



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**PETITION NO. 6 OF 2018**

**(FORMERLY MOMBASA HIGH COURT CONSTITUTIONAL PETITION NO. 85 OF 2012**

**ABDULRAHMAN C. KIRAO & 3 OTHERS .....PETITIONERS**

**VERSUS**

**1. SAID SEIF**

**2. CHIEF LAND REGISTRAR**

**3. THE NATIONAL LAND COMMISSION**

**4. THE ATTORNEY GENERAL..... RESPONDENTS**

**JUDGMENT**

**Introduction**

1. This petition was filed on 21<sup>st</sup> August, 2012. The petitioners seek the following orders:-

1) A declaration that the decision and the manner in which the 2nd Respondent issued title over LR No. 17906/Section 1/Mainland North (formerly plot No. 331/Section 1/Mainland North) to the 1st Respondent were in violation of the Constitution of Kenya and were therefore unconstitutional and invalid and hence the title issued on 1<sup>st</sup> September, 2010 to the 1<sup>st</sup> Respondent is null and void.

2) A declaration that the root and the existence of title over LR No. 17906/Section1/Mainland North (formerly plot No. 331/Section 1/Mainland North) in the name of the 1<sup>st</sup> Respondent is a violation of the constitutional rights of the petitioners.

3) A mandatory order compelling the Chief Land Registrar to cancel the title issued on 1<sup>st</sup> September, 2010 to the 1<sup>st</sup> Respondent over LR No. 17906/Section 1/Mainland North (formerly plot No. 331/Section1/ Mainland North).

4) An order of mandamus compelling the Chief Land Registrar to issue certificates of title to the petitioners in respect of the portions of LR No. 17906/Section 1/Mainland North (formerly plot No. 331/Section1/ Mainland North) which they occupy.

5) An order of injunction prohibiting the 1<sup>st</sup> Respondent by himself, his agents, servants and/or employees from further depositing building materials, digging trenches, building, constructing, putting up any structures and/or demolishing the petitioners structures on the property known as LR No. 17906/Section 1/Mainland North (formerly plot No. 331/ Section 1 Mainland North) and/or from selling, transferring, leasing, charging and/or in any manner whatsoever dealing with the said land.

6) Such other orders as this Honourable court shall deem fit and just to grant.

7) Costs of the petition.

2. The petition was supported by facts set out in the petition and the Affidavit of ABDULRAHMAN C. KIRAO, the 1<sup>st</sup> petitioner sworn on 17th August, 2012.

3. In response to the petition, the 1<sup>st</sup> Respondent filed a Replying Affidavit sworn by SAID SEIF on 29<sup>th</sup> September, 2012.

## **The petitioners' case**

4. The petitioners' case in a nutshell is that they live in the suit land which is situated at Utange, Mombasa, and that their parents began residing on the suit land way back in the 1950s. The petitioners contend that they were born and bred on the suit land which measures about 3.16 acres. The petitioners further contend that they represent their 8 families who number about 35 people who are in actual occupation of the suit land and that they occupy the following portions thereof:

- a) Abdul C. Kirao .....0.4695ha
- b) Karen Anyango Kombe ..... 0.2113 ha
- c) Grace M. Kilango ..... 09.4318 ha
- d) Mwanahamisi A. Abdalla .....0.1893 ha

5. The petitioners contend that at the time Kenya gained independence in 1963, their parents and some of them who were already born were in occupation of the suit land and that as a result of the long occupation, there are graveyards thereon for the petitioners forefathers and family members, fully grown trees, fully cultivated farms, permanent and semi-permanent houses, footpaths, public wells, fresh water and religious shrines among other features.

6. It is the petitioners' case that the suit land was registered in the name of one Abdulahmed Esmail before it reverted and/or transferred to the Crown on 1<sup>st</sup> August, 1950. The petitioners aver that throughout their occupation on the suit land, they have made frantic efforts to the government to have the land allocated to them to no avail.

7. It is the petitioners' case that they held meetings and wrote numerous letters to the Provincial Administration, the Commissioner of Lands and to the Permanent Secretary Ministry of Lands applying for allocation of the suit land. That the Permanent Secretary wrote a letter to the District Land Officer, Kisauni requesting his office to investigate the petitioners complaint that there was a plan to allocate the suit land to a non- resident, but there was never a feedback.

