



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC PETITION NO. 4 OF 2018

IN THE MATTER OF ARTICLES 23 AND 40, OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

STEPEHN NGATIA MUGO.....1ST PETITIONER

WILSON KAMAU CHEGE.....2ND PETITIONER

FRANCIS KIMANI GATURU.....3RD PETITIONER

ANTHONY MBURU NYOIKE.....4TH PETITIONER

WILLIAM WAWERU KIMANI.....5TH PETITIONER

PETER NDUNGU MUGO.....6TH PETITIONER

JORAM MUGI MWANGI.....7TH PETITIONER

FREDRICK NJOROGE GITHUI.....8TH PETITIONER

JOSEPH KANGERE MOGERE.....9TH PETITIONER

JOSIAH NGURE WANDERI.....10TH PETITIONER

MARGARET WANJIRU KIMARU.....11TH PETITIONER

LUCY NDUTA KIRAGU.....12TH PETITIONER

AND

COMMISSIONER OF PRISONS.....1^S RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGEMENT

1. On the 14th March 2013, the Petitioners filed their Petition dated 13th March 2018, seeking for the following:

i. A Declaratory order to the effect that the Petitioners herein are entitled to parcels of land registered in their respective names being:

a. LR Nyandarua/Ol Kalou Salient/1364 registered in the name of the 1st Petitioner on 1st April 2008.

- b. LR Nyandarua/Ol Kalou Salient/1365 registered in the name of the 2nd Petitioner on 2nd February 2007.
 - c. LR Nyandarua/Ol Kalou Salient/1366 registered in the name of the 3rd Petitioner on 17th April 2008.
 - d. LR Nyandarua/Ol Kalou Salient/1368 registered in the name of the 4th Petitioner on 6th January 2010.
 - e. LR Nyandarua/Ol Kalou Salient/1372 registered in the name of the 5th Petitioner on 20th November 2015
 - f. LR Nyandarua/Ol Kalou Salient/1375 registered in the name of the 6th Petitioner on 27th May 2003
 - g. LR Nyandarua/Ol Kalou Salient/1379 registered in the name of the 7th Petitioner on 15th November 2011.
 - h. LR Nyandarua/Ol Kalou Salient/1381 registered in the name of the 8th Petitioner on 20th May 1999.
 - i. LR Nyandarua/Ol Kalou Salient/1383 registered in the name of the 9th Petitioner on 2nd August 2011.
 - j. LR Nyandarua/Ol Kalou Salient/1385 and 1386 both registered in the name of the 10th Petitioner on 129th January 2001.
 - k. LR Nyandarua/Ol Kalou Salient/1397 registered in the name of the 11th Petitioner on 13th April 1990.
 - l. LR Nyandarua/Ol Kalou Salient/1398 registered in the name of the 12th Petitioner on 26th October 2007.
- ii. A permanent injunction be issued by the court restraining the prisons Department or any other arm of the Government of Kenya from interfering with the Plaintiff's (sic) exclusive possession and use of their respective parcels of land.
- iii. Cost of the Petition
- iv. Any other further relief that the court may deem fit and just to grant.

2. Alongside the said Petition, the Petitioners filed an application dated the 13th March 2018 seeking conservatory orders pending the hearing of the application inter parties wherein on the 14th March 2018, interim orders were issued restraining the Respondents by themselves, their servants, employees, agents and or proxies or any other persons acting under or on their authority or claiming through or under them from entering, remaining using, occupying, possessing or in any manner whatsoever interfering with the Petitioners parcels of land Known and described as Nyandarua/Ol Kalou Salient/1364, 1365, 1366, 1368, 1372, 1375, 1379, 1381, 1383, 1385, 1386, 1397 and 1398

3. After the interim orders were issued, and the Respondents upon being served failed to turn up for hearing of the Application inter parties and the same was allowed as unopposed. Parties were then directed to dispose of the Petition by way of written Submissions.

4. On the 18th April 2018 the Hon Attorney General entered appearance but never filed any papers.

5. The Petitioners filed their written submissions on the 6th November 2018.

The Petitioners' case.

