



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CONST. PETITION NO. 7 OF 2018

THOME REALITY LIMITED.....1ST PETITIONER

YATTA MEADOWS LIMITED.....2ND PETITIONER

ARGA LIMITED.....3RD PETITIONER

ARTHUR KESEVE KITONGA.....4TH PETITIONER

DR. LUKE MUSAU.....5TH PETITIONER

FLEIFLEH LIMITED.....6TH PETITIONER

VIOLA JEPKOSKEI MUNYOKI.....7TH PETITIONER

PASTEV HOLDINGS LIMITED.....8TH PETITIONER

VINCENT MWELA KILONZO, ERICK KILONZO

MULE, CHRISTOPHER TAABU KILONZO &

MARGARET NTHEYA (*as legal representatives of the Estate*

of the late PHILLIP MULE KILONZO).....9TH PETITIONER

KAMELOTT FARM LIMITED.....10TH PETITIONER

JUSTUS GITOBU WAMBUTURA.....11TH PETITIONER

CAXTON MUNYOKI.....12TH PETITIONER

MACHAKOS FUNERAL HOME LIMITED.....13TH PETITIONER

DESIRAL 'K' LIMITED.....14TH PETITIONER

VERSUS

THE NATIONAL YOUTH SERVICE.....1ST RESPONDENT

MINISTRY OF PUBLIC SERVICE, YOUTH AND

GENDER AFFAIRS.....2ND RESPONDENT

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

AND

NATIONAL LAND COMMISSION.....INTERESTED PARTY

JUDGMENT

Introduction:

1. In a rather long Petition running upto 162 paragraphs, the 1st-12th Petitioners have averred that they are the registered proprietors of parcels of land known as L.R. Nos. 22284; 22297; 222302; 222306; 22339 and 22338; 18475 (*which was sub-divided into L.R No. 18475/2-18*); 22300; 22337 and 22288; 22290; 22287 and 22289; 15246 (*which was sub-divided into L.R. Nos. 15246/1-3*); 22279; and 22283 respectively (*the suit properties*).

2. According to the twelve (12) Petitioners (*the Petitioners*), they acquired the suit properties on diverse dates in accordance with the law and fulfilled the requisite procedures for allotment and preparation of the Grants; that they have invested heavily in agricultural enterprises on the suit properties and that the 1st Respondent never raised any objections to the registration of the suit properties in their names.

3. According to the Petitioners, having been registered as the proprietors of the suit properties in fee simple, they are entitled to protection by virtue of Section 23(1) of the Registration of Titles Act (*repealed*) and that the Grants registered in their favour constitute their absolute and indefeasible proprietorship.

4. According to the Petitioners, in the year 2016, the 1st and 2nd Respondents conceded to the Chief Land Registrar that the suit properties did not belong to the 1st Respondent; that although this concession was made in one case, it was a representative of all cases since all the allotments were issued by the same presidency and under the hand of the same Commissioner of Lands and that it was on the basis of the said concession that the Petitioners were granted their respective Grants.

5. The Petitioners have averred in their Petition that in the Daily Nation newspaper of 13th February, 2018, the 1st and 2nd Respondents issued a public notice giving notice to the effect that the 1st Respondent is the de jure registered owner of the suit properties and that the 1st Respondent does not recognize any claim whatsoever that any individual or entity has over the suit properties.

6. It has been averred by the Petitioners that in the same notice, the 1st and 2nd Respondents informed the Petitioners to voluntarily vacate the suit properties and surrender any title documents relating to the said parcels of land to the office of the Director General, National Youth Service, within fourteen (14) days, failure to which the 1st Respondent was to embark on the process of repossessing of the said land.

7. It is the Petitioners' case that the said public notice by the 1st and 2nd Respondents is draconian because it was made before hearing the Petitioners; that the notice has the capacity to occasion prejudice to the Petitioners and that the Constitution guarantees them the right to life, the right to own property and protects them against discrimination. It is the Petitioners' case that in addition to the said constitutional rights, they also have the right to fair administration action.