8. The petitioners contend that from their investigations they established that the 2<sup>nd</sup> Respondent issued to the 1<sup>st</sup> Respondent a title in respect of the suit land on 1st September, 2010. The petitioners further contend that the 1<sup>st</sup> Respondent and/or any of his family members has never resided or occupied the suit land, hence the decision to issue title to him is an affront to the petitioners' constitutional rights and a violation of the constitution. The petitioners aver that they were best suited for consideration for allocation of the suit land having been in actual occupation of the same for over 50 years. The petitioners state that the 2<sup>nd</sup> Respondent never notified them or the other families in occupation of the suit land of his intention to issue title to such public land to the 1<sup>st</sup> Respondent.

9. It was the petitioners contention that the decision and the manner in which the title over the suit property was issued to the 1<sup>st</sup> Respondent is in violation of the Constitution of Kenya and thus unconstitutional, invalid, null and void.

## **Response by the 1<sup>st</sup> Respondent**

10. In his Replying Affidavit the 1<sup>st</sup> Respondent stated that during his due diligence procedure, a search revealed that plot No. 331/I/MN measuring 3.16 acres was registered in the name of the Government of Kenya and he proceeded to apply for allotment of the same and was allocated the same by a letter of allotment dated 7th September, 2010. The 1<sup>st</sup> Respondent added that in line with the conditions stipulated in the letter of allotment, he paid the requisite fees for registration, conveyancing, survey, rent, stand premium, stamp duty and approval fees on 27<sup>th</sup> September, 2010 and was issued with a Grant of the parcel of land known as LR No. MN/1/17906 which was allocated to him by the Government of Kenya which granted him a lease for a term of ninety nine (99) years from 1<sup>st</sup> September, 2010.

11. The 1<sup>st</sup> Respondent averred that he is now the registered owner of the suit property. He stated that he obtained approval from the Municipal Council of Mombasa to develop a boundary wall on the suit property so as to prevent encroachment but when he delivered the building materials costing about Kshs. 761,360/=, he was prevented by the petitioners herein who harassed and intimidated his agents and covered the foundation already dug. The 1<sup>st</sup> Respondent contends that he properly acquired the suit property and the petitioners have without his consent and without any colour of right prevented him from accessing the said land and therefore are hindering his right to peaceful and quiet enjoyment of his constitutional right to property.

12. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents did not file any responses, although the 3<sup>rd</sup> respondent entered appearance in the matter on 12th October, 2017.

## **Petitioners' submissions**

13. The petitioners filed their submissions on 11<sup>th</sup> August, 2015 in which they submitted that they have been in occupation of the suit land since 1963 and have requested to be allocated the same to no avail. The petitioners further submitted that by allocating the suit land to the 1<sup>st</sup> Respondent, the Commissioner of Lands, who is a public officer, discriminated against the petitioners by giving the 1<sup>st</sup> Respondent undue preference. The petitioners submitted that they were denied full and equal enjoyment of their constitutional rights of non- discrimination as provided under Article 27 of the Constitution of Kenya. They further submitted that the Commissioner of Lands, now the office of the 2<sup>nd</sup> Respondent, acted in violation of the national values and principles of governance that bind public officers and set out under Article 10(1)(b) by failing to involve the petitioners in the process of allocation, failing to give the petitioners reasons for failure to allocate to them public

land which they occupy and by giving undue preference to the 1<sup>st</sup> Respondent. The petitioners contended that the Commissioner of Lands, now the office of the 2<sup>nd</sup> Respondent, lacked integrity, did not embrace the principles of inclusiveness and social justice, did not exercise impartiality, transparency or observe fairness of procedure.

14. While relying on Article 47 of the Constitution of Kenya, the petitioners submitted that as persons who were to be affected by the 2<sup>nd</sup> Respondent's decision, they had the right to reasonable and procedurally fair administrative action. It was the petitioners submissions that no reason was given to them explaining why their applications for allocation were declined or why the 1<sup>st</sup> Respondent was preferred for allocation to their exclusion.

