



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 263 OF 2011

BETWEEN

VEKARIYA INVESTMENTS LIMITED PETITIONER

AND

KENYA AIRPORTS AUTHORITY 1ST RESPONDENT

THE PERMANENT SECRETARY, MINISTRY

OF STATE AND PROVINCIAL

ADMINISTRATION &

INTERNAL SECURITY 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

Introduction

1. The issue in this case is whether the petitioner's right to the protection of the property under **Article 40** of the Constitution was violated by the respondents' threat to evict it from its property.

Petitioner's Case

2. The petitioner is the owner of a property known as Land Reference Number 9095 (Grant Number IR 89497) ("the suit property) registered under the ***Registration of Titles Act (Repealed)***. It purchased the property in February 2009 from Senator Services Limited ("Senator") for the sum of Kshs 25 million and a transfer in its favour was registered on 25th February 2009.
3. The petitioner moved the court by the petition dated 24th November 2011 in which it sought an injunction to restrain the respondents by themselves, their agents and or employees from evicting, demolishing or in any manner interfering with the suit property. It also seeks a declaration that it is entitled to the protection of its fundamental right to property under the Constitution and a declaration that the certificate of title issued to it by the State is conclusive evidence of ownership and that it is the absolute and indefeasible owner the property.

4. At the time of filing the petition, the petitioner was in the process of erecting 22 godowns, 2 office blocks, ancillary facilities and a perimeter wall on the property. Manji Ravji Vekariya, a director of the petitioner, in a deposition sworn on 24th November 2011, states that on 15th and 16th November 2011, the Kenya Airports Authority (“KAA”), the 1st respondent, served on the petitioner’s employees on site a notice directing it to stop all construction and vacate the site.
5. The notice issued on 15th September 2011 (“the Notice”) was directed to persons who had illegally developed and encroached portions of KAA’s land, LR No. 21919, at Kyangombe and Syokimau within the vicinity of Jomo Kenyatta International Airport (“JKIA”). The notice stated that the person who had undertaken any development on any portion of KAA’s property without its approval or undertaken any development without obtaining approval of KAA on any portion thereof falling on the flight path or upon any restricted area of JKIA. The notice notified such persons that the any buildings, installations or erections will be demolished and removed within 7 days of service of the notice.
6. As a result of KAA’s threat to demolish its property, the petitioner moved the court by an application dated 24th November 2011 seeking conservatory orders to restrain the respondents from interfering with the suit premises. On the same date, I granted conservatory orders which were confirmed pending hearing and determination of the suit after inter-parties hearing on 16th December 2012.

1st Respondent’s Case

7. KAA opposes the petition on the basis of the replying affidavit sworn on 15th December 2011 by Joy Nyaga, its Acting Corporation Secretary at the material time. KAA contends that the suit property is part of its property, LR No. 21919 (Grant IR No. 70118) (“the JKIA property”) allocated to it on 1st August 1996 for the public purpose of constructing of an airport and ancillary facilities and as such the same was not available for alienation and allocation to the petitioner or any other person for private purposes. KAA avers that the title to the suit property constitutes double allocation over part of the JKIA property and is therefore illegal null and void. It urges that that the title to the suit property came second in time and that the title to the JKIA property takes priority. It submits that as the petitioner’s case is grounded on an illegality and should be dismissed.
8. KAA admits that it issued the Notice in the interest of not only ensuring aviation safety and security but also on account of KAA’s proprietorship rights over the JKIA property. It further avers that it was within its power and authority under **section 2** of the *Kenya Airports Authority Act (Chapter 395 of the Laws of Kenya)* to, inter alia, prohibit, control or regulate the presence of any person within any premises controlled by KAA including the area covered by the JKIA property.
9. According to the deposition of Ms Nyaga, the petitioner has encroached and constructed on the land occupied by the JKIA. She avers that, in fact, the petitioner did admit that it encroached on the KAA’s land and informed KAA by a letter dated 13th November 2009 of its intention to convert the suit property into a lease. She also avers that petitioner did not have or obtain the relevant authority of the Director of the Civil Aviation Authority to construct godowns on the suit premises therefore such constructions are illegal.

