



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC PETITION CASE NO. 30 OF 2017

IN THE MATTER OF ARTICLES 22 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19, 22, 23, 40, 47, 50 AND 64 OF THE CONSTITUTION OF KENYA

BETWEEN

SISTERS OF NOTRE DAME DE NAMUR REGISTERED TRUSTEES.....PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION.....INTERESTED PARTY

JUDGEMENT

1. Sisters of Notre Dame De Namur Registered Trustees, the Petitioner, seeks for the following prayers in their petition dated the 20th September 2017;

A. “An order of prohibition does issue to prohibit the Respondents by themselves, servants, agents or whomsoever from alienating the Petitioner’s parcel of land comprised in the title number Kisumu Municipality/Block 12/124 or in any manner interfering with the Petitioner’s possession of the said land.

B. An order of mandamus does issue to compel the Respondents by themselves, servants, agents to delete any entry on the Petitioner’s title number Kisumu Municipality/Block 12/124 or the register in respect of title number Kisumu Municipality/Block 12/124 made as a consequence to or in furtherance of all that parcel of land comprised in the title number.

C. An order of Certiorari does issue to bring into this Honourable Court and quash the Gazette Notice, Gazette Notice No. 6862 of 17th July, 2017 in so far as it relates to the Petitioner’s parcel of land, Kisumu Municipality/Block 12/124.

D. A declaration that the Respondents’ purported revocation of the Petitioner’s title number Kisumu Municipality/Block 12/124 is unconstitutional, null and void.

E. A declaration that the Title Deed of the Petitioner in respect to the suit property is conclusive evidence of ownership and that the Petitioner is the absolute and indefeasible owner of all that parcel of land known as Kisumu Municipality/Block 12/124.

F. An order for general and exemplary damages to the petitioner for violation of its Fundamental Rights and Freedoms

under the Constitution of Kenya, 2010.

G. An order that the costs consequent upon this petition be borne by the Respondents.

H. All such other orders as this Honourable Court shall deem just in the circumstances.”

2. The Petition is based on the following facts/grounds;

- That the Petitioner was in August 2009 introduced by John Kennedy Odundo to Justin Kimutai Sirma, the registered proprietor of Kisumu Municipality/Block 12/124 on which a house number KISU/HOU/HG/80 is situated, the suit property.
- That after carrying out due diligence and confirming the title document, the Plaintiff agreed to buy the suit property at Kshs. 6,000,000/= and they executed the sale agreement on the 11th September 2009.
- That upon obtaining the rates and rent clearance and consent to transfer from the Commissioner of Lands, the suit land was transferred to the Petitioner and certificate of lease issued on the 20th November 2009.
- That the Petitioner moved into the suit property on the 14th December 2009 and has been in occupation since then.
- That on or about 28th July 2017 the Petitioner got to know of G.N. NO. 6862 of 17th July 2017 published by National Land Commission, the 1st Respondent, revocating the Petitioner's title to the suit property among others.
- That the Petitioner being a bona fide purchaser for value had not been given an opportunity to be heard before the revocation notice was gazetted.
- That the suit property is private land that cannot be expropriated without compensation.
- That the Respondent's action amounts to arbitrary deprivation of the Petitioner's property rights and contravene Article 40 (2), and 40 (3) (b) of the Constitution 2010.
- That the action also violates Article 47 (1) and (3) of the Constitution 2010 and is capricious, vindictive, callous and actuated by bad faith.

3. The petition was filed contemporaneously with the notice of motion under certificate of urgency dated 20th September 2017 seeking for conservatory orders. The application was granted in terms of prayer 5 on the 2nd October 2017 pending the hearing and determination of the petition.

4. The petition has named the National Land Commission, Chief Land Registrar and the Hon. Attorney General as the 1st to 3rd Respondents respectively, but none has filed any replying papers to date.

