



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. PETITION NO. 6 OF 2018**

**MULLYS CHILDRENS FAMILY TRUST REGISTERED TRUSTEES.....PETITIONER**

**AND**

**MINISTRY OF PUBLIC SERVICE, YOUTH AND GENDER AFFAIRS.....1<sup>ST</sup> RESPONDENT**

**STATE DEPARTMENT OF PUBLIC SERVICE & YOUTH, NATIONAL YOUTH SERVICE.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. In the Petition dated 23<sup>rd</sup> February, 2018, the Petitioner averred that it is the registered proprietor of parcels of land known as L.R. No. 15312/1, 15312/2, 15312/3 and 15312/4 (*the suit land*) which were created from L.R. No. 15312 and 15246 owned by Gideon Munyao and Philip Mule Kilonzo respectively.
2. According to the Petitioner, it acquired the suit land by way of purchase; that before it purchased the suit land, it carried out due diligence and that it has since developed the suit land extensively. It is the Petitioner's case that it was surprised to learn that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had placed the Notice in the Daily Newspaper of 13<sup>th</sup> February, 2018 directing that any person residing on or occupying the suit land should vacate the land within fourteen (14) days of the date of the Notice.
3. The Petitioner averred that following the placement of the Public Notice in the Daily Nation of 13<sup>th</sup> February, 2018, it may lose its properties which it acquired through purchase; that the Certificate of Title issued to the Petitioner is conclusive proof of ownership of the suit land and that the generalized Public Notice as placed in the Daily Nation Newspaper of 13<sup>th</sup> February, 2018 is illegal, null and void in regard to the suit properties.
4. The Petitioner has sought for a declaration that its rights as enshrined in Article 40 of the Constitution shall be violated if the Respondents revoke and repossess the suit land and shall affect the life of more than 2,500 children benefiting from its programs; a declaration that having acquired Certificates of Titles in respect of the suit properties, it holds genuine and indefeasible titles to the said parcels of land and an injunction to issue against the Respondents restraining them from revoking and repossessing the suit properties.
5. The Respondents, through the Attorney General, filed Grounds of Opposition in which they averred that the Petitioner has not annexed the authority from all the trustees to institute the suit; that L.R. No. 15312 and 15246 and any subsequent sub-divisions are public utilities and that a public utility is not capable of alienation.
6. The Respondents finally averred that the protection offered under Article 40 of the Constitution does not extend to property that has been legally acquired; that where a title is issued without due observance of procedure or through fraud, the title therefrom would be null and void and that the grant of the orders sought by the Petitioner would amount to perpetuating on illegality.
7. In his submissions, the Petitioner's advocate submitted that the Petitioner is a registered Trust under the Trustees (*Perpetual Succession*) Act carrying out charitable work; that the Petitioner acquired the suit land by way of purchase for value and that prior to impugned Notification in the Newspaper, neither the Petitioner nor the original Allotee of the suit properties had been served with any Notice of Complaint nor was the Petitioner accorded any hearing before the said Notice was published in the Daily Nation Newspaper of 13<sup>th</sup> February, 2018.
8. The Petitioner's counsel submitted that conservatory orders should issue against revocation of the Petitioner's titles by the Respondents in violation of Article 40 of the Constitution. Counsel relied on the case of *Republic vs. National Land Commission, Ex parte Cecilia Chepkoech Leting & 3 others (2016) eKLR and Rosemary Wanjiru Njiraini vs. Officer in Charge of Station, Molo Police Station and Another (2017) eKLR* which I have considered.

9. The Respondents' counsel submitted that since the inference from the Public Notice was that the Petitioner's titles were under challenge, the Petitioner had an obligation to prove how it acquired its Certificate of Title through Sale Agreements; that the Petitioner did not avail evidence to prove that the initial allotments were done legally and that the Commissioner of Lands had no power to alienate land set aside for a public purpose.

10. The Respondents' counsel submitted that the 2<sup>nd</sup> Respondent has been in existence since 1965; that the suit land was not unalienated government land and that the suit land was not available for allocation to private persons. Counsel relied on the cases of *Munyu Maina vs. Hiram Gathiha Maina (2013) eKLR*; *Henry Muthee Kathurima vs. Commissioner of Lands and Another (2015) eKLR*; *James Joram Nyaga & Another vs. The Hon. Attorney General, Miscellaneous Civil Application No. 1732 of 2002*, amongst others.

11. The evidence before me shows that vide an Agreement dated 6<sup>th</sup> October, 2003, the Plaintiff purchased from Gideon Munyao Mutiso a parcel of land known as L.R. No. 15312 measuring 80.77 Ha. The said land was subsequently sub-divided to create L.R. Nos. 15312/1, 15312/2, 15312/3 and 15312/4. Prior to the said sale, the said Gideon Munyao Mutiso had been issued with a Freehold Grant by the Commissioner of Lands on 2<sup>nd</sup> October, 1991.

12. In addition to the purchase of L.R. No. 15312, the Petitioner exhibited an Agreement of Sale with the Administrators of the Estate of Philip Kilonzo dated 13<sup>th</sup> March, 2008 for L.R. No. 15246 measuring 304.5 acres. The Freehold Title for L.R. No. 15246 that was issued to Philip Mule Kilonzo by the Commissioner of Lands on 27<sup>th</sup> January 1995 has also been exhibited by the Petitioner.

