



**REPUBLIC OF KENYA**

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

**ELC PETITION NO 518 OF 2017**

**IN THE MATTER OF ARTICLES 19, 22, 23,40,47,50, AND 64 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF CONTRAVENTION OF THE RIGHTS TO PROPERTY & PURPORTED REVOCATION OF TITLE NO. LAIKIPIA/KINAMBA/MWENJE BLOCK 1/1311 VIDE GAZETTE NOTICE NO. 13287 OF 27<sup>TH</sup> SEPTEMBER 2013**

**BETWEEN**

**ELIJAH GITHINJI CHARARA.....PETITIONER**

**VERSUS**

**COUNTY LAND REGISTRAR LAIKIPIA .....1<sup>ST</sup> RESPONDENT**

**HON ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**AND**

**ZAKAYO KAMAU THEURI.....INTERESTED PARTY**

**JUDGEMENT**

1. On the 20<sup>th</sup> June 2014, the Petitioners filed their Petition and a Notice of Motion dated 19<sup>th</sup> June 2014.
2. On the 20<sup>th</sup> June 2014, the matter was placed before the Hon Judge H. Omondi, sitting at the Nakuru High Court, under certificate of urgency who issued the following orders :
  - i. That the application is certified Urgent
  - ii. That pending the hearing of the application interpartes, a conservatory order do issue restraining the interested party from selling, transferring, charging, leasing, disposing, or in any other manner adversely dealing with Title No. Laikipia/Kinamba/Mwenje Block 1/1311
  - iii. Interparte hearing for the 2<sup>nd</sup> July 2014.
3. On the 2<sup>nd</sup> July 2014, Counsel for both the Interested Party and the Respondents informed the court that they had not filed their respective responses to the application and sought for 30 days to file the same.
4. The court granted them all 14 days to respond with corresponding leave to the Applicant/Petitioner to file supplementary application within 7 days upon service. The matter was rescheduled for interpartes hearing on the 17<sup>th</sup> September 2014 and interim orders were extended.
5. On the 17<sup>th</sup> September 2014 when the matter came up for hearing, both the Interested Party and the Respondents had not filed their responses to the application and Counsel for the Respondent conceded to the Application since it did not affect her client. Counsel for the Petitioner/Applicant requested the court for the orders as prayed since the application was unopposed.

6. A Ruling was delivered on the 16<sup>th</sup> December 2014 wherein the court found that the petitioner's application was merited and issued conservatory orders restraining the Interested Party from selling, transferring, charging, leasing, disposing, or in any other manner adversely dealing with Title No. Laikipia/Kinamba/Mwenje Block 1/1311 until the petition was heard and determined.

7. Subsequently the matter was transferred to the now established High Court at Nyahururu wherein on the 14<sup>th</sup> December 2017 it was erroneously listed before the High Court and thereafter brought before me wherein Counsel for the Petitioner Mr. Gakuhi Chege, requested for a hearing date for the Petition and so as to enable him serve.

8. The matter was fixed for hearing on the 15<sup>th</sup> March 2018 on which day, despite notice having been served, neither the Interested Party nor the Respondents had filed their responses to the petition. Further, they were not present to seek the court's indulgence or proceed with the matter which then proceeded ex-parte on the Petitioner's filed Petition and supporting affidavit thereto.

### **The Petitioner's Case**

9. The Petition was drawn and filed by Gakugi Chege & Company Advocates and is supported by an affidavit sworn on 19<sup>th</sup> June 2014 by Elijah Githinji Charara, the Petitioner herein.

10. The Petitioner's claim is to the effect that he acquired the suit land Parcel No. Laikipia/Kinamba/Mwenje Block 1/1311 for valuable consideration from the previous proprietor one James M. Japheth and was duly issued with a title deed on the 10<sup>th</sup> March 2011. That he had been in possession of the land since then.

11. On the 13<sup>th</sup> May 2013, when he conducted a routine official search of the property, he learnt that the interested party had registered a caution against the title on the 20<sup>th</sup> April 2012.

12. That subsequently he had received a demand letter from the Interested Party's Counsel requiring him to surrender his title deed to the lands office for cancellation on claims that the Interested Party had acquired the land through purchase from the original allottee.