5. The Ethics and Anti-corruption Commission made an oral application through Counsel on the 31st January 2018 to be enjoined as an Interested Party. The application, not being opposed by Counsel for the Petitioner, 2nd and 3rd Respondents, was allowed. That directions on filing and exchanging replying papers and written submissions on the petition were issued. By then the Petitioner's counsel had filed their written submissions dated the 29th January 2018, on the 30th January 2018. The Interested Party filed their replying affidavit sworn by Grace Kwamboka Omweri an advocate for the Interested Party, on the 15th February 2018. The Petitioner filed a further affidavit in reply thereto sworn by Samwel Kiongera, an Advocate for the Petitioner on the 14th May 2018. The Interested Party then filed their written submission dated 1st November 2018 and list of authorities of the same date.

6. The Petitioner's case, as discerned from the supporting and further affidavit, grounds/facts on the petition, written submissions and authorities cited therein, is as summarized herein below;

a. That the Petitioner acquired the suit property procedurally and after carrying out due diligence and is therefore legally registered as proprietor of the leasehold interest as confirmed by the copy of the certificate of lease.

b. That the 1st Respondent action of gazetting revocation of the Petitioner's title to the suit land without giving them a hearing or compensation contravenes their constitutional rights.

c. That the Petitioner had filed petition No. 30 of 2012 in this court for the following orders;

A. Declaration that notices of eviction issued by the Permanent Secretaries of the Ministries of Medical Services and Housing were inconsistent with Articles 40, 48 and 50 of the Constitution as they are the registered proprietor of Kisumu Municipality/Block 12/124 on which is House No. HG/80 is situated.

B. Declaration that the allegations by the Respondents and or their agents that the Petitioner's title to the suit property was illegally and fraudulently acquired is arbitrary, capricious, irregular, unconstitutional and contravenes the Petitioner's fundamental rights and Freedoms as recognized under the Constitution and therefore void, illegal, invalid and or inapplicable of enforcement and or of no legal effect.

C. Consequently an order prohibiting the Respondents and or their agents from evicting the Petitioner or interfering with the Petitioner's right of ownership and occupation of the suit land and the house thereon be issued.

D. Consequently an order prohibiting the Respondents and or agents from restricting or limiting the Petitioner's

peaceful enjoyment of and access to the suit property and the house thereon be issued.

E. Costs

F. Such other order as the court may deem just.

d. That the judgment in petition No. 30 of 2012, (Previous Nairobi H. C. Petition NO. 150 of 2012), was delivered on the 29th May 2014 and being dissatisfied, and with the intention of filing an appeal, filed an application on the 14th July 2014 seeking for among others enlargement of time to file the Notice of Appeal, stay of execution of the Judgment of 24th May 2014 and any other proceeding subsequently thereto and injunction order. That the application was heard on the 14th July 2014, the following orders issued;

- Application certified urgent.
- Stay of execution for 14 days pending hearing and determination of the application.
- That file be placed before ELC Kisumu on 28th July 2014 for further orders.
- The Respondents be served.

e. That the Interested Party herein was served with the application dated 11th July 2014, on the 15th July 2014 and the orders issued thereof and they consequently filed their Grounds of Opposition on the 24th July 2014. That the Petitioner filed and served the Interested Party with their submissions on the 13th November 2014. The Interested Party caused several adjournments seeking for time to file submissions. That the matter was then set for 14th September 2015 which fell within the Court's vacation and the matter was mentioned before the Deputy Registrar without their knowledge. That they then filed the application dated 27th October 2015 seeking to reinstate and extend the stay orders pending the ruling of the application dated 11th July 2014. That the stay orders were reinstated and extended but their efforts through a letter dated 9th February 2017 to fix the application for highlighting has not been successful as they were told the file was missing.

f. That after the Petitioner filed Petition no. 30 of 2012, the Interested Party had thereafter filed ELC No. 78 of 2013, against the Petitioner and two others which is still pending.

g. That the ownership of the suit land and the house on it has never been determined and is subject matter of ELC No. 78 of 2013.

h. That the petition has merit and should be granted as prayed.

