



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC PETITION CASE NO. 5 OF 2019

SPRINGFIELD FARMERS COOPERATIVE

SOCIETY LTD.....PETITIONER

VERSUS

1. THE HONOURABLE ATTORNEY GENERAL

2. W.C. KIMAIYO, DEPUTY COUNTY COMMISSIONER

LIKUYANI SUB COUNTY.....RESPONDENTS

JUDGEMENT

The facts of this petition is that the petitioner was allotted L.R. No. Kakamega/Kongoni/327 on 24th March 1969, among other parcels of land initially known as P.I.805. That on the said land, the petitioner put up a cattle dip, and semi-permanent rental houses. That sometimes in July, 2018, the petitioner got a letter dated 19th July, 2018, which enclosed minutes for leaders meeting from the 2nd respondent stated that a portion of L.R. No. Kakamega/Kongoni/327, measuring approximately 0.9 hectares or 2.5 acres will be used for construction of his official residence. That the petitioner, being the allottee of the said parcel of land, was not involved in or notified of the meeting, hence the petitioner was denied the right to participate in the said meeting and thus denied the right to be heard and fair administrative action. That the petitioner avers that all parcels of land under the Settlement Fund Trustees are registered in the name of the fund first, before the same is transferred to the allottee. That the petitioner responded to the 2nd respondents letter vide its letter dated 27th September, 2018 in which the petitioner informed the 1st respondent that his action amounted to trespass and encroachment on its properties, which action is unlawful. That the petitioner wrote a letter dated 27th September, 2018 to the Sub County Land Settlement Officer, who responded vide his letter dated 2nd October, 2018, confirming that the land in question belong to the petitioner. That the 2nd respondent unlawfully and without any colour, fenced off the petitioner's land, erected a gate and forcefully chased away its tenants thus denying the petitioner the right of user and income. That the 2nd respondent's action are in direct contravention of the Constitution of Kenya, 2010 as it tampers with the various fundamental rights and freedom as enshrined in the Constitution. That the petitioner further states that the 1st respondent has failed and acted in blatant disregard by deliberately abdicating his duty to advice the 2nd respondent and defend the Constitution of Kenya 2010 and the rule of law. That there is eminent danger and threat to the petitioner in that it has been subjected to unlawful arbitrary administrative action, which flies on the face of the Constitution of Kenya, 2010 and the same hampers and limits various fundamental rights of the petitioner to own land and be subjected to fair administrative action. That the petitioner is apprehensive that the sorry state of affairs shall continue in the absence of this courts intervention and the government resource shall continue being wasted on unplanned and unlawful projects. That the petitioner avers that the respondents action is discriminatory in that the 2nd respondent has failed to involve the petitioner, give notice and failing to follow due process of compulsory acquisition of land and payment of compensation.

The petitioner submits that the legal foundation of the petition is as follows;

1. Article 1 (1) of the Constitution of Kenya stipulates that all sovereign power belong to the people of Kenya and shall be exercised only in accordance with this Constitution.
2. Article 2 (1) of the Constitution of Kenya pronounces the supremacy of the Constitution and provides that the constitution binds "all persons and all state organs at both levels of Government.
3. Article 2 (5) of the Constitution provides among other things that any act or omission in contravention of the Constitution is invalid.

4. Article 3 of the Constitution of the Republic of Kenya obligates every person to respect, uphold and defend the constitution.
5. Article 10 of the Constitution provides for the values and principles of governance to be adhered to by every person.
6. Article 22 (1), read together with Article 258 (1) gives every person the right to institute court proceedings claiming the right or fundamental freedom in the Bill of Right has been denied, violated or infringed or is threatened. Article 22 (2) and Article 258 (2) provides that in addition to a person acting in their own interest court proceedings under clause 1 may be instituted by (a) a person acting on behalf of another person who cannot act in their own name, (b) a person acting as a member of, or in the interest of a group or class of person; (c) a person acting in the public interest; or (d) an association acting in the interest of one or more of its members.
7. Article 28 of the Constitution guarantees every person the right to human dignity it provides that; Every person has inherent dignity to have that dignity respected and protected.
8. Article 47 guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
9. That the petitioner's right to property has been infringed.

The respondents did file a response to petition dated 1st July, 2020 and filed on 6th July, 2020. That the petitioner is relying on a letter of allotment which has not been processed into a formal lease or title and hence it is not registered owner of

land parcel no. Kakamega/Kongoni/327 since as per the records the same is still registered under the Settlement Fund Trustee. That therefore the petitioner is not protected by the provisions of Article 40 of the Constitution and Section 26 (1) of the Land Registration Act, 2012.