15. The petitioners submitted that the title issued to the 1<sup>st</sup> Respondent resulted from a process which infringed the petitioners' constitutional rights and fundamental freedoms and therefore such a title is invalid, null and void. The petitioners relied on the case of **Kenya Transport Association -vs- Municipal Council of Mombasa and Another** [2011] eKLR, and submitted that they are entitled to the prayers sought in the petition.

### **1<sup>st</sup> Respondent's submissions**

16. The 1<sup>st</sup> Respondent filed his submissions on 4<sup>th</sup> October, 2018. The 1<sup>st</sup> Respondent submitted that the petitioners have not demonstrated any recognizable claim over the suit land to sustain a claim of violation of the right to protection of property under Article 40(1) of the Constitution of Kenya. The 1<sup>st</sup> Respondent relied in that regard on the case of **Kiambu County Tenants Welfare Association -vs- Attorney General and Another** [2017] eKLR and the passage contained in Halsbury's Laws of England, 4<sup>th</sup> Edition (Re-issue) Vol. 8(2) at paragraph 165 cited with approval by the court in **Joseph Letuya and 21 Others -vs- Attorney General and 5 Others** [2014] eKLR.

17. On the contention by the petitioners that the 1<sup>st</sup> Respondent is not a resident of the subject land, the 1<sup>st</sup> Respondent submitted that Article 40(1) of the Constitution of Kenya recognizes that every person has the right to acquire and own land in any part of Kenya.

18. Regarding the petitioner's contention that they have occupied the suit land for years, the 1<sup>st</sup> Respondent submitted that no amount of occupation of Government land can accrue an interest in land capable of being protected as urged by the petitioners. He cited Section 41(a) of the Limitation of Actions Act Cap 22 Laws of Kenya and relied on the cases of **Faraj Maharus -vs- J.B. Martin Glass Industries and 3 Others** [2005] eKLR, **Sammy Mwangangi & 10 Others -vs- Commissioner Lands and 3 Others** [2018] eKLR and **Joseph Letuya and 21 Others** (supra).

19. The 1<sup>st</sup> Respondent submitted that there has been no credible attempt by the petitioners to have the suit land allocated to them by the Government when the land was available for allocation and before the 1<sup>st</sup> Respondent successfully applied for allotment and was issued with the grant over it. Replying on the case of **Wreck Motor Enterprises -vs- Commissioner of Lands and 3 Others** [1997] eKLR, the 1<sup>st</sup> Respondent submitted that once the title to the suit land was issued to the 1<sup>st</sup> Respondent, the same was no longer available for allocation until upon expiry of the term. The 1<sup>st</sup> Respondent added that allotment of land or grants by the Government is not a right but an exercise of discretion.

20. The 1<sup>st</sup> Respondent submitted that under Section 23(1) of the Registration of Titles Act (repealed), the 1<sup>st</sup> Respondent's title is conclusive evidence of proprietorship and can only be impeached on account of fraud or misrepresentation to which the 1<sup>st</sup> Respondent is proved to be a party. The 1<sup>st</sup> Respondent further submitted that the petition cannot be the proper instrument to challenge his title as there exists a robust statutory procedure within the arena of private law under the Registration of Titles Act (repealed) as enabled by Section 107(1) of the Land Registration Act No. 3 of 2012.

21. The 1<sup>st</sup> Respondent submitted that he successfully went through the motions of having the suit land allocated to him and the court must protect his right to own and utilize his property in exercise of his economic rights without interference from the petitioners. The 1<sup>st</sup> Respondent, denied that there was discrimination and submitted that he deserves equal protection and benefit of the law and protection of his right to property.

22. The 1<sup>st</sup> Respondent concluded by submitting that the petition lacks merit and that the reliefs sought by the petitioners cannot be granted. Replying on the case of **Republic -vs- Lancashire County Council Ex p Gayer** [1980] 1 WLR 1024, the 1<sup>st</sup> Respondent submitted that courts should be acutely conscious that they do not usurp the role of the administration by assuming the task of deciding how resources are to be allocated as between competing claims.

### **Determination**

23. Having analysed the pleadings and the submissions filed, I pose the following questions for determination:

- a) Whether the allocation of the suit property to the 1<sup>st</sup> Respondent violated the constitutional and fundamental rights and freedoms of the petitioners.
- b) Whether the petitioners are entitled to the reliefs sought.

