



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC PETITION NO. 17 OF 2015

(FORMERLY MOMBASA HIGH COURT PETITION NO 12, 13 AND 14 OF

2011)

BETWEEN

IN PETITION NO. 12 OF 2011

MIKAAL LIMITED.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE COMMISSIONER OF LANDS.....2ND RESPONDENT

AND

DANIEL RUNYA GAMBA.....INTERESTED PARTY

IN PETITION NO. 13 OF 2011

MICHAEL JOHN KARANJA.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

COMMISSIONER OF LANDS.....2ND RESPONDENT

IN PETITION NO. 14 OF 2011

MICHAEL JOHN KARANJA.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

COMMISSIONER OF LANDS.....2ND RESPONDENT

JUDGMENT

BACKGROUND

1. This Petition was initially filed at the High Court Mombasa as Petition No. 14 of 2011 on 9th March 2011. By an Amended Petition filed at the said registry on 18th March 2014, Michael John Karanja and Mikaal Ltd (the Petitioners) pray for:-

- a. A declaration that the actions of the Respondents as set out(in the Petition) are unconstitutional;**
- b. An order that the Respondents compensate the Petitioner for the loss of the suit property in the sum of Kshs 59,000,000/-;**
- c. Interests on (b) at Court rates until the full and final settlement of (b); and**
- d. Costs of the Petition.**

2. Those prayers arise from the Petitioners contention that Mikaal Ltd is the registered allottee for value of Plot No. Kilifi/Jimba/470 measuring 3.0 Ha or thereabout. The Petitioners complied with all conditions and paid the required allotment sum of Kshs 100,830/- on 17th April 1996 and have been awaiting the issuance of title documents from the Commissioner of Lands (the 2nd Respondent). However on account of some political/legal problems that affected some pieces of land in the Kilifi/Jimba and Chembe/Kibabamche Registration Sections, the 2nd Respondent placed restrictions against all pieces of land registered in those registration sections. As a result the Petitioners have never been issued with a Certificate of Lease.

3. Subsequently the Petitioners have discovered that the suit property has been unlawfully subdivided by the Respondents whereby the same has mutated to Plot Nos Kilifi/Jimba/1089, 1090, 1091 and 1153 which plots of land were allocated by the Respondents to so called indigenous/locally based Mijikenda Community members and it is therefore impossible for the Petitioners to ever peacefully occupy the suit property or to obtain title documents therefor.

4. The Petitioners aver that the Respondents actions are unconstitutional in that the Respondent had no power to place a general embargo over the suit property and/or to sub-divide or allocate the same without the consent of the Petitioners and hence the orders sought herein.

5. In response to the Petition, the two Respondents-the Honourable the Attorney General and the Commissioner of Lands rely on Grounds of Opposition dated 4th June 2012 and filed herein on 5th June 2012, which Grounds state simply as follows:-

- 1. That the Petition is frivolous, vexatious and an abuse of the Court process.**
- 2. The Respondents decision was proper and in order.**
- 3. That no constitutional rights have been demonstrated to (be) breached.**
- 4. That the Respondents acted in accordance with the law and the orders made were not unconstitutional.**

6. On 6th May 2014, directions were given by consent of the parties that the Petition would proceed on the basis of affidavits to be filed by the parties. The trial thereafter commenced before the Honourable Justice Edward Muriithi in Mombasa but the Petition was subsequently on 22nd October 2015 transferred to this Court for trial and disposal.

The Petitioners Case

7. At the trial, the Petitioners called two witnesses in support of their case.

8. PW1- Richard Kimani Kagwe was a Director of Mikaal Ltd. He told the Court that the other directors of the company are his father Michael John Karanja, his mother Margaret Wairimu Karanja and his brother Mburu Hilary Karanja.

9. PW1 referred the Court to the Affidavit of his father sworn on 8th March 2011 in support of the Petition. He told the Court that there was a caution on the suit property registered in the company's name which remains in existence to date. He testified that the Respondents placed an embargo on their title without any explanation and that its existence means that they are unable to utilize the land. A caution was also registered on the land by one Daniel Ginya Gamba as an interested party.

10. PW1 told the Court that they paid a sum of Kshs 1,083,000/- as compensation to the said Daniel Ginya Gamba on 15th December 1998. He further told the court that they got the property valued in 2012 and its value as at the time was Kshs 25 Million. He urged the Court to grant them the said amount as compensation for the land.

11. PW2- Josephine Wanjiru Osodo is a Valuer. She told the Court that she carried out a Valuation of land parcel Chembe/Kibabamshe/376 on 20th February 2012. The property measures 2.471 acres and PW2 returned a Marked Value of Kshs 25 Million.

The Defence Case

12. Other than filing Grounds of Opposition to deny the averments in the Petition, the Defence did not call any witness and/or produce any

documents at the trial herein.

Analysis and Determination

13. I have perused and considered the pleadings filed by the parties, the oral testimony of the Petitioners witnesses and the Written Submissions and authorities filed herein by the Learned Counsels for the parties.

14. A reading of this Petition as filed and amended on 18th March 2014 would suggest that it was filed by one person Michael John Karanja Mikaal Limited. A clear reading thereof however reveals that it was filed by two different entities-Michael John Karanja and Mikaal Limited. At the trial herein it became clear that Michael John Karanja is but one of the Directors of Mikaal Ltd.

