



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI LAW COURTS**

**PETITION NO.158 OF 2014**

**IN THE MATTER OF: ARTICLE 2,20,21,22 (1) (3) (4) 23 AND 165 OF THE CONSTITUTION AND SECTIONS 7 AND 19 OF THE SIXTH SCHEDULE OF THE CONSTITUTION.**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION**

**IN THE MATTER OF: PARCELS OF LAND KNOWN AS LAND REFERENCE NUMBERS 22516,23260,23259,23261,22492,22491, AND 24123**

**=BETWEEN=**

**KENYA POST OFFICE SAVINGS BANK STAFF RETIREMENT BENEFIT**

**SCEHEME REGISTERED TRUSTEES.....PETITIONER**

**=AND=**

**THE ATTORNEY GENERAL & 7 OTHERS.....RESPONDENTS**

**JUDGEMENT**

1. The Petitioner is a body Corporate incorporated under the Trustees (Perpetual Succession) Act Cap 164 Laws of Kenya which was incorporated for the purposes and benefit of the employees of Kenya Post Office Savings Bank. Prior to the incorporation of the Petitioner, the trustees of the Petitioner purchased six parcels of land from various individuals and companies. The Petitioner purchased a seventh parcel after it was incorporated. Upon incorporation of the Petitioner, the Petitioner filed Nairobi HCCC No.1598 of 1999 whereby it obtained orders vesting the six properties purchased in the name of individuals upon the Petitioner.
2. Land Reference number 22516 measuring 3.630 hectares was purchased from the 4<sup>th</sup> respondent at Kshs.22,500,000/=. LR No.23260 measuring 4.040 hectares was purchased from the 5<sup>th</sup> Respondent at Kshs.25,000,000/=. LR No.2359 measuring 2.460 hectares was purchased from the 5<sup>th</sup> respondent at Kshs.15,195,000/=LR NO.23261 measuring 4.040 hectares was purchased from the 5<sup>th</sup> respondent at Kshs.25,000,000/=. LR No.22492 measuring 1.847 was purchased from the 6<sup>th</sup> respondent at Kshs.11,250,000. LR No.22491 measuring 1.889 hectares was purchased from the 7<sup>th</sup> respondent at Kshs.10,000,000/=.LR No.24123 measuring 4.000 hectares was purchased from the 7<sup>th</sup> respondent at Kshs.18,000,000/=.
3. All the vesting orders which had been obtained from the court were presented to the lands office for registration against the titles. All the vesting orders were registered except those in respect of LR Nos.22492, 23261, 22516 and 22491. The petitioner's advocates wrote several letters to the Commissioner of Lands asking for registration of the remaining vesting orders but the Commissioner of Lands did not act. This refusal forced the Petitioner to file Misc. application No.143 of 2010 where an order of mandamus was obtained compelling the Commissioner of Lands to act but the Registrar of titles who was the successor of the Commissioner of Lands has failed to act.
4. The Petitioner was forced to carry out investigations on the titles to the properties which were purchased. It turned out that the properties which had been purchased had been created out of Ngong Forest Reserve vide Gazette Supplement number 42 Legal Notice number 79 of 13<sup>th</sup> June 1996. Following the Gazette Notice, the president of the Republic granted part of the land to the 4<sup>th</sup>,5<sup>th</sup>,6<sup>th</sup> 7<sup>th</sup> and 8<sup>th</sup> respondents who in turn sold the same to the Petitioner. The Petitioner further learnt that the process of de-gazettment of Ngong Forest was not followed. The Petitioner's attempts to take possessions of the purchased properties were thwarted by the Kenya Forest service who in a letter dated 23<sup>rd</sup> may 2013 notified the Petitioner that the parcels in issue were invalid as there had been no de-gazettment and that the properties were not available for grant by the president.

5. The petitioner now contends that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were aware of the procedure of de-gazettment of a forest area and that that procedure was not followed. Despite this knowledge they went ahead to register the grants which were later sold to the petitioner. The petitioner now contends that it was a purchaser for value without notice and that it now has paper titles and has been deprived of its right to property as enshrined under Article 40 of the Constitution.

6. The Petitioner contends that as the Government guarantees the sanctity of Certificate of Title, the Petitioner is entitled to compensation from the Government. It is on this basis that the petitioner is seeking compensation of **Kshs.974,268,000/=**.

