



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC PETITION 28 OF 2017

(FORMERLY KISUMU HIGH COURT PETITION NO. 19 OF 2010)

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTION 75 OF THE CONSTITUTION OF KENYA

GEORGE OSANYO OPONDO.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE DISTRICT COMMISSIONER

–UGENYA DISTRICT.....2ND RESPONDENT

JUDGEMENT

1. George Osanyo Opondo, the Petitioner, filed the petition dated 20th April, 2010 and amended on the 16th December 2013, against the Hon. Attorney General and The District Commissioner, Ugenya, the Respondents, seeking for the following prayers;

a) “A declaration that the Petitioner’s Constitutional rights under Section 75 of the Constitution were violated.

b) An order that the Respondents be restrained from interfering with the Petitioner’s use and enjoyment of land parcel No. Ukwala Township/15.

b1) In the alternative and without prejudice to prayer (b) above, an order that the Respondents compensate the Petitioner in the sum of Kshs. 2,845,100/= or the market value of the parcel No. Ukwala Township/15.

c) Costs of this petition be provided for.”

2. The petition is based on the ground that the Petitioner is the registered proprietor of the leasehold interest in Ukwala Township/15 measuring 0.0239 hectares, the suit property, which borders the 2nd Respondent’s offices. That after the approval of his building plans, the Petitioner moved onto the suit property and commenced some works. That the 2nd Respondent accompanied by administration police officers moved onto the said plot and ordered the petitioner to stop the works and vacate from the property claiming it was Government land reserved for the expansion of District Headquarters. That as the said land had not been compulsorily acquired, the 2nd Respondent’s act violated the Petitioner’s Constitutional rights provided for under **Section 75 of the Constitution**.

3. The petition is supported by the Petitioner’s affidavits sworn on the 8th February 2010 and 8th April 2013, in which he among others deponed as follows:

a) That the copies of the certificate of lease issued on the 4th January 1994 and certificate of official search obtained on the 29th April 2009 confirms that he is the registered proprietor of the leasehold interest of the suit property measuring 0.0239 hectares for 99 years from 1st October 1984.

b) That his building plans were approved by the Town Clerk, Ukwala Town Council on the 5th November 2009 and he commenced development thereafter by digging the foundation, but was stopped by the 2nd Respondent.

c) That he served the 1st Respondent with the notice of intention to sue on the 3rd December 2009 and had not received a response by the time of filing the petition.

d) That his plot could not have been repossessed on the 2nd October 2009 for failure to develop as his building plans were with the Council by then and were approved on the 5th November 2009.

e) That he had not received the Town Clerk's letter of 2nd October 2009 and therefore had no notice of the repossession. That the Town Council received payment for rent arrears on the 15th November 2009 and issued him with a receipt.

f) That the market value for the suit property was Kshs. 2,845,100/= which the Respondents should pay him as compensation in the alternative.

4. The petition is opposed by the Respondents through the Replying Affidavit sworn by Caroline Onchoka (Mrs.), the 2nd Respondent, on the 28th March 2011 among others deponing to the following;

a) That the suit property was allocated by the Town Council of Ukwala to the Petitioner on the 1st October 1984 for a 99 year lease. That the lease was registered in 1994.

b) That the Petitioner had not carried out any development since 1984 which is a period of 26 years, and that the Town Clerk, Town Council of Ukwala under gazette Notice No. 10625 dated the 2nd December 2009 repossessed all the undeveloped plots in the area. That the Petitioner's suit property was among those repossessed and was notified under the letter dated 2nd October 2009. The copy of the gazette notice and letter are attached.

c) That the suit property and other plots behind the former District Officer's office Ukwala, are now part of Ugunja District Headquarter and were not allocated to any allottees after repossession.

d) That the construction of the District Headquarters is ongoing as confirmed in the report prepared after the visit to the locus of 11th February 2011.

e) That the Petitioner had not paid rent for the plot after that of 2009.

