



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. PETITION NO. 12 OF 2018**

**VIJAYKUMAR SHAMJI PATEL.....PETITIONER**

**VERSUS**

**PRINCIPAL SECRETARY TO NATIONAL TREASURY.....1<sup>ST</sup> RESPONDENT**

**CHIEF LAND REGISTRAR.....2<sup>ND</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION.....3<sup>RD</sup> RESPONDENT**

**THE DIRECTOR OF SURVEY.....4<sup>TH</sup> RESPONDENT**

**THE DIRECTOR OF HOUSING.....5<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. This Judgment is in respect to the Petitioner's Petition dated 2<sup>nd</sup> July, 2014 and the Respondents' Cross-Petition dated 15<sup>th</sup> October, 2018.

**The Petition:**

2. In his Petition dated 2<sup>nd</sup> July, 2014, the Petitioner averred that he is the registered proprietor of land known as L.R. No. 27792 (*the suit property*); that he was allocated the suit property by the then Commissioner of Lands vide a letter of allotment dated 21<sup>st</sup> May, 2007 and that attached to the letter of allotment was a Part Development Plan (PDP) dated 21<sup>st</sup> March, 2007.

3. According to the Petitioner, the suit property was allocated to him on condition that it is used for developing residential houses; that the land is surrounded by other properties reserved for Housing Units for the Ministry of Housing and that upon acquisition of the land, the Petitioner developed a row housing plan to construct 398 Maisonettes.

4. It is the Petitioner's contention that he applied for the relevant approvals, which approvals were granted by the former Mavoko Municipal Council; the Machakos District Physical Planning Officer; NEMA; Water Resources Management Authority, amongst others. According to the Petitioner, he has since completed constructing forty (40) units on the suit land and that the construction of the remaining units was ongoing until the orders of this court were issued.

5. It is the Petitioner's case that he has complied with all the conditions of the title document and has invested over Kshs. 1.3 billion in the suit property; that vide gazette notice number 2932 dated 17<sup>th</sup> March, 2010, the 2<sup>nd</sup> Respondent purported to cancel his title document on the ground that the land was reserved for public purpose and that on 11<sup>th</sup> May, 2010, the Commissioner of Lands purportedly issued to the Permanent Secretary, Treasury, with a Letter of Allotment.

6. The Petitioner has averred that on 14<sup>th</sup> May, 2010, the Director of Surveys purported to issue a Deed Plan for L.R. No. 28455 in place of his Deed Plan for L.R. No. 27792; that on the same day, the Director of Surveys purportedly amended the survey plan number 345/41 obliterating the suit property from the survey plan and replacing it with L.R. No.28455 and that on 29<sup>th</sup> September, 2010, the Registrar of Titles transferred the newly created L.R. No. 28455 to the Permanent Secretary, Treasury.

7. It is the Petitioner's contention that the first and second revocation notices, the letter of allotment issued to the Permanent Secretary, Treasury, the Memorandum of Registration of Transfer of Land to the Permanent Secretary and the issuance of a new Deed Plan were all done without any communication or notice to him and that the preparation of the second Deed Plan over the suit property was fraudulent and illegal.

8. It is the Petitioner's case that the Respondent's actions are an affront to his rights and freedoms as enshrined under Article 40 of the Constitution; that the Respondents' actions are a violation of the principles of natural justice and that a Title Deed can only be revoked by a court of competent jurisdiction.

9. The Petitioner has prayed for several declaratory orders, including a declaration that he is the proprietor of L.R. No. 27792 Mavoko, situate in Athi River; a declaration that the Kenya Gazette Notices No. 2932 and 3454 published on 26<sup>th</sup> March, 2010 and 1<sup>st</sup> April, 2010 respectively are unconstitutional, null and void; a declaration that the second letter of offer dated 11<sup>th</sup> May, 2010 to the Permanent Secretary, Treasury is null and void and for an order that the Title Deed for L.R. No. 28455 issued to the 1<sup>st</sup> Respondent to hold in trust for the 5<sup>th</sup> Respondent be cancelled.

#### **The Cross-Petition:**

10. In their Cross-Petition, the Respondents averred that the suit property was un-alienated government land within Mavoko Municipality and was reserved for the construction of civil servants houses and UN-HABITAT and other housing programs; that the Part Development Plan where the suit land lies shows public user and not private user and that the Petitioner knowingly applied for allocation of land which was not available for private development.

