



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

PETITION NO. 510 OF 2017

IN THE MATTER OF ARTICLES 2 & 3 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHT TO INFORMATION UNDER ARTICLE 35 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS (CHAPTER 4) UNDER ARTICLES 22 & 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 6, 7, 10 & 12 OF THE LAND REGISTRATION ACT (2012)

BETWEEN

SIMON PASUA OLE KAANTO.....PETITIONER

VERSUS

CHIEF LAND REGISTRAR.....RESPONDENT

AND

1. SAFES & LOCKS (K) LIMITED

2. NATIONAL BANK OF KENYA.....INTERESTED PARTIES

JUDGEMENT

By a Petition dated the 25th January, 2016 the Petitioner prays for orders that:

- a) An order directing the Respondent to prohibit any dealings over land title number KAJIADO/ LORNGUSUA/ 84 pending the determination of this petition.
- b) A declaration that the Petitioner is entitled to all the information from the Respondent over the transfer of land title number KAJIADO/ LORNGUSUA/ 84 made on the 21st July, 1992 from the Petitioner to the 1st Interested Party.
- c) An order directing the Respondent to furnish the Petitioner with the supporting documents used for the transfer made on 21st July, 1992 within a specified period namely:
 - i. The Petitioner's copy of identity card
 - ii. Application for consent of the Land Control Board

- iii. Letter of consent of the Land Control Board for transfer
- iv. Transfer of land form signed by the Petitioner
- v. Valuation requisition for stamp duty
- vi. Application for registration of transfer
- vii. Receipts for payment of stamp duty
- viii. Receipt for payment of registration fees
- ix. Receipts for application for consent to transfer
- x. Certificate of corporation of the 1st Interested Party
- xi. Identity Cards for the directors of the 1st Interested Party
- xii. PIN Certificate for Ist Interested Party
- xiii. Certified Land Register for land title Number KAJIADO/ LORNGUSUA/ 84
- d) Any other relief that this honourable Court may deem fit to grant.
- e) The costs of this Petition be borne by the Respondent.

The Respondent opposed the Petition and filed Grounds of Opposition dated 1st September, 2016 where he stated as follows:

- There are no constitutional matters raised in the Petition capable of sustaining a constitutional application
- Without prejudice to (1) above, even if there were constitutional issues raised in the Petition, such rights cannot be enforced against the Respondent
- The Petitioner is guilty of laches and the Court should dismiss the Petition with costs.

The 1st Interested Party despite being served via substituted service of summons failed to enter appearance and file a response.

The 2nd Interested Party opposed the Petition and filed a replying affidavit sworn by SAMUEL MUNDIA, the Head of Commercial Transactions & Litigation where he deposed that the 1st Interested party who was the proprietor of the suit land charged it to the 2nd Interested party to secure a loan of Kshs. 24 million but defaulted in repaying the same. He avers that the 2nd Interested party issued the requisite notices and instructed messrs Spotlight Intercepts Auctioneers to sell the suit property through public auction. He confirms the suit land was sold by public auction on 13th November, 2015 and the highest bidder CAWA ENTERPRISES purchased it for Kshs. 24.5 million. He claims the lawyers for CAWA ENTERPRISES messrs Kale Maina & Bundotich Advocates informed the bank that there was a restriction registered on the title on 30th September, 2014 which was entered four(4) months after the suit land had been charged on 9th May, 2014. He reiterates that the 2nd interested party legally exercised its statutory power of sale and there was no fraud, as indeed no claim of fraud has been pleaded against the bank. He reaffirms that the alleged restriction was registered twenty (22) years after the transfer of the suit land to the borrower, hence the Petitioner is guilty of laches.

Analysis and Determination

Upon perusal of the materials presented in respect of the Petition herein, the following are the issues for determination:

- Whether the Petitioner's Constitutional rights has been violated by the Respondent.
- Who should bear the costs of the Petition

As to whether the Petitioner's Constitutional right to information has been violated by the Respondent, it is his contention that the failure by the Respondent to furnish him with all the abovementioned requisite documents amounted to a violation of his rights.

In response, the Respondent insists there are no constitutional matters raised in the Petition capable of sustaining a constitutional application. The Petitioner does not dispute that he had entered into a contract to sell the suit land to the 1st Interested Party. Further, he even admits that the 1st Interested party partially paid for the suit land but transferred the same to itself without the Petitioner's knowledge. He only discovered the transfer when the suit land had been scheduled for sale. I note the Petitioner did not enjoin the current owner of the suit land in the instant proceedings. Before I delve into whether the petitioner's rights were violated or not, I wish to make reference to the various laws governing access to information in Kenya.