5. That parties Advocates consented on the 27th May 2014 to file and exchange written submissions. Subsequently, the learned counsel for the Petitioner and Respondents filed their submissions dated 30th September 2014 and 8th January 2019 respectively. The submissions are as summarized herein below;

A. THE PETITIONER'S SUBMISSIONS:

a) That **Section 28 of the Registered Land Act (Repealed)** protected the Petitioner's title to the suit property subject only to the overriding interests indicated thereon. That the Petitioner's interest over the suit property were not compulsorily acquired as required under **Section 30 of the Act** and therefore the Respondents did not follow the law in taking the plot from him.

b) That the Respondents action amounted to a violation of the Petitioner's right under **Section 75 of the Constitution**. That the provisions of **Section 6 of the Land Acquisition Act** was not followed.

c) The learned Counsel referred to the case of **James Joram Nyaga & Another vs The Attorney General & another [2007] eKLR** and **Ocean View Plaza Ltd vs Attorney General [200] IKLR (E & L)** in support of their submission that it was only through compulsory acquisition that the Government could have acquired the plot lawfully.

d) That **Section 32 of the Registration Land Act (repealed)** recognizes the certificate of lease as prima facie evidence of ownership of the plot. That as the petitioner's rights over the plot are indefeasible under **Section 28 of the said Act**, the Respondents should be restrained from interfering with his rights of enjoying the plot or alternatively compensate him at Kshs. **2,845,100/=**, as per the valuation by Western Homes Ltd.

B. RESPONDENTS SUBMISSIONS.

i) That the plot was allocated to the Petitioner on the 1st October 1984 and the lease registered in 1994, but he did not undertake any development on it. That the Town Council of Ukwala vide **gazette Notice No. 10625** gave notice to the plot allottees and General Public of the intention to repossess all undeveloped plot. That further the Petitioner was notified of the intention vide letter dated 2nd November 2009 and given 21 days to develop the plot or have it repossessed.

ii) That the plot was then given to the Government for construction of the Ugenya District Headquarters. That the District Headquarter's building currently stands on the suit property together with plots 16, 17 and 19. That the surveyor's report obtained pursuant to the court order of 6th October 2011 recommended the suit land's title be revoked.

iii) That the process of repossessing the suit property was followed in view of the gazette notice and letter to the Petitioner both dated 2nd October 2009. That the suit property was allocated to the 2nd Respondent after repossession by the Town Council of

Ukwala who was not enjoined in the petition.

iv) That the Respondents did not compulsorily acquire the plot and the issue of compensation should therefore not arise.

v) That the Petitioner has not shown how his rights have been violated as he is the one guilty of laches for failing to develop the plot for 26 years and further failing to object to the repossession notice.

vi) That the receipts attached to the petition shows that they were made on the 5th November 2009, way after the notice to repossess had lapsed. That the said late payments was an afterthought by the Petitioner and is insufficient to justify ownership of the suit property which had by then been repossessed and allocated to the 2nd Respondent.

vii) That the petitioner ought to have sued the Town Council of Ukwala (now Siaya County Government), who had repossessed the plot and allocated it to the 2nd Respondent but did not do so. That as the Respondents were only beneficiaries as allottees of the plot, and have established the District Headquarters thereon, the Petitioner should pay their costs of the petition.

6. The following are the issues for the Court's determination;

a) Whether the suit property was repossessed and or compulsorily acquired and by whom.

b) Whether the Town Council of Ukwala (Now Siaya County Government) was a necessary party in the petition.

c) Whether the Petitioner is entitled to the declaratory and or compensation orders sought.

d) Who pays the costs.

7. The Court has carefully considered the grounds on the petition, supporting, further and replying affidavits, submissions by both counsel and come to the following determinations;

a) That the affidavit evidence by both the Petitioner and the 2nd Respondent confirms that the suit property was allotted to the Petitioner in 1984 by the Town Council of Ukwala. That subsequently the lease was issued and registered in the Petitioner's name on the 4th January 1994 as confirmed by the copies of the certificate of search and certificate of lease attached to the Petitioner's affidavit. That accordingly, the court finds and holds that the suit property was regularly and lawfully allocated to and registered with the Petitioner.

b) That the Petitioner did not carry out any development on the suit property for several years but in the year 2008, he submitted some building plans for approval. The two pages of the plans marked "GOO-3" attached to the affidavit shows it was checked by the District Physical Planning Officer, and approved by the District Public Health Officer, Siaya on the 26th February 2008 and on the 5th November 2009 it approved by the Town Council. That even though the Ukwala Town Council is not a party in these proceedings, the 2nd Respondent's affidavit evidence has confirmed the Petitioner's evidence that he had cleared all rent arrears up to 2009 on the 5th November 2009.

c) That the Respondents' affidavit evidence to the effect that the Ukwala Town Council had issued a notice dated the 17th September 2009, and gazetted in Gazette Notice No. 10625 of 2nd October 2009, giving 21 (twenty one) days to the allottees of undeveloped plots at Ukwala and other 14 (fourteen) markets that were "allocated more than 18 months ago shall be repossessed by the Council after the lapse of twenty (21) days from the date of this notice and the plots will be allocated to new applicants for developments" has not been rebutted. That whereas it is probable that the Petitioner did not receive the Town Clerk's, Town Council of Ukwala, letter dated the 2nd October 2009 under reference UTC/UPR/VOL.1/2009 (28) as it does not indicate the address it was to be posted or how it was delivered, he is expected and deemed to have been duly notified through the gazetted notice.

d) That the 21 (twenty one) days' notice from the 2nd October 2009 were lapsing on or about the 24th October 2009 according to paragraph 2 of the letter dated the 2nd October 2009. The letter was to the effect that the Petitioner "**will cease to be the owner of the above mentioned undeveloped plot by the 25th October 2009**". That the court has taken notice of the unchallenged evidence that the Town Clerk, Ukwala Town Council, approved the Petitioner's building plans on the 5th November 2009, which was about ten (10) days after the lapse of the 21 days' notice. That as the Town Clerk is the one who had issued the 21 days' notice, then the court can only arrive at the only logical conclusion that the action of approving the Petitioner's building plans was an acknowledgment that the suit property had not been repossessed.

e) That the claim by the Respondents that Ukwala Town Council had actually repossessed the suit property and allocated it to the 2nd Respondent for development of their District Headquarters is not supported by any evidence, for example letter of allotment, Part Development Plain or confirmed minutes. That as between the Petitioner and the Respondents, it is only the former who has tendered documentary evidence of ownership of the suit property in the form of the certificates of lease and search which under Sections 32 of the repealed **Registered Lands Act Chapter 300 of laws of Kenya**, and now under **Section 26 of the Land registration Act No. 3 of 2012** is prima facie evidence of indefeasible and absolute ownership of the plot unless and until lawfully challenged.

f) That as there is no evidence tendered to confirm that Ukwala Town Council had allocated the suit land to the 2nd Respondent as alleged, their action of stopping the Petitioner from carrying out the duly approved development was unlawful and an affront to his

rights. That had the 2nd Respondent wanted the suit property for their use, they were obligated to first compulsorily acquire it as required under **Section 75 of the then Constitution** by adhering to the provisions of Section 6 of the **Land Acquisition Act Chapter 295 of Laws of Kenya (repealed)** and ensure the Petitioner was fully compensated. That procedure had not been complied with and the Respondents have in their submissions admitted that the suit property had not been compulsorily acquired.

g) That as the Respondents have reportedly already taken over the suit property and fenced it in within the District Headquarters without ensuring that the Petitioner is compensated for his interest in the plot, the least they could have done is to engage the Petitioner and right the wrong by ensuring that he is either compensated or given an alternative plot. The Petitioner has submitted a valuation report detailing how the Kshs. 2,845,100/= he seeks was arrived at. The Respondents have not challenged the figures therein including the market value of Kshs. 300,000/= and Kshs. 6000/= and 8000/= for lorry of sand and ballast respectively. That the Petitioner would be entitled to the market value of the suit property and the materials (development) he had undertaken on it. That there is no proof tendered on the further profits of Kshs. 2,160,000/= and that amount will not be granted.

8. That flowing from the foregoing, the court finds that the Petitioner has proved that his rights under Section 75 of the Repealed Constitution were violated by the 2nd Respondent action of unlawfully, irregularly and un-procedurally taking over the suit property. That the Petitioner is therefore entitled to be compensated for the suit property at the market value of Kshs. 300,000/= and reimbursement for the materials he had placed on the site, of Kshs. 14,000/= totaling Kshs. 314,000/= (three hundred fourteen thousands) with interests and costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 12TH DAY OF JUNE 2019

In the presence of:

Petitioner Absent

Respondents Absent

Counsel Mr. Onsongo for Kowino for Petitioner

M/s Esendi for Respondents

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE