



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL PETITION NO 246 OF 2012

MUGURE THANDEPETITIONER

VERSUS

THE ATTORNEY GENERALRESPONDENT

JUDGMENT

1. The petitioner filed this petition alleging violation of her right to property under Article 40 of the Constitution. She asserts that because of the lacuna in the Land Registration Act, Act No. 3 of 2012 (hereafter LRA), her title deed, Nachu/Mikuyuni/660, which was issued under the Registered Land Act, (Cap 300) by the Kiambu Land Registrar on 4th May 2012, two days after the commencement date of the LRA, may be held invalid as it was issued by a Registrar not appointed under the LRA. She claims that the fact that her title can be questioned limits her constitutional right to own and acquire property as envisaged by Article 40 of the Constitution.

2. In the Petition dated 7th June 2012, which is supported by her affidavit sworn on the same day, the petitioner seeks the following orders:

(a) A declaration that the implementation of sections 106(1) and 109 of the Land Registration Act No. 3 of 2012 (LRA) without the necessary infrastructure and administrative structures fetters and violates the petitioner's exercise of the right to property as provided for under Article 40(1) of the constitution.

(b) A declaration that the implementation of sections 106(1) and 109 of the LRA without the necessary infrastructure and administrative structures violates the land policy principles as enshrined in Article 60 of the constitution.

(c) An order that this is a matter of public interest.

(d) An order suspending the implementation of sections 106(1) and 109 of the LRA pending;

(i) The constitution of the National Land Commission as provided under part III of the National Land Commission Act No. 5 of 2012

(ii) The promulgation of Regulations for the better carrying into effect the purposes and provisions of the LRA as provided for under section 110 of the LRA, and

(iii) The appointment of the Chief Land Registrar and such other offices necessary for the

3. Together with the Petition, the petitioner had also filed a Chamber Summons Application dated 12th June 2012 seeking a temporary injunction to restrain the respondent from implementing sections 106(1) and 109 of the LRA pending determination of this Petition. That application was argued before me on 2nd July 2012 and I delivered a ruling thereon on 3rd August 2012. I will revert to my findings in that ruling later on in this judgment.

The Petitioner's Case

4. Ms Gachihi for the petitioner asked the court to render its judgment on the basis of the petitioner's submissions dated 31st January 2013 the petitioner contends that with the coming into force of the LRA, legal and practical difficulties have been encountered that have rendered title to property precarious and defeasible. She argues that section 12 to 14 of the LRA provides for the appointment of the Chief Land Registrar, County Land Registrars and other land Registrars as may be considered necessary for the effective discharge of functions under the LRA. She contends that the Registrars currently in office were appointed under the repealed Acts and no Registrars have been appointed under the LRA to carry out the provisions of the LRA.

5. She contends further that there are no provisions in the LRA that allow the Registrars appointed under the former legal regime governing land to remain in office, and their continued stay in office is illegal. She contends further that in the absence of such provisions, the acts done by such Registrars including execution and registration of dispositions of interests in land are *ipso facto* illegal. She submits that the full implementation of sections 106(1) and 109 of the LRA cannot be realised without the appointment of the Chief Land Registrar and such other officers necessary for the effective discharge of functions under the LRA.

6. The petitioner contends therefore that the implementation of the LRA in its current form is incompatible with the right to property as protected by Article 40 of the Constitution. In particular, the operation of sections 106 (1) and 109 of the LRA without putting in place the necessary infrastructure and administrative structures required by the LRA violates the land policy principles enshrined in Article 60 of the Constitution which principles are the basis for ensuring the sustainable, productive and equitable holding and use of land.

7. She urged the Court to suspend the operation of sections 106(1) and 109 and allow registration to proceed as it did before the coming into force of the LRA on 2nd May 2012 to await the appointment of Registrars under the LRA. She also urged the Court to adopt a generous and purposive interpretation to Article 40(1) of the Constitution and hold that the proprietary rights entail peaceful enjoyment of land and there can be no peaceful enjoyment of land where an unascertained state of affairs subsists.

The Respondent's Case

8. Mr. Moimbo, Counsel for the respondent, submitted that the issues raised by the petitioner in the Petition are the same issues that had been addressed by the court in its ruling of 3rd August 2012 on the petitioner's application for conservatory orders. He therefore asked the court to rely on the submissions made by the respondent with regard to that application.

9. The basic argument made before me by the respondent in his response to the petitioner's application for conservatory orders is that the Constitution envisages protection of the right to property and that this court has jurisdiction to protect that right. However, the application was speculative as it was based on unfounded apprehensions. Mr. Moimbo contended on behalf of the respondent that the petitioner's right to property had not been challenged. She had been duly registered as the owner of all that parcel of land known as Nachu/Mikuyuini/660 and issued with a title that is indefeasible.

10. According to the respondent, some parts of the repealed Acts had been saved by the LRA, and therefore every holder of a title issued under the LRA or the repealed Acts has valid ownership that can only be impugned under the provisions of Article 40(6) of the Constitution. He referred the court in particular to the provisions of section 108 of the LRA which provides that the provisions of the repealed Acts would continue to apply where there is a lacuna. A conservatory order directed at section 106 and 109 of the LRA would, according to the respondent, stifle the operations of land registries across the country.