15. By a Letter of Allotment dated 19th June 1992 addressed to the said Mikaal Ltd at P.O. Box 273, Karuri, one RNO Matende for the Commissioner of Lands informed the company that the Government was offering to them Plot No. Kilifi/Jimba/470(the suit property) measuring 3.0 Ha subject to their formal written acceptance of certain conditions prescribed thereunder.

16. The Petitioners contend that they fulfilled all the requirements including payment of the sum of Kshs 100,830/- on 17th April 1996 and that thereafter they have waited for the Respondents to issue them with a Certificate of Lease in vain. They accuse the Respondents of without any basis placing an embargo and/or restrictions on Kilifi/Jimba and Chembe/Kibabamshe registration section within which the suit property falls on account of some political/legal problems and thereafter refusing to lift the same to the Petitioners detriment.

17. It is further the Petitioners case that they have since come to learn that the Respondents unlawfully sub-divided the suit property and proceeded to allocate the same to the so-called indigenous/locally based Mijikenda Community members and that it is therefore impossible for the Petitioners to ever peacefully occupy the property and/or to obtain title documents therefor.

18. The Petitioners assert that under Article 40 of the Constitution, they are entitled to the protection of their fundamental rights and freedoms which include the right to own property and a bar to the state from arbitrarily depriving them thereof. They urge that they be compensated in the tune of Kshs 59 Million for the infringement of their right.

19. As I have already stated, the Respondents did not lead any evidence herein other than filing Grounds of Opposition on 5th June 2012 in which they generally denied any wrong doing on their part.

20. Even though the events leading to this dispute occurred much earlier, the Petitioners herein base their claim on Article 40 of the Constitution of Kenya 2010. That was no big deal though given that the right not to be arbitrarily deprived of one's property was equally protected under the repealed Constitution which applied when the cause of action accrued.

21. Considering the question of protection of private property in *Multiple Hauliers East Africa Ltd –vs- The Attorney General & 10 Others (2013) eKLR*, the Court observed as follows:-

“What is clear from these provisions is that private property is protected and may not be taken arbitrarily without due process. It is also clear that the protection afforded to property does not extend to property that has been unlawfully acquired because, as observed in Isaac Gathungu Wanjohi & Another –vs- Attorney General & 6 Others Petition 154 of 2011(2012) eKLR:-

“(42) Article 40 must be read as a whole so that protection afforded by Article 40 which protects the right to property must be read to exclude property found to be unlawfully acquired under Article 40(6). This requirement is an extension of the fact that the Constitution protects higher values which are to be found in the preamble to the Constitution and Article 10. Values such as human rights and social justice cannot countenance a situation where the Constitution is used to rubberstamp what is in effect unlawful.”

22. In the matter before me, the Petitioners plead that the presence of an embargo and/or restriction placed on the suit property has hindered them from utilizing the property as they would have wished. There was however no evidence or proof of the existence of the embargo or restriction allegedly placed by the Respondents that was produced before the Court. All that the Petitioners produced is an advertisement placed by the 2nd Respondent in the Daily Nation of 12th August 2010 lifting the restriction in regard to certain parcels of land.

23. In my view, the fact that the suit property is not listed among those cleared did not necessarily mean that there was an embargo and/or restriction placed thereon. From the Petitioner pleadings, they assert at paragraph 5 of the Amended Petition that the embargo and/or restriction was placed by the Respondents on the Kilifi/Jimba and Chembe/Kibabamshe Registration Sections in the early 1990s. If that were so, the Petitioners must have been aware of the restriction when they received their Letter of Allotment dated 19th June 1992 or sometime thereabout.

24. Indeed while the said Letter of Allotment required the fulfilment of certain conditions thereon within 30 days from the date it was issued, the Petitioners did not make any payment until some four years later on 17th April 1996.

25. As it were, other than the fact that a third party had filed a caution in regard to the suit property, there was nothing placed before the Court to demonstrate that they had tried to utilize the premises and were stopped from, doing so by the Respondents herein. In their own admission at the trial herein, the Petitioners conceded that they had settled the matter concerning the caution with the third party claimant after they paid him a sum of Kshs 1,083,000/-. There was otherwise absolutely nothing placed before me to demonstrate that any attempt had been made at the Land Registry to process the title deed.

26. The Petitioners remain in occupation of the land and I am not satisfied that they have suffered any loss to warrant the grant of compensation in the sum of Kshs 59,000,000/- claimed herein or any other sum. I hold so because a claim for compensation is meant to restore a claimant to the position existing prior to the action complained of.

27. In the matter before me, the Petitioners appear to have obtained the land from the Government during an on-going investigation in regard to the allocation of land in the affected adjudication section. They paid for that property outside the prescribed period and want compensation from the Respondent who were kind enough in the first instance to allocate them the land. I find no basis for their claim.

28. As the Court stated in *Patrick Musimba –vs- National Land Commission & 4 Others(2016)eKLR:-*

“..... a closer reading of Article 40(3) of the Constitution would reveal that the Constitution did not only intend to have the land owner who is divested of his property compensated or restituted for the loss of his property but sought to ensure that the public treasury from which compensation money is drawn is protected against improvidence. Just as the owner must be compensated so too must the public coffers not be looted...”

29. In that regard, I think I have said enough to indicate that I did not find any merit in the Petition. The same is dismissed.

30. I make no order as to costs.

Dated, signed and delivered at Malindi this 24th day of October, 2019.

J.O. OLOLA

JUDGE