



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**PETITION NO.10 OF 2018**

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS**

**UNDER ARTICLE 21 AND 46 OF THE CONSTITUTION**

**BETWEEN**

DOMINIC MBUGUA WANAINA.....1<sup>ST</sup> PETITIONER

JANEFER WANJIRU KAMUTI.....2<sup>ND</sup> PETITIONER

**VERSUS**

NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT

THE LAND REGISTRAR, KIAMBU.....2<sup>ND</sup> RESPONDENT

THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT

**JUDGMENT**

By a **Petition** dated **12<sup>th</sup> June 2018** the Petitioners herein filed this suit against the Respondents seeking for orders that;

***1. A declaration that the act of revocation of the Petitioners parcel Nos.Muguga/Gitaru/1745 and 1746 is a gross violation of their constitutional rights to private property and infringement of their protection afforded by Article 40 of the Constitution and is an abrogation of the right to fair administrative action as enshrined by Article 47 of the Constitution.***

***2. A declaration that the Respondents have no right in law to interfere with the Petitioners private property without following due process of law as set out in Article 40, 47 and 60 of the Constitution 2010 as well as Section 14 of the National Land Commission Act No. 5 of 2012.***

***3. An order to issue declaring the acts of the 1<sup>st</sup> Respondent purporting to revoke the Petitioners titles unconstitutional, null and void ab initio.***

***4. An order directed at the 2<sup>nd</sup> Respondent to issue directing the 2<sup>nd</sup> Respondent to rectify all relevant records and restore the Petitioners as the lawful owners of land parcel Nos.Muguga/***

***Gitaru/1745 and 1746 respectively.***

***5. A mandatory order do issue injuncting the Respondents, their agents employees or servants from purporting to interfere with the Petitioners lawful property.***

***6. A declaration that the Respondents are liable to compensate the Petitioners for the unlawful revocation of their property, illegal deprivation of their proprietary interest rights by the 1<sup>st</sup> Respondent.***

***7. A declaration that the Respondents are liable to compensate the Petitioners in general damages for infringement of their rights to fair administrative action as enshrined at Article 47 of the Constitution.***

**8. An order issue for exemplary and aggravated damages against the 1<sup>st</sup> Respondent for maliciously trampling down upon the constitutional rights of the Petitioners again and again with impunity.**

**9. The Respondents do pay the Petitioners costs of these proceedings.**

In their **Petition**, the Petitioners averred that the 1<sup>st</sup> Petitioner is the registered proprietor **L.R Muguga/Gitaru/1745**, while the 2<sup>nd</sup> Petitioner is the registered proprietor of **L.R Muguga/Gitaru/1746**. They alleged that on the **17<sup>th</sup> of July 2017**, vide a Gazette Notice **No.4273 Gazette Vol.97-10-7-2017**, the 1<sup>st</sup> Respondent revoked their parcels of land without any basis and vested the said parcels of land in the National and County Government for re planning to accommodate public utilities and *bonafide* allottees as per the Gazette Notice.

It was their contention that the 1<sup>st</sup> Respondent was in contravention of its Statutory and Constitutional mandate and abrogated its fundamental duties when it breached its duties under **Subsection 1** of the **National Land Commission Act** and **Articles 40, 47 and 60** of the Constitution which requires it to give any person who appears to it a notice of such review and an opportunity to appear before it to inspect any relevant documents.

They further averred that the 1<sup>st</sup> Respondent made the Gazette Notice revoking their parcels of land without following due process. They alleged that they sought for notices and proceedings and decisions of the 1<sup>st</sup> Respondent that culminated in its decision to revoke their titles through a gazette notice but none has been availed to them. They further averred that the 1<sup>st</sup> Respondent had on the **4<sup>th</sup> of August 2016**, made an order to the effect that they had encroached on a **link road E1507**, and further directed the 1<sup>st</sup> Petitioner to remove their development, the 1<sup>st</sup> Petitioner challenged the decision and their decision was quashed in **Judicial Review No.4 of 2017** and the Petitioner had to further seek for damages as their rights are still being trampled on. However before the suit could be resolved, the 1<sup>st</sup> Respondent moved to illegally and irregularly revoked their titles without any basis or following due process.