7. The Interested Party's case as set out in their replying affidavit and submissions is as summarized herein below;

- That the Interested Party received a complaint that a Government house No. Kisu/Hou/HG/80, on parcel Kisumu Municipality/block 12/124, the suit property, had been illegally alienated. That after conducting investigations and finding the complaint as correct, they filed ELC 78 of 2013 to recover it. That before then, the Petitioner had filed Petition No. 30 of 2012 to challenge the imminent eviction from the suit property by the Ministry of Health.
- That in the Petition No. 30 of 2012, the validity of the title held by the Petitioner to the suit property was canvassed and in the Judgment delivered by Kaniaru J on the 29th May 2014, the petition was dismissed and the suit property declared to have been Government property at all material times, and therefore not available for alienation, sale and transfer to anybody.
- That the Petitioner obtained interim stay but the application has to date not been heard inter partes. That further, no appeal has been preferred.
- That the current petition challenging the 1st Respondent's cancellation of the Petitioner's title through G.N. No. 6862 is superfluous, ill-advised and an abuse of the Court's process in view of the decision of the Court in Petition No. 30 of 2012 on the validity of the title.
- That the gazettelement by the 1st Respondent was in order and aimed at regularizing the ownership of the suit property in conformity of the Court's decision in Petition No. 30 of 2012.
- That the Petitioner's attempts to re-litigate the Petition No. 30 of 2012, through the back door, by filing this petition is in bad faith and amounts to abuse of the court's process.
- That the petition be dismissed with costs to the Interested Party.

8. The following are the issues for the court's determinations;

a. Whether this petition is res judicata in view of the decision in Petition No. 30 of 2012.

b. Whether the gazettelement of cancellation of the Petitioner's title to the suit land amounts to an infringement of the Petitioner's fundamental and Constitutional rights as alleged.

c. Whether the Petitioner is entitled to any of the orders/reliefs sought.

d. Who pays the costs.

9. The Court has carefully considered the grounds/facts on the petition, the supporting, replying and further affidavits, written submissions by counsel for the Petitioner and Interested Party, the authorities cited therein, and come to the following conclusions;

a. That Petition No. 30 of 2012 was filed by the same Petitioner in this petition, and is against the Hon. Attorney General and the Permanent Secretaries, Ministries of Medical Services and Housing. That the suit property in that petition is the same one in this petition, that is Kisumu Municipality/Block 12/124 and House No. KISU/HOU/HG/80 erected thereon.

b. That the Hon. Attorney General was the 1st Respondent in Petition No. 30 of 2012 and the 3rd Respondent in the current petition.

c. That the Ethics and Anti-corruption Commission was the Interested Party in Petition No. 30 of 2012 and in this petition. That National Land Commission and the Chief Registrar, who are the 1st and 2nd Respondents in this petition were not parties in the petition No. 30 of 2012.

d. That the question of ownership of suit property, which is the subject matter in this suit, was the main issue of determination in petition No. 30 of 2012 going by the pleadings filed by the Petitioner and the Interested Party in both petitions. That issue was succinctly captured by the Court in the Judgment delivered on the 29th May 2014 in Petition No. 30 of 2012 as shown in the following paragraphs;

“3. At the centre of the dispute is land Parcel No. Kisumu Municipality/Block 12/124 on which is House No. KISU/HOU/HG/80. The Petitioner is claiming ownership of both the land and house.....

6. The intended move by the Respondents is said to constitute a violation of Petitioner’s Constitutional right to own property. It is viewed as arbitrary taking and deprivation of property or otherwise a limit and restriction of Petitioner’s fundamental right to the enjoyment of the aforementioned property.....