8. In the Petition, the Petitioners are seeking for the following orders: A declaration that the Respondents are bound and enjoined to heed and respect the rights of holders of Title Deeds; a declaration that the interests of the 1st Respondent over the suit land became extinguished when the land was allocated to them; a declaration that the Respondents do not have jurisdiction to negate a Certificate of Title or a Title Deed; an order of certiorari quashing the decision of the 1st and 2nd Respondents purporting to repossess the suit properties and an order of permanent injunction restraining the 1st and 2nd Respondents from evicting the Petitioners from the suit land or trespassing on the said land. The Petitioners have also sought for an order of general damages for the violation of their fundamental rights.

9. In response, the Attorney General, on behalf of the 1st, 2nd and 3rd Respondents filed Grounds of Opposition in which he averred that the 1st, 2nd, 3rd, 6th and 9th Petitioners have not annexed a resolution from the respective companies to institute this suit or an authority to the deponents to swear the Affidavit and that the suit properties, to wit, L.R Nos. 22297, 222302, 222306, 22338, 18475, 22300, 22337, 22288, 22287, 22289, 22290, 15246, 22279, 22283 and 22339 are public utilities.

10. The 3rd Respondent further averred that public utility land is not capable of alienation; that the Grants which were issued to the Petitioners were issued illegally and that the protection offered to individuals under Article 40 of the Constitution does not extend to illegally acquired land. The 3rd Respondent finally averred that a declaration of ownership of land cannot be made through a Constitutional Petition. The National Land Commission did not file any response to the Petition.

Submissions:

11. The Petition proceeded for hearing by way of written submissions. The Petitioners' advocate submitted that Article 27 of the Constitution guarantees the Petitioners the right to protection from discrimination and that having been issued with the letters of allotment and the Grants, the Petitioners deserve equal treatment. Counsel submitted that the Petitioners were issued with Letters of Allotment by the Commissioner of Lands pursuant to the provisions of Section 7 of the Government Lands Act (*repealed*).

12. The Petitioners' advocate submitted that being holders of title documents, the Petitioners are indefeasible owners of the suit land. Counsel submitted that the State cannot expropriate private property without due process; that compulsory acquisition of land can only be conducted by the Interested Party and that in any event, such a process cannot be conducted through a Daily Newspaper.

13. The Petitioners' counsel finally submitted that any decision made in violation of the rules of natural justice is void; that the Respondents made a decision that affects the rights and interests of the Petitioners; that the said decision was subject to the rules of natural justice and that the decision having been made before hearing the Petitioners, the same was void and of no effect. The Petitioners' counsel relied on numerous decisions of this court and the Court of Appeal which I have considered.

14. The 3rd Respondent's counsel submitted that the 1st Respondent issued the impugned public notice because the suit properties belonged to the 1st Respondent; that the suit properties is public land and that a certificate of ownership cannot stand on its own. Counsel submitted that public interest supersedes the private interests of the Petitioners. Counsel relied on numerous authorities which I have also considered.

Analysis and findings:

15. The evidence before me shows that the 1st Petitioner purchased parcel of land known as L.R No. 22284 from William Mbatha Kivuvani vide an Agreement of Sale dated 22nd December, 2009. The said William Kivuvani had been allocated the said land by way of a letter of allotment dated 15th December, 2009. The 1st Petitioner was then registered as the proprietor of the suit land on 1st September, 2010.

16. The 1st Petitioner produced in evidence the Sale Agreement of 22nd December, 2009, and the Freehold Grant that was registered in its favour on 12th April, 2010. The said Grant was signed by the Commissioner of Lands on 22nd March, 2010. The said Grant is supported by Deed Plan number 305799 dated 10th February, 2010. The Deed Plan shows the measurement of the land as 25.36 Ha.