11. According to the Respondents, the Petitioner's title was revoked on the ground that the suit land was public land reserved for housing units for civil servants and that the issuance of a title to the Petitioner for L.R. No. 27792 is a nullity and of no legal consequence.

12. The Respondents finally averred that the proprietary rights over L.R. No. 27792 have been created contrary to the Constitution, and in particular Articles 62(2) and 40(6) of the Constitution. The Respondents are seeking for a declaration that L.R. No. 27792 was obtained illegally and that the title for L.R. No. 27792 be revoked.

13. The Respondents are also seeking for a declaration that the Director of Housing is the lawful owner of L.R. No. 28455 and that the transfer of the suit property to Traneshui Limited on 5<sup>th</sup> February, 2015 was in disregard of the order of *status quo*.

#### **Submissions:**

14. Both the Petition and the Cross-Petition proceeded by way of written submissions. The Petitioner's advocate submitted that the title to the suit land by the Petitioner was acquired lawfully; that the Petitioner made an Application to the Commissioner of Lands; that the Petitioner was issued with a Letter of Allotment and that the Petitioner met all the conditions in the Letter of Allotment and paid rates upto the year 2015.

15. The Petitioner's counsel submitted that under the provisions of Section 23(1) of the Registration of Titles Act (*repealed*), a title obtained pursuant to Sections 20, 21, and 22 of the Act is indefeasible and that an allegation that a title has been illegally acquired can only be instigated through a legally established process. Counsel submitted that the Registrar of Titles had no legal authority to purport to revoke the Petitioner's title in the manner he did.

16. The Petitioner's counsel submitted that L.R. No. 27792 was not unalienated land as at the time of the registration of L.R. No. 28455 in favour of the 2<sup>nd</sup> Cross- Petitioner; that the Cross-Petitioners cannot use this court as an instrument of validating their fraudulent and illegal actions and that L.R. No. 27792 was not available for the second allocation.

17. Counsel submitted that the suit property was reserved for "*proposed future programs*" and not for future public housing programmes; that the proposed reservation for civil servants low housing units and UN-HABITAT was reserved in areas marked A and B on the Part Development Plan and that the title of L.R. No. 27792 was done earlier and should be upheld. Counsel relied on several authorities which I have considered.

18. The Respondents' advocate submitted that the suit property was initially part of L.R. No. 1844 measuring 18.484 acres; that the issuance of the Title Deed to the Petitioner was irregular, unlawful and illegal and that the land was reserved for the Ministry of Housing for low housing cost and UN-HABITAT houses. Counsel relied on numerous authorities which I have considered.

#### **Analysis and finding:**

19. The evidence before me shows that on 9<sup>th</sup> August, 2006, the Petitioner applied to the Commissioner of Lands for "*ten (10) or more acres of land for development*." The Petitioner's Application for allocation of government land was accepted when the Petitioner was issued with a letter of allotment dated 21<sup>st</sup> May, 2007.

20. The land that was allocated to the Petitioner was shown in a Part Development Plan number NRB/8/200/1A. I have perused the exhibited Part Development Plan. The Part Development Plan attached on the Petitioner's letter of allotment is in respect to two portions of land. The first portion, otherwise marked as "A" and "B" is the "*proposed sites for Ministry of Housing Low Cost Housing and Athi River Housing Pilot Project UN-HABITAT Sustainable Neighbourhood Programme*". The second portion, otherwise marked as C-M, is the "*proposed sites for future Housing programmes*".

21. The Respondents have not denied that the Letter of Allotment and the Part Development Plan exhibited by the Petitioner emanated from their offices. The Respondents have also not denied that in compliance with the conditions in the letter of allotment, the Petitioner paid to the Commissioner of Lands Kshs. 346,400. Indeed, on 9<sup>th</sup> November, 2007, the Commissioner of Lands asked the Petitioner to remit an additional amount of Kshs. 14,400 being the difference upon the increase of the payable amount.

22. The evidence before me shows that the Petitioner commissioned a Surveyor who served the suit land vide Survey Plan No. F/R 345/41. The survey plan was duly authenticated by the Director of Surveys on 9<sup>th</sup> October, 2007. A Deed Plan in respect of L.R No. 27792 was then issued by the Director of Surveys on 30<sup>th</sup> October, 2007. It is on the basis of the said Survey Plan, Deed Plan, the Letter of Allotment and the Part Development Plan that the Registrar of Titles registered the suit land in favour of the Petitioner on 16<sup>th</sup> November, 2007.

