



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC NO 127 OF 2016
(FORMERLY CONSTITUTION PETITION NO. 40 OF 2011)
DANIEL MCHOMBO CHAI
LAWRENCE CHAI.....PETITIONERS
VERSUS
THE HONOURABLE ATTORNEY GENERAL
THE CHIEF LAND REGISTRAR
ATHI RIVER MINING.....RESPONDENTS

JUDGMENT

A. Introduction

1. This Petition was filed on 8th April 2011 by the 2 Petitioners who have described themselves as the sons of Mparreni Katama Mtile (deceased) and bring this Petition as the Limited Legal Representatives of the estate of the deceased who died on 17th February 2004 aged 94 years. That the deceased was till his death married to Esther Pahe Chai (deceased) who died on 14th September 2010 and both were blessed with two children, the Petitioners herein.

B. The Petitioners pleadings

2. The Petitioners have stated that prior to 1993, Mpareni Katama Mtile (deceased) was the registered proprietor of the Plot Title **NO.MBWAKA/MAERENI/112** (hereinafter ‘the Suit Property’) measuring 10.6 hectares which was solely used by the deceased and the Petitioners for family farming.

3. That in the year 2005, the Petitioners reported to the 2nd respondent about a breach of the law and their constitutional right to own and use the suit property and after a while were informed by the 2nd Respondent through the District Land Adjudication/Settlement Officer-Kilifi that the 3rd Respondent had acquired the said property and had already collected the title deed and that the Petitioners recourse lay in filing a civil suit in a court of law.

4. The Petitioners state that Section 28 of the Registered Land Act (now repealed) stood on their way and

they could not go to a civil court to challenge the title held by the 3rd Respondent.

5. The Petitioners further state that the process of acquisition of the Suit Property by the 3rd Respondent was in full breach of the law because by 1993, the deceased was aged over 84 years and was sickly, frail and illiterate and was always assisted to walk by the Respondents and that whenever he visited any government offices, he would always be accompanied by either the 1st or 2nd Petitioners or any other close relative. That prior to his death, the deceased had disclosed to the Petitioners that the Suit Property had illegally been taken away from him by the agents of the 3rd Respondent. The Petitioners further state that they do not recall accompanying the deceased to any law firm or to the Land Registry at Kilifi to sign a sale agreement or an application to the Land Control Board for consent or a transfer. It is the Petitioners contention that if a consent of the Land Control Board was granted, they were never called by the agents of the 1st and 2nd Respondents to give or decline to give their consent for the suit property to be transferred to the 3rd Respondent.

6. The Petitioners state that the Suit Property was originally family land and the deceased inherited it through Rabai customary practice and held the title to it as a trustee of the Petitioners. It is the Petitioners contention that prior to the disposal of the Suit Land, their consent was mandatory.

7. They further contend that they were never contacted and never gave their consent and thus were discriminated against and the acquisition of the land by the 3rd Respondent was in breach of their constitutional right to own property as Rabais. They complain that the actions of the 3rd Respondent to acquire the Suit Property was unconstitutional as it deprived them the right to own and use land contrary to Article 40 of the Constitution.

8. The Petitioners also state that Section 28 of the Registered Land Act Cap 300 (now repealed) is unconstitutional as it prevented them from challenging the acquisition of the Suit Property through a Civil Suit. They further state that the 3rd Respondent has deprived them the use and possession of the Suit Property making them landless and squatters, which is unconstitutional.

9. The Petitioners aver that the Suit Property was not purchased but was acquired by the 3rd Respondent arbitrarily, fraudulently and illegally and therefore the transaction was null and void for lack of consent from the Land Control Board, lack of consideration and forged signatures/thump prints, among others. The Petitioners further aver that they are entitled to sufficient compensation in line with Article 40 of the Constitution.

