him to seek that protection. It was his submission further that if one has a title, he is entitled to possession, occupation and development, but the petitioner is not in possession as the land in dispute has been fenced off by the 2nd respondent. He submitted that as long as the petitioner had a title, that is an issue for this court, and if anyone wanted to quash the title, that is a separate dispute that should go to the ELC court. He submitted that it is only a judgment of a court that would take away the legality of one’s title, and the only issue for determination is whether the petitioner is entitled to protection of its title.

18. In determining whether to transfer this matter to the Environment and Land Court, I start from the constitutional provisions with regard to jurisdiction over matters pertaining to land. Article 165 (5) provides as follows:

(5) The High Court shall not have jurisdiction in respect of 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. Article 162(2) provides that:

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

20. In determining the question whether the Industrial Court established under Article 162(2)(a) of the Constitution has jurisdiction to deal with matters pertaining to fundamental rights and freedoms and whether the High Court has jurisdiction to deal with such matters relating to labour disputes, Majanja opined as follows:

[44.] In the final analysis, I would adopt the position of the Constitutional Court of South Africa in Gcaba v Minister of Safety and Security (Supra). The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), section

12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the constitution and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within a matter before it.

[45.] In light of what I have stated, I find and hold that the Industrial Court as constituted under the Industrial Court Act, 2011 as court with the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of section 12 of the Industrial Court Act, 2011.

21. I agree with the view of the court in the above matter. Like the Industrial Court, the Environment and Land Court is a 'court of the status of the High Court' established under Article 162(2) of the Constitution. It has the jurisdiction, under section 13 of the Environment and Land Court Act, to deal with issues relating to alleged violation of fundamental rights arising in matters within its exclusive jurisdiction.

22. In the present case, the petitioner argues that it has a title to the property in dispute, and that therefore its title, however acquired, should be protected under Article 40. However, in my view, the fact that there is a cross-petition by the 2nd respondent, a public institution which alleges ownership of the property and has been in possession of the land in dispute, puts a totally different complexion on the matter. In the case of **Abdullah Mangi Mohamed - vs- Lazarus Beja & 5 Others** relied on by the 2nd respondent, the court stated as follows:

“The determination of title to land must be made by the Environment and Land Court which has jurisdiction on the question of title to land. The constitutional court would only have jurisdiction in cases where the Applicant's title to the land is established so that the owner of the title is seeking to protect his undisputed right to the property from infringement real or threatened.”

23. This is a position I agree with-see in this regard the decision of this court in **High Court Petition No. 494 of 2013 Jockey Club Of Kenya –vs- Kenya Forest Service & Others**. If, upon hearing the parties in this matter on the contested question of the ownership of the property in dispute, the court determines that the petitioner's title is not valid or was improperly acquired, then it would not be entitled to protection in light of the provisions of Article 40(6) which states that *“The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”*

24. Further, and despite the protestations of Counsel for the petitioner to the contrary, the parties are agreed that the proper court with jurisdiction in this matter is the Environment and Land Court. The petitioner filed its petition alleging violation of its constitutional right to property. A cross-petition, which is in effect a counter-claim with respect to the ownership and title to the property, was filed. It is not possible to determine the question of the alleged violation of the petitioner's right to property without enquiring into the counter-claim by the 2nd respondent, which can only be done by an inquiry into the propriety of the petitioner's title. This is doubtless what informed Mr. Wachira's views expressed on 3rd November 2014 that the matter be transferred to the Environment and Land Court. Mr. Wachira had then drawn attention to the decision in **Republic –vs- Land Registrar Murang'a & Others ex parte Isaac Maina Kahacho & Another** (supra) in which Odunga J had expressed himself, with regard to judicial review proceedings as follows:

[34.] In this case issues of fraud have been raised by the applicants. Issues such as fraud, forgery and similar wrongdoings are in my view issues which can only be determined during a proper trial and not on conflicting affidavits. It is therefore trite that fraud or negligence as the case may be, is a matter, which, unless the facts and the circumstances are clearly obvious, need

oral evidence to establish.”

25. I believe these considerations apply in equal force to constitutional petitions alleging violation of constitutional rights when the facts are highly contested and the right in question cannot be said to have crystallized. In the circumstances, I am satisfied that it is proper to transfer this matter to the Environment and Land Court as prayed by the 2nd respondent.

26. With regard to when the matter will be heard before that court, I do not believe that it is within the remit of this court to make any directions in that regard. That is a matter for the determination of the court seized of the matter.

27. I take a similar view with regard to costs incurred so far, which will no doubt be addressed by the court that will hear and determine the matter.

28. The orders of this court are that this matter be transferred to the Environment and Land Court for hearing and disposition. Upon such transfer, the parties shall take a date convenient to them for directions before the Presiding Judge of the Environment and Land Court.

Dated, Delivered and Signed at Nairobi this 10th day of February 2015

MUMBI NGUGI

JUDGE

Mr. Kibe Mungai instructed by the firm of Kinoti & Kibe & Co. Advocates for the petitioner

Mr. Kuria instructed by the State Law Office for the 1st respondent, 1st and 2nd interested party

Mr. Lutta instructed by the firm of Lutta & Co. Advocates for the 2nd respondent/cross petitioner