13. The Respondents have not denied that indeed the Commissioner of Lands issued to the Vendors Freehold Titles in respect of L.R. No. 15312 and 15246. The Respondents have also not denied that the Petitioner purchased the two parcels of land and subsequently had them sub-divided into several portions of land.

14. The Respondents have averred that the suit properties were set aside as public utility. According to the Grounds of Opposition filed by the Respondents, the suit properties were not unalienated government land and could not be alienated to the Vendors and/or the Petitioner.

15. Indeed, as correctly submitted by the Respondents' counsel, any land reserved or set aside for public purpose cannot be alienated to a private person. As was held by this court in *Farooq Imtiaz Mohamed Malik vs. Director of Police Investments & 3 others (2018) eKLR*, the concept of indefeasibility or conclusive nature of a title is inapplicable in respect to the title that is unlawfully acquired. In the Farooq case, this court held as follows:

**“65.The suit land was set aside for a public purpose, that of putting up government houses, as and when funds were available. It could not be allocated to a private person at the whim of the Commissioner of Lands, who was mandated by the Constitution to hold it in trust for the public. When the Commissioner of Lands, or any other public body purports to allocate land set aside for a public purpose, the court will not hesitate to cancel such a title.”**

16. The above holding is a reflection of the Provision of Article 40(6) of the Constitution. Indeed, where evidence is placed before this court to show that land which was meant for public purpose was allocated to a private entity for private purposes, the court will cancel such a title.

17. The Respondents in this matter did not place before the court any evidence to show that the suit properties was reserved or set aside for use by the 2<sup>nd</sup> Respondent. Indeed, the Respondents did not file a Replying Affidavit to dispute the depositions of the Petitioner that the suit land was lawfully registered in the names of the Vendors.

18. Although the Respondents' counsel relied on the case of *Munyu Maina vs. Hiram Maina (2013) eKLR* to shift the burden of proving that the suit land was not set aside for public purpose to the Petitioner, the same court stated as follows in the case of *Peter Kamau Njau vs. Emmanuel Charo Tinga*.

**“The learned Judge was clearly misled by the Statement of this court sitting at Nyeri in Munyu Maina (supra) in the passage reproduced earlier, which, in effect erroneously suggests that a document of title is worthless without further supporting evidence. Due diligence expected of a purchase does not extend beyond the title of the Vendor and, so long as the Vendor's name is contained in the Certificate of Title, Section 26 of the Land Registration Act enjoining “all courts” to take that Certificate of Title as prima facie evidence that he is the absolute and indefeasible owner, subject only to encumbrances and conditions endorsed on the certificate.”**

19. The above decision of the Court of Appeal clearly demonstrates that it was for the Respondents to show that indeed the suit land was set aside for public purpose, and only then would the burden shift to the Petitioner to show that it acquired the suit land lawfully. However, the Respondents failed to do so.

20. In any event, there is no evidence before me to show that before the Respondents threatened to revoke the Petitioner's title vide the Notice of 13<sup>th</sup> February, 2018, they had given the Petitioner an opportunity to be heard. As has been stated by numerous jurists, whether or not a person is entitled to a hearing depends on whether or not he has some right, interest or legitimate expectation of which it would not be fair to deprive without hearing what he has to say. That is the import of Article 47 of the Constitution which the Respondents did not adhere to.

21. In the circumstances, and having failed to show that the suit land was reserved or set aside for public purpose, and having failed to hear the Petitioner before publishing the Notice of 13<sup>th</sup> February, 2018, I find and hold that the Petitioner has proved its case on a balance of probabilities.

22. I therefore allow the Petition dated 23<sup>rd</sup> February, 2018 as follows:

**a. A declaration be and is hereby issued that the Petitioner's rights as enshrined at Article 40 of the Constitution shall be violated and infringed by the Respondents through the intended revocation and repossession of land parcel Numbers 15312 and 15246 and as a result affect the life of more than 2,500 children benefiting from the Petitioner's programs.**

**b. A declaration be and is hereby issued that the Petitioner, having acquired Certificate of Titles for land parcel numbers L.R No. 15312/1, 15312/2, 15312/3, 15312/4, 15246/2 and 15246/3 as a purchaser for value without notice, holds a genuine and indefeasible title to the said parcels of Land.**

**c. That the Honourable Court do hereby issue an injunction against the Respondents restraining them from revoking and repossessing the Petitioner's Title to land Parcel Numbers L.R No. 15312/1, 15312/2, 15312/3, 15312/4, 15246/2 and 15246/3 all of which were created by purchase and sub-division of the mother Title number L.R No. 15312 Grant No. I.R. 71501 owned by Gideon Munyao Mutiso and L.R No. 15246 Grant No. I.R. 65169 owned by the late Philip Mule Kilonzo.**

**d. The costs of this Petition to be borne by the Respondents.**

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18<sup>TH</sup> DAY OF JANUARY, 2019.**

**O.A. ANGOTE**

**JUDGE**