10. The Petitioners have sought the following prayers in the petition:

i. A declaratory order that the acquisition of MBWAKA/MAERENI/112 by the 3rd Respondent was null and void.

ii. A declaration that the process of acquisition of MBWAKA/MAERENI/112 by the 3rd respondent was unconstitutional.

iii. A declaration that Section 28 of the Registered Land Act Cap 300 is unconstitutional, null and void to the extent of that inconsistency.

iv. A declaration that the Title Deed issued to the 3rd Respondent by 2nd Respondent on 7th September 1993 and the Certificate of Lease issued by the 1st and 2nd Respondents on 7th September 1993 is null and void.

v. An order of cancellation of Title Deed issued to the 3rd respondent by the 2nd Respondent on 7th September 1993 and the Certificate of Lease issued by the 1st and 2nd Respondents on 7th September 1993.

vi. An order directed at the 2nd Respondent to rectify the Register of Rectification of MBWAKA/MAERENI/112 register directing the 2nd respondent to cancel the name of the 3rd respondent and replace it with that of the Petitioners.

vii. In the alternative and without prejudice to a), b), d) e), f) above, an order for compensation in favour of the petitioners by the respondents of MBWAKA/MAERENI/112 at the prevailing market rates.

viii. Costs and interests

ix. Such other order(s) as this Honourable Court shall deem just.

11. The Petition is supported by the Affidavit and Supplementary Affidavit of Daniel Mchombo Chai, the 1st Petitioner. He has more or less reiterated the averments in the Petition which I have already set out above and I see no need of repeating the same.

C. Response by the respondents

12. The 1st and 2nd Respondents entered appearance through the Honourable Attorney General while the 3rd Respondent entered appearance through the firm of M/s Ndegwa Muthama Katisya & Associates Advocates and filed a Replying Affidavit sworn by Charles Bett, a Further Affidavit sworn by Kevin Macharia and Grounds of Opposition.

13. It is stated *inter alia*, that the 3rd Respondent is the registered owner of all that parcel of land known as **MBWAKA/MAERENI/112** which was purchased by the 3rd Respondent from Mr. Mpareni Katama Mtile at a consideration of Kshs.800,000 on 6th August 1993 and the said Mpareni Katama Mtile duly executed the transfer of the property. It is stated that prior to registration and issuance of Title Deed to the Suit Property, the prerequisites of the law were duly complied with by the 3rd Respondent.

14. It is further stated that at the time of sale and transfer the Suit Property was under occupation by several squatters who were conducting farming activities within the suit property but an assessment to establish the nature of the farming activities was carried and eventually the squatters were compensated for their crops and duly acknowledged receipt and confirmed that they were merely squatters with no rights over the property and moved out of the Suit Property. The 3rd Respondent has annexed to the said Affidavits copies of application for consent and letter of consent, title deed, transfer, valuations and agreements signed by the squatters.

15. The 3rd Respondent further states that the particulars of paragraph 20 of the Petition are misleading because at all material times, the vendor, Mpareni Katama Mtile was an adult of sound mind who initiated and conducted **Succession Cause No.120 Of 1993**, and that he signed all documents using his left thumbprint. Copies of the said petition for letters of administration and affidavit are attached. They deny that the deceased was under any disability at the time of sale and transfer and state that he was a willing participant who received due consideration for the sale and proceeded to execute all the requisite documents to facilitate transfer and registration. It is also stated that all prerequisite consents were obtained in registering the 3rd Respondent in accordance with Section 20 (1) of the Land Control Act.

16. The 3rd Respondent avers that paragraphs 24 and 25 of the Petition are contradictory with paragraph 8 of the Supporting Affidavit and that this is a clear indication that the petition is premised on fabricated facts and designed to hoodwink the court.

17. The 3rd Respondent avers that it has been in occupation since the purchase in 1993 without interruption and was a bona fide purchaser for value and without notice. The allegation that the deceased was holding the Suit Property in trust for the Petitioners and others is denied.

18. The 3rd Respondent states that the allegation that Section 28 of the Registered Land Act is unconstitutional is a misconception because the Section does not specifically bar recourse to courts of law and the alleged matters of fraud and breach of law could have been raised in court for determination at the right time.