13. On the 15<sup>th</sup> July 2013 he filed an application against the Interested Party in the Nyahururu Principal Magistrate's Court in Miscellaneous Application No. 15 of 2013 seeking orders for the removal of the Caution. The Interested Party also filed his pleadings therein but while the proceedings were still pending, his counsel received a letter from the interested party to the effect that the Petitioner's title had been cancelled by the 1<sup>st</sup> Respondent vide Kenya Gazette Notice No. 13287 of the 27<sup>th</sup> September 2013.

14. The Petitioner lamented that despite his effort to try and find out the true position in the Laikipia land Registry, he was met with the response that that Register was missing. However on the 6<sup>th</sup> May 2014, his Counsel successfully applied for the abstract of the Title to the suit land which confirmed the cancellation of his title as the proprietor of No. Laikipia/Kinamba/Mwenje Block 1/1311.

15. The Petitioner's issue was that prior to the cancellation, he had neither received any notice or communication from the County Land Registrar Laikipia that his title was in the process of being cancelled nor was he accorded a hearing before the decision was made.

16. The Petitioner contended that the 1<sup>st</sup> Respondent was under a Constitutional obligation to give reasons for his action as he believed that the he, 1<sup>st</sup> Respondent, had no powers under the Law to cancel his title and thus his action amounted to expropriation of his property without compensation and without due process.

17. That further, his Constitutional right to own private property had been infringed and he now sought for redress through the present Petition.

18. The Petitioner annexed the following documents in support of his Petition.

i. A copy of the Official search marked as EGC 1 (a) obtained before the purchase of the suit land.

ii. A copy of his title deed marked as EGC 1(b).

iii. A copy of the subsequent official search showing the registration of the caution by the interested party marked as EGC 2.

iv. A copy of the demand letter marked as EGC 3.

v. A copy of the reply to the demand letter marked as EGC 4.

vi. A copy of the Nyahururu Principal Magistrate's Court Miscellaneous Application No. 15 of 2013 marked as EGC 5.

vii. Copies of the Interested Party's notice of appointment of Advocate and Notice of Preliminary objection marked as EGC 6(a) and (b).

viii. Copies of the letter informing him of the cancellation of his title, gazette notice, official search and title issued to the interested Party marked as EGC 7(a) (b) (c) and (d) respectively.

ix. Copies of the application and abstract of title marked as EGC 8(a) and (b) respectively.

19. The Petitioner thus prayed inter alia, for the following orders:

i. A declaration that the cancellation of the Petitioner's registration as the proprietor of title No. Laikipia/Kinamba/Mwenje Block 1/1311 on the 29<sup>th</sup> October 2013 is constitutionally invalid, null and void.

ii. An Order for re-instatement of the petitioner's registration as proprietor of title No. Laikipia/Kinamba/Mwenje Block 1/1311 forthwith.

iii. Costs of this Petition. Any other relief deemed fit and just to grant by the Honorable court.

20. I have considered the Petitioner's Petition. Of interest are the entries made by the 1<sup>st</sup> Respondent against land parcel No. Laikipia/Kinamba/Mwenje Block 1/1311 which I herein produce as follows;

**i. Entry No. 1-Government of Kenya – registered on 19<sup>th</sup> April 1989**

**ii. Entry No. 2 – Transfer to James M, Japheth on 10<sup>th</sup> December 2002**

**iii. Entry No 3 - registered in the name of James M, Japheth on 28<sup>th</sup> March 2007.**

**iv. Entry No. 4 –Transfer to Elijah Githinji Charara on 10<sup>th</sup> March 2011**

**v. Entry No.5 -registered in the name of Elijah Githinji Charara on 10<sup>th</sup> March 2011.**

**vi. Entry No. 6 – Caution by Zakayo Kamau Theuri claiming bonafide owner interest on the 20<sup>th</sup> April 2012**

**vii. Entry No 7- on 29<sup>th</sup> October 2013-Cancellation of entry No 2-6 vide registration of instrument Gazette Notice No 132877 of 27<sup>th</sup> September 2013.**

**viii. Entry No. 8 Transfer to Zakayo Kamau Theuri on 30<sup>th</sup> October 2013**

**ix. Entry No 9 - registered in the name of Zakayo Kamau Theuri on the 30<sup>th</sup> October 2013.**

**21. Issues for determination;**

i. Whether the 1<sup>st</sup> Respondent's action of cancelling the Petitioner's title contravened Article 47 of the Constitution.

ii. Whether Article 40 of the Constitution was violated.

iii. Whether the Petitioner is entitled to the reliefs sought in the petition.