2nd Respondent’s Case

10. The 2nd respondent opposed the petition through the affidavit of Francis Kimemia, the Permanent Secretary, Ministry of State for Provincial Administration and National Security, sworn on 24th January 2012. He denies all the allegations in the petition and avers that as no allegation have been made against it, the suit should be dismissed with costs.

The Testimony

11. From the parties depositions it was apparent that the issue is in dispute concerned the location of the suit property vis a vis that of the JKIA property and upon request the 1st respondent, I summoned the Commissioner of Lands to give evidence regarding the suit property and the JKIA property. Subsequently, I also issued summons to the Director of Surveys and the Director of Planning to attend court and give evidence on the subject.
12. Mr Silas Mburugu, the Principal Land Administration Officer, testified on behalf of the Commissioner of Land. His evidence was that the suit property was initially allocated to Senator by an allotment letter dated 9th March 1999. Senator accepted the offer and the grant was processed and executed by the Commissioner of Lands on 2nd August 2002 and the title issued to it. He confirmed that on 25th February 2009, a transfer was registered in favour of Vekariya Investments Limited, the petitioner. He testified that the JKIA property was re-planned and several plots created over it according to the approved development plan. Mr Mburugu stated that as a result of the re-planning several plots were created namely; LR No. 9091 to 9099 (inclusive of 9095), 9186 to 9199 and 25469 to 25477. However, he did not produce the plan he referred to in his testimony.
13. Mr Mburugu produced Part Development Plan No. NBI/C/018, Survey plan No. FR 265/27 and the Registry index Map SE 5(NRB) showing the location of the suit property and the JKIA property. He demonstrated that the the suit property, LR No. 9095, which has been re-planned according to the Part Development Plan overlapped with the part covered by the JKIA title. He testified that when KAA surveyed its property, it did so without the reference to Survey Plan No. 265/97. When cross-examined by counsel for KAA, he confirmed that Deed Plan for the JKIA property was consistent with the Part Development Plan No. NBI/C/018 which was issued on 21st May 1996.
14. Mr Wilson Ojunju, a Senior Land Surveyor at the Ruaraka Survey Office, testified on behalf of the Director of Surveys. He testified that when a title holder wants to sub-divide land, a subdivision plan is prepared by the Director of Physical Planning or a private physical planner. Such a plan must be approved by the Commissioner of Lands and the County authority or the local authority as it was known. Mr Ojunju stated that he investigated the title to the suit property at the Survey Records office and he could not get it survey map or any measurements carried out by the surveyor or any deed plan relating to the suit property.
15. Mr Christopher David Gitonga, a Principle Physical Planner, in the Ministry of Lands testified on behalf of the Director of Physical Planning. He stated that he deals with the production of Physical Development plans. He testified that a licenced planner must be engaged to re-plan an area and in respect of the area covered by the suit property there was no physical plan as re-planning occurs only where there is an approved physical plan. Mr Gitonga explained that re-planning occurred when there is difficulty in implementing or execution of any approved physical development plan. He stated that the Director of Physical Planning makes proposals to the Cabinet Secretary justifying the need for re-planning. The planning is duly gazetted as the intention to re-plan and request for objection or representation of the proposals. After expiry of the time of the notice and there being no objection, the Director re-plans the area and forwards the plans to the Cabinet Secretary for approval. After approval, the director gazettes the plan which becomes the approved plan. Mr Gitonga stated that to the best of his knowledge there was no re-planning of suit property and that the Director of Physical Planning was never consulted regarding any re-planning in respect of the JKIA property and in fact no re-planning was done in accordance with the *Physical Planning Act (Chapter 286 of the Laws of Kenya)*.

