



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 697 of 2007

NJUGUNA PETER KINYAGIA.....PETITIONER

AND

THE COUNTY COUNCIL OF KIAMBU.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioner's case relates to his Plot T.32 located at Kimende Market along the Nairobi-Nakuru highway. The petitioner's case is that he was allocated the plot in 1987 by the County Council of Kiambu ("the County Council") after complying with the terms and conditions. On the property stands a one storey building.
2. The petitioner avers that he has paid annual market rent since 1987 to date and the 1st respondent, the County Council, has refused to approve its building plans and grant his tenants licences thereby violating his fundamental rights and freedoms. Further the County Council has threatened to demolish his building.
3. The basic facts of the case are not disputed and are set out below.

The facts

4. When the petitioner was allocated the plot in 1991, he submitted to the County Council building plans for a one storey building which he intended to construct on the plot. The plans were duly approved and in 1992 he constructed the one storey building.
5. In 2006, the petitioner submitted to the County Council a revised building plan in which he proposed to add a second storey to the single storey building. The County Council rejected the building plans. At the same time, it declined to grant the petitioner's tenant licenses to carry on business on the suit premises.
6. The County Council claimed that Plot T.32, Kimende Market was situated on a road reserve and pursuant to the ***Physical Planning Act (Cap 26)***, it was obliged to seek approval from among others, the Ministry of Roads and Public Works before approving development plans. By a letter dated 7th May 2007, the Ministry of Roads and Public Works refused to permit the petitioners development plan on the ground that Plot T. 32 was situated on a road reserve which would be required in future for the maintenance of road A 104.
7. By a letter dated 22nd May 2007, the County Council wrote to the petitioner informing him that the proposed development had been rejected by the Road Department, Ministry of Roads and Public Words.

The County Council thereafter threatened to demolish the building which action precipitated these proceedings.

Petitioner's Case

8. The petitioner's case is that his property rights protected under **section 75** of the former Constitution have been violated. Although the petitioner does not have a registered title, Mr Gacheru, counsel for the petitioner, submitted that the petitioner had a proprietary interest capable of being protected. Counsel relied on the case of ***Commissioner of Lands v Hussein (1968) EA 585***.

9. The petitioner argues that the purported notices issued to him by the County Council are illegal because they require him to demolish a building whose plans the County Council approved in 1991 thus paving way for the construction of the same.

10. The petitioner submits that the power to enter land and demolish building under **section 29** of the ***Physical Planning Act*** exists only where a building has been constructed without approval of the relevant authority. That the action of the County Council is unreasonable within the ***Wednesbury's Principles*** and discriminatory within the meaning of **section 82** of the former Constitution and therefore null and void.

11. The petitioner submits that in 1960s, Plot No. T. 203 was set aside for the Bathi/Kimende Market was trust land which the County Council had power, under **section 145** of the former Constitution, to subdivide and make grants to citizens for development of the market and in exercise of its powers under **section 117** of the former Constitution and the ***Trust Land Act***, the County Council made grants to, among others, the petitioner out of the said Plot No. T. 203 Bathi. Upon such allocation Plot No. T. 32, Kimende Market, the same became the petitioner's private property.

12. The petitioner further submits that **section 118** of the former Constitution requires **section 75** of the former Constitution to be complied with before the petitioner's land is acquired. According to the petitioner, the 2nd respondent has not acquired the petitioner's property as required by **section 75** of the former Constitution and the ***Land Acquisition Act (Chapter 295 of the Laws of Kenya)***.

The Respondents' Case

13. The respondent opposes the petition by the Replying Affidavit of Joseph Kimani, the County Clerk, sworn on 3rd July 2009. Mr Kimani depones that Plot T. 32 does not fall within the jurisdiction of the County Council as it is on a road reserve of the old Nairobi Naivasha Highway C68. This road is under the control of the Chief Engineer Roads and could not be alienated or allocated by the County Council.

14. According to the County Council, the fact that the property was part of a road reserve was duly confirmed by the Ministry of Roads and Public Works. As such the County Council cannot and could not alienate the property to the petitioner.

15. Counsel for the County Council, Mr Mwaura, submitted that the Ministry of Roads and Public Works found that the property was on a road reserve and as such the County Council had no authority to give title of any kind to the petitioner and no good title could have passed to the petitioner and not even a licence could be given to the petitioners and his tenants.

Determination and disposition

16. The petitioner's case is clearly grounded on the provisions of **section 75** of the former Constitution which prohibits arbitrary deprivation of property. **Section 75** of the former Constitution protects proprietary rights and interests acquired under the law. For the petitioner to take advantage of these provisions, then he must establish that he has a right to the property he seeks to protect. In the case of ***Joseph Ihugo Mwaura and Othes v The Attorney General and Others Nairobi Petition No. 498 of 2009 (Unreported)***, the court referring to **section 75** 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.”