### **Constitutional and fundamental rights and freedoms violations**

24. The petitioners contended that they have been occupying land known as LR. No. 17906/Section1/Mainland North (formerly plot No.

331/Section1/ Mainland North) for over 50 years. They averred that they have sought to have the suit land allocated to them from the Government of Kenya to no avail. The petitioners state that upon investigations they established that the 2<sup>nd</sup> Respondent issued the 1<sup>st</sup> Respondent title to the suit land on 1<sup>st</sup> September, 2010. The petitioners contend that the allocation of the suit land to the 1<sup>st</sup> Respondent violated their constitutional and fundamental rights and freedoms as espoused under Articles 10, 27, 40, 43, 47 and 60 of the Constitution which relate to the national values and principles of governance, equality and freedom from discrimination, protection of right to property, fair administrative action and the principles of land policy. The question this court is called to consider is whether the allocation of the suit property to the 1<sup>st</sup> Respondent has infringed on the rights of the petitioners.

25. Before the court can begin inquiring into an alleged violation of a constitutional right, the court must be satisfied that the constitutional right has accrued or exists to the applicant and that the constitutional right has been infringed in the manner alleged.

26. As already stated, the petitioners allege that the allocation of the suit property to the 1<sup>st</sup> Respondent violated their rights to own and occupy land as contemplated under Article 40 and 60 of the Constitution. Article 40(1) protects the right to property in the following terms:

***“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.”***

For the protection of the right to property under Article 40(1) above to avail, the petitioners must firstly demonstrate that they have legally recognizable claim in the subject property. In the case of **Joseph Letuya and 21 Others –vs-Attorney General and 5 Others** [2014] eKLR, it was held:

***“The protection under the constitution of the right of property does not obtain until it is possible to lay claim in the property concerned ..... an applicant must establish the nature of his property right and his right to enjoy it as a matter of domestic law ....***

***The process of conferring legal and equitable property rights in land under Kenyan law is settled, and is dependent upon formal processes of allocation or transfer and consequent registration of title, or of certain transactions that confer beneficial interest in land in the absence of a legal title of ownership.”***

28. It is the petitioners’ contention that the 1st Respondent is not a resident on the suit land. However, Article 40(1) of the Constitution supremely recognizes that every person has the right to acquire and own property in any part of Kenya. The said Article does not even remotely suggest that only residents can acquire and own property in a given area. This court will therefore reject the petitioners’ invitation to apply the Constitution in a manner that limits the 1<sup>st</sup> Respondent’s Constitutional right to acquire and own property in any part of Kenya.

29. The petitioners have complained that they were not allocated the suit land despite having resided and occupied it for several years. It should, however, be noted that no amount of occupation of Government land can accrue an interest in land capable of being protected as urged by the petitioners. Section 41(a) of the Limitation of Actions Act Cap 22 Laws of Kenya states that the Act does not enable a person to acquire any a title or easement over Government land or land otherwise enjoyed by the Government. This position has been restated in several decision of this court and the Court of Appeal. In **Faraj Maharus -vs- J.B. Martin Glass Industries and 3 Others** [2005] eKLR, the Court of Appeal stated that:-

***“There can be no adverse possession on public or government land however long one may have been squatting thereon without let or hindrance from the Government. Therefore the appellant cannot benefit from the long period of his occupation of the disputed property.”***

30. Similarly, in the case of **Sammy Mwangangi and 10 Others -vs- Commissioner of Lands and 3 Others** [2018] eKLR the Court of Appeal stated that:

***“It is trite law that one cannot claim adverse possession against Government land by virtual of Section 41 of the Limitation of Actions Act.”***

31. It is the petitioners’ case that they or their parents were already occupying the suit land. They allege that they made several applications to be allocated the land to no avail. Instead, the petitioners allege that after investigations, they established that the said land had been allocated to the 1<sup>st</sup> Respondent who has never resided or occupied the land.