The Submissions

16. The parties filed written submissions after the witnesses gave evidence.

17. The petitioner submits that its right to acquire and own property protected and its right to be protected from arbitrary deprivation of property without compensation under **Article 40(1)** and **40(3)** of the Constitution is threatened. It also avers that its right to fair administrative action under **Article 47(1)** of the Constitution has been violated.
18. The petitioner's case is that it is the registered proprietor of the suit property as evidenced by the title to the suit property issued by the Registrar of Titles in accordance with the **Registration of Titles Act** and that there is no evidence of fraud or unlawful acquisition on its part. Mr Ooyo, counsel for the petitioner, cited the case of **Joseph Arap Ng'ok v Justice Moijo Ole Keiwua CA NAI Civil Appl. No. 60 of 1997 (Unreported)** and **Samuel Murimi Karanja and 2 Others v Republic HC Crim. Appl. No. 412 of 2003 [2003]eKLR**.
19. Counsel further submitted that even if there were any irregularities in the manner in which the title to the suit property was issued, the title to the property could not be impeached. Counsel cited the case of **Dinshaw Byramjee and Sons Limited v Attorney General of Kenya [1966] EA 198**. In the circumstances the petitioner avers that as the lawful owner of the suit property it is entitled to the protection afforded by **Article 40(1)** of the Constitution. The petitioner therefore avers that the attempt to evict it from the suit property without giving it an opportunity to be heard or arbitrarily constitutes a violation of **Articles 40(3)** and **47(1)** of the Constitution.
20. The 1st respondent submits that the evidence is clear the land comprising the JKIA property has never been surrendered or re-planned and was not available for allocation to the petitioner or any other person. Counsel for KAA, Ms Orengo, cited the case of **Republic v Registrar of Lands in Kilifi ex-parte Daniel Ricci Malindi HC JR No. 6 of 2013 [2013]eKLR** to support the proposition that where public land is allocated to an individual, the court has an obligation not to recognize such title, because public interest in a property outweighs an individual right to the same property.
21. The 1st respondent submit that from the evidence it is evident that the petitioner's title was acquired illegally as the Commissioner of Land did not have power, under **section 3** of the **Government Lands Act (Repealed)** to alienate land already owned or alienated to another person. It submits that the petitioner cannot seek the protection of the Constitution and anchors its case on **Article 40(6)** which excludes unlawfully acquired property from the protection of the **Article 40**. Ms Orengo cited the case of **Isaac Gathungu Wanjohi and Another v Attorney General and Others Nairobi Petition No. 154 of 2011 [2012]eKLR** where the court declined to provide relief where allegations of unlawful acquisition of the property were made against the petitioner.
22. The 1st respondent avers that as the registered proprietor of the JKIA property, it is entitled to protect its land from encroachment by third parties including the petitioner. Counsel cited the case of **Alfred Kalimba Musau and Syokimau Residents Association v Attorney General and Another [2012]eKLR** where the court held that KAA has the authority to demolish legal structures on its land which it needs to utilise for its purposes as an airport.
23. The 1st respondent submits that the petitioner had a duty to exercise due diligence by conducting a historical search on the premises to establish the sanctity of title and failure to do so meant that the petitioner was not a bona fide purchase for value without notice of any irregularities. In any case, KAA contends that its title, having been issued in 1996, takes precedence over the title issued by the petitioner over the suit property.
24. The 1st respondent argues that the title to the JKIA property cannot be impugned as it is indefeasible and since the petitioner has not established any legal right over the property which cannot be protected by the Constitution, its continued stay over the suit property is detrimental to the 1st respondent's rights and as such the petition ought to be dismissed.
25. The Attorney General supports the 1st respondent's case. Ms Muchiri, counsel representing the

2nd and 3rd respondents, argued that since Director of Surveys confirmed that the land held by the petitioner does not exist, the land was fraudulently and illegally acquired by the petitioner in collaboration with Senator hence by reason of **Article 40(6)** of the Constitution, the petitioner is not entitled to constitutional protection. Counsel cited the case of ***Electrical Options Limited v Attorney General Nairobi Petition No. 23 of 2011 [2012]eKLR***. The 2nd and 3rd respondents deny that they had anything to do with the threatened demolition of the property.