Article 35 of the Constitution provides that;

- 1) *“Every citizen has the right of access to—*
 - a) *information held by the State; and*
 - b) *information held by another person and required for the exercise or protection of any right or fundamental freedom.*
- 2) *Every person has the right to the correction or deletion of untrue or misleading information that affects the person.*
- 3) *The State shall publish and publicise any important information affecting the nation.’*

Further, Section 4 of the Access to Information Act 2016 Act stipulates that:

- ‘1) *“Subject to this Act and any other written law, every citizen has the right of access to information held by—*
 - a) *the State; and*
 - b) *another person and where that information is required for the exercise or protection of any right or fundamental freedom.*
- 2) *Subject to this Act, every citizen's right to access information is not affected by—*
 - a) *any reason the person gives for seeking access; or*
 - b) *the public entity's belief as to what are the person's reasons for seeking access.*
- 3) *Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.*
- 4) *This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.*
- 5) *Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information’*

I note the Petitioner claims that when he sought for information from the Respondent, he only gave him a copy of uncertified copy of the Green Card. However, from the documents on record, I note there is a Certificate of Official Search which confirmed that the 1st Interested Party was the proprietor of the suit land from 21st July, 1992 but later charged it on the 31st February, 2013 to the 2nd Interested Party that exercised its statutory power of sale when the 1st Interested Party failed to repay the loan.

In the case of ANARITA KARIMI NJERI Vs R (1976 – 1980) KLR 1272 the Court held that the Petitioner must state and identify the rights with precision and how the same have been infringed upon.

Further *In the case of Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission* [2016]eKLR, the Court reaffirmed the position that the Constitution does not limit the right to access information when it stated;

“[270] Article 35(1) (a) of the Constitution does not seem to impose any conditions precedent to the disclosure of information by the state. I therefore agree with the position encapsulated in *The Public’s Right to Know: Principles on Freedom of Information Legislation –Article 19 at page 2* that the principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances and that public bodies have an obligation to disclose information and every member of the public has corresponding right to receive information. Further the exercise of this right should not require individuals to demonstrate a specific interest in the information”

I note the Petition herein was filed 24 years later after the 1st Interested party had been registered as owner of the suit land. What is not clear is why the Petitioner after entering into an agreement in 1992 and noting that the 1st Interested Party had failed to pay for the suit land as alleged, failed to seek a remedy against him in time, and service for the documents enumerated above.

In the High Court *Petition No. 306 of 2012 Ochieng Kenneth K’Ogotu Vs Kenyatta University and 2 others* where the learned Judge held as follows: *“In my view failure by a Constitutional Court to recognize general principles of law including, limitation expressed in the Constitution would lead to legal anarchy or crisis. It would also trivialize the constitutional jurisdiction in that applicants would in some cases ignore the enforcement of their rights under the general principles of law in order to convert their subsequent grievance into a “constitutional issue” after the expiry of the prescribed limitation periods.”*

The Petitioner has not explained the reason of the delay in instituting this Petition. To my mind a delay of over 20 years is not justifiable. In

being persuaded with the abovementioned case, and relying in section 7 of the Limitation of Actions Act, I find that the claim against the 1st Respondent is deemed statute barred. He is demanding documents from the government after a long period of time and does not explain why he took so long in demanding the said documents. On perusal of the Land Registration Act, I note it refers to the Land Register to confirm records of ownership of land. From the evidence herein that the Respondent gave the Petitioner a copy of the Green Card which is indeed an extract of the Land Register that confirms the records therein. Further that the Land Records have since changed hands as evidenced in the Certificate of Official Search. From the Mutation Form annexed to the 2nd Interested Party's Replying Affidavit, I note it is the Petitioner who undertook the Mutation and subdivided the land into three portion. I further note that the Petition admitted that he had sold the land to the 1st Interested Party which failed to pay the full purchase price. The Petitioner however has not informed Court whether he lodged any civil suit against the 1st Interested Party within the requisite period nor whether the Police commenced criminal prosecution against them. It is my view that the Land Registrar who is the custodian of the Land Records entered the details in the register which he availed to the Petitioner to confirm current ownership. From this, the court infers that the process of transfer was duly adhered to.

According to Article 35 of the Constitution, this right to access information is required ***for the exercise or protection of any right or fundamental freedom***. In the current scenario the Petitioner has not demonstrated what protection or fundamental freedom he is seeking from the Respondent in respect of this Petition. I find that the rights the Petitioner is demanding is limited in accordance with Article 24 of the Constitution. From the Petition, I opine that there is no disclosure nor any infringement of fundamental rights by the Respondent. I concur with the Respondent that the Petitioner's claim herein is a cover up as the Limitation of Actions Act has caught up with him.

It is against the foregoing that I find that the Petitioner has failed to precisely demonstrate, how his rights have been infringed upon.

From my findings above, I find that the Petition dated the 19th December, 2016 is not merited and dismiss it with costs to the Respondent and the 2nd Interested party.

Dated signed and delivered in open court at Kajiado this 4th March, 2019

CHRISTINE OCHIENG

JUDGE