32. From the evidence on record, the 1<sup>st</sup> Respondent was allocated the suit land vide a letter of allotment dated 7th September, 2010 and was later issued with a Grant dated 4<sup>th</sup> February, 2011 for a term which of ninety nine (99) years from 1<sup>st</sup> September, 2010. Prior to that, the land was registered in the name of the Government of Kenya.

33. The Government of Kenya as the registered owner had the absolute discretion and indefeasible right over the property and could allocate it as it did to the 1st Respondent. The petitioners allege that they made applications for allocation to no avail. Looking at the documents that the petitioners have exhibited, the only letter that predates the 1<sup>st</sup> Respondent’s letter of allocation over the suit land is the letter dated 11<sup>th</sup> May, 2005. There is no evidence to demonstrate that the said letter was delivered or received by the Commissioner of Lands. It is worth noting that the letter dated 6<sup>th</sup> November, 2010 was duly received. The court notes that all these other correspondence exhibited by the

petitioners is either reactionary, or an afterthought. As at 1<sup>st</sup> September, 2010, the suit land was already allocated to the 1<sup>st</sup> Respondent and a grant issued to the 1st Respondent under the Registration of Titles Act (repealed). Under Section 23(1) of the Registration of Titles Act (repealed), the 1<sup>st</sup> Respondent's title is conclusive evidence of proprietorship and can only be impeached on account of fraud or misrepresentation to which the 1<sup>st</sup> Respondent is proved to be a party. The repealed Act is very specific on this protection and sanctifies title. In such circumstances, it is now too late and irrelevant whether or not the Commissioner of Lands ignored the applicants' application for allocation of the suit land.

34. In their petition, the petitioners have not alleged the matters set out in Section 23(1) of the Registration of Titles Act (repealed) as to assail the 1<sup>st</sup> Respondents' title. I agree with the 1<sup>st</sup> Respondent's submissions that the petitioners have without specificity alleged favourism, improper motives and/or corrupt practices. Moreover, this petition cannot be the proper instrument to challenge the 1<sup>st</sup> Respondent's title. Under the Registration of Titles Act (repealed) as enabled by Section 107(1) of the Land Registration Act No. 3 of 2012, there exists a robust statutory procedure within the arena of private law where the petitioners could challenge the 1<sup>st</sup> Respondent's title if they so wish.

35. Courts have many times taken the view and held that for a party to prove violation of their rights under the various provisions of the Bill of rights, they must not only state the provisions of the constitution allegedly infringed in relations to them, but also the manner of infringement and the nature and extent of that infringement and the nature and extent of the inquiry suffered (if any). See for instance **Kiambu County Tenants Welfare Association -vs- Attorney General and Another** [2017] eKLR.

36. From the evidence on record, the court notes that there is no credible attempt by the petitioners to have the suit land allocated to them by the Government when the land was available for allocation. Once the suit land was allocated to the 1st Respondent, the subject land was no longer available for allocation until expiry of the term issued. The petitioners may have been in occupation of the suit land for several years. However, they did not take steps to have the land allocated to them. They only made attempts, it seems, after the land had been allocated to the 1<sup>st</sup> Respondent. It is apparent that the petitioners were jolted by the 1<sup>st</sup> Respondent's action to develop the suit property.

37. The petitioners have failed to prove that the 2<sup>nd</sup> Respondent or the Commissioner of Lands discriminated against them as alleged. The allegation of discrimination in the petition are broadly stated and lacking the least amount of specificity required in constitutional litigation. In my view, the petitioners have failed to discharge their burden of proof as required.

38. My view is that this was Government land which was available for allocation by the government to any persons. The government, through the Commissioner of Land and indeed the 2nd Respondent had the discretion under the law to allocate the land if the same was available for allocation.

39. My conclusion therefore is that the petitioners constitutional and fundamental rights and freedoms have not been infringed as alleged. The petitioners have failed to prove that their rights have been infringed. They are therefore not entitled to the reliefs sought in the petition. It is my finding that the petition has no merit and hereby dismiss it with costs to the Respondents.

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA this 14<sup>th</sup> day of January, 2019.**

**C.K. YANO**

**JUDGE**

**In the presence of:**

No appearance for petitioner for the petitioner

Mureithi holding brief for Said for 1<sup>st</sup> for the respondent

Yumna – Court Assistant