



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 466 OF 2017

(FORMERLY MILIMANI ELC 269 OF 2015)

IN THE MATTER OF: SECTION 1,2,19,20,22 AND 23 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: SECTION 165(3) AND (6) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF SECTION 40, 47,50 AND 64 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF LAND REFERENCE NUMBERS THIKA MUNICIPALITY LR. NO 4953/1595 AND 4953/1596

BETWEEN

JANE WANJIRU CHEGE.....PETITIONER

AND

COMMISSIONER GENERAL OF PRISONS.....1ST RESPONDENT

OFFICER IN CHARGE THIKA MAIN PRISONS.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

By a **Petition** dated **7th January 2015**, the Petitioner filed this suit as against the Respondents seeking for orders that;

a) A declaration that the two parcels of land

i) Thika Municipality L.R No. 4953/1595

ii) Thika Municipality L.R 4953/1596 belong to Jane Wanjiru Chege jointly with Cav. Giorgio Calanca.

b) That a permanent injunction do issue against the Respondents whether by themselves , agents servants and/ or employees restraining them from interference with the Petitioners user and enjoyment of Land parcels Number Thika Municipality Number 4953/1595 and Thika Municipality 4953/1596.

c) Compensation for violation of the fundamental rights of Petitioner and financial losses calculated in form of Damages and Financial Losses from 2004 until the said interference is stopped.

d) Any other relief that this Honourable Court deems fit and proper to grant.

In her Petition, she averred that together with her partner **Cav. Giorgio Calanca**, they were desirous of acquiring a plot for construction of a school for purposes of helping children with education and other academic needs within the then Thika Municipality. They then identified the two suit properties and before they purchased them they carried out due diligence including making inquiries on whether they were private or public land. Further that land rates were duly paid to the Government and to the then Municipal Council of Thika and subsequently a transfer was effected in their favour as joint owners.

She averred that on the **26th of May 2004**, they entered into a construction agreement for construction of a wall on the suit property and they made a deposit of **Kshs.420,000/=**. That when the Contractor commenced work on the said properties, they were violently stopped by Prison Officers from Thika Prisons claiming ownership. She further averred that a number of correspondences were exchanged including a letter from the District Lands Officer informing the Prison Officers that the land belonged to the Petitioner and her business partner but the Prison Officers kept guarding the suit property with armed prison officers. That they were advised that there should be no development on the said land until a Report on the Commission on irregular/illegal allocation of public land was released. She alleged that the said Report was then released to the President but the Commissioner did not still allow the Petitioner to access her property and has to date refused to allow her to access the said property and as a result, she suffered losses and continues to suffer losses and damages as she cannot develop the property but still continues to pay rates and rent .

She averred that she instructed her Advocates to write a letter to the 2nd Respondent but the 2nd Respondent neither denied nor confirmed their interest on the suit property confirming their fears that they have not rescinded their fears and therefore this has led the Petitioner to confirm that they cannot enjoy quiet possession use and enjoyment of the said pieces of land. The Petitioner further averred that any time she tries to engage the Surveyors to identify the beacons on the suit land, they have declined to do so fearing that the Respondents will chase them with guns or arrest their workers. She contended that her fundamental rights under **Articles 1,2,19,20,22 and 23** of the Constitution of Kenya have been breached and thus seeks remedy.

The Respondents were duly served and despite service they did not file any **Replying Affidavits**. However when the matter came up for Mention on the **6th of December 2018**, the Court directed that the Petition be canvassed by way of written submissions.

In compliance with the said directives, the Petitioner filed her submissions through the **Law Firm of Dola Magani & Co. Advocates** and submitted that they are duly registered as the proprietors of the land in question and that her rights have been breached. She relied on various provisions of law and decided cases to which the Court has carefully read and considered.

The Respondents through **Ann Mwangi** Litigation did not file any response to the Petition but filed their submissions and submitted that the Petitioner's right which she claims to have been violated are limited subject to public interest as the suit land are public land and it is for public purpose and the said Article provides that the rights do not extend to any rights or interests that have been found to have been unlawfully acquired. It was further submitted that via a **Gazette Notice**, the Secretary of Defence declared the Prison Camp to be a Prison and as the Government claimed the land first and the Petitioner is estopped from claiming the land in equity.

Though the Respondents filed submissions and claimed that there was a Gazette Notice, they did not file a **Replying Affidavit** to the Petition and therefore failed to attach any evidence indicating the existence of the said Gazette Notice or indicating that the main Prison is the proprietor of the suit properties. The Prisons Officer actions of denying the Petitioner entry to the suit land have not been controverted and therefore this Court has no option but to believe the allegations

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 Respondents, then it is this Court's holding that the same ought to be determined through a legally recognized process and institution and a finding made that that the land was acquired illegally. Without following the above stated

procedure, then this Court finds that it cannot find and hold that the land owned by the Petitioner is public land or that the same was illegally acquired. Further, this Court has not been presented with any, evidence indicating that the suit land belong to the Thika Prisons and the Court cannot verify the validity of the said allegations.

The Respondent have alleged that the Petitioner's parcel of land was acquired **fraudulently** and therefore did not fall under the protection of **Article 40** of the Constitution. The Defendant relied on **Article 40(6)** of the Constitution which provides that:-

“The rights under this Article do not extend to any property that has been found to have been unlawfully acquired”.

The Petitioner being holder of lease to the suit property, has an absolute and indefeasible title that can only be challenged if there was either fraud or misrepresentation and the said illegality be determined by a legally recognized institution. See the case of ***The National Land Commission & Others Exparte 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”.

Though the Respondents herein contends that the Petitioner's parcel of land was acquired illegally or through fraud, there was no due process followed to establish any fraud or illegality on the part of the Petitioner. There was no finding herein by any legally recognized institution that the Petitioner's property was unlawfully acquired and therefore the said assertions by the Respondents that the suit land was illegally acquired has no basis. This Court has seen documentations annexed by the Petitioner indicating that indeed there was proper due diligence and that there was transfer to the Petitioner of the suit property and in the absence of any evidence to the contrary, the Court finds and holds that the Respondents' action was a breach of the Constitutional right of the Petitioner. That action denied her ownership of the suit land without any justification.. See the case of ***Isaac Gathungu Wanjohi & Another...Vs... Attorney General & 6 Others (2012) eKLR***, where 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 of facts and evidence, this Court finds that before the Gazette Notice was issued and which resulted in the revocation of the Petitioner's title, due process was not followed as required under the Constitution and that omission resulted in violation of the rights of the Petitioners.

The Petitioners have sought for various declarations and amongst them compensation for general damages. This Court finds that the Petitioner is entitled to General damages of **Kshs.500,000/=** for infringement of her rights

The Upshot of the foregoing is that this Court finds that the Petitioner's Petition is merited and the same is allowed. Further the Court finds and holds that the Petitioner is entitled to General Damages of

Kshs.500,000/= plus costs of the Petition.

It is so ordered

Dated, Signed and Delivered at Thika this 25th day of October, 2019.

L. GACHERU

JUDGE

25/10/2019

In the presence of

No appearance by the Petitioner

No appearance by the Respondents

Lucy - Court Assistant.

L. GACHERU

JUDGE

25/10/2019