23. The Petitioner has exhibited on his Affidavit the site plan and the development plan of the 398 Maisonettes that he was to develop on the suit land. The said plans were duly approved by the then Mavoko Municipal Council. The Plans were also approved by the Machakos District Physical Planning Officer. According to the Petitioner, the construction of the Maisonettes is ongoing.

24. The Petitioner has annexed a Gazette Notice No. 3453 dated 1<sup>st</sup> April, 2010. In the said gazette notice, the Registrar of Titles revoked gazette notice No. 2932 of 2010 and went ahead to “revoke” the Petitioner’s title for L.R No. 27792 situate in Mavoko Municipality. The grounds for the said revocation were that the land was “reserved for public purposes under the relevant provisions of the Constitution of Kenya, the Government Lands Act and the Trust Land Act.”

25. After the revocation of the Petitioner’s title by way of a gazette notice, the Commissioner of Lands issued to the Permanent Secretary to the Treasury the same land, vide a Letter of Allotment dated 1<sup>st</sup> May, 2010.

26. According to the letter of allotment to the Permanent Secretary, the land was for “proposed site for Ministry of Housing (Housing Project)”. A fresh Deed Plan was then prepared for L.R. No. 27792 whose number changed to L.R No. 28455. The Respondents have not denied that indeed L.R. No. 28455 encompasses in total L.R. No. 27792.

27. The Respondents have also not denied that before the Registrar of Titles revoked the Petitioner’s title in respect of L.R No. 27792, no notice was issued to him, either personally or by way of advertisement in the Daily Newspapers. The Petitioner was also never issued with a notice before the new Deed Plan and the second title was created over his land.

28. It is trite that once the government, through its relevant organs, registers land in the name of a private entity, it can only repossess such land by compulsory acquisition and not in any other manner. Indeed, even where the government acquires land by way of compulsory acquisition, or by way of review of illegally acquired land, it must notify the registered proprietor of the land before revoking his title or taking away his land. This requirement is mandatory even in instances where the government or its organs believe that the land was acquired illegally or fraudulent. In the case of *Dickson Ngigi vs. Commissioner of Lands (1998) eKLR*, the Court of Appeal held as follows: -

**“The right to a hearing before a decision is made is a basic right which cannot be taken away by the hopelessness of one’s case.”**

29. Indeed, it is now settled that persons who are registered as owners of land under the Registration of Titles Act (*repealed*) acquire an absolute and indefeasible title which cannot be challenged except on grounds of fraud or misrepresentation (*See Section 23 of the Registration of Titles Act*).

30. The Registrar of Titles purported to revoke the Petitioner’s title on the ground that the suit land was reserved for public purpose. A reading of the Registration of Titles Act shows that the Registrar of Titles was not clothed with any power to revoke or cancel title to land. Indeed, the unlawful actions of the Registrar of Titles to cancel titles through gazette notices has been upheld in many decisions of the court, including in the case of *Kuria Greens Limited vs. Registrar of Titles & Another (2011) eKLR* where it was held as follows:

**“There is no provision under the Registration of Titles Act or any other Act that bestows on the 1<sup>st</sup> Respondent [the Registrar of Titles] or the Commissioner of Lands or the Government power to revoke registered title in the absence of a court order to that effect.”**

31. Indeed, the above position holds even in situations where the government believes that the suit land is public property. In the case of *Republic vs. G.G. Gachihi, Land Registrar, Ex-parte Varun Industrial Credit Ltd (2013) eKLR*, the court held as follows:

**“I agree with the position taken by the Respondent and the Interested Party that the court is duty bound to protect the public interest. I however hasten to add that public interest must be protected within the law. The court cannot sanction an illegality in the name of public interest.”**

32. 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.”**

33. 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.”***

34. 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.

35. That being the law, I agree with the Petitioner that the purported cancellation of its title for L.R No. 27792 by way of a Gazette Notice No. 3453 dated 1<sup>st</sup> April, 2010 was unlawful and the same cannot stand. Indeed, the unilateral decision to cancel the Petitioner’s title for L.R No. 27792 and the creation of another title in the name of the Permanent Secretary, Treasury for L.R No. 28455 is not only unconstitutional, but null and void.

36. The considerations of public interest, or the suit property having been reserved for public purpose, can only be dealt by this court, or by the National Land Commission, and not otherwise. That being the case, and in view of the Cross-Petition, this court will now consider if indeed the suit land was reserved for public purpose.

37. The Respondents have averred in the Cross-Petition that the suit land was reserved for the construction of civil servants houses and UN-HABITAT low cost housing and other future housing programs. The Respondents did not produce any Part Development Plan to support this assertion.