That in *John Mukora Wachira & Others vs. Minister of Lands & Others*, petition No. 82 of 2010, quoted with approval in the case of *Evans Kafusi Mcharo vs. Permanent Secretary Ministry of roads, Public Works and Housing and Another* (2013) eKLR the court held as follows:-

“The court observed that the distinction is based on the fact that the right to property under the Law and Constitution is afforded to the registered owners of land, that a letter of allotment is not proof of title as it is only a step in the process of allocation of land.”

That in *Stephen Mburu & 4 Others vs. Comat Merchants Limited & Another* [2012] eKLR Kimondo J at paragraph 11 held that:-

“From a legal standpoint, a letter of allotment is not a title to property, it is transient and is often a right or offer to take property.”

That land parcel No. Kakamega/Kongoni/327 was set aside as a public utility in the year 1976 and therefore was not available for allocation to the petitioner. That even assuming that the same was allocated to the petitioner through a letter of allotment, the petitioner herein has failed to fulfill the conditions in the letter of allotment, that is, payment of the full amount as per the allotment letter. That through leaders meeting held on 25th July, 2018 which included members of the petitioner it was agreed and resolved that one acre out land parcel No. Kakamega/Kongoni/327 be hived off and the official residence of the Deputy County Commissioner, Likuyani Sub County be built and this is explained by the 2nd respondent's replying affidavit. That the petition filed against the 2nd respondent is fatally defective, improper and against the 2nd respondent in his personal capacity for actions that he undertook in his official capacity and they urge the honourable court to dismiss the petition as against the 2nd respondent. That in *Kimunai Ole Kimeiwa & 5 Others vs. Joseph Motari* (The then District Commissioner Rongai District) & 3 others (2019) eKLR the court held as follows:-

“The respondents are correct, that when discharging one's duties or functions, the property course is to sue the Attorney General or the officer and not the individual officer in their personal capacity”

That the petition is improper as it is disguised as a constitutional issue for redress for violation of fundamental rights when in fact it is an ordinary land dispute elevated into a constitutional issue that can be resolved through a normal civil suit.

This court has carefully considered the petition and the submissions therein. The petitioners came to this court under certificate of urgency where they filed a Notice of Motion Application and the petition. The petition proceeded by way of written submissions. Article 40 of the Constitution, reads in part as follows:

40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any

description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

The Land Acquisition Act (now repealed) provided for the procedure to be followed in the compulsory acquisition of property by the Government of Kenya. When the compulsory acquisition herein began, the Land Acquisition Act Cap 295 Laws of Kenya, Section 3 of the Land Acquisition Act provided as follows:-

“Whenever the Minister is satisfied that the need is likely to arise for the acquisition of some particular land under section 6, the Commissioner may cause notice thereof to be published in the Gazette, and shall deliver a copy of the notice to every person who appears to him to be interested in the land.”

The Universal Declaration of Human Rights has the force of law in Kenya. In the case of R vs Chief Immigration Officer (1976) 3 AER 843 Lord Denning stated thus regarding the Universal Declaration of Human Rights;

“... Among the important rights which individuals traditionally have enjoyed is the right to own property. This right is recognised in the Universal Declaration of Human Rights (1948). Article 17(1) which states that everyone has the right own property and Article 17(2) guarantees that "no one shall be deprived of his property" The contention of the State counsel negates this right. An intention to provide for arbitrary infringement of human rights cannot be attributed to the legislature unless such intention is unequivocally manifest. When Parliament is enacting a statute, the court will assume that it had regard to the Universal Declaration of Human Rights and intended to make the enactment accord with the Declaration and will interpret it accordingly...”

And Justice G.V. Odunga in Republic vs Council of Legal Education Ex-parte Nyabira Oguta (2016) eKLR, phrased it thus:

“Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality”.

Be that as it may, I have perused the court records and documents therein and find that, the suit parcel of land parcel No. Kakamega/Kongoni/327 current registered owner is the Settlement Fund Trustee as per a copy of the certificate of official search and not the petitioner herein. I find that the petitioner has failed to establish that they are the registered proprietors of the suit land and/or any legal ownership of the same. Secondly it has been established that, through the all leaders meetings held on 10th July, 2018 and 26th October 2018 all leaders in the sub county resolved that the Deputy County Commissioner official residence be put up on the said public utility as per copies of the minutes in the file. That the Deputy Commissioner convened a meeting with the officials of the petitioner herein on 25th July, 2018 at his office where members agreed after lengthy deliberations to withdraw their objections on the one acre piece of land being hived off from suit property, Kakamega/Kongoni/327 for the construction of the Deputy Commissioner official residence as per a copy of the minutes. The Chairman of the Applicant’s Cooperative Society attended all the meetings as captured in the minutes. I find that the petitioner’s rights to a fair trial have not been infringed. I find this petition is unmerited and I dismiss it with costs

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 24TH NOVEMBER 2020.

N.A. MATHEKA

JUDGE