17. The evidence by the 2nd Petitioner shows that it was issued with a Grant in respect of L.R. No. 22297 on 21st January, 2008. The said Grant was produced in evidence by the Petitioners.

18. The 2nd Petitioner's Director deponed that the 2nd Petitioner also acquired L.R No. 22306 from one James Kaiyo Kiplenai who sold the land to the 2nd Petitioner for Kshs. 1.3 million. The said land was then transferred in favour of the 2nd Petitioner on 8th May, 2012.

19. In addition to the above two properties, the 2nd Petitioner produced in evidence the Sale Agreement dated 30th November, 2011 between it and Joel Kiprotich Marusoi. According to the said Agreement, the 2nd Petitioner purchased L.R. No. 22302 from the Vendor for Kshs. 900,000. The said land was then registered in favour of the 2nd Petitioner on 8th March, 2012. The Grant in respect of L.R. No. 22302 was produced in evidence by the 2nd Petitioner.

20. The 3rd Petitioner's Director produced the copy of the Grant for L.R. No. 22338. According to the said Grant, the suit land was registered in favour of the 3rd Petitioner on 4th February, 2013. The 3rd Petitioner then sub-divided the said land into four portions, being L.R. Nos. 22338/2, 22338/3, 22338/4 and 22338/5. The four title documents were produced in evidence by the 3rd Petitioner.

21. The 4th Petitioner produced evidence to show that he was allocated L.R. No. 18475 and was issued with a Grant dated 3rd August, 2012. After the said Grant was issued, the 4th Petitioner sub-divided the land into L.R. Nos. 18475/2-15.

22. Although the 5th Petitioner deponed that he is the owner of land known as L.R. No. 22300, no evidence was produced to show that indeed the land is registered in his name. The letter of allotment annexed on his Affidavit does not show that it is in respect of L.R No. 22300 or that he ever paid the stand premium stipulated in the said letter of allotment.

23. The 7th Petitioner deponed that she is the proprietor of land known as L.R. No. 22288. According to the 7th Petitioner, she was allocated the said land vide a letter of allotment dated 11th November, 1996. The 7th Petitioner produced a letter dated 26th February, 2016 in which the 1st and 2nd Respondents stated as follows:

“Confirm the above mentioned parcel of land (L.R. No. 22288) does not belong to the National Youth Service but to the allottee as by the Letter of Allotment Ref. No. 14308/111. Please proceed with your further action...”

24. On the basis of the said letter, the Chief Land Registrar issued to the 7th Petitioner with a Grant for L.R. No. 22288 in Fee Simple. The 7th Petitioner exhibited the said Grant.

25. The 8th Petitioner's Director stated in his Affidavit that the 8th Petitioner is the registered proprietor of land known as L.R. Nos. 22287, 22289 and 22290. It is the 8th Petitioner's case that it was issued with a letter of allotment in respect of L.R. No. 22290 vide a letter of allotment dated 11th November, 1996; that it then settled all the requisite premium and assessed charges and that on 17th November, 1997, the President issued it with a Grant for L.R. No. 22289. The 8th Petitioner produced in evidence the Grant in respect of L.R. No. 22289.

26. The 8th Petitioner's Director deponed that the letter of allotment in respect of L.R. No. 22287 was issued to one Janet Chirchir; that the 8th Petitioner purchased the said land from the allottee and that the Grant in respect of L.R. No. 22287 was issued to the 8th Respondent on 29th April, 1997.

27. In respect of L.R. No. 22290, it was the evidence of the 8th Petitioner that the land was initially allocated to Betraco Limited vide a letter of allotment dated 21st May, 1997. The 8th Petitioner's Director produced a Sale Agreement dated 5th March, 1998 between the 8th Petitioner and the said Betraco Limited. The Sale Agreement dated 5th March, 1998 shows that the 8th Petitioner purchased the suit land from

the Vendor for Kshs. 7,000,000. The 8th Petitioner produced in evidence the Grant that was registered in its name.

