



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CONSTITUTIONAL PETITION NO 25 OF 2017

JANDU INVESTMENT LIMITED.....PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

JUDGMENT

1. The petitioner, Jandu Investments Limited, is the registered leasehold proprietor of Land Reference Number 209/9633 which is comprised in Grant Number IR 41421, registered on 19/11/1986 (the **suit property**). The suit property measures approximately 1.379 hectares and is situated in Viwandani Location within Nairobi's Industrial Area. On 10/12/2015, the petitioner brought this petition seeking the following orders:

a) a declaration that the petitioner has been deprived of its property rights due to the combined inaction of the respondents in failing to evict squatters from its property, namely L.R. NO. 209/9633, Nairobi or to provide an alternative of similar financial valued to the said piece of land.

b) a declaration that the continued occupation by squatters with the acquiescence of the 2nd and 3rd respondents amounts to constructive taking or eminent domain and thus the 1st and 2nd respondents have a duty to follow the procedure found in Article 40(3) of the constitution of Kenya 2010 and Part VIII of the Land Act 2012 including payment of adequate compensation.

c) an order of full compensation to Jandu Investment Limited by the respondents for the value of its lost property, namely Land Reference Number 209/9633, as well as adequate compensation for mesne rents or loss or user since 2004.

d) That the costs of this petition be borne jointly and severally by the respondents.

2. The petitioner's case is that sometime after the year 2002, squatters invaded the suit property. Since then, the said squatters have been unwilling to vacate the suit property. It contends that, despite its efforts to get assistance from the National Land Commission and from various departments of the Executive arm of Government, none has been forthcoming. It is the case of the petitioner that to the extent that the respondents have failed to assist it recover the suit property or get compensation for the suit property, Articles 10, 20, 27, 35, 40, 47 and 48 of the Constitution have been contravened by the respondents.

3. The 1st and 3rd respondents oppose the petition through a replying affidavit sworn on 4/6/2018 by Fredrick O Ndunga, Deputy County Commissioner, Makadara Sub County. The case of the 1st and 3rd respondents is that the petitioner bought the suit property while aware that the property was inhabited by squatters. In the alternative, they contend that the petitioner willfully allowed the squatters to settle and dwell on the suit property and has not taken any legal action to remove them. They add that there are preceding suits between the squatters and the petitioner and the petitioner on its own free will and volition, through a consent order, compromised one of the suits on terms, *inter alia*, that the petitioner was to identify genuine residents/owners of the informal settlement and undertake necessary surveys, subdivisions, and transactions on the said property. A further term of the consent order was that the genuine owners/residents of the informal settlement were to be given the first option to purchase the suit property. The 1st and 3rd respondents add that the petitioner failed to obtain eviction orders from the court after implementation of the consent orders collapsed hence it cannot blame the state for its current predicament.

4. The 1st and 3rd respondents further contend that the petitioner is aware of **Petition Number 402 of 2012; Muungano Wa Wanavijiji v Jandu Investments Limited** in which **Muungano Wa Wanavijiji** have asserted that the petitioner has no claim over the suit property because it failed to comply with Special Condition Number 2 of the Grant which required the petitioner to develop the suit property within 24 months. They urge the court to dismiss the petition.

5. The 2nd respondent opposes the petitioner through a replying affidavit sworn on 26/7/2016 by Gregory Kingori Mwangi. The case of the 2nd respondent is that occupation of the suit property by squatters is the subject of litigation in **Constitutional Petition Number 869 of 2012; Peter Kengara v Jandu Investments Limited** where the court ordered the petitioner to continue with the process of identifying the genuine residents/owners who had established informal settlements on the suit property and give them the first option to purchase the suit property. The 2nd respondent further adds that it is up to the petitioner to implement the terms of the consent order reached with the squatters. The 2nd respondent adds that the 2nd respondent at all material times duly upheld the petitioner's title and provided a platform for negotiations between the petitioner and the squatters. It further contends that it has no powers to evict squatters from any piece of land in the Republic.

6. The petition was canvassed through written and oral submissions. Mr Charles Kanjama, counsel for the petitioner, submitted that this petition was necessitated by the fact that the process of enforcing the consent order recorded in **Nairobi HCCC 869 of 2012** had been frustrated despite substantial efforts by all the parties. He added that the Ministry of Interior and National Coordination had indicated that they cannot guarantee security to the petitioner in the implementation of the consent order. Counsel further submitted that the squatters number approximately 5,000.

7. In response, Mr Eredi counsel for the 1st and 3rd respondents, submitted that the petitioner had been indolent in that it failed to develop the suit property within 2 years and allowed squatters to encroach onto it. Counsel added that the petitioner had freely entered into a compromise with the squatters and it was up to the petitioner to implement the compromise reached with squatters through the consent order.

8. I have considered the petition herein together with all the materials placed before the court in support of the petition. I have also considered the responses to the petition and the parties' rival submissions. Further, I have considered the relevant constitutional and statutory framework. The single broad question in this petition is whether the petitioner has laid a proper basis for grant of the orders sought in the petition. There is common ground that the petitioner is the registered proprietor of the suit property. There is also common ground that the suit property is currently occupied by squatters, none of whom is a party to this petition.

9. There is no gainsaying that Article 40 of the Constitution secures and guarantees the right to property. It provides thus:

40. Protection of right to property

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 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 and 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 into, 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.

10. Similarly, Article 43(1) (b) of the Constitution secures and guarantees the right to housing in the following terms :

“43(1) Every person has the right-

a)

b) *to accessible and adequate housing, and to reasonable standards of sanitation.*

11. The guarantor and protector of the above rights is the state. It guarantees and protects the above rights through its various security instruments, organs and social programmes. Therefore, where a proper basis has been laid to demonstrate that the state has abdicated in its constitutional obligation to protect the right to property, the state may be held liable. It is with this in mind that I have reflected upon the question as to whether or not to grant the prayers sought in this petition at this point.