19. It is the 3rd Respondent's contention that the Petition herein is out of the limitation of time in so far as it contains actions founded on recovery of land contrary to Section 7 of the Limitation of Actions Act. That the Petitioners have not brought their claim within exceptions if any to the limitation of actions or sought and/or obtained any extension of time. It is further the 3rd Respondent's contention that the Petitioners rights were limited by the transfer made on 17th August 1993 and registered on 7th September 1993 which limited and extinguished the deceased's and consequently the Petitioners' rights. It is averred that the Petition is an abuse of the Court process calculated to escape the Limitation of Actions Act as it raises stale claim for recovery of land which claim in any event is time barred and has been mischievously disguised as an issue relating to infringement of fundamental rights. It is the Respondents contention that the 3rd Respondent acquired the Suit Property lawfully and legally and urged the Court to have the petition struck out or dismissed.

D. The Petitioners' submissions

20. The Petitioners filed their submissions on 20th February 2014 and were highlighted by their counsel who submitted that the 3rd Respondent did not avail 3 crucial documents, namely; agreement for sale, minutes of the Land Control Board and a Certificate of Confirmation of Grant. He further submitted that the suit is not statute barred as the Petitioners realized that the property had been transferred to the 3rd Respondent in 2005 and that is when time started running. It is the Petitioners submission that the Suit Property was unlawfully acquired by the 3rd Respondent and that there is no time Limitation on constitutional Petitions. They relied on the cases of **Wanjiku Nganga Vs Njenga Nganga (2005) eKLR; Rashid Odhiambo Aloggoh & 245 Others Vs Haco Industries Ltd, Civil Appeal No.110 Of 2001; C.O.M Vs Standard Group Limited & Another (2013) eKLR; Hussein K. Khan Bahi & Another Vs Dzito Mwapanga & Another (2004)eKLR And Thabita Kamwangi Vs John Gitonga Njeru & Another (2006)eKLR.**

E. 3rd Respondent's submissions

21. The 3rd Respondent filed its written submissions on 7th March 2017 and was briefly highlighted by their counsel. It was submitted that the Petition seeks to nullify a title deed issued in 1993 hence the constitution of Kenya, 2010 cannot apply as the same cannot act retrospectively. It was further submitted that the Petition is a civil claim disguised as a constitutional petition and the proper forum is a civil suit in a civil court where proper hearing would be conducted. They relied on the case of **Charles Ratemo Nyambati vs Jacton Ocharo & 4 others (2016) eKLR and Abdallah Mangi Mohamed vs Lazarus Beja & 5 others (2012)eKLR.**

22. The 3rd Respondent also submitted that as the Petition raises an issue of trust, the same could be dealt with in a civil suit where the same must be proven. They relied on the case of **Grace Mwayitsi Luyundi vs Edward Kaunda Anyanda & another (2007)eKLR** and the case of **Phillicery Nduku Mumo vs Nzuki Makau, and Edward Kipkosgei Cherurbii & Another vs Charles K. Kosgei & Another (2014) eKLR.** It is the 3rd Respondent's submission that the issue of fraud cannot be tested by way of affidavit evidence, and being a criminal act, the burden of proof is on the party who alleges it and that the proof is more than a mere balance of convenience. They cited the case of **Charles Karathe Kiarie & others vs Administrators of the Estate of John Wallace Mathare & 5 others.**

23. The 3rd Respondent further submitted that consent to transfer was given and there was no requirement for the owner to invite the Petitioners. They also submitted that no evidence was availed to prove the allegations that the deceased was sick and could not comprehend what he was doing.

24. It is further the 3rd Respondent's submission that the Petitioners claim is barred by the Limitation of Actions Act.

F. Decision

25. Having analyzed the pleadings and the submissions filed, I am of the view that the issues for determination are as follows:

i. Whether this Court has jurisdiction to determine this matter

ii. Whether Section 28 of the Registered Land Act (repealed) is unconstitutional.

iii. Whether the process of acquisition of TITLE MBWAKA/MAERENI/112 by the 3rd Respondent was unconstitutional.

iv. Whether the Petitioners' constitutional rights have been violated by the Respondents.

v. Whether the Petitioners are entitled to the reliefs sought.

