



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**PETITION NO.64 OF 2011**

**IN THE MATTER OF ARTICLES 19, 22, 23, 40, 47, 50 & 64 OF THE CONSTITUTION**

**IN THE MATTER OF THE REGISTERED LAND ACT (CAP 300), THE GOVERNMENT  
LANDS ACT (CAP 280), THE REGISTRATION OF TITLES ACT (CAP281)**

**IN THE MATTER OF CONTRAVENTION OF THE RIGHT TO OWN PROPERTY**

**IN THE MATTER OF GAZETTE NOTICE NOS.15576 AND 15577 OF 26TH NOVEMBER 2010**

**IN THE MATTER OF PURPORTED REVOCATION OF TITLES NOS.KISII  
MUNICIPALITY/BLOCK III/262 AND KISUMU MUNICIPALITY/BLOCK 6/504**

**BETWEEN**

**JOHN ANTONY ANGWENYI & ANOTHER.....PETITIONERS**

**VERSUS**

**THE DISTRICT LAND REGISTRAR KISII DISTRICT**

**AND 2 OTHERS.....RESPONDENTS**

**J U D G M E N T**

1. The two petitioners herein – **JOHN ANTONY ANGWENYI** and **MATHEW NYACHOTI** – filed this petition here on 25/9/2013. The petition is against three respondents – **THE DISTRICT LAND REGISTRAR, KISII, THE DISTRICT LAND REGISTRAR, KISUMU,** and the **HON. ATTORNEY GENERAL**. It is premised on articles 19, 22, 23,, 40,47,50 and 64 of the Constitution of Kenya, 2010 and concerns Gazette Notices nos.15576 and 15577 of 26/11/2010. The two gazette notices revoked titles to Land parcels: **KISII MUNICIPALITY/BLOCK 111/262 and KISUMU MUNICIPALITY/BLOCK 6/504** (Hereafter the suit parcels).

2. The 1st Petitioner – **JOHN ANTONY ANGWENYI** – brings the petition as beneficiary of the estate of the late Zacharia Angwenyi, which he states is currently being administered by **WILLIAM PETER MAYAKA** and **GEORGE TUMBO ANGWENYI** as joint administrators. John states that the late Zacharia Angwenyi was his father.

3. The 2nd petitioner – **MATHEW NYACHOTI** – brings the petition as the registered owner of Land Parcel No. **KISUMU MUNICIPALITY/BLOCK 6/504**. He however talks of a challenge to his

ownership of that parcel of land from a neighbour and owner of adjacent pieces of land – **JOHANNES AKELLO OMBOTO**. That challenge found expression in **KISUMU CMCC NO.1545** of 1997, a case in which Johannes seems to have won but which Nyachoti appealed against. The appeal filed was **KISUMU HCC Appeal No.56/06** which, at the time of filing this petition, had already been argued and was pending judgment.

4. The petitioners' beef with the respondents concerns the process leading and surrounding purported revocation of allocation, registration, and issuance of title documents to the suit parcels of land. The process is said to have been in breach of petitioners' constitutional rights.

5. The process was faulted for not following due process; being done without a court order; disregarding rules of natural justice; and not offering the option of compensation to the petitioners.

6. The petitioners averred that they had made repeated demands that the respondents withdraw, revoke, cancel or degazette the gazette notices issued but that had not been done.

7. The prayers sought are as follows:-

(a) A declaration that the actions, omissions, and/or commissions of the respondents in purporting to revoke, cancel, deregister titles in respect of the suit parcels are unconstitutional.

(b) An order that gazette notices Nos.15576 and 15577 relating to the suit parcels are null and void and that the said order be quashed and declared to be of no legal consequences.

(c) A declaration that the suit parcels belong to the persons in whose names they were registered prior to the publication of the aforesaid gazette notices.

(d) An order prohibiting the Respondents from canceling, altering, or in any other way interfering with the petitioners interests in the suit parcels.

8. The two petitioners swore supporting affidavits which gave some history and explained the case. The 1st petitioner introduced himself as a beneficiary of the estate of the late Zacharia Angwenyi, which is currently being administered by **WILLIAM PETER MAYAKA** and **GEORGE TUMBO ANGWENYI** as joint administrators. The late Zacharia Angwenyi is said to have been the 1st petitioner's father. For the 1st petitioner, the affected parcel is **KISII MUNICIPALITY/BLOCK III/262**. He denies that it was public land and depones that it had never been reserved for public purposes. He asserted that the parcel falls within an area which belongs to private land owners.

9. The 1st petitioner deponed that neither him nor the administrators of the estate of his late father were notified of the intention to revoke the title.