28. The Legal Administrators of the Estate of the late Phillip Mule, the 9th Petitioner, produced in evidence the Grant in respect of L.R No. 15246 dated 27th January, 1995 which has since ceased to exist after sub-division of the said land.

29. The evidence before this court shows that the 10th Petitioner was issued with a letter for L.R No. 22279 on 11th November, 1996. The 10th Petitioner produced in evidence a copy of the said letter of allotment together with a receipt showing that it paid to the government the stand premium and other charges amounting to Kshs. 1,311,020.

30. The 11th Petitioner produced in evidence the letter of allotment in respect of L.R. No. 22283 dated 12th November, 1996. In addition, the Petitioner exhibited the letter dated 17th September, 1999 in which the Commissioner of Lands accepted the offer that he made to the Petitioner in respect to the suit land.

31. Just like the other Petitioners, the 12th Petitioner produced in evidence the Grant that was issued in his favour for L.R No. 22339. The said Grant was registered in favour of the 12th Petitioner on 30th July, 1997.

32. Petitioners number 13 and 14 were joined in the suit by the consent of the parties. According to the Affidavit of the 13th Petitioner's Director, the 13th Petitioner owns L.R No. 22276. The Petitioner produced in evidence the Freehold Grant in respect of L.R. No. 22276 that was registered in its favour on 30th July, 1997.

33. The 14th Petitioner produced in evidence the Freehold Grant for L.R. No. 22278. The said Grant was registered in favour of the 14th Petitioner on 24th June, 2011.

34. The evidence before this court shows that all the Petitioners, except Petitioner number five (5) and six (6) are the registered proprietors of L.R. Nos. 22284, 22297, 22306, 22302, 22338, 18475, 22288, 22287, 22289, 22290, 15246, 22279, 22283, 22339, 22276 and 22278. Some of those parcels of land have since been sub-divided by the Petitioners.

35. The evidence before this court shows that without consulting or notifying the Petitioners, the 1st and 2nd Respondents purported to cancel the Petitioners' titles vide a public notice in the Daily Nation newspaper of 13th February, 2018 in the following terms:

“National Youth Service (NYS) is a statutory body established under Cap 208 Laws of Kenya and currently under the Ministry of Public Service, Youth and Gender Affairs.

The Department is the legal proprietor of various parcels of land located within the Republic.

It has however come to the notice of the Department that a number of individuals acquired specific parcels of land without the knowledge or consent of the Department.

This is, therefore, to notify the individuals and or entities and the public that the de jure registered owner of the said parcels is the National Youth Service. The department, therefore, does not recognize any claim whatsoever that any individual or entity has over the said parcels of land whether through themselves, their agents, assigns or successors.

Take notice therefore that any such individuals or entities aforesaid either through themselves, their agents, assigns or successors that are described in the listed schedule thereunder-located in Yatta Complex Kilifi, Samburu/Laikipia – should take steps to voluntarily vacate the subject parcels of land and surrender any title documents relating to the said parcels to the office of the Director General, NYS within the next fourteen (14) days from the date hereof, failure to which the department shall embark on the process for repossession of the subject parcels at the individuals or entities own peril as to the attendant costs and legal consequences arising from such repossession.”

36. The above notice proceeded to list the Petitioners' parcels of land. To the extent that the 1st and 2nd Respondents did not give the Petitioners an opportunity to explain how they obtained the Grants in respect of the suit properties, the purported revocation of the Petitioners' titles was a violation of the rules of natural justice and was an affront to the provisions of Article 47 (1) and (2) of the Constitution, which provides as follows:

“47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

37. The mandatory requirement of affording every person a hearing before a decision affecting his legal rights was affirmed by Lord Diplock in the case of ***Attorney General vs. Ryan (1980) AC. 718*** at page 730 as follows:

“It has long been settled law that a decision affecting the legal rights of an individual which is arrived at by procedure which offends the principles of natural justice is outside the jurisdiction of the decision-making authority.”