Determination

11. The substance of the petitioner's complaint with regard to the LRA is that the implementation of sections 106 (1) and 109 of the LRA without the necessary infrastructure and administrative structures fetters and violates her right to property as guaranteed under Article 40(1) of the Constitution. She that no Registrars have been appointed under the provisions of the LRA, and that those who continue to register documents and issue titles, including the title to her property, were appointed under the statutes that formerly governed interests in land, which statutes were repealed by the LRA. In her view, the full and proper implementation of sections 106(1) and 109 of the LRA cannot be realised without the appointment of the Chief Land Registrar and such other officers as are necessary for the effective discharge of functions under the LRA.

12. The LRA provides at section 109 that the Acts set out in the Schedule to the Act are repealed. These Acts are the Indian Transfer of Property Act of 1882, the Government Lands Act, (Cap 280), The Registration of Titles Act (Cap 281), The Land Titles Act, (Cap 282) and the Registered Land Act (Cap 300) of the Laws of Kenya. Under the provisions of Section 106(1) of the LRA, the repealed Acts ceased to apply to a parcel of land to which the Act applied upon the coming into force of the LRA.

13. As I understand it, the contention by the petitioner is that the LRA makes provision for the repeal of the legislation which constituted the legal regime governing land without having made adequate provision in its transitional provisions to ensure that the validity of titles issued subsequent to the coming into force of the LRA is not in question.

14. Section 108 of the LRA contains the transitional provisions with regard to the land law regime. It provides as follows:

'Until the Cabinet Secretary makes the regulations contemplated under section 110, any rules, orders, regulations, directions, notice forms, notifications or other administrative acts made, given, issued or undertaken before the commencement of this Act under any of the Acts of Parliament repealed by this Act or any other law continue in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with this Act.' (Emphasis added)

15. The petitioner had raised these concerns and sought the same prayers as she seeks in her petition in her application for conservatory orders. In declining to grant the conservatory orders, I observed as follows in my ruling of 3rd August 2012:

'The petitioner's concern with regard to her title to property is, in my view, adequately answered by the provisions of Section 108 set out above. Her concern, as is apparent from her affidavit and petition, is that the implementation of section 106(1) and 109 threatens her rights because administrative action has not been undertaken to ensure the operationalization of the LRA. However, the provisions of section 108 of the LRA that the form of the documents or instruments presented for registration shall not change until rules, orders, regulations, directives, notices, forms and notifications are put in place by the Cabinet Secretary clearly secure any title document to land that is issued prior to the enactment of the requisite rules and regulations by the Cabinet Secretary.'

16. The petitioner has also, in her submissions on the substantive petition and in her application for conservatory orders, expressed concern about the validity of the title issued to her on 4th May 2012. This

issue was also addressed in my ruling of 3rd August 2013, and this underscores the challenge in raising issues and seeking prayers at an interlocutory stage as are sought on the final determination of a matter. In dealing with the question of the petitioner's title, I observed as follows:

'In addition, the concerns of the petitioner with regard to her title are, in my view, specifically addressed by the provisions of section 107 as follows:

107. (1) Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

(2) Unless the contrary is specifically provided for in this Act or the circumstances are such that the contrary must be presumed to be the case, where any step has been taken to create, acquire, assign, transfer, or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act. (Emphasis Added)

17. I then went on to observe with regard to the petitioner's title as follows:

'Having considered the petitioner's application against the provisions of Section 107 and 108 of the LRA, I find nothing that would justify the grant of an interim injunction restraining the operationalization of sections 106(1) and 109 of the Land Registration Act. The legislation and provisions in questions result from implementation of the constitutional provisions with respect to land registration. The Act contains sufficient transitional provisions to safeguard the petitioner's and any other title issued after the commencement date.

18. As correctly observed by the respondent, the substance of this Petition was fully addressed in my ruling of 3rd August 2013, and my observations above, and there is nothing left for this court to determine at this stage.

19. I must observe in closing that this Petition is based on an apprehension that is in my view purely hypothetical in nature. There has been no question or challenge to the validity of the petitioner's title, and there is therefore no dispute or controversy that the court should have been called upon to determine. As was observed in **John Harun Mwau & 3 Others v Attorney General and 2 Others, Petition No. 65 of 2011**, the court cannot exercise its jurisdiction under Article 258(1) and 165 (3)(d) in the absence of a real dispute. The Court observed as follows in this regard:

'We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the constitution conferred under Article 165(3) (d) does not exist in a vacuum. We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the constitution conferred under Article 165(3)(d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy. (Emphasis Added)

20. There is no dispute or controversy before me, and no basis has been established for suspending the operations of section 106 and 109 of the LRA and allowing registration under the laws repealed by section 109 of the LRA.

21. The upshot of my findings is that this Petition must fail. It is hereby dismissed but with no order as to costs.

Dated, Delivered and Signed at Nairobi this 11th day of April 2013

**MUMBI NGUGI
JUDGE**

Ms. Njoki Gachihi instructed by the firm of Kembi Gitura & Co. Advocates for the Petitioner

Mr. Moimbo Momanyi, Litigating Counsel, instructed by the State Law Office for the Respondent