Issue i: whether this Court has jurisdiction to determine this matter.

26. In the case of the Owners of Motor Vessel 'Lilian's vs Caltex Oil Kenya Limited (1989)KLR 1653(CA), the Court of Appeal stated as follows:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

In the case of John Kipng'eno Koech & 2 others vs Nakuru County Assembly & 5 Others (2013) eKLR, Emukule, J had this to say on jurisdiction:

“Jurisdiction is the practical authority granted to a formally constituted legal body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. It is the scope, validity, legitimacy or authority to preside or adjudicate upon a matter.”

27. A Court's jurisdiction flows from either the constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. Article 162(2) of the constitution of Kenya provides that parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Subsequently, the Environment and Land Court Act 2011 was enacted. The preamble to the ELC Act provides that it is an Act of Parliament to give effect to Article 162(2)(b) of the Constitution Section 13 of the said Act provides as follows:

13(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other written law relating to environment and land.

Such disputes are provided in Section 13(2) and what is set out thereon are not conclusive and therefore the Court can hear any other dispute relating to the environment and land.

28. The dispute in the petition herein being over land **TITLE NO.MBWAKA/MAERENI/112** falls within the purview of Article 162 (2)(b) of the Constitution and the ELC Act. I therefore find that the petition is properly before this Court and the Court has jurisdiction to determine the dispute.

Issue ii: Whether Section 28 of the Registered Land Act (repealed) is unconstitutional

29. It is the Petitioner's case that prior to the year 1993, the Suit Property was registered in the name of Mpareni Katama Mtile (deceased) and was solely used by the deceased and the Petitioners for family farming. That though the property was in the name of the deceased, the deceased held it as a trustee for the Petitioners and other family members. The Petitioners contend that in the year 2005, they discovered that the 3rd Respondent had a title deed to the property. The Petitioners aver that though their recourse lay in filing a Civil Suit in a Court of law to challenge the title of the suit property held by the 3rd Respondent, Section 28 of the Registered Land Act (now repealed) stood on their way. The Petitioners want the said Section of the Law declared unconstitutional.

30. Section 28 of the Registered Land Act (repealed) provided as follows:

28 The rights of a proprietor whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by Section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

31. The current land regime is that set out in the Land Registration Act, 2012 and the Land Act, 2012 which have codified the law that was previously set out in a number of repealed statutes, including the Registered Land Act, Cap 300. The rights of a proprietor are set out in Section 25 of the Land Registration Act, 2012 which has the same provisions as those in Section 28 of the Registered Land Act (repealed) it will be noted that both Section 25 of the Land Registration Act and Section 28 of the Registered Land Act (repealed) do not relieve a proprietor of any duty or obligation to which he is subject to as a trustee.

32. In addition to the overriding interests provided for under Section 30 of the Registered Land Act (repealed), the overriding interests alluded to in Section 25 of the Land Registration Act are set out in Section 28 and includes spousal rights over matrimonial property, trusts including customary trusts and rights acquired or in the process of being acquired by virtue of any written law relating to the Limitation of Actions or by prescription.

33. For completeness I now wish to reproduce Section 27 of the Registered Land Act (repealed) before I consider the complaint by the Petitioners regarding Section 28. Section 27 provided as follows:

27. Subject to this Act:

a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

34. It is conceded that the rights of a registered proprietor of land are absolute and indefeasible and are only subject to the rights and encumbrances noted on the register and overriding interests set out in Section 30 of the Registered Land Act (repealed). However, trusts are subject to protection under the Act. The registration of the land in the name of the deceased and later in the name of the 3rd Respondent under the Registered Land Act in my view did not extinguish the Petitioners rights and neither did it relieve the deceased of his duties or obligations under Section 28 as a trustee. Such claims may stem from

the possession and occupation of the land. Moreover Section 143 (1) of the repealed Registered Land Act empowered the Court to order the rectification of the Registration to be cancelled if it was obtained by fraud or mistake. I do not therefore agree with the Petitioners contention that Section 28 left them without a remedy and should be declared unconstitutional. Further, the Registered Land Act has since been repealed and therefore declaring the said Section unconstitutional would be an exercise in futility. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant the remedy when it is no longer necessary or has been overtaken by events.