38. The above decision was adopted by the Court of Appeal in *Mirugi Kariuki vs. The Attorney General, (1992) eKLR* as follows:

“The mere fact that the exercise of discretion by the decision making authority affects the legal rights or interests of some person makes it judicial, and therefore subject to the procedure required by natural justice.”

39. It is therefore settled that any person whose rights or interests are to be affected by a decision ought to be heard before the decision is made. Any decision made in contravention of the rules of natural justice, like in the instance case, is illegal, null and void. This position was reiterated by the Court of Appeal in the case of *Dickson Ngigi vs. Commissioner of Lands (1998) eKLR* in which it was held that the right to a hearing is a basic right which cannot be taken away however hopeless a person’s case is.

40. Having found that the publication of the notice by the 1st and 2nd Respondents in the Daily Nation Newspaper of 13th February, 2018 is null and void, the next issue to determine is whether indeed the Petitioners are entitled to the suit land.

41. The Petitioners have narrated how they acquired the suit land. Indeed, the Petitioners have produced not only the letters of allotment that were issued to them by the Commissioner of Lands on various dates, but the Grants that were granted to them by the Commissioner of Lands on behalf of the President.

42. Although the Attorney General averred in his Grounds of Opposition that the suit properties are public utilities, no evidence was placed before the court to prove this allegation. Indeed, as correctly submitted by the Attorney General, the rights to own property does not extend to property that has been found to have been unlawfully acquired.

43. However, the Attorney General having not denied that the Petitioners are holding title documents in respect to the suit land, it was upon him, or the Respondents, to place before the court evidence showing that the suit properties were either reserved for the 1st Respondent or for any other public purpose.

44. Having failed to show that the suit properties were reserved for the 1st Respondent or for public purpose, or that the titles that the Petitioners are holding were obtained fraudulently, I find that the Petitioners are entitled to the suit land.

45. Considering that the Grants that the Petitioners are holding were issued by the Government, and in the absence of evidence to show that the same were procured in respect to land reserved for public purpose, I find and hold that the Petitioners, except the 6th Petitioner, have proved the Petition on a balance of probabilities.

46. For the reasons I have given above, I allow the Petition dated 26th February, 2018 as follows:

a. A declaration be and is hereby issued that the Respondents have no jurisdiction to negate a Certificate or Deed of title issued under law and neither can the Respondents in absence of a court order divest a registered interest in land nor negate its existence or substance.

b. A declaration be and is hereby issued that a decision to negate a registered interest in land and to divest such registered interest in land affects the registered party, and accordingly such decision must be subject to natural justice.

c. An order of certiorari be and is hereby issued removing into this Honourable Court for purposes of quashing, and quashing the decision of the 1st and 2nd Respondents conveyed in a Public Notice published in the Daily Nation newspaper dated 13th February, 2018 purporting to negate and divest listed properties and threatening repossession of the properties listed therein, and particularly in L.R. No. 22284, L.R. No. 22297, L.R. No. 222302, L.R. No. 222306, L.R. No. 22338 (which now exists as L.R. No. 22338/2, L.R. No. 22338/3, L.R. No. 22338/4 and L.R. No. 22338/5), L.R. No. 18475 (which now exists as L.R. No. 18475/2, L.R. No. 18475/3, L.R. No. 18475/4, L.R. No. 18475/5, L.R. No. 18475/6, L.R. No. 18475/7, L.R. No. 18475/8, L.R. No. 18475/10, L.R. No. 18475/11, L.R. No. 18475/12, L.R. No. 18475/13, L.R. No. 18475/14, L.R. No. 18475/16, L.R. No. 18475/17 and L.R. No. 18475/5/18), L.R. No. 22300, L.R. No. 22337, L.R. No. 22288, L.R. No. 22287, L.R. No. 22289, L.R. No. 22290, L.R. No. 15246 (now existing as L.R. No. 15246/1 and L.R. No. 15246/2), L.R. No. 22279, L.R. No. 22283 and L.R. No. 22339.