7. The 4<sup>th</sup> to 8<sup>th</sup> Respondents were served with the petition documents through advertisement in the press. They neither entered appearance nor filed any grounds of opposition or replying affidavit to the Petition.

8. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents opposed the petition through grounds of opposition dated 20<sup>th</sup> April 2017 and filed in court on 15<sup>th</sup> June 2017. The 1<sup>st</sup> and 2<sup>nd</sup> respondents contend that the petitioner has not demonstrated any breach of the constitution or law on their part and that the petitioner ought to have pursued the 4<sup>th</sup> to 8<sup>th</sup> Respondents for breach of contract. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further contend that the petitioner has not demonstrated that they acted illegally, irrationally or without complying with the law.

9. The 3<sup>rd</sup> respondent opposed the petitioner's petition based on grounds of opposition dated 14<sup>th</sup> November 2017 and filed in court on 20<sup>th</sup> November 2017. The 3<sup>rd</sup> respondent contends that the petition is an abuse of the process of the court; that no court, tribunal or the 3<sup>rd</sup> respondent itself has determined the legality or otherwise of the titles to the properties in issue and as such the petitioner cannot base its petition on allegations that he titles are not good. The 3<sup>rd</sup> respondent argues that it does not guarantee the sanctity of title which is a preserve of the Government through the Chief Land Registrar. The 3<sup>rd</sup> respondent further states that the petitioner has not stated in what manner its constitutional rights have been violated and that the petitioner is seeking to enforce rights which were not protected under the former constitution.

10. The 3<sup>rd</sup> respondent goes on to state that there is no evidence which has been tabled by the petitioner to show that the properties in issue fall within a gazetted Government forest. The 3<sup>rd</sup> respondent blames the petitioner for not carrying out due diligence before purchasing the properties in issue.

11. The petitioner is relying on the petition as filed, a further affidavit filed on 24<sup>th</sup> January 2018 and a supplementary affidavit filed on 28<sup>th</sup> March 2018. The petitioner is also relying on submissions filed on 24<sup>th</sup> January 2018 and supplementary submissions filed on 11<sup>th</sup> April 2018, as well as a list of authorities filed on 11<sup>th</sup> April 2018 further list of authorities filed on 30<sup>th</sup> May 2018 and a digest of the authorities file don 30<sup>th</sup> May 2018.

12. The 1<sup>st</sup> and 2<sup>nd</sup> respondents are relying on their grounds of opposition and submissions filed on 15<sup>th</sup> June 2018. The 3<sup>rd</sup> respondent is relying on grounds of opposition filed on 20<sup>th</sup> November 2017 and submissions filed on 15<sup>th</sup> February 2018.

13. I have gone through the petition by the petitioner, the opposition to the same by the 1<sup>st</sup> to 3<sup>rd</sup> respondents as well as the submissions by the petitioner, and those of the 1<sup>st</sup> to 3<sup>rd</sup> respondents. There is no doubt that the petitioner purchased seven parcels of land from the 4<sup>th</sup> to 7<sup>th</sup> respondents. There is also no doubt that the petitioner has been unable to take possession of the properties as they are said to be within Ngong forest. The issues which emerge for determination are *firstly, has the constitutional rights of the petitioner been infringed? Secondly is the petitioner entitled to compensation? Thirdly what order should be made on costs?*

14. In dealing with the first issue, a look at Article 40 of the Constitution is necessary in order to determine whether the petitioner's rights have been infringed as alleged. Article 40 of the Constitution provides as follows:-

***(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.*

*(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause*

*(3) Who may not hold title to the land.*

*(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.*

*(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.*

15. Under the Constitution of Kenya (Protection) of Rights and Fundamental Freedoms) practice and Procedure Rules 2013, a Petitioner is expected to state the nature of injury he has suffered. In other words, the Petitioner has to show in which manner his rights have been violated. In **Anarita Karimi Njeru Vs The Republic ( 1976- 1980) KLR1272** it was held that a petitioner must state his or her case with precision. In the instant case the Petitioner is alleging that its constitutional rights under Article 40 of the Constitution have been violated. The petitioner does not state in what way the rights protected under that Article were violated.