10. The 2nd petitioner introduced himself as the registered owner of **KISUMU MUNICIPALITY/BLOCK 6/504**, having bought it from the previous owner – **RACHEL NYABOKE**. He however has a case with **JOHANNES AKELLO OMBOTO** who is the owner of adjacent parcels of land. The case is **KISUMU CMCC NO.1545 OF 1997** and sought the revocation of 2nd petitioner's title to the land. It would appear that the Johannes succeeded but the 2nd petitioner appealed, the appeal being **KISUMU HC APPEAL NO.56/06**. It was deponed that the appeal had already been argued and only judgment was pending. The 2nd petitioner averred that the Respondents did not notify him of intention to revoke the title. The land, he deponed, has never been reserved for public purposes and falls within an area belonging to private land owners.

11. The following documents were availed by the petitioners in support of the case.

**1st Petitioner:**

(a) National Identity Card No.1599619 – marked JAAI.

(b) A copy of Certificate of official search for parcel No. **KISII MUNICIPALITY BLOCK III/262** – marked JAA 2.

(c) Copy of Gazette Notice No.15576 – **MARKED JAA 3**

(d) Copy of Index map showing where the parcel of land is situated – marked JAA4.

### **2nd Petitioner**

(a) National Identity card No.200 11 2149 – marked MNI.

(b) A copy of Certificate of official Search for parcel No. **KISUMU MUNICIPALITY/BLOCK 6/504**.

(c) Copy of Green card for the same parcel of land – marked MN3.

(d) Copy of proceedings in **KISUMU CMCC NO.1545/97** – marked MN4.

(e) Memorandum of Appeal in **KISUMU HCC CIVIL APPEAL NO.56/06** – Marked MN5.

(f) Copy of Gazette Notice No.15577 – marked MN6.

13. The Respondents replied to petitioners' petition vide a replying affidavit filed on 24/7/2013. A look at the replying affidavit shows that the focus is on land parcel No. **KISII MUNICIPALITY BLOCK 3/262**. This parcel of land concerns the 1st petitioner. It has nothing to do with the 2nd petitioner.

14. The replying affidavit confirms that title to that piece of land was revoked vide Gazette Notice No.15576 of 26/11/2012. The revocation, it was deponed, was due to the fact that the land was reserved for Gusii Community Centre and that the late Zacharia Angwenyi had irregularly acquired it. It was stated further that Kenya Anti-Corruption Commission investigated the matter and recommended revocation of title to the Minister for land. According to the Respondents, Kenya Anti-Corruption Commission should have been joined as a party to this suit.

15. The Respondents availed only one document, which is a letter to the Minister for lands recommending revocation of title – marked JSOI.

16. Both sides filed submissions. In fact the petitioner's side filed two versions – one which is rival submissions to Respondents own submissions and another which is a response filed after the filing of the Respondents submissions. I will look at the submissions in the order in which they were filed.

17. The petitioners first submissions were filed on 21/6/2013. The respondents are said to run afoul of several constitutional provisions which they are accused of violating or disregarding. By publishing the two gazette notices taking away the ownership of the suit parcels from the petitioners, the respondents, singly or jointly, violated articles 40,43,47 and 50 of the Constitution. Article 40 because the right of the petitioner to own property in any part of Kenya was not respected; article 43 because the process to be followed when taking away such property was not adhered to; article 47 because canons of fairness in procedure were disregarded; and article 50 because due application of law was not resorted to before a court of law or other appropriate forum.

18. Various decided cases were availed to demonstrate that a process that does not afford the affected party the opportunity of being heard cannot be said to be fair. It was pointed out that it is trite that the affected party should have the relevant notice before an order prejudicing his rights is made. Those making such order are enjoined to comply with rules of natural justice and the manner to do so is to give each party a hearing.

19. The decided cases were **ERICK OKONGO OMOGENI VS THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND 2 OTHERS, (2013)EKLK**, where a three

judge bench quoted with approval the decision of Court of Appeal in **OWUOR OKUNGU VS LAZARO ONYANGO: CIVIL APPEAL NO.43 OF 1982** as well as **CENTRAL ORGANIZATION OF TRADE UNIONS VS BENJAMIN K. NZIOKA & OTHERS: CIVIL APPEAL NO.166 OF 1993**. The other authority is **KURIA GREENS LIMITED VS REGISTRAR OF TITLES & ANOTHER, (2011) eKLR**, and the final one is **REPUBLIC VS COMMISSIONER OF LANDS EXPARTE CAROLIZANNE GATHONI KURIA 2013 eKLR**.

20. The cumulative thrust of the submissions is that the petitioner's were never accorded the opportunity of being heard; provisions of the Constitution were violated or disregarded by the respondents; the petitioners were not given written reasons for the cancellation of titles to the suit parcels; and that there was no evidence that the titles were acquired unlawfully. The actions of the respondents were said to be in breach of the rules of natural justice and were ultra-vires the relevant provisions of the Constitution.

21. The respondent's submission comprise a three-pronged attack on the petitioner's case Viz: the petition lacks merit as the petitioners rights under article 40 of the Constitution have not been violated; the petitioners have failed to join other interested parties; and the public interest in revoking the titles, which were allegedly unlawfully acquired, outweigh private interests.

22. The respondent's pointed out that the right to protection of property conferred by Article 40 of the Constitution does not extend to property that is unlawfully acquired. The two suit properties in this case were said to be unlawfully acquired. Then the Kenya Anti-Corruption Commission (now EACC) is said to have conducted investigations and established tha the suit parcels were illegally acquired.

23. The 1st petitioner was also said to be busybody in these proceedings as he has not demonstrated his beneficial interest. There are administrators to the property, it was submitted, and he is not among them.

24. It was the respondent's view that the Kenya Anti- Corruption should have been joined as a party. It was that body, it was said, that conducted investigations concerning and surrounding acquisition of the two suit parcels. Enjoining that body would lead to shedding of more light on how investigations were carried out. It would then be clear, it was submitted, how revocation came about.

25. The aspect of public interest was also submitted on. The suit parcels were said to have been earmarked or reserved for public purposes and the petitioners alleged private interest cannot override such interest.

26. The respondent's submissions elicited a response from the petitioners. The response is largely based on points of law. The Respondents, it was stated, should have shown alleged illegality in acquisition of the suit parcels. They were bound to prove such illegality but didn't do it. No evidence was availed to demonstrate such illegality, it was submitted.

27. And it was not the duty of the petitioners to enjoin the Kenya Anti-Corruption Commission (or EACC) as a party. That was, it was asserted, the respondent's duty. In any case, it was further averred, no suit can be defeated due to non-joinder or misjoinder of parties.

28. It was emphasized that the principles of natural justice were not adhered to as the petitioners were not heard or involved at all in the process leading to revocation of titles to the suit parcels. The issue of legality or otherwise in the revocation of titles should have been subjected to due process.

29. It was asserted too that the petitioners have a right to institute these proceeding as they have done and have a locus standi grounded in the Constitution to bring these proceedings.

30. It seems to me to be common ground that titles to the suit parcels were cancelled or revoked as alleged. The petitioners fault the cancellation on the grounds that it was not merited and on the basis of the allegedly flawed process leading to the cancellation. The respondents on the other hand believe the cancellation was merited as the suit parcels were for public purposes and titles to them had been acquired through dubious means.

31. The petitioners disputed the respondents position and pointed out that the suit parcels were not for public purposes as they are in areas with private residences and private land owners. The respondents on the other hand point out that the suit parcels were earmarked for development of infrastructure for public community use. The then Kenya Anti-Corruption Commission is said to have investigated the matter and recommended cancellation of the title.

32. The petitioners feel that their constitutional rights were infringed. In particular, their right to own property (article 40) and their right to fair treatment (articles 47 and 50) were not respected. They therefore want a reversal of the respondents' decision and restoration of their rights.

33. It seems to me that the response of the respondents to the petition is incomplete and unsatisfactory. The replying affidavit filed addresses only issues relating to the parcel of land in Kisii. That parcel relates to the 1st petitioner only. There is no mention at all of the parcel in Kisumu.

34. I have also looked at the submissions filed on behalf of the respondents. They are lacking in depth. No attempt is made to demonstrate whether articles 43,47 and 50 of the constitution were complied with when the process of revocation of the titles to the suit parcels was initiated. This is a serious omission because the petitioners case hinges largely on allegations of non-compliance with these articles. In fact it is because of such non-compliance that a further argument is raised that the petitioners right to own property under article 40 was violated.

35. And while the respondents' submissions make the compelling point that public interest, which is what is said to have led to cancellation of titles, far outweighs private interest, they fail to address the import of decided authorities mentioned by the petitioners where purported cancellation of title precisely on the same ground was dismissed by the Courts because due process was not followed.

36. And to further assail the respondents' submissions a riposte was made styled “**Submissions in Response**” attacking the aspects of respondents submissions that had been unaddressed in the first petitioners' submissions. For instance, it was the allegation of the respondents that the Kenya Anti-Corruption Commission (or its successor EACC) should have been enjoined in the suit. According to the respondents, it is this entity that conducted investigations and recommended the cancellation of titles. The petitioners make a convincing counter – argument, which is to the effect that the respondent's themselves should have brought the commission on board. The point here is that the respondents are the ones immediately responsible for cancellation of titles. The underlying circumstances leading to the cancellation are less obvious and it would be improper to assume the respondents knew them if no notice or information was given to them. It seems obvious therefore that the respondents are the ones better placed to explain the role of the anti- corruption body and that role could only benefit their case, not the respondents' case.