9.For the Respondents, the then Permanent Secretary, Ministry of Housing, replied with an 18 paragraph Replying affidavit in which he depend interalia, that the house on the suit property belonged to the Ministry of Housing, that upon learning of the Petitioner’s claim, the matter was handed over to the Anti-corruption Commission; that investigations revealed that inspite of the Petitioner’s claim, the suit property was still government property, hence the subsequent notice to the Petitioner to quit the suit property.....

11. The Interested Party responded vide a Replying affidavit filed here on the 19th June 2013....that one Justin Kimutai Sirma fraudulently got himself registered as owner of the suit land and produced a certificate of lease whose purported signatory –P.K. Sibuchi – flatly refuted ever signing it.....

15. The Land Registrar, Kisumu, is said to have confirmed that Justin Sirma’s lease was a forgery. The suit property having been reserved for use as residence for hospital staff was not available for alienation and Justin Sirmas lease was said to be null and void.....

.....”

e. That the Court came to the following findings in Petition No. 30 of 2012 in its Judgment dated the 29th May 2014;

“41.....The Petitioner is seeking declaratory orders as to rights of ownership followed by consequential orders arising from such declarations. Quite clearly, rights of ownership will not be delved into without looking into the merits. In trying to consider the matter, it is inevitable that a finding will have to be made whether such rights were lawfully acquired or even acquired at all.....

.....

42. The Respondents made a written response to the petition that I think was not sufficiently considered by the Petitioner. For instance, it is asserted that the sale transaction between the Petitioner and the alleged seller of the suit property was a fraudulent arrangement.....It remains therefore true that the sale transaction was conducted on the basis of a fake or forged lease certificate. Can a transaction ensuing therefrom then confer a good title? Obviously no.

43.....The Petitioner’s own statement contains details as to how the purchase money was to be distributed. Crucially noteworthy here is that one of the beneficiaries is the Land Registrar who was later to issue a lease certificate. It puzzles a bit that the Petitioner couldn’t smell a rat when this scenario was unfolding. One would have expected that the Petitioner would be concerned that such an official was benefitting from purchase money. The lease certificate availed by the seller didn’t show such official as possessing an interest. When the Respondents depone that compromised government officials were involved in the deal, that does not sound hollow.

44. When all this is taken into account, it is easy to agree that no good title ever passed to the Petitioner. Consequently, no property rights of the Petitioner under the Constitution or any other statute were ever violated.

Such rights never existed in the first place. The Petitioner was duped into a transaction that gave it a false sense of legal ownership, possession and occupation. The premise of the transaction was that the suit property was private property then belonging to the seller- Justin Kimutai Sirma. But Kimutai's title turns out now to be a forgery.....

47. Having now considered what both sides presented it is clear that the petition herein cannot succeed. Both the Respondents and the Interested Party have put forward unassailable proof that the suit property is still government land in law. It was never legally availed for alienation in the first place and was never available for sale or transfer to anybody. The Petitioner's petition is therefore found unmeritorious and is hereby dismissed with costs" (Emphasizes mine)

f. That in view of the finding above that the question of ownership, possession and title to the suit property was the main issue for determination in petition No. 30 of 2012, and that it was decided in favour of the Government of Kenya, represented then by the Attorney General and the Interested Party. That it follows that the current/instant petition over the same issue is res judicata and contravenes **Section 7 of the Civil Procedure Act Chapter 21 of Laws of Kenya.**

g. That the Petitioner has deponed that the Judgment of 29th May 2014 in Petition No. 30 of 2012 was stayed on 14th July 2014 pursuant to their application dated the 11th July 2014. That indeed a copy of the order issued by ELC Bungoma on 14th July 2014 has been availed and contains order 2 in the following words;

"2. That there be stay of execution for fourteen (14) days of the Judgment entered herein on the 29th May 2014 and any other proceedings and/or orders subsequent thereto pending the hearing and determination of this application."