It was their contention that the 1<sup>st</sup> Respondent has therefore by its acts forcefully and arbitrarily taken over the Petitioners property and restricted their enjoyment and use contrary to **Article 40** of the **Constitution**. It was therefore their contention that the 1<sup>st</sup> Respondent acted unfairly and unjustly by denying them their fair administrative action and the 2<sup>nd</sup> Respondent has declined to accord them an official search over the suit property despite the Petitioners applying for the same. That the 2<sup>nd</sup> Respondent has alleged non availability of the properties Green Cards. They contended that the said acts and omissions are unlawful as they are a restriction of their enjoyment of their rights to private property as enshrined in **Article 40** of the **Constitution**.

The 1<sup>st</sup> Petitioner in his supporting Affidavit averred that he is the registered proprietor of **Muguga/Gitaru/1745**. He reiterated the averment in the Petition and further averred that the 1<sup>st</sup> Respondent maliciously revoked title to his parcel of land without notifying him of any complaint to his land or inviting him to the proceedings and notifying him of any decision reached and according him a chance to be heard. He further averred that he sought and requested for notices but the same were not forthcoming and that he only learned that his title had been revoked when he attended the County Government offices to apply for the requisite permits. He further averred that the acts of the 1<sup>st</sup> Respondent have restricted their use and enjoyment of their properties and the 1<sup>st</sup> Respondent is determined to trample over their rights.

He therefore averred that the Respondents acts and omissions are unlawful and urged the Court to allow the Petition.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed grounds of opposition and averred that the Petition lacks merit as the suit land is public land and that the Constitutional mandate of the 1<sup>st</sup> Respondent has been probably exercised. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents further averred that the Petitioners were duly notified of the encroachment and failed to make good the removal of the encroachment and the recourse available to them is vide an Appeal to Environment & Land Court and not a Petition. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents further denied violating any right and hence none is capable of being protected and that the public interest overweighs private interest.

The Court directed that the Petition be canvassed by way of written submissions and the Petitioners through the **Law Firm of Kimathi Wanjohi Muli Advocates** filed their submissions on the **6<sup>th</sup> of March 2019** and submitted that they have shown that their rights to fair administrative action and right to protection of property as enshrined in **Article 40 and 47** of the **Constitution** were infringed by the acts and omissions of the Respondent. However, the Respondents failed to file any submissions despite being granted several opportunities to do so.

This Court has now carefully read and considered the pleadings of the parties, the annexures thereto and the written submissions and the Court finds that the issues for determination is whether the Petitioners are entitled to the orders as sought.

The Petitioners have averred that the 1<sup>st</sup> Respondent purported via **Gazette Notice** to revoke their title to the suit land without any basis. They further averred that they were never issued with any notices to appear before the 1<sup>st</sup> Respondent nor were they ever given any chance to be heard. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed grounds of opposition in which they alleged that the Petitioners were fully made aware of the encroachment and they failed to make good the removal of t encroachment.

First this Court notes that this Petition does not deal with the issue of encroachment but rather the revocation of title. The Respondents did not file any Replying Affidavit and therefore missed a chance to properly articulate the issues that are in contention.

Though it seems that the allegation by the Petitioners shave not been challenged, this Court still has an obligation to interrogate the same and make a proper determination on the issues. **Article 40(1)** of the **Constitution** provides for the right to property. It provides that;

**“Subject to Article 65 each person has a right either individually or in association with others to acquire and own property ;-**

*(a) of any description*

*(b) in any part of the Kenya*

From the foregoing therefore it would mean that any Kenyan citizen has a right to own land without any interference. However this right is not absolute as it is limited in certain instances as provided for by **Article 40(3)** of the **Constitution** which provides;

***(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—***

***a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or***

***b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—***

***i. requires prompt payment in full, of just compensation to the person; and***

***ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.***

The provisions of the Constitution are very clear on the instances in which a person can be deprived of their rights to a property. If indeed the land is public land as alluded to by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and the **Gazette Notice** marked as annexure **ZWN-3**, then the same ought to be determined wherein the necessary parties follow a due process through a legally recognized institution and a finding made on whether there was illegal encroachment or that the land was acquired illegally. Without following the above due process, then this Court finds that it cannot be said that the land owned by the Petitioners is public land. Further this Court has not been presented with any material to show how such a decision was arrived at.

