



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

PETITION No. 2 OF 2015

DR. CHESANG KIPRUTO.....PETITIONER

VERSUS

NATIONAL POLICE SERVICE COMMISSION.....1ST RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF

INTERIOR AND COORDINATION OF

NATIONAL GOVERNMENT.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

(Matter was scheduled for delivery of judgment; petition was heard by way of affidavit evidence and written submissions; in the course of reviewing the record so as to write judgment, it became apparent to the court that it would not be possible to properly determine the matter without taking oral evidence; directions given that hearing to start afresh and to be by oral evidence)

1. The proceedings herein were commenced on 13th January 2015 pursuant to petition dated 6th October 2014. The petitioner describes himself in the petition as a citizen of the Republic of Kenya and a resident of Nakuru County. He brings these proceedings against the 1st respondent, a body corporate established pursuant to Article 246 (1) of the Constitution of Kenya; against the 2nd respondent, a state officer under Article 155 of the Constitution who he describes as the Chief Accounting Officer of the Ministry of Interior and Co-ordination of National Government; against the 3rd respondent, a state officer under Article 245 of the Constitution and finally against the 4th respondent, a state officer whose office is established under Article 156 of the Constitution.

2. It is averred in the petition that the petitioner was on 23rd November 1998 allocated the parcel of land known as Nakuru Municipality Block 12/93 (the suit property) by the Commissioner of Lands. That the respondents trespassed into the suit property in or about the year 2001 and have since continued to use it as residence for various senior police officers and have deployed armed police officers at the property thus locking him out from his private property. That the respondents' actions are a threat to rule of law

and constitutionalism.

3. The petitioner thus sought judgment *inter alia* for a declaration that the respondents' actions of using the police to keep off the petitioner from his property violate the right to property, right to dignity, equality and the security of person and therefore unconstitutional; general damages for violation of his right to property, right to dignity, equality and the security of person; and an order of mandamus compelling the respondents to pay KShs. 10,000/= per month from January 2002 to date within a period of 30 days from the date of judgment and to vacate the property.

4. The respondents opposed the petition through Grounds of Opposition filed on 30th March 2015 wherein it is averred that no basis has been laid for the determination of the right to own the suit property; that the petitioners' case is not corroborated by documentary evidence; that the case is an abuse of the court's process; that the constitutional court does not determine convoluted disputes that require viva voce evidence; that the issues raised had been determined by other courts and the matter is therefore *res judicata* and that Article 40 of the Constitution does not protect illegally acquired property. Additionally, the respondents filed a replying affidavit on 19th August 2016, almost one and a half years after filing the Grounds of Opposition. The respondents urged the court to dismiss the petition.

5. The petition is supported by an affidavit sworn by the petitioner. He deposed that he was allocated land known as Nakuru Municipality Block 12/93 (the suit property) by the Commissioner of Lands on 23rd November 1998 and that he is the registered proprietor of the property having been issued with a Certificate of Lease dated 23rd November 1998.

6. The respondents' evidence in response to the petition is contained in the replying affidavit of Hassan Rashid Barua, the County Commissioner, National Police Service, Nakuru County sworn on 18th August 2016. He deposed among others that he was an occupant of the suit property until around February 2016 and that as at the time he swore the affidavit the suit premises were occupied by the Regional Police Administrator. He added that the property has been the official residence of several Provincial Police Officers since 1941 and that the property was not available for alienation when the petitioner became registered as the owner. Basically, the respondents' position is that the property remains public land.

7. Parties agreed to have the petition heard by way of affidavit evidence and written submissions followed by oral highlighting. Accordingly, the court issued orders to that effect and parties duly filed submissions. The court then retired to write judgment.

8. In the course of reviewing the record so as to prepare judgment, it became apparent to me that it would not be possible to properly determine the matter without looking into the question of validity of the petitioner's title.

9. If the allotment to the petitioner was procedurally and lawfully done, then the petitioner's title would be protected by **Article 40** of the **Constitution** and **Section 26** of the **Land Registration Act**. Conversely, an unlawful or irregular allotment would, under **Article 40(6)** render the certificate of title a nullity. If I were to deliver judgment in favour of the petitioner and it later turns out that the petitioner's title is a nullity, my said judgment would also be a nullity. A court of law should not act in vain.

10. Unfortunately, the parties have not adequately addressed the court on the issue of how the allotment was done and validity of the Certificate of Lease issued to the petitioner. If the respondents contend that the allotment was not proper, appropriate pleadings should be put before the court supported by evidence. The opposite also applies to the petitioner. To achieve a fair hearing in the matter, I believe oral evidence as opposed to affidavit evidence should be taken.

11. So as to be able to determine the dispute between the parties, I will not deliver judgment but will instead give the parties an opportunity to fully put their cases before the court. I am not alone in this kind of approach. Munyao J. stated as follows in **Rosemary Wanjiru Njiraini v Officer in Charge of Station, Molo Police Station & another [2017] eKLR**:

5. Directions had earlier been taken for the petition to be disposed of by way of the affidavit evidence and written submissions, which was done. I then retired to write a judgment. However, upon going through the material that had been presented by the parties, I formed the view that there were serious questions of fact to be determined, including the question whether the land had been set aside for public utility or whether it was one set aside as a police station. I came to the conclusion that I am unable to determine all issues based solely on the affidavit evidence before me, and on reflection, I directed that the case be heard by way of oral evidence....

12. In view of the foregoing, I make the following orders:

- a. Hearing of this matter shall start afresh. Hearing will be by way of oral evidence.
- b. The petitioner is hereby granted leave to file and serve an amended petition, if need be, and to file and serve List of Witnesses, Witness Statements, List of Documents together with paginated bundle of documents within 21 (twenty-one) days from today.
- c. The respondents are granted corresponding leave to file and serve a response to the amended petition or to the petition, if need be, and to file and serve List of Witnesses, Witness Statements, List of Documents together with paginated bundle of documents within 21 (twenty-one) days of service of the petitioner's documents.
- d. The petitioner is granted leave to file and serve, if need be, a response to the respondents' documents within 14 (fourteen) days of service.
- e. I will give a mention date for further directions upon delivery of this ruling.

13. No order as to costs.

Dated, signed and delivered in open court at Nakuru this 24th day of January 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Akango holding brief for Mr. Kipkoech for the petitioner

No appearance for the respondents

Court Assistant: Gichaba