17. The fundamental issue in this case is whether the petitioner is entitled to the Plot No. T 32 Kimende Market. This calls for an examination of the nature of the proprietary interest the petitioner claims.

18. Both parties concede that between 1956 and 1959, trust land in Kiambu District underwent the process of consolidation and registration. Under that process the entire trust land was divided into personal properties registered in the names of individuals and certain parcels were reserved for schools, markets, hospitals and townships.

19. What is in dispute is whether the property falls within the jurisdiction of the County Council. There is a clear deposition by the County Council Clerk and the confirmation contained in the letters written on behalf of the Ministry of Roads and Public Works confirming that the property was part of a road reserve. Although the 2nd respondent did not file an affidavit, there is no reason to believe that the letters confirming that the plot was part of a road reserve is not authentic. The letters were written in the ordinary course of business. I therefore find and hold that on the balance of probabilities the subject property is a road reserve under the control of the Ministry of Roads and Public Works.

20. The subject plots falls not on trust land, which would be under control of the County Council, but on a road reserve which falls outside the jurisdiction of the County Council. The letter dated 22nd June 2006 from the Ministry of Road and Public Works is relevant in this respect. It states;

*The County Clerk
Kiambu County Council
P O Box
Kiambu*

RE: DEVELOPMENT OF PLOT NO. 32 NEW BATHI (KIMENDE MARKET)

Reference is hereby made to Lari Division Administrative Officer’s letter Ref No. KCC/LND/G3/VOL 1/14 dated 13th June 2006 on the above subject.

It is noted that the plot under development is apparently on the road reserve of old road C 68 whose tentative road reserve is 40 m. The road is however not maintained by roads department since Nairobi Nakuru road (A 104) is operational.

All the same, the roads (both old and currently utilized) belong to the Chief Engineer Roads. Since the County Council has not liaised with Office of Chief Engineer Roads, it is out of order to utilise any part of the road.

The council is therefore advised to seek authority from the above mentioned office to have the section of the road put under jurisdiction of County Council so that it may use it as a service road of Kimende Market without interference.

The Council may thereafter decide on how to utilise the road reserve.

*(Signed)
Eng. E N Waithaka
District Works Officer
KIAMBU*

cc. Njuguna Peter Kinyagia

21. Since the property is not within the jurisdiction of the County Council to alienate, the alienation of

Plot T. 32 Kimende was without legal basis and the petitioner cannot acquire a legal right to it.

22. The petitioner has relied on the case of *Commissioner of Lands v Hussein (Supra)* as authority to establish its proprietary claim. In that case, army authorities verbally suggested to the defendant's father that he should, at his own expense erect building for a canteen on an area of land in Nairobi then occupied by the Army. The defendant's father accepted the suggestion on condition he was given a 50 years lease. On the basis of the undertakings given to him the defendant's father, built the canteen on the land which remained unalienated Crown (later Government) land subjected to the *Government Land Act*. In 1964, the Army moved out of the property and handed it over to the Ministry of Health. No lease or registrable interest was given to the defendant's father although he made, through correspondence, a request for a 30 year lease.

23. The Commissioner of Lands brought proceedings to take possession of the premises. The court held that the army had encouraged defendant's father, the defendant's predecessor in title to spend money on erecting the building on the understanding fostered by them that he would be given a reasonable measure of security of tenure and therefore the Commissioner was stopped by acquiescence from claiming possession of the suit premises.

24. *Commissioner of Lands v Hussein (Supra)* can easily be distinguished. Unlike the present case, the Commissioner of Lands had actually commenced to suit to recover the land and the defendant was entitled to rely on proprietary estoppel to defence the suit. Further, the land subject of the suit was unalienated government land. In this case, the land is a road reserve and the County Council could not purport to give any undertaking to the petitioners. The County Council purported to allocate what was a road reserve under the control of the Ministry of Roads and Public Works. It had no authority to do so nor could it give any assurance of the kind that would create a proprietary estoppel on the part of the County Council.

Disposition

25. I am satisfied that on the material before me that the petitioner's Plot No. T. 32 falls on a road reserve being part of the old Nairobi Naivasha Highway C68. It was unavailable for alienation and the petitioner could not acquire a legal right or interest (see *Niaz Mohamed v Commissioner of Lands and Others Msa HCCC 423 of 1996 (Unreported) [1996] eKLR*).

26. In the circumstances of this case, I find and hold that the petitioner does not have a proprietary interest to be protected by **section 75** of the former Constitution.

27. The net result of my finding is that the petitioner's claim is dismissed but with no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 5th day of November 2012

D.S. MAJANJA
JUDGE

Mr Gacheru instructed by Kamau Kuria and Kiraitu Advocates for the petitioner.

Mr Mwaura instructed by Karuru Mwaura and Company Advocates for the 1st respondent.