The Petitioners being holders of title to the parcels of land in question, they have an absolute and indefeasible title that can only be challenged if there was either fraud or misrepresentation and the said illegality should be determined by a legally recognized institution. See the case of ***The National Land Commission & Others Ex parte Vivo Energy Kenya Ltd (2015) eKLR***, where the Court held that:-

***“The impugned Gazette Notice seems to suggest that there was an illegality, involved in the registration of the suit land in the name of the Applicant. No doubt under the provisions of Article 40(6) of the Constitution, property rights protected under Article 40 of the Constitution do not extend to any property that has been found to have been unlawfully acquired. Therefore, there must be a finding that the property in question was unlawfully acquired”.***

There was no finding herein by any legally recognized institution that the Plaintiff’s property was unlawfully acquired and therefore terming the encroachment illegal or revocation of the suit properties without any justifiable Course was a breach of the Constitutional right of the Petitioners to own the said land.

The Petitioners have in their Petition averred that before the decision to revoke their titles was made, they were not given an opportunity to be heard by the 1<sup>st</sup> Respondent nor were they informed of the reasons for the decision. This Court has considered the letter dated **21<sup>st</sup> May 2018**, from the 1<sup>st</sup> Petitioner’s Advocate requesting for the proceedings that led to the revocation of the suit land. As already stated, the Respondents did not file any **Replying Affidavits** to controvert these assertions. There is also no evidence to establish that the Petitioners were given a chance to present their case. Further, no reasons for the said decision have been annexed by the Respondents. A right to fair administrative action is a right enshrined under **Article 47** of the Constitution that provides that;

***“(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 a right to be given written reasons for the action.”***

There is no doubt that the Petitioners were not afforded this right by the 1<sup>st</sup> Respondent before a decision was made. It is not in doubt that due process ought to have been followed and the State had no right whatsoever to trample on the Petitioners’ rights and/or breach their rights to property as provided by Article 40 of the Constitution. The action of the 1<sup>st</sup> Respondent contravened Article 47 of the Constitution. It is clear that the state and its organs have an obligation to follow the due process where there is an assertion that the land a party is occupying has been acquired illegally. See the case of ***Isaac Gathungu Wanjohi & Another...Vs... Attorney General & 6 Others (2012) eKLR***, the Court held that:-

***“Where the state contended a property was acquired illegally, the state must follow due process to establish the illegality”.***

From the foregoing analysis therefore, this Court finds that before the Gazette Notice was issued and which resulted in the revocation of the Petitioners’ title, due process was not followed as required under the Constitution and this therefore resulted in violation of the rights of the Petitioners.

The Petitioners have sought for various declarations and amongst them compensation for general damages and aggravated and exemplary damages for the infringement of their constitutional Rights. This Court finds that the Petitioners are entitled to General damages of

**Kshs.200,000/=** each for infringement of their rights.

On the issue of Exemplary damages, the guiding principles in granting of the same are to be found in the case of **Godfrey Julius Ndumba Mbogori & Another v Nairobi City County NRB CA Civil Appeal No. 55 of 2012 [2018] eKLR** where the Court held that;

**“[32] The appellants claimed for exemplary and punitive damages. Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of Rookes v Barnard [1964] AC 1129 where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute.”**

The Court having held and found that the acts of the 1<sup>st</sup> Respondents were unconstitutional and taking into account that the said acts were done by Government Officers, this Court further finds that the Petitioners are entitled to Exemplary Damages of **Kshs.200,000/=** each.

Having now carefully read and considered the pleadings by the parties, the annexures thereto and the written submissions, the Court finds that the Petitioner’s Petition is merited and the same is allowed entirely in terms of prayers **No.1 – 9**. On General Damages, the Petitioners are each awarded **Kshs.200,000/=** and an Exemplary damages each of the Petitioner is awarded **Kshs.200,000/=**.

It is so ordered

**Dated, Signed and Delivered at Thika this 25<sup>th</sup> day of October, 2019.**

**L. GACHERU**

**JUDGE**

**25/10/2019**

In the presence of

1<sup>st</sup> & 2<sup>nd</sup> Petitioners present in persons

No appearance for the Respondents

Lucy - Court Assistant

**Court** – Judgment read in open court.

**L. GACHERU**

**JUDGE**

**25/10/2019**