Determination

26. At the heart of the petitioner's claim is the right to the protection of property afforded by **Article 40** of the Constitution. In order to succeed in a petition under **Article 40**, the petitioner must demonstrate that it holds property which is recognised in law as capable of being protected. In the case of ***Joseph Ihugo Mwaura and Others v The Attorney General and Others Nairobi Petition No. 498 of 2009 (Unreported)***, the Court, referring to **section 75** of the former Constitution which is the equivalent of **Article 40**, observed that, “[46] *Section 75 of the Constitution contemplates that the person whose property is the subject of compulsory acquisition has a proprietary interest as defined by law. The Constitution and more specifically section 75 does not create proprietary interests nor does it allow the court to create such rights by constitutional fiat. It protects proprietary interests acquired through the existing legal framework.*” It is not in dispute that the properties in contention were registered under the ***Registration of Titles Act (Repealed)*** which has been replaced by ***Land Registration Act, Act No. 3 of 2012***.
27. The petitioner being the holder of a title is entitled to rely on the indefeasibility conferred by statute to protect its right to property. This is the effect of **section 23** of the ***Registration of Titles Act (Repealed)*** and its successor **section 26(1)** of the ***Land Registration Act, Act No. 3 of 2012***. **Section 23(1)** of the ***Registration of Titles Act*** which reads as follows, “*The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.*”
28. The title document is conclusive proof of ownership and the owner thereof is entitled to exercise and enjoy all the incidents that ownership confers. The principle of indefeasibility was summarised in ***Dr Joseph N K arap Ng'ok v Justice Moiwo ole Keiuwa and Others Nairobi Civil Application No. NAI 60 of 1997 (Unreported)*** where the Court of Appeal stated thus, “*Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title to such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.*” (See also ***Wreck Motors Enterprises v The Commissioner of Lands and Others Nairobi Civil Appeal No. 71 of 1997 (Unreported)***, ***Nairobi Permanent Markets Society and Others v Salima Enterprises and Others Nairobi Civil Appeal No. 185 of 1997 (Unreported)***).
29. The evidence presented by the three witnesses points to an irregularity in the manner in which the title to the suit property was issued. Mr Mburugu, from the office of the Commissioner of Lands, confirmed that the suit property was hived off the JKIA property after re-planning. The Director of Surveys confirmed that the suit property does not exist in the survey plans and the Director of Physical Planning avers that the JKIA property was not re-planned and as such any subdivision of its title was irregular and contrary to the ***Physical Planning Act***.
30. KAA is the registered proprietor of LR No. 21919 having been issued with a title way back in

1996. It is also entitled to the same rights conferred by the **Registration of Titles Act**. In order for KAA to subdivide the JKIA property, it would have to apply for subdivision in accordance with an approved Physical Development Plan to the Director of Planning in accordance with the **Physical Planning Act**. KAA avers, and I agree with it, that it has never applied for nor presented a subdivision plan for its property. The Director of Physical Planning confirmed that the JKIA property has never been subject of re-planning. The process for planning under the **Physical Planning Act** is quite rigorous and requires various approvals leading to the gazettelement of the Physical Plan. These processes would have been evident had the legal process been complied with.
31. Mr Mburugu did not present the development plan from which the subdivisions, including the suit property, were derived. Survey Plan No. FR 265/97, which he produced, was consistent with the Deed Plan for the JKIA property. It is worth noting that the said Survey Plan was issued on 21st May 1996 while the JKIA title was issued not so long thereafter in August 1996. No further development plan to support re-planning was produced to support the subdivision from which the petitioner's property was derived. I therefore find and hold that while the petitioner is the holder of the title for the subdivision LR No. 9095, it was irregularly subdivided from the property known as LR 21919 belonging to KAA.
32. The right of KAA to the protection of its property cannot be wished away and it is in this context that I am called upon to determine whether there has been a threatened violation of the petitioner's right under **Article 40** of the Constitution by the respondents. The effect of the petition is to enforce the petitioner's rights as against the rights of another title holder as a result of what is a double allocation. It is well established that where there is a double allocation, the first title in time takes priority. In **Gitwany Investment Limited v Tajmal Limited and 3 Others Nairobi HCCC No. 1114 of 2002 [2006]eKLR**, Lenaola J., observed that, “[46] My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in **Wreck Motors Enterprises vs Commissioner of Lands, C.A. No. 71/1997 (unreported)**:- is the “grant [that] takes priority. The land is alienated already.” Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity.” I agree with these sentiments and I find and hold that the title to the JKIA property takes precedence over the suit property.
33. At this juncture let me deal with the respondents' submission that the petitioner acquired the property irregularly and is therefore not entitled to the protection afforded by **Article 40**. **Article 40(6)** of the Constitution states, “The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.” In **Chemei Investments Limited v The Attorney General & Others Nairobi Petition No. 94 of 2005 (Unreported)**, the Court emphasized that even where property is acquired unlawfully, the finding of “unlawful acquired” contemplated in **Article 40(6)** must be through a legally established process (see also **Electrical Options Limited v The Attorney General & Another (Supra)** and **Isaac Gathungu Wanjohi and Another v Attorney General and Others (Supra)**). Under **section 26** of the **Land Registration Act, Act No. 3 of 2012**, the petitioner's title can only be challenged on the ground of fraud or misrepresentation to which he has to be proved to be a party or if it is shown he acquired the title illegally, unprocedurally or through a corrupt scheme. In my view these provisions fall within the rubric of **Article 40(6)** of the Constitution.
34. Although broad allegations of fraud were made by the respondents, the current proceedings were not intended for the purpose of establishing the fact of unlawful acquisition. The respondents did not present any cross-petition to establish fraud, illegality or corruption. I am therefore circumspect in making any findings that would prejudice any other legal process.