38. Indeed, the only Part Development Plan before this court is the one that the Petitioner produced. According to the said Part Development Plan, the land that was reserved for the “*proposed sites for Ministry of Housing Low Cost Housing*” is marked as A and measures approximately 22 Ha. The same Part Development Plan shows that the land that was earmarked for “*proposed sites for Athi River Housing Pilot Project UN-HABITAT sustainable neighbourhood programme*” is marked as “B” and measures approximately 22.53 Ha.

39. The land that was allocated to the Petitioner to put up houses is what is indicated in the Part Development Plan as “*proposed sites for the Future Housing Programme.*” The Part Development Plan therefore distinguished the area earmarked for Ministry of Housing Low Cost Houses “*and the site for future Housing Programmes.*”

40. Indeed, no evidence was produced by the Respondents to show that the said Part Development Plan has ever been varied, or changed to indicate that the suit property formed part and parcel of land earmarked for public houses.

41. Considering that the Respondents are the custodians of all government documents relating to land, they were aware that the suit land was earmarked for general housing programmes and not for “*public*” houses. That is why they allowed the Petitioner to put up residential houses on the land without any objection. Indeed, the Machakos District Physical Planner, who is the custodian of Part Development Plans, approved the Petitioner’s building plan.

42. Having perused the existing Part Development Plan, and in the absence of evidence to show that the Petitioner has encroached on any land reserved for public purpose, I find that the Cross-Petition by the Respondents is unmeritorious. To the contrary, the Petitioner has proved on a balance of probability that he obtained the title document in respect of L.R. No. 27792 lawfully.

43. For the reasons I have given above, I dismiss the Respondents’ Cross-Petition dated 15<sup>th</sup> October, 2018 with costs and allow the Petition dated 2<sup>nd</sup> July, 2014 as follows:

***a. A declaration be and is hereby issued that the Petitioner is the proprietor and is legally and constitutionally registered and entitled to the suit property known as L.R. No. 27792 Mavoko situate in Athi River, Mavoko Municipality within the Republic of Kenya measuring approximately 6.87 hectares and therefore is legally and constitutionally entitled to enjoy all the rights and privileges accruing and appurtenant thereto.***

***b. A declaration be and is hereby issued that the Kenya Gazette Notices No. 2932 and 3454 published on the 26<sup>th</sup> March, 2010 and 1<sup>st</sup> April, 2010 respectively purportedly revoking the Petitioner’s proprietary rights and Title Deed over L.R Number 27792 are unconstitutional, null and void.***

***c. A declaration be and is hereby issued that the second letter of offer dated 11<sup>th</sup> May, 2010 offering the Petitioner’s property, L.R No. 27792 Mavoko to the Permanent Secretary Treasury and the purported registration of the Memorandum of Registration of Transfer from L.R No. 27792 to L.R. Number 28455 in favour of the Permanent Secretary Treasury have infringed the Petitioner’s fundamental rights and freedoms as are enshrined under Articles 40 and 47 of the Constitution and are unconstitutional, null and void.***

***d. A declaration be and is hereby issued that the Survey Plan, Folio/Registration No. 345/41 purportedly deleting and revoking the Petitioner’s L.R. No. 27792 and replacing the same with L.R. No. 28455 violated the Petitioner’s fundamental rights and freedoms under Articles 40 and 47 of the Constitution. The said Survey Plan is unconstitutional, illegal, null and void.***

***e. An order be and is hereby issued that the Deed Plan Reference Number 309106 issued to the 1<sup>st</sup> Respondent to facilitate the registration of L.R No. 28455 in the place of the Petitioner’s Land Reference No. 27792 is a violation of the law and the Petitioner’s rights and freedoms under Article 40 and 47 of the Constitution and the same be and is hereby cancelled.***

*f. An order be and is hereby issued that the Deed Plan Reference Number 280499 issued to facilitate the registration of the Petitioner's Land Reference Number 27792 be and is hereby upheld.*

*g. An order be and is hereby issued that the Title Deed to Land Reference Number 28455 issued in favour of the first Respondent to hold in trust for the 5<sup>th</sup> Respondent be and is hereby cancelled and Title Deed to the Petitioner's Land Reference Number 27792 be and is hereby upheld.*

*h. The Respondents to pay the costs of the Petition and the Cross-Petition.*

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24<sup>TH</sup> DAY OF MAY, 2019.**

**O.A. ANGOTE**

**JUDGE**