That among the prayers on the motion are;

- **Enlargement of time within which to file the Notice of Appeal.**
- **Enlargement of time to apply for typed copies of proceedings.**
- **Stay of execution of the Judgment entered on the 29th May 2014 and other proceedings, initially pending the hearing and determination of the application, and thereafter pending the hearing and determination of the intended appeal.**
- **Temporary injunction prohibiting the Respondents and Interested Party from evicting the Petitioner from the suit land.**

That the Interested Party opposed the application through their Grounds of opposition dated the 24th July 2014 summarized as follows;

- **The court is without jurisdiction to enlarge time to file appeal.**
- **That as the Petition had merely been dismissed, there is nothing to stay.**
- **That the court lacks jurisdiction to grant temporary injunction pending appeal in exercise of its original jurisdiction.**
- **That the Petitioner has not shown that it will suffer substantial loss if stay is not granted.**

h. That further to (g) above, it appears that the ex parte interim stay issued on 14th July 2014 has since lapsed. The Petitioner then filed the application dated the 23rd October 2015 seeking to among others ***"reinstate and extend the stay granted following the Applicant's application dated the 11th July 2014 to the next mention or ruling date."*** That though at paragraph 13 of the further affidavit sworn in support of the Petition by Samuel Kiogora, it is deponed that, according to the information received from Mr. Orlando Olembo Advocate, the ***"interim orders were extended pending the hearing and determination of the Petitioner's application dated the 11th July 2014"***, there is no prove availed in form of the extracted order or ruling. That under Section 107 of the Evidence Act, Chapter 80 of the Laws of Kenya, the Petitioner has the burden of proving that claim that the stay order was reinstated and extended and has not done so. That the Court will therefore take that there is no order in force staying the execution of the Judgment of the 29th May 2014 in Petition No. 30 of 2012. That whether there was anything to be stayed in that Judgment is not an issue for determination in this petition.

i. That the Petitioner, in filing the instant petition, is taking another effort to pursue its claim of ownership, title and possession of the suit property, which question or issue has already been decided by this court in Petition No. 30 of 2012. That the court agrees with the finding of Majanja J in **E. T. vs Attorney General and Another [2012] eKLR** that Courts must be vigilant to guard against litigants introducing new causes of action so as to seek the same remedy before the Court after it has already been resolved by a Court of competent jurisdiction. The findings in the following decisions are also relevant to the foregoing position taken by the court. **(R. vs Commissioner of Lands & Another Ex parte Lima Ltd Eldoret H.C. J.R. No. 10 of 2008, R. V. Senior Registrar of Titles, Mombasa & 2 Others Ex parte Comen Ltd, Mombasa H.C. Misc. Civil App. No. 70 of 2010 and R. vs District Land Registrar Mombasa & 5 Others ex parte Super Nova Properties Ltd Mombasa Judicial Review App. No. 105 of 2010).**

j. That as the Court's decision in Petition No. 30 of 2012 was arrived at after hearing the Petitioner, the Respondents and Interested Party therein, and that it was ruled that the Petitioner did not obtain good title and that the suit property was Government Land, the Court finds no basis of faulting the gazettement carried out by the 1st Respondent, which seems to have triggered this petition. That until and unless the Court's decision on who owns the suit property, or is entitled to its title and possession is changed by Court of Appeal, the judgment of 29th May 2014 remains the only valid pronouncement on its ownership. That accordingly, there are no

contraventions or infringement occasioned by the Respondents and or Interested Party on the Petitioner's rights under **Article 40 (2), 40 (3) b, 47 (1) and (2) of the Constitution of Kenya 2010.**

10. That in view of the foregoing, the Court finds that the Petitioner has failed to establish its claim in the Petition to the standard required. That the petition is therefore dismissed with costs to the Interested Party who participated in its hearing.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 3RD DAY OF APRIL 2019

In the presence of:

Petitioner Absent

Respondents Absent

Interested Party Absent

Counsel Mr. P.D. Onyango for Myiha for the

Petitioner, M/s Orege for the 2nd and

3rd Respondents and Mr. Robert Bii for

The Interested Party.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE