

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA

ELC PETITION NO. 44 OF 2021

**ABDULLAHI AHMED GELE
T/A BUXTON FILLING STATION PETITIONER**

VERSUS

**CHIEF OFFICER, LAND HOUSING &
PHYSICAL PLANNING 1ST RESPONDENT**

**COUNTY GOVERNMENT OF MOMBASA 2ND
RESPONDENT
H.E HASSAN ALI JOHO, GOVERNOR**

COUNTY GOVERNMENT OF MOMBASA 3RD RESPONDENT

BUXTON POINT APARTMENTS LTD 4TH RESPONDENT

HON SULEIMAN SHAHBAL 5TH RESPONDENT

ROTON CONSTRUCTION CO.LTD 6TH RESPONDENT

THE CHIEF LAND REGISTRAR 7TH RESPONDENT

THE ATTORNEY GENERAL8TH RESPONDENT

JUDGMENT

Background

1. By an Amended Petition dated 15th July 2022, Abdullahi Ahmed Gele T/A Buxton Filling Station (the Petitioner) sought for the following reliefs:

- a) An order of prohibition do issue to prohibit the Respondents herein their servants and/or agents from further trespassing, encroaching, digging, constructing on or in any way further dealing with the property known as Buxton Filling Station erected on Land Reference Number Mombasa/Block XVII/1443 for being in breach of Articles 40, 47, 50 & 60;**
- b) A declaration that the actions by the 1st-5th Respondents to demolish the Petitioner's gas station without affording the Petitioner's due process violated the rights of the Petitioner under Articles 40, 47 and 50 of the Constitution of Kenya and therefore unconstitutional, null and void;**
- c) A declaration that the actions of the 1st-5th Respondents in depriving the Petitioner of his property without just and prompt compensation was illegal, null and void and contravened Articles 40, 47 and 50 of the Constitution of Kenya;**
- d) A declaration that the 1st - 3rd Respondents' actions in taking away the Petitioner's land without fair administration of justice violated his rights as enshrined in Articles 40, 47 and the Fair Administrative (Actions) Act 2015;**

- e) A declaration that the meeting and subsequent minutes and purported recommendations of the County Regularization Committee dated 19th January, 2021 and the supposed letter of the 1st Respondent directing the Land Registrar at Mombasa to cancel the suit property's lease was unlawful, unconstitutional, null and void;**
- f) A declaration that the 1st-6th Respondents trespassed the Petitioner's property without lawful authority and contravened his rights to property under Articles 40 and 47 of the Constitution;**
- g) A declaration that the 6th Respondent, the Land Registrar's purported cancellation of the suit property vide Gazette Notice No. 4671 dated 26th April 2021 Vol No. CXXIII No. 104 was unlawful, unconstitutional and null and void;**
- h) A declaration that the 4th, 5th & 6th Respondents acts of actively taking part in the demolition without lawful authority and Court order violated the Petitioner's rights to property as enshrined in the Constitution and shall be held personally liable and pay hefty damages;**

- i) An order for prompt compensation for the value of the gas station, monthly income for the next 20 years and loss of earnings and livelihood;**
- j) A permanent order directing the suit property be returned to the Petitioner and his Fuelling Station be rebuilt and restored to its original station before the illegal demolition was done;**
- k) An order for payment of general and punitive damages;**
- l) Costs of the Petition; and**
- m) Any other reliefs as the Honourable Court may deem fit and just to grant.**

2. Those prayers arise from the Petitioner's contention that he was a lawful occupant and sub-lessee of the suit property for twenty (20) years carrying out the business of gas station and car wash. It is the Petitioner's case that on 22nd September 2021, the 2nd Respondent's Officers from the Fire Department while undertaking impromptu inspections served notices of non-compliance for fire safety precaution

and asked the Petitioner to comply within 24 hours. The Petitioner asserts that he complied with the same and requested for a compliance certificate.