37. In sum therefore, if the only consideration to make are those that concerns the weight and compellability of the material presented, the petitioners would carry the day. But there are other considerations which are basic to the case. I must now turn to these considerations. The considerations concern the foundational aspects of the petition as presented.

38. The first consideration, which was fleetingly referred to in the respondent's submissions, and which the petitioners counsel never adequately addressed, concern the capacity of the 1st petitioner as a beneficiary.

39. The 1st petitioner premises the petition on the alleged fact that he is a beneficiary of the estate of the late Zacharia Angwenyi. He availed a copy of his national identity card which shows the name Angwenyi as his surname. That document is supposed to show he is the son of Zacharia Angwenyi. But does it? The truth is that it does not. It only shows that possibility. There is no telling whether the Angwenyi appearing on the national identity card was really Zacharia Angwenyi. In my view, more was needed to sufficiently demonstrate the necessary nexus between the 1st petitioner and the late Zacharia Angwenyi. I have in mind something like a Grant from the Court issued to the alleged administrators of the late Zacharia Angwenyi. Such a grant would obviously show 1st petitioner as a beneficiary.

Considered together with the availed copy of the ID card, it would clearly emerge that the 1st petitioner is the son of the late Zacharia Angwenyi. The only other document I know of which could have the same effect is a birth certificate for it clearly has sections requiring details of both the mother and the father of a child.

40. As things stand now, neither such Grant nor the birth certificate is availed. That is a serious shortcoming. But there is even more to this: the 1st petitioner says clearly that the estate of the late Zacharia Angwenyi has administrators. Proof of this was required and I expected the 1st petitioner to avail a copy of the grant. Such administrators are the ones entitled in law to bring a petition like this and it is not clear why the petitioner decided to bring it himself. If he presumably did so to protect his interest in the suit property, he still needed to avail the Grant to show that he is connected to the property not generally but specifically. Such a Grant should show that such property is specifically earmarked for him, not another beneficiary. I am unable to accept a mere verbal averment that the 1st petitioner is a beneficiary.

41. But there is even more. The 1st petitioner saw no need of obtaining some kind of Grant before coming to court. He is here because of property belonging to a deceased person. Wasn't some Grant necessary to allow him to connect legally with the Court? Could he bypass succession law and bring the petition as if such law does not exist? Obviously, the 1st petitioner was labouring under a serious misdirection if he thought that this is possible.

42. The conclusion I make here is that the 1st petitioner has not proved well that he is a beneficiary of the estate of the late Zacharia Angwenyi. He has not also acquired or demonstrated capacity to bring this petition and has not demonstrated the necessary direct nexus between him and the property he seeks to protect.

43. I now turn to the 2nd petitioner. His petition is premised on the alleged fact that he is the registered owner of the property in Kisumu. But he avails evidence to show that that ownership has been challenged in the past. And the challenge was successful. In short, there was a case in the lower court by somebody – a Mr. Johannes Akello Omboto – who challenged him in case No. **KISUMU CMCC NO.1545/97**. Omboto won. The 2nd petitioner appealed and he depones in his supporting affidavit that at the time of filing this petition, judgment was awaited.

44. This petition was filed way back in year 2011. As I write this judgment, the decision of the awaited judgment has not been communicated to the Court. That places me in a difficult situation. It is not lost on me that the 2nd petitioners ownership of the suit parcel had been successfully challenged in the lower court. It does not appear anywhere that the judgment of the lower court had been stayed. If it was not, it still has its legal force.

45. But more important is the outcome of the judgment that was being awaited. It is now several years since this petition was filed. Why didn't the 2nd petitioner find it necessary to avail the judgment? In my view, he had a duty to show that Johannes Akello Omboto didn't win. He needed to demonstrate that the appellate court did not uphold the lower court's judgment. All this is not shown. I am now faced with a situation where I can give orders concerning land that possibly belong to somebody else. The 2nd petitioner had a duty to make things very certain. He didn't do so. I am unable to view him as a person who has an indefeasible and sacrosanct title. Yet that is the only kind of title that can enable me to grant him the prayers he is seeking.

46. I have endeavoured to demonstrate that the petition as it stands on quicksand. Its foundational aspects are wanting. It ignores basic factual and legal imperatives and that clearly makes it a tenuous legal adventure.

47. Ultimately then, the petition fails not because of the strength of the respondents case, but because of the reasons so far highlighted.

The upshot is that I dismiss this petition with costs.

**A.K. KANIARU – JUDGE**

**8/5/2014**