**22. On the first issue as to whether the 1<sup>st</sup> Respondent's acts of cancelling the Petitioner's title contravened Article 47 of the Constitution, I shall have to look at the provisions of the said Article which stipulate as follows;**

**47(1)Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) If a right of fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

23. From the Petitioner's annexure herein marked as EGC 7(b), the 1<sup>st</sup> Respondent issued a Notice in the Kenya Gazette Notice No. 13287 of the 27<sup>th</sup> September 2013 titled, "*Registration of Instrument,*" wherein he purported to cancel the Petitioner's title on the basis that it had been obtained fraudulently and efforts to compel the petitioner to surrender it for cancellation having failed, after the expiration of a 30 days' notice, his title stood cancelled.

24. A reading of the Petitioner's Petition and his grievance is clear to the effect that he stood to be affected adversely by the 1<sup>st</sup> Respondent's actions of cancelling his title since he had acquired the rights and interests in the suit property by virtue of its registration on the 10<sup>th</sup> March 2011. In terms of Article 47 (1) and (2) of the Constitution, the 1<sup>st</sup> Respondent was therefore under an obligation to ensure that the Petitioner was given an opportunity to be heard before any action that was adverse to his rights over the suit property was taken away from him.

25. The Petitioner pointed out that prior to the cancellation of his title, he had neither received any notice or communication from the County Land Registrar Laikipia, the 1<sup>st</sup> Respondent herein, that his title was in the process of being cancelled nor was he accorded a hearing before

the decision was made a fact which was not disputed as there was no response from either the 1<sup>st</sup> nor the 2<sup>nd</sup> Respondents herein.

26. Under Section 60 of the Registration of Titles Act, Cap 281, Laws of Kenya (now repealed) the Registrar is required to summon the holder of a title in respect of which an erroneous entry has been made or a fraudulent title has been issued to deliver the title for correction failing which the registrar has to apply to the court for such person to be summoned. The Registrar can only cancel or correct a title pursuant to an order of the court under Section 61 of the Registration of Titles Act (repealed).

27. Although the Registration of Titles Act together with other Acts were repealed following the enactment of the Land Registration Act No. 3 of 2012, Section 107 of the Land Registration Act, 2012 provides that any right, interest, title, power or obligation acquired, accrued or established under the repealed Acts would continue to be governed by the law applicable to it immediately prior to the commencement of the new Act. The petitioner's rights and interests to the suit property having been acquired before the coming into force of the Land Registration Act would therefore stand to be construed under the provisions of the Registration of Titles Act.

28. By virtue of Section 107 of the Land Registration Act, 2012 thereof, the Registrar of Titles had no power to cancel the entries against the title of the suit property as he did.

29. The Petitioner herein contends that his rights over the ownership of parcel No. Laikipia/Kinamba/Mwenje Block 1/1311 have been contravened through the unlawful and arbitrarily cancellation of his title by the 1<sup>st</sup> Respondent.

30. The issue of the constitutionality of the revocation of titles by the Registrar was decided in the cases of **Kuria Greens Ltd –vs- Registrar of Titles & Another [2011] eKLR** and **Isaac Gathungu Wanjohi & Another –vs- Attorney General & 6 Others [2012] eKLR**, where it is now settled law that a Registrar has no power to cancel title.

31. In **Chemei Investments Limited v The Attorney General & Others Nairobi Petition No. 94 of 2005 (Unreported)** the court emphasized that even where property is acquired unlawfully, the finding of “*unlawful acquisition*” contemplated in **Article 40(6)** must be through a legally established process and not by whim or revocation by Gazette Notice.

32. Having regard to the petitioner's Petition herein, I find that the 1<sup>st</sup> Respondent's action of cancelling the petitioner's title denied the petitioner a fair chance to defend his title thereby contravening the provisions of Article 47 (1) and (2) of the Constitution thereby failing to afford the Petitioner fair administrative action. Consequently the same cannot stand.