6. The Petitioners' case is based on the fact that on the 16th December 1985, the register for parcel No. Nyandarua/Ol Kalou Salient/378 was opened in the name of the Settlement Funds Trustee who then allocated the same to one Muritu Mahugu Rubere(deceased) and the land was registered in his name on the 3rd October 1990, wherein he took actual possession of the same.

7. That on the 3rd October 1990, Muritu Mahugu caused the land to be sub divided into three resulting in land parcels No. Nyandarua/Ol Kalou Salient/722, 723 and 724. The mother title No Nyandarua/Ol Kalou Salient/378 was closed upon these subdivisions.

8. On the 5th December 1997, Muritu Mahugu Rubere further subdivided parcel No. Nyandarua/Ol Kalou Salient/722 into parcels No 1355-1402. Which he put up for sale. Parcel No. Nyandarua/Ol Kalou Salient/722 was closed.

9. The Petitioners herein acquired the said parcels of land for valuable consideration and were registered as proprietors of the same as herein above stated wherein they took actual possession of their respective parcels of land and proceeded to develop them according to their individual ability.

10. In the year 2018, officers from the 1st Respondent started appearing on the Petitioners' parcels of land wherein they demanded that the Petitioners vacate from the same. The officers then went ahead to put up beacons and erected a sign post warning the Petitioners and the public at large from trespassing thereon

11. On the 27th February 2018 they visited the suit lands and without a court order or any authority, went ahead to demolish some of the

perimeter fences that the Petitioners' had placed around their land.

12. The Petitioners' contention is that the officers from the 1st Respondent had no legal or beneficial interest over their parcels of land.

13. The unlawful interference with the Petitioners' proprietary rights over their respective parcels of land by personnel from the 1st Respondent, contravenes the provisions on protection of right to property enshrined in the Article 40 of the Constitution of Kenya.

14. The Petition was not challenged by the Respondents who did not file any response.

15. The Petitioners subsequently filed their written submissions in support of the Petition, and relied on the decided cases of **Pius Kibet Tott vs Uasin Gishu County Government & 9 Others [2018] eKLR** and **Arnacherry Limited vs Attorney General [2014] eKLR** to submit that the Petitioners herein had a right to own property as was envisaged under Article 40 of the Constitution and that the state had no right to arbitrary deprive a person of property of any description, or of any interest in, or right over any property of any description.

16. That there was no dispute that the Petitioners herein were the registered proprietors of their respective parcels of land as stated in paragraph 5 of their Petition.

17. That there was nothing availed in court to show that their respective titles had been revoked, cancelled or declared invalid through any legal means and therefore the Respondents had no legal basis in interfering with the Petitioner's proprietorship rights over the said parcels of land.

Analyses and Determination

18. It is worth noting that the 2nd Respondent in this matter entered appearance on the 22nd March 2018 on behalf of the 1st and 2nd Respondents. Thereafter, they neither filed their response nor appeared in court to oppose the petition, despite service having been effected upon them.

19. I have considered the written submissions by counsel for the Petitioners and also considered the annexures, the law and the authorities herein attached.

20. From the title and/or heading of the Petition, the Petitioners' grievance is that their rights under Article 40, of the Constitution have been infringed by Respondents.

21. Briefly, the Petitioners' case was that they had acquired the said parcels of land from one Muritu Mahugu Rubere for valuable consideration wherein after they had been registered as proprietors of the same and took actual possession of their respective parcels of land

22. That it was upon their settlement on their respective parcels that officers from the 1st respondent visited them, and without any color of right or any court order went ahead and destroyed their fence before placing beacons on their land and putting up a sign post warning the Petitioners and the public at large from trespassing thereon demanding that the Petitioners vacate from suit land which they claimed ownership.

23. Following the above brief position of the matter, I have framed the issues for determination as being;

- i. Whether the Petition discloses a legal interest capable of protection under the law
- ii. Whether the Petitioners' right to property has been violated contrary to Article 40 of the Constitution.