3. It is the Petitioner's case that the Fire Department failed to issue him with the Compliance Certificate and instead resorted to intimidation and threats of closure, hinting that compliance was a smoke screen tactic and that the property was to be demolished for the Buxton Project. The Petitioner further states that on 29th September 2021, the 1st to 6th Respondents sent their officers accompanied by goons to the suit property and without any lawful authority fenced off the same and installed guards thereon.
4. The Petitioner avers that on 30th September 2021, the Respondents demolished the property an act that was irregular, unlawful, malicious and un-procedural. It is his case that the demolition was done without any justification and that the same amounted to misuse of power without the Petitioner being accorded a fair hearing or just compensation as provided for in Article 40 (2) (b) of the Constitution.

5. The Petitioner asserts that the said actions have deprived him of his livelihood of Kshs. 1,000,000/= a month and that the Land Registrar acted ultra vires and usurped the Powers of the Court in cancelling his ownership documents.
6. The Chief Officer, Land Housing and Physical Planning and the County Government of Mombasa (the 1st and 2nd Respondents) are opposed to the Petition. In a Replying Affidavit sworn on their behalf by the 2nd Respondent's Director, Department of Lands, Housing and Physical Planning Rose Mbaika Munupe, the Respondents aver that this Petition is misconceived, scandalous and an abuse of the Court Process, the 1st and 2nd Respondents aver that the 1st Respondent is not a judicial body capable of being sued or petitioned as in the present manner as the 2nd Respondents have no legal liability in relation to acts of omissions done by virtue of their offices as provided under Section 133 of the County Government Act and Section 22 of the National Coordination Act 2013.
7. The 1st and 2nd Respondents aver that the 2nd Respondent is the registered proprietor of all that parcel of land known as

Mombasa Block XVII/1821 measuring about 4.905 Ha. It is the Respondents case that by a lease dated 11th June 2021 between the 2nd Respondent and Buxton Point Apartments Ltd (the 3rd Respondent), the 2nd Respondent leased to the 3rd Respondent the said parcel of land for a term of 99 years effective 15th January 2021 for the purpose of the urban renewal and re-development of the old Buxton Estate.

8. The Respondents further aver that the leasehold interest acquired by the Petitioner was irregularly issued without the written authority of 2nd Respondent's predecessor - the defunct Municipal Council of Mombasa and hence all successive transfers were illegal and wrongful. The 1st and 2nd Respondents further aver that the Petition as filed is res judicata and that the same does not raise any constitutional issues.
9. Buxton Point Apartments Ltd, Hon. Suleiman Shahbal and Roton Construction Co. Ltd (the 3rd, 4th and 5th Respondents) are equally opposed to the Petition. In a Replying Affidavit sworn on their behalf by the 3rd Respondent's director Ahmed Alwy Ahmed Badawy, the Respondents aver that the

3rd Respondent is the absolute proprietor of all that parcel of land known as Mombasa Block XVII/1821. It is their case that by a lease agreement dated 11th June 2021, the 2nd Respondent had let the said property to the 3rd Respondent for a term of 99 years.

10. The 3rd, 4th and 5th Respondents aver that at the time of execution of the agreement the suit property had within it unoccupied blocks of flats which the 2nd Respondent demolished and commenced building affordable houses in accordance with a venture agreement between the 2nd and 3rd Respondents dated 15th January 2021.
11. The Respondents further aver that the said developments are confined to Block XVII/1821 and not on the parcel described by the Petitioner as Block XVII/1443.
12. The Chief Land Registrar and the Honorable the Attorney General (the 6th and 7th Respondents) are equally opposed to the Petition. In their response to the Petition dated 19th November 2021, the 6th and 7th Respondents aver that they had no knowledge of and were not parties to the demolition. The Respondents further aver that the records at the Land

Office do not have any lease records for the Petitioner and that he is hence not a protected tenant. It is further their case that if any action was taken on the records of the suit property then it was pursuant to the directions of the Lessor, which is currently the County Government of Mombasa.

13. At the trial herein which proceeded by way of *viva voce* evidence, the Petitioner called a total of three (3) witnesses. The Respondents equally called three (3) witnesses in support of their case.

Analysis and Determination

14. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence placed before the Court at the trial. I have similarly perused and considered the submissions and authorities placed before the Court by the Learned Advocates representing the parties.
15. By his Petition before the Court, the Petitioner prays for a raft of orders to issue against the seven (7) Respondents herein. It is the Petitioner's case that he was a lawful occupant and sub-lessee carrying on the business of a gas

station and car wash on the property he describes as Mombasa/Block XVII/1433. The Petitioner asserts that on 29th September 2021, the 1st to 5th Respondents sent their employees accompanied by other people he describes as goons who proceeded to the suit property and fenced off the same.

16. It is further the Petitioner's case that on 30th September 2021, the same people demolished all the structures on the property thereby depriving him of his source of livelihood. The Petitioner urges the Court to declare that the Respondents' acts aforesaid violated his rights as enshrined under Articles 40, 47, 50 and 60 of the Constitution and that he is entitled to an order for general and punitive damages.
17. In support of his case, the Petitioner called 3 witnesses. Najma Abdullahi Ahmed (PW1) told the Court that she was the daughter of the Petitioner. Adopting the Petitioner's recorded statement dated 15th June 2022, she told the Court that the Petitioner was the lawful occupant of the suit property where they ran a business known as Buxton Filling Station. PW1 told the Court that she was the Operations

Manager of the business and that the Petitioner had validly acquired the property through a Lease dated 1st March 2018 executed between the Petitioner and one Jiviben Lalji Shah who was the registered owner of a Lease from the defunct Municipal Council of Mombasa for the said LR. No. Mombasa/Block XVII/1443.

18. PW1 testified that on 29th September 2021, they received information from their employees that the 2nd Respondents' officers had stormed into the suit property, fenced it off and left their guards to watch over the same. PW1 further told the Court that on 30th September 2021, the 2nd Respondent's Officers acting in concert with some goons proceeded to demolish the Filling Station and that in the process, the Petitioner lost fuel worth Kshs. 4,000,000/= together with other valuables.
19. As it were, the 2nd Respondent did not deny that it had evicted the Petitioner from the suit premises. On the contrary the 2nd Respondent asserted through its Director of Land Administration Rose Mbaika Munupe (DW1) that the evictions carried out were lawful as it was the registered

proprietor of the land which the Petitioner had been occupying unlawfully.

20. The 2nd Respondent denied that it had leased the property to the Petitioner or given its authority for a sub-lease to the Petitioner and asserted that it had acted within its rights to reclaim the land after entering into a joint venture contract with the 3rd Respondent for the purpose of renewal and re-development of ten (10) of its dilapidated estates including Buxton Housing Estate in Mombasa Island.
21. DW1 told the Court that upon reclaiming the suit property, they had requested the 6th Respondent who had proceeded to cancel the title and to consolidate the same with several other parcels to create LR. No. Mombasa/Block XVII/1821 measuring about 4.908 Ha for the purposes of the joint venture.
22. From the Petitioner's pleadings herein, it was apparent that this suit was filed on the basis that the Petitioner was the proprietor of the said LR No. Mombasa/Block XVII/1443. On the other hand it was the 1st and 2nd Respondents' position that the Petitioner had no valid lease to the said property.

At the trial herein PW1 testified that the Petitioner had leased the suit property from one Jiviben Lalji Shah on 1st March 2018. It was not in dispute that the said Jiviben Lalji Shah who was not enjoined in these proceedings had leased the property from the defunct Municipal Council of Mombasa.

23. In its Replying Affidavit filed herein, the 2nd Respondent has exhibited an extract of the lease for the suit property (Annexure RMM 6). A perusal thereof reveals that:

- i) The Lease entry was first opened on 17th July 1996 with the Lessor as the defunct Municipal Council of Mombasa and one Mohamed Bohero as the Lessee for a term of 99 years with effect from 1st July 1947 at an annual rent of Kshs. 4,924/-;**
- ii) There was an express restriction that no deposition by the proprietor shall be registered without the written consent of the Lessor;**
- iii) On 11th November 1997, the Lessee Mohamed Bohero sold the leasehold interest to Jiviben Lalji Shah at a consideration of Kshs. 1.5 Million; and**

iv) On 19th January 2001, the same Mohamed Bohero again transferred the leasehold interest to Rashid and Mohamed Abdullahi Ahmed Gele at a monthly rent of Kshs. 23,000/= for a term of six (6) years with effect from 1st March 2001.

24. At the trial herein PW1 conceded that she had nothing to demonstrate that the sub-lease between Jiviben Lalji Shah and the Petitioner had been authorized or endorsed by the 2nd Respondent as was required under the terms of the lease. She further conceded that she had nothing to demonstrate how the user of the land had been changed from residential to commercial to enable them operate a petrol station on the suit premises.
25. In dealing with leases, Section 55 of the Land Registration Act No. 8 of 2012 provides as follows:

“55. Lessor’s consent to dealing with leases

If a lease contains a condition, express or implied, by the lessor that the lessor shall not transfer, sub-let, charge or charge or part with the possession of the land leased or any part of it without the written consent

of the lessor, the dealings with the lease shall not be registered unless—

(a) the consent of the lessor has been produced to, and authenticated to the satisfaction of the Registrar and the Registrar shall not register any instrument purporting to transfer or create any interest in that land...”

26. In his testimony before the Court, the Mombasa County Land Registrar Sego Manyarkiy (DW3) confirmed that according to their records, the 2nd Respondent was the Lessor and that there had been a short-term lease in favour of the Petitioner for a term of 5 years from 1st March 2001. He told the Court that from their records, the short term lease had expired without extension.
27. Having considered the material placed before the Court, it was clear to me that this was a matter wherein the Court was being called upon to act in vain to protect a non-existent lease. In ***Juma Nyamawi Ndungu & 5 Others -vs- Attorney General (2019) eKLR*** the court quoted with approval the case of ***Holman -vs- Johnson (1775) 1 Cowp 341*** where Lord Mansfield CJ held that:-

“... No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the Plaintiff’s own standing or otherwise the cause of action appears to arise *ex turpi causa* (“from an immoral cause”), or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes, not for the sake of the defendant, but because they will not lend their aid to such a Plaintiff...”

28. In the matter before me, it was evident that while the lease was specifically for residential purposes, the Petitioner was using the same for commercial purposes by conducting the business of a Petrol Station. That was clearly in contravention of Section 12 (8) and (9) of the Land Act.

29. Section 12 (8) of the Land Act 2012 provides thus:

“Public land allocated under this section shall not be sold, disposed off, subleased, or subdivided unless it is developed for the purpose for which it was allocated.

30. Section 12 (9) of the Act on the other hand provides as follows:

“(9) Where the land allocated under subsection (8) is not developed in accordance with the terms and conditions stipulated in the lease, that land shall automatically revert back to the national or county government, as the case may be ...”

31. In the end, I was not persuaded that the Petitioner had any legal interest in the suit premises. It was indeed clear to me that there were no constitutional rights of the Petitioner that had been infringed and that the alleged illegalities that he claims to have been subjected to could have been addressed by way of an ordinary civil suit.

32. It follows that I did not find merit in the Amended Petition dated 15th July 2022. I hereby dismiss the same.

33. Each party shall bear their own costs.

Judgment dated, signed and delivered in open court and virtually at Mombasa this 24th day of March, 2026.

.....
J.O. OLOLA
JUDGE

In the presence of:

(b) Ms. Firdaus Court Assistant.

(c) Ms. Anjiko Advocate for the Petitioner

- (d) Kenya Kanga Advocate for the 1st and 2nd Respondents
- (e) Ms. Thuku Advocate for the 3rd, 4th and 5th Respondents
- (f) Mr. Penda Advocate for the 6th and 7th Respondents

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