12. My understanding of the above legal framework together with the framework in Sections 152(A) to 152H of the Land Act and the provisions of the Trespass Act is that, although the Constitution grants the right to own and enjoy property, the duty to enforce that right lies with the property owner. It is incumbent upon every property owner to remain alert and assert his property rights whenever there is an encroachment on the property. Assertion of property rights in relation to land is to be actualized through the due process either through the criminal justice process under the Trespass Act or through the civil judicial process. In so far as assertion of land rights is concerned, our civil law which is based on common law doctrines provides remedies for the tort of trespass to land. The remedies include an order of eviction against the trespasser. It is therefore expected that whenever one trespasses onto the land of another and remains there, the aggrieved party will initiate appropriate proceedings to evict the trespasser.

13. In the present petition, the petitioner contends that the respondents have absconded their constitutional and statutory obligations by failing to either remove the squatters from its property or compensate it as a result of the illegal occupation of the suit property by the squatters.

14. Significantly, in 2016, Parliament came up with an elaborate legal framework which expressly prohibits occupation of the land of another. It further provides a mechanism through which trespassers are to be evicted from land. Because my view on the present petition is significantly informed by that framework, I will reproduce the relevant parts of the legal framework:

152A Prohibition to unlawful occupation of land *A person shall not unlawfully occupy private, community or public land.*

152B Evictions to be undertaken in accordance with the Act *An unlawful occupant of private, community or public land shall be evicted in accordance with this Act.*

152C Eviction Notice to unlawful occupiers of public land

The National Land Commission shall cause a decision relating to an eviction from public land to be notified to all affected persons, in writing, by notice in the Gazette and in one newspaper with nationwide circulation and by radio announcement, in a local language, where appropriate, at least three months before the eviction

152D Eviction Notice to unlawful occupiers of community land

(i) The County Executive committee Member responsible for land matters shall cause a decision relating to an eviction from unregistered community land to be notified to all affected persons, in writing, by notice in the Gazette and in one newspaper with nationwide circulation and by radio announcement, in a local language, where appropriate, at least three months before the eviction.

(ii) In the case of registered community land, the procedure prescribed in Section 162E shall apply

152E Eviction Notice to unlawful occupiers of private land

(i) If, with respect to private land the owner or the person in charge of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on the person a notice, of not less than three months before the date of the intended eviction.

(ii) The notice under section (1) shall-

a) be in writing and official language;

b) in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;

c) specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and

d) be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.

152F Application to court for relief

(i) Any person or persons served with a notice in terms of sections 152C, 152D and 152E may apply to Court for relief against the notice.

(ii) The Court, after considering the matters set out in Sections 152C, 152D and 152E may-

- (a) Confirm the notice and order the person to vacate;*
- (b) Cancel, vary, alter or make additions to the notice on such terms as it deems equitable and just;*
- (c) Suspend the operation of the notice for any period the court shall determine; or*
- (d) Order for compensation 152 G Mandatory procedures during eviction*

1) Notwithstanding any provisions to the contrary in this Act or in any other written law, all evictions shall be carried out in strict accordance with the following procedures:

- a) be preceded by the proper identification of those taking part in the eviction or demolitions;*
- b) be preceded by the presentation of the formal authorizations for the action;*
- c) where groups of people are involved, government officials or their representatives to be present during an eviction;*
- d) be carried out in a manner that respects the dignity, right to life and security of those affected;*
- e) include special measures to ensure effective protection to groups and people who are vulnerable such as women, children, the elderly, and persons with disabilities;*
- f) include special measures to ensure that there is no arbitrary deprivation of property or possessions as a result of the eviction.*
- g) Include mechanisms to protect property and possessions left behind involuntarily from destruction;*
- h) Respect the principles of necessity and proportionality during the use of force; and*
- i) Give the affected persons the first priority to demolish and salvage their property*

2) The cabinet Secretary shall prescribe regulations to give effect to this section 152H Disposal of property left after eviction

The competent officer of the Commission or County Government, community owning a registered community land or owner of private land shall at least seven days from the date of the eviction, remove or cause to be removed or disposed by public auction, any unclaimed property that was left behind after an eviction from private, community or public land.

15. In the present petition, there is no evidence that the petitioner has asserted and exhausted the criminal and civil remedies available to them under the law. In the present context where the squatters have asserted their right to be on the suit property, it is incumbent upon the petitioner to initiate appropriate proceedings and obtain an eviction order. The state will be obligated to come in to give the petitioner support in enforcing the eviction order as and when ordered by the court. It is at that point that the petitioner will be legitimately entitled to point an accusing finger at the state and rightly point out that the state has abdicated in its constitutional duty to protect the right to property. Regrettably, that is not the route which the petitioner has taken in the present petition. The petitioner has, in my view, come to court prematurely without exhausting the legal remedies available.

16. Without saying much, my finding on this petition is that it is premature. The petitioner should exhaust the available legal remedy of obtaining and enforcing an eviction order. It is only after the state fails to render support in enforcing the eviction order that this court will be entitled to hold the respondents liable and burden the Kenyan tax payer with the burden of shouldering the petitioner's problems.

17. In light of the above reasons, I decline to grant the prayers sought in the petition. Because of the nature of the petition herein, each party shall bear own costs of the petition.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF FEBRUARY 2019

B M EBOSO

JUDGE

In the presence of:-

Mr Mwangi holding brief for Mr Kanjama for the Petitioner

Mr Evedi for the 1st and 3rd Respondents

Phillis - Court Clerk