24. The Respondent did not file a Defence, Replying Affidavit or at least Grounds of Opposition and therefore the Petitioner's case is uncontroverted and unchallenged both in terms of facts and the law. I shall therefore proceed to evaluate the Petitioner's case for the effect of the said uncontroverted evidence

25. In the decided case of **Kenya Bus Service Ltd & 2 Others vs. The Attorney General & 2 Others (2005) eKLR**, Nyamu J. stated as follows ;

“... fundamental right are contained in the Constitution and are principally against the State because the Constitution's function is to define what constitutes Government and it regulates the relationship between the Government and the governed On the other hand the rights of individual interests are taken care of in the province of private Law and are invariably addressed as such.”

26. In the present case, the Petitioners have annexed their title deeds as well as laid down the root of the same. I have also had a look at the copy of the green card in relation to parcel No. 722 wherein the same is clear that the same had been initially registered in the name of Muritu Mahugu Rubere wherein it was closed on the 5th December 1997 upon subdivision into parcels No.1355-1402 which parcels encompass the Petitioners parcels of land herein.

27. As was held in the case of **Republic vs Senior Registrar of Titles Ex-parte Brookside Court Limited (2012) eKLR**, the statutorily, the sanctity of title to land is assured and protected under **Section 24, 25 and 26** of the **Land Registration Act 2012** produced as herein under’;

28. Section 24 stipulates as follows:

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

29. Section 25 of the act provides:

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

30. Section 26 is to the effect that:

Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

31. It was the Petitioners' submission that in the year 2018, officers from the 1st Respondent started appearing on these parcels of land and demanded that the petitioners should vacate from their land. They also put up beacons and erected a sign post warning the petitioners and the public at large from trespassing thereon

32. On the 27th February 2018 the said officers visited the suit lands and without any color of right, court order or any authority, went ahead to demolish some of the perimeter fences that the Petitioners' had placed around their land. They then put up a sign post warning the Petitioners and the public at large from trespassing thereon demanding that the Petitioners vacate from suit land which they claimed ownership.

33. I find that these acts by the 1st Respondents officers and /or agents constituted acts of forceful acquisition of the Petitioner's land which was private property. This was done without due or proper administrative process, full, fair and prompt compensation as was required of it under **Article 40** of the Constitution 2010 and part VIII of the **Land Act**

34. Article 40 of the **Constitution of Kenya** provides that;

(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 or 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

35. Articles 3, 12 and 17 of the Universal Declaration of Human Rights, 1948 provide that a State's obligation is to respect and protect of private property as well as safety of the person.

36. Article 2 (5) of the Constitution recognizes international law as forming part of our domestic law or sources of law. In the circumstance thereof the invasion of the Petitioners' suit land and failure of the State to protect their property run afoul of **Articles 3, 12 and 17 of the Universal Declaration of Human Rights 1948** herein above stated.

37. 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 recognized 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..."

38. The Petitioners have alleged violation of their constitutional rights, to property under **Article 40 of the Constitution**, facts in support of the allegation have not been contested. It has been demonstrated that the 1st Respondent invaded the Petitioners' the suit land where they have put up a sign post that threatens the Petitioners and the public at large of prosecution should they set foot on the suit land, an act that continues to date.

39. I find that the Respondents without lawful process, compulsorily acquired the said parcel of the suit land thereby violating the Petitioners' right to ownership of the property, fair and prompt compensation upon compulsory acquisition of their land under **Article 40 of the Constitution** has been breached by the acts and/or omissions of the 1st Respondent

40. I find that the Petitioners have established, on a balance of probabilities, that they deserve the orders sought in their Petition which is herein allowed as prayed to the effect that;

i. The Petitioners herein are entitled to parcels of land registered in their respective names as herein indicated in the Petition.

ii. A permanent injunction is issued restraining the prisons Department or any other arm of the Government of Kenya from interfering with the Petitioners' exclusive possession and use of their respective parcels of land.

iii. Cost of the Petition at a lower scale since the same was not defended.

Dated and delivered at Nyahururu this 4th day of February 2019

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE