



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

Petition 48 of 2010

IN THE MATTER OF ARTICLE 19,22,23(1),40(1) AND (2) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF AN ALLEGED CONTRAVENTION OF ENFORCEMENT OF BILL OF RIGHTS

BETWEEN

SELASSIE WAIGWA KARUORO.....PETITIONER

VERSUS

THE COMMISSIONER OF LANDS.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

EXPORT PROCESSING ZONES AUTHORITY.....INTERESTED PARTY

RULING

1. In the application dated the 16th of May 2012, The Interested Party (hereafter ‘the applicant’) seeks the following orders:

i. That the petition herein be struck out

ii. That the costs of this application and the petition be borne by the petitioner.

2. The application is supported by the affidavit of Ms. **Maria Ouya**, the Corporate Secretary of the Interested Party sworn on the 16th of May 2011.

3. The respondents supported the application but my perusal of the court file revealed that no affidavit

in opposition was filed by the petitioner.

4. In his affidavit in support of his petition dated 9th September 2010, the petitioner claims to be entitled to various properties which were part of L.R. No 20603 whose lease had been granted to him in 1995.

5. He states that sometime in August 2010, the applicant trespassed on his land and started constructing a perimeter wall around it, and upon making inquiries, he discovered that the 1st respondent had issued a letter dated 30th August 2010 directing that his title to the land be cancelled and expunged from their records.

6. On its part, the applicant states that it is the registered owner of the suit property, **L.R. No. 18474** issued on 1st March 1991. It asserts that the petitioner was alleging ownership of a parcel of land comprised in title number L.R.65779 and Deed Plan Number 294133 which it says is similar to a fictitious claim that had been advanced by one John Kiplangat and Paul Chepsat over the same property, allegedly allotted to them by the 1st respondent by a letter dated 30th September 1994.

7. However, the alleged allotment to John Kiplangat and Paul Chepsat had been cancelled by the 1st respondent by a letter dated the 22nd May 1996 in which the 1st respondent informed the alleged allottees that the allotment had been cancelled as the letter of allotment had been issued in error since the land is private property belonging to the Export Processing Zone Authority and was not available for allotment. The 1st respondent had also informed the applicant by a letter dated the 6th May 2002 that the alleged allotment had been cancelled in 1996; that the claim by John Kiplangat and Paul Chepsat was based upon a forged deed plan No 191479 and that the applicant was the legal owner of the suit property.

8. The applicant also avers that the deed plan no 294133 submitted by the petitioner was made on 14th March 1995 and relates to the same property that John Kiplangat and Paul Chepsat had earlier claimed. The petitioner had produced yet another Deed Plan 191479 dated 8th December 1994 in his Replying Affidavit dated 10th November 2010 in respect of the same parcel of land. According to the applicant, this was the same Deed Plan that had been advanced by John Kiplangat and Paul Chepsat who had claimed to have been allocated the land.

9. Mr. Mbugua for the applicant submitted that the petition raised no valid constitutional issue and that the petitioner had not established a superior title to that of the Interested Party. He argued that the issue of a threatened violation of rights is premised on the supposition that the petitioner has a valid title to the property. Since the applicant is the registered owner of the property, a fact which had been confirmed by the 1st respondent in the replying affidavit to the petition sworn on 16th November 2011, the petitioner had no valid claim to the land.

10. The applicant contended further that the petitioner had produced documents with conflicting information. The acreage of the property which the petitioner claims is different from what the Commissioner allocated to the applicant as is the deed plan in respect of the land. In the face of such clear conflicting depositions, the petitioner's claim is based on suspect documents and cannot found any constitutional issues under Article 40.

11. Mr. Mbugua submitted that in any event, even if the petitioner had a claim to the land, such claim lies in private law where the documents can be examined and witnesses cross-examined. He relied, among others, on the case of **Renega Project Ltd -v- Commissioner of Lands and Another High Court ELC No. 28 of 2010** for the proposition that where cross examination was necessary to establish a claim, the claim lay in private law and could not form the basis for a constitutional reference. He therefore urged the court to find that the petition is frivolous, an abuse of the court process, and to strike it out.

12. Ms. Barasa for the respondents supported the application and submitted that the right to property under Article 40 does not extend to property that has been unlawfully or illegally acquired. The dispute in

this petition is clearly a dispute over ownership of the subject property and the validity of the titles held by the applicant and the petitioner and is not an issue that can be determined by a constitutional petition. She referred to the contents of the affidavit sworn on the 16th of November 2010 by **Silas Kiogora Mburugu**, the Chief Land Administration Officer in the Ministry of Lands with regard to the title to the property and urged the court to dismiss the petition.

13. In the said affidavit, Mr. **Silas Kiogora Mburugu** states that L.R No 18474 registered as IR No 62166, measuring about 454.4 hectares situated in Mavoko Municipality was allocated to the Export processing Zone authority (EPZA) by the Government for a term of 99 years from 1st March 1991. A copy of the title issued to the applicant is annexed to the affidavit. The conditions of the grant were that the land was not to be sold transferred or charged except with prior consent in writing of the Commissioner of Lands. The applicant, according to the 1st respondent, has subdivided and transferred portions of the land to various beneficiaries but the petitioner is not one of the beneficiaries. The said beneficiaries have sub-leases of the property while the mother title remains with the Interested Party

14. The 1st respondent confirms that he had, by his letter dated 30th August 2010, directed the Chief Land Registrar to initiate the process to cancel all the titles resulting from the alleged subdivision of LR No 20603 as the titles had been observed to be irregular.

15. From the submissions before me and the pleadings filed in this matter, it is clear that such title as the petitioner may have in the subject property is based on documentation that is questionable and that has been disputed by the issuing authority. In order for a party to come to this court to seek protection of a right, it should have a clear and valid claim, one that the court does not need to first establish by a close examination of the evidence and by calling witnesses who will be cross examined in order to establish the validity of a claim. If this is what is required, then, as correctly submitted by the applicant, a party must seek relief in the private law realm so that his claim can first be determined on the basis of evidence adduced and tested by cross-examination.

16. On the other hand, the 1st respondent has no right to cancel any title by way of a letter or, has been the norm recently, by way of Gazette Notice and without according the party affected by such cancellation a hearing. This court has so held in several decisions in the last two years. See in particular **Power Technics Limited-v- Attorney General Petition No. 178 Of 2011.**

17. In considering this matter, however, I need to consider the benefit of proceeding with a hearing of this petition. Ultimately, the court will find only a procedural violation of the petitioner's rights, but will not be in a position to make a finding on the petitioner's claim to the subject property. While, therefore decrying the actions of the 1st respondent in cancelling the petitioner's titles unprocedurally, and in light of the fact that the petitioner did not deem it fit to oppose the application, I see no useful purpose in maintaining this petition.

18. I therefore grant the prayers sought and strike out the petition but with no order as to costs.

Dated, Delivered and Signed at Nairobi this 6th day of July 2012

MUMBI NGUGI
JUDGE