33. The 1<sup>st</sup> Respondent ought to have given the Petitioner an opportunity to state his case before reaching the decision that has such far reaching ramifications. The Petitioner ought to have been called upon to explain how it had acquired the suit land considering that the 1<sup>st</sup> Respondent had himself issued a Certificate of Title to the Petitioner. I also find that the 1<sup>st</sup> Respondent did not follow due process of affording the Petitioner a fair hearing pursuant to Article 50 (1) of the Constitution which stipulates as follows;

**(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or; if appropriate, another independent and impartial tribunal or body.**

34. On the second issue for determination as to whether Article 40 of the Constitution was violated, the provisions of the said Article more so Article 40(3) are to the effect that:

**40(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) 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 first 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.**

**(4) .....**

**(5) .....**

**(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.**

35. It is trite law that the Torrens System is applicable in Kenya to the effect that the title of a bonafide purchaser for value without notice of fraud cannot not be impeached. The Court of Appeal in the case of **Charles Karathe Kiarie & 2 Others –vs- Administrators of Estate of John Wallance Muthare (deceased) & 5 others [2013] eKLR**, held as follows:

**‘The Registration of Titles Act is entirely a product of the Torrens System of registration. The word “Torrens” is derived from Sir Robert Torrens, the third premier of South Australia and pioneer and author of a simplified system of land transfer which he introduced in 1958. This system emphasizes on the accuracy of the land register which must mirror all currently**

active registrable interests that affect a particular parcel of land. Government as the keeper of the master record of all land and their owners guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration the person affected is guaranteed of government compensation. This statutory presumption of indefeasibility and conclusiveness of title under the Torrens System can be rebutted only by proof of fraud or misrepresentation which the buyer is himself involved.'

36. The Petitioner has averred that he acquired the suit land Parcel No. Laikipia/Kinamba/Mwenje Block 1/1311 for valuable consideration from the previous proprietor one James M. Japheth and was duly issued with a title deed on the 10<sup>th</sup> March 2011 thereby making him a bonafide purchaser for value without any notice of any defect in the title.

37. Once the Petitioner demonstrated that his title was not acquired the title fraudulently, the title was: in terms of Section 23 (1) of the Registration of Titles Act, (now repealed) but adopted under the new Section 26 (1) of the Land Registration Act, absolute and indefeasible, unless it is shown that it was obtained through fraud or misrepresentation to which the title holder is proved to have been a party to.

38. Section 23 (1) of the Registration of Titles Act provides as follows:-

**(1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive of evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.**

39. Section 26 (1) of the Land Registration Act provides:-

**(1) The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-**

**a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

40. From the above provisions it is clear that a title can only be challenged on grounds of fraud or misrepresentation in obtaining the same and in such case, the registered proprietor has to be shown to have been a party to the fraudulent or illegal activities that led to him being registered as owner. The rectification of the register in regard to a registered title can only be effected if fraud is proved under Section 80 of the Land Registration Act, 2012.

41. Section 80 (1) provides thus:-

**(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained made or omitted by fraud or mistake.**

**(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.**

42. The Respondents herein did not tender any evidence to show that the Petitioner acquired the subject suit from James M. Japheth or that he was aware that James M. Japheth had acquired the property fraudulently from the Government of Kenya so that it can be said that he had knowledge of the fraud.

43. The title of the petitioner in this instance would only lose protection of the Constitution if the Petitioner is proved to have acquired the property fraudulently and/or had knowledge of the fraud. In the present case, the petitioner has demonstrated that he was a bonafide purchaser without any notice of any fraud which assertion has not been controverted by either the Respondents or the Interested Party herein.

44. In the result therefore I find the Petitioner has proved his case on a balance of probabilities as against the Defendants and I enter judgment for the Petitioner in the following terms:-

i. The cancellation of the Petitioner's registration as the proprietor of title No. Laikipia/Kinamba/Mwenje Block 1/1311 on the 29<sup>th</sup> October 2013 is **hereby declared** constitutionally invalid, null and void.

ii. **The Registrar of Titles is hereby directed to reverse the entry effected on the 29<sup>th</sup> October 2013 cancelling entries number 2, 3, 4, 5 and 6 on the register of No. Laikipia/Kinamba/Mwenje Block 1/1311 and is ordered to re-instate the petitioner's registration as proprietor of title No. Laikipia/Kinamba/Mwenje Block 1/1311 forthwith.**

iii. The Petitioner be and is hereby awarded costs of the Petition.

iv. The Registrar of Titles is directed to publish these orders in the Kenya Gazette within 21 days from the date hereof.

**Dated and delivered at Nyahururu this 31<sup>st</sup> day of May 2018.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**