Issue iii: Whether the process of acquisition of TITLE NO. MBWAKA/MAERENI/112 by the 3rd Respondents was unconstitutional

35. From the evidence on record, the 3rd Respondent purchased the Suit Property from Mpareni Katama Mtile (deceased) for valuable consideration. The deceased, who was the Petitioners father, was the registered owner of the subject property. The deceased who died on 17th February 2004 executed a transfer document transferring title and all interests over the suit property to the 3rd Respondent and the title was issued in favour of the 3rd Respondent on the 7th September 1993. The record also shows that prior to the registration and issuance of title deed, the prerequisites of the law were duly complied with by the 3rd Respondent. They have annexed to their affidavits an application for consent of land control Board dated 14th May 1993 and Letter of Consent dated 6th August 1993. In addition, evidence has been shown that the squatters who were in occupation were duly compensated and vacated from the land. There is no evidence that the petitioners were in possession and remained in occupations. I find it hard to believe that the Petitioners were in occupation and were not aware of what was happening until the year 2005 as alleged. If indeed they were in occupation, and had an interest in the land, they could have been compensated as the other squatters or they could have raised their objection then against the 3rd Respondent or their father who was still alive.

36. The deceased as the registered proprietor had the absolute and indefeasible right over the property and he could deal with or dispose of it as he wished and therefore had the right to sell it to the 3rd Respondent as he did without seeking consent from anybody else. The Petitioners allege that the deceased was by 1993 aged over 84 years, sickly and illiterate and was always assisted to walk. However, no evidence was adduced to support these allegations. In particular no evidence was adduced to show that the deceased was incapacitated in any manner. It is therefore my conclusion that the process in which the 3rd Respondent acquired the Suit Property was not unconstitutional.

Issue iv: Whether the Petitioners constitutional rights have been violated by the Respondents:

37. The Petitioners contend that they were not consulted over the sale and transfer of the Suit Property to the 3rd Respondent and that by failing to consult them and obtain their consent, the Respondents discriminated against them. In my view, and as already concluded, the Respondents had no obligations to consult the Petitioners as they were not the owners nor had interest in the land. As already noted, the squatters who were on the land had their property assessed and were duly compensated. It is doubtful that the Petitioners were in occupation as no evidence has been shown to the Court. The Petitioners have not demonstrated under what circumstances the Respondents were expected to consult and seek their consent.

38. The Petitioners have also complained that the provisions of Section 28 of the repealed Registered Land Act stood in their way and prevented them from challenging the acquisition of the Suit Property by the 3rd Respondent through a Civil Suit. As already stated, the said Act, and in particular Section 143 gave the Petitioners the remedy to challenge the title of the 3rd Respondent if they felt that the same was acquired illegally or fraudulently.

39. The Petitioners also complain that they have been deprived the use and possession of the suit land contrary to Article 40 of the Constitution. My view is that this was private land and the proprietor had the legal right to sell it to a willing buyer voluntarily and the 3rd Respondent followed the law in its acquisition. Moreover, it has been shown that those who were in occupation were adequately

compensated. My conclusion therefore is that the Petitioners constitutional rights have not been infringed as alleged. There being no infringement of their rights, I do not see how the issue of compensation can come in. One cannot be heard asking for compensation over land which he has no rights over. I therefore find, in addition to finding that there has been no violation of the constitutional right to property, find that there has been no violation of the right to compensation.

Issues v: Whether the Petitioners are entitled to the reliefs sought

40. The Petitioners have failed to prove that their constitutional rights have been infringed. They are therefore not entitled to any of the reliefs sought in the Petition.

Conclusion

41. In conclusion, I am not satisfied that the Petitioners have made out a case to show that their constitutional rights have been violated. It is my finding that the Petition has no merit and hereby dismiss it with costs to the Respondents.

It is so ordered

Dated, signed and delivered at Mombasa this 22nd day of January 2018

C. YANO

JUDGE