16. The petitioner is contending that it a bonafide purchaser for value without notice of any defect in the titles. The petitioner contends that before the properties in issue were purchased, due diligence was undertaken by the firm of *Rachier & Co. Advocates* and that there were titles which had been registered under the registration of titles Act (Now Repealed) . The petitioner therefore contends that the titles held by it are indefeasible under Section 23(1) of the Registration of Titles Act (Now Repealed) In support of this argument, the petitioner has relied on the case of **Permanent Markets Society & 11 Others Vs Sahara Enterprises & 2 others Civil Appeal 185 of 1997** where it was held that where it is shown that past registrations were obtained illegally the title of the last bonafide purchaser for value is indefeasible.

17. The Petitioner is claiming to be an innocent purchaser for value without notice. It is important to note that the properties in issue were purchased in the 90's. The petitioner has not taken possession of the same up to now. The reason for not taking possession is clear. The properties fall within Ngong Forest .As late as May 2013, the Petitioner was given the reason why it could not be allowed into the suit properties. The petitioner wants this court to believe that it did not know that the properties which it had purchased had no issues. If as late as 2013, or even as at the time of writing this judgement the petitioner has not taken possession. It is unbelievable that the petitioner did not know that the properties had issues.

18. It is common knowledge that in the 90's grabbing of public land was at its peak. The grabbers could grab public land, have titles over the same and quickly sell to public bodies who rarely cared to establish whether the land was available for alienation. The petitioner was a victim of this scheme. However be that as it may, the ultimate issue to be determined is whether any of the rights of the petitioner under Article 40 of the Constitution have been violated.

19. The Petitioner itself has admitted that what it has are paper titles. It has been confirmed to the Petitioner a fact which the petitioner agrees with that the titles which it obtained were illegally obtained. The properties in issue were hived off from Ngong Forest without following the laid down procedures. There is no further evidence required to find that the titles to the land which the petitioner purchased were illegally obtained. The petitioner has said as much and the documents filed in this petition attest as much. Under Article 40 (6) of the Constitution, it is clear that protection to the rights under the article does not extend to any property that has been found to have been unlawfully acquired. The petitioner itself has admitted that the titles which were passed to them had been illegally obtained. The petitioner cannot therefore come to court to claim that its rights under Article 40 of the constitution have been violated. This sub- article does not offer protection to innocent purchasers and as I have said hereinabove, the petitioner may not have been an innocent purchaser for value. A prudent purchaser has to ensure that he or she is granted possession and not wait for decades to come and claim that he or she did not know that the titles had issues. I therefore find that there is no violation of the petitioner's rights which has been established capable of protection under Article 40 of the Constitution.

20. The issue of compensation could only arise if the petitioner's rights were found to have been violated. The petitioner sought compensation of a total sum of **Kshs.974,268,000/=** based on valuation carried out on the properties in issue. The petitioner later carried out another valuation which was introduced through a supplementary affidavit filed on 28<sup>th</sup> March 2018. The Petitioner sought compensation of **2,400,000,000/=**. It is important to note that there was no application made to court for leave to amend the petition to include this new figure. It is therefore clear that the petitioner would not have been awarded this new figure even if it had proved that its rights were violated and it was entitled to compensation.

21. In the alternative, the petitioner is seeking an order compelling the respondents to refund the purchase price totalling to **126,945,000/=**. There is no evidence that these monies were paid out. If the petitioner paid out the sums claimed, it ought to have pursued the same from the 4<sup>th</sup> to 7<sup>th</sup> respondents in an ordinary claim for breach of contract. It is expected that any agreements signed between the petitioner and the 4<sup>th</sup> to 7<sup>th</sup> respondents must have set out terms which included the manner in which possession was to be given. The petitioner should have pursued those who sold land to it when they failed to get possession. The petitioner cannot wait for decades only to come under the guise of violation of Constitution when it ought to have enforced its rights under contract law. I therefore find that the petitioner is not entitled to any compensation or order for refund against the respondents.

22. It is now clear that this petition lacks merit. I proceed to dismiss it with costs to the **1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.**

Dated, Signed and delivered at **Nairobi** on this **28<sup>th</sup>** day of **February 2019**.

**E.O.OBAGA**

**JUDGE**

In the presence of;-

Mr Kimani for Petitioner

Mr Sekwe for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

M/s Koech for 3<sup>rd</sup> Respondent

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**