35. Where does my finding leave the petitioner who has a title issued by the State? In **David Peterson Kiengo and 2 Others v Kariuki Thuo Machakos HCCC No. 180 and 220 of 2011 [2012]eKLR**, Ngugi J., discussed the implications of indefeasibility of title thus, “[14]Practically, the principle of indefeasibility has two implications for the instant case. It means that if the parties who acquired interests to the properties from Njendu can demonstrate that they did so in good faith, without notice and did not participate in Njendu’s fraud, their titles will be secure and guaranteed by the State. They were not obligated to do anything more than search the official register to establish ownership. If, as it turned out, the register was inaccurate by reason of malfeasance by land officials, the second implication is that the parties deprived of their property by such inaccuracy or malfeasance may bring an action against the State for recovery of damages but not for possession or ownership of the property.” [Emphasis mine]
36. The petitioner, having been issued with a title by the State, is entitled to turn to it for relief for a breach of warranty as to the title of the property. In **Gitwany Investment Limited v Tajmal Limited and 3 Others (Supra)**, the Commissioner of Lands was ordered to pay damages to the 2nd title holder for incompetence and negligence in issuing a title without cancelling the prior title. In this case, the evidence presented is clear the petitioner’s title was issued without regard to KAA’s title to the JKIA property.
37. These proceedings were not instituted for the purpose of seeking compensation from the State for issuing a defective title hence I will not award any compensation to the petitioner. In defending such a case, the State as I have stated, is entitled to interpose such a claim with a plea of fraud, illegality or corruption. These issues therefore must be determined in another forum and I say no more.

Conclusion and Disposition

38. The issue in this case is whether petitioner’s constitutional rights appurtenant to LR No. 9095 should be protected and enforced against the 1st respondent as owner of LR No. 21919. I have found as fact that the petitioner’s rights cannot be enforced against the 1st respondent as its title was irregularly issued over the 1st respondent’s property. I unable to grant the orders sought in petition as to do so would amount to disregarding the title issued to KAA issued earlier in time.
39. The issue of costs is within the court’s discretion. I shall not award costs because the petitioner was entitled to litigate this matter to protect its interest in a title to property guaranteed by the State.
40. The petition is therefore dismissed with no order as to costs.

DATED and DELIVERED at NAIROBI this 5th day of May 2014

D.S. MAJANJA

JUDGE

Mr Odoyo instructed by T. K. Rutto and Company Advocates for the petitioner.

Ms Orenge instructed by Sichangi Partners Advocates for the 1st respondent.

Ms Muchiri, Litigation Counsel, instructed by the State Law Office for the 2nd and 3rd respondents.