d. A declaration be and is hereby issued that the decision of the 1st and 2nd Respondents conveyed in a Public Notice published in the Daily Nation newspaper dated 13th February, 2018 purporting to negate and divest the properties of the Petitioners herein being L.R. No. 22284, L.R. No. 22297, L.R. No. 222302, L.R. No. 222306, L.R. No. 22338 (which now exists as L.R. No. 22338/2, L.R. No. 22338/3, L.R. No. 22338/4 and L.R. No. 22338/5), L.R. No. 18475 (which now exists as L.R. No. 18475/2, L.R. No. 18475/3, L.R. No. 18475/4, L.R. No. 18475/5, L.R. No. 18475/6, L.R. No. 18475/7, L.R. No. 18475/8, L.R. No. 18475/10, L.R. No. 18475/11, L.R. No. 18475/12, L.R. No. 18475/13, L.R. No. 18475/14, L.R. No. 18475/16, L.R. No. 18475/17 and L.R. No. 18475/5/18), L.R. No. 22300, L.R. No. 22337, L.R. No. 22288, L.R. No. 22287, L.R. No. 22289, L.R. No. 22290, L.R. No. 15246 (now existing as L.R. No. 15246/1 and L.R. No. 15246/2), L.R. No. 22279, L.R. No. 22283 and L.R. No. 22339 threatens and violates the Petitioners’ fundamental rights to protection of property guaranteed by Article 40 read with 260 of the Constitution, to protection against discrimination guaranteed by Article 27 of the Constitution, to life and livelihood and to protection of dignity and respect guaranteed by Articles 25 and 28 respectively, and to fair administrative action guaranteed by Article 47(1) of the Constitution.

e. A declaration be and is hereby issued that the issuance of letters of allotment over un-alienated government land under Section 7 of the Government Land Act (Chapter 280 of the Laws of Kenya) now repealed, and subsequent processing and issuance of Grants conferred legitimate interests in the properties in issue that are protected by law and guaranteed by the Constitution and which interests can only be upset by an order of court after due process.

f. An order of Permanent injunction be and is hereby issued restraining the 1st and 2nd Respondents either by themselves, agents, servants or by any other person whomsoever from interfering with the proprietorship of the Petitioners over L.R. No. 22297, L.R. No. 222302, L.R. No. 222306, L.R. No. 22338 (which now exists as L.R. No. 22338/2, L.R. No. 22338/3, L.R. No. 22338/4 and L.R. No. 22338/5), L.R. No. 18475 (which now exists as L.R. No. 18475/2, L.R. No. 18475/3, L.R. No. 18475/4, L.R. No. 18475/5, L.R. No. 18475/6, L.R. No. 18475/7, L.R. No. 18475/8, L.R. No. 18475/10, L.R. No. 18475/11, L.R. No. 18475/12, L.R. No. 18475/13, L.R. No. 18475/14, L.R. No. 18475/16, L.R. No. 18475/17 and L.R. No. 18475/5/18), L.R. No. 22300, L.R. No. 22337, L.R. No. 22288, L.R. No. 22287, L.R. No. 22289, L.R. No. 22290, L.R. No. 15246 (now existing as L.R. No. 15246/1 and L.R. No. 15246/2), L.R. No. 22279, L.R. No. 22283 and L.R. No. 22339, by evicting, trespassing on, remaining on, interrupting with activities on, or by howsoever interfering with the rights of the Petitioners as by law conferred under Sections 24 and 25 of the Land Registration Act, 2012.

g. The Respondents to pay the costs of the Petition.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF MAY, 2019.

O.A. ANGOTE

JUDGE