



Bundotich & 3 others v Kenya Forest Service (Environment & Land Petition E005 of 2022) [2024] KEELC 511 (KLR) (30 January 2024) (Judgment)

Neutral citation: [2024] KEELC 511 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT & LAND PETITION E005 OF 2022**

**L WAITHAKA, J
JANUARY 30, 2024**

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 22, 27, AND 40 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

SAMUEL KIPTARUS BUNDOTICH & 3 OTHERS PETITIONER

AND

KENYA FOREST SERVICE RESPONDENT

JUDGMENT

Introduction

1. By a Petition dated 26th July 2022 and amended on 5th October 2022, the petitioners seek judgment against the respondent, Kenya Forest Service (KFS), for;
 - i. A declaration that the respondent has violated their right to own the suit property as enshrined in Article 40 of the *Constitution*;
 - ii. A conservatory order of injunction to restrain the respondent, any authority or person-legal or otherwise from entering or interfering in any manner whatsoever with their quiet possession, ownership, use and/or occupation of the suit properties;
 - iii. Costs of the Petition.
2. The Petition is premised on the grounds that the petitioners are the registered owners of the suit properties namely, plots nos. 873, 875, 876, 879, 880 to 892, 894, 897, 898, 899, 901, 902, 905, 906, 908, 910, 911, 912, 913 and 919; that on or about 22nd July 2022, the respondent through its agents, employees and/or servants entered into and/or invaded their land, cut trees and dug trenches with the intention of planting trees on their land.



3. Asserting that the respondent has interfered with or violated their legal and constitutional rights, the petitioners filed the instant petition seeking the reliefs listed above.
4. The respondent filed a response to the petition and a cross-petition dated 30th March 2023 denying the petitioner's contention that they are the legal or registered owners of the suit properties and that it invaded the suit properties and committed the acts it is alleged to have committed.
5. Terming the Petition incurably defective, incompetent, frivolous, scandalous and devoid of substance, the respondent contend that the Petition does not meet the threshold for pleading constitutional violation set out in *Anarita Karimi Njeri vs. Republic* 1976-1980 klr 127. The respondent's further contend that the Petition is *res judicata* Petition No. 15 of 2015 which the petitioners had filed but voluntarily discontinued.
6. It is the respondent's case that the petitioners in collusion with individuals from the Ministry of Lands, attempted to alienate part of Kapchorua forest which is gazetted as state forest by subdividing it into numerous plots and causing titles to be issued to them when they knew or ought to have known that the plots were not available for allocation or alienation.
7. The respondent avers that records confirm that Kapchorua forest blocks, consisting of four separate portions lying within and forming part of Kerio native land was gazetted and declared as Kapchorua forest vide Proclamation No.102 of 1941; that through the Proclamation, Kapchorua forest blocks namely Block 1 measuring 350 acres, Block II measuring 290 acres, Block III measuring 150 acres and Block IV measuring 360 acres;
8. The respondent has further pleaded that vide legal notice No. 500 of 1962, the boundaries of Kapchorua forest blocks were altered to the extent that Block 11 and 111 were excised from Kapchorua forest and boundaries of the two blocks clearly defined and delineated; that as a result of the excision, Block II and III ceased to be Kapchorua blocks but Block I and IV remained part of the forest; that vide legal notice No. 174 of 1964, the new boundaries of Kapchorua forest were defined as a piece of land measuring approximately 710 acres situated approximately 28 miles south of Tambach township and became central forest.
9. It is the respondent's case that legal notice no. 174 of 1964 has never been degazetted.
10. Asserting that the boundary of Kapchorua forest is as delineated in boundary plan No.180/10, the respondent states that between 2008 and 2014, some residents of Kapchorua attempted to illegally, unlawfully and irregularly acquire portions of the remaining forest, particularly Block IV.
11. Maintaining that the suit properties were created and/or derived out of Block IV of Kapchorua forest irregularly and fraudulently hence null and void, the respondent prays for judgment against the petitioners for:-
 - i. A declaration that the petitioner's titles known as Mosop/Kapchorwa plot Nos. 873, 875, 876, 879, 880 to 892, 894, 897, 898, 899,901, 902, 905, 906,908, 910, 911, 912, 913 and 919 were fraudulently and unlawfully acquired and a nullity *ab initio* for being part of gazetted block IV of Kapchorua forest;
 - ii. An order cancelling the petitioner's titles known as plot Nos. 873, 875, 876, 879, 880 to 892, 894, 897, 898, 899,901, 902, 905, 906,908, 910, 911, 912, 913 and 919 all entries made in the register thereof;



- iii. An order of permanent injunction restraining the petitioners, their servants, agents and/or any other person acting under them, from ever laying claim, interfering with or in any manner dealing with the suit properties.
12. The petitioners filed a response to the respondent's response and cross-petition vide a replying affidavit of Daniel Korir Bundotich filed on 12th June 2023. He avers that the Petition is not *res judicata* as Petition No. 15 of 2015 was discontinued without being heard and finally decided on by the court; that the suit properties do not lie in Block IV of Kapchorua forest; that the respondent's claim concerning gazette notice No. 1, Proclamation No. 102 of 6th December 1941 are not in tandem with the gazette notice; that gazette notice No. 174 of 1964 excludes Block IV which had been degazetted vide Proclamation No. 102 of 1941 and that land officials at Ardhi house conducted due diligence to ascertain that the suit property is not forest land before issuing titles in their favour.
13. The petition was heard by way of viva voce evidence

Evidence

Petitioners Case

14. PW1 Isaac Kiprotich Kiptoo, relied on his statement recorded and signed on 25th August 2023 after it was adopted as his evidence in chief. He stated that he is the registered owner of the parcels of land known as Mosop/Kapchorua/910 and 919 and was testifying on his own behalf and on behalf of all other petitioners. He produced certificates of search (16) in respect of the following parcels of land:- Mosop/Kapchorua 873, 875, 878, 880, 882, 884, 886, 892, 894, 897, 899, 901, 902, 905, 911 and 913 and stated that the parcels are not within forest land.
15. Concerning annexure AM1 in the replying affidavit of Antony Musyoka, he stated that paragraph 2 of the gazette notice clearly states that the suit property (which is listed as 10 in the 1st schedule of the gazette notice ceased to be forest land).
16. According to him the forest land was degazetted in 1941. He stated that he is not aware of any other gazette notice gazetting Kapchorua forest as forest land.
17. In cross examination, he stated that according to the amended Petition, the persons who moved the court are Bundotich Kimugul and Benjamin Kiprotich. He acknowledged that the amended Petition does not state that they have brought the Petition on behalf of others (The amended Petition was filed on 5th October 2022 when Bundotich Kimugul had passed on, as he died on 17th June 2019). He gave that information in Eldoret Petition No.15 of 2015.
18. He admitted that their parcels of land are located within Kapchorua Block IV. He stated that he is aware of existence of Kapchorua forest but not existence of Block 1 to IV which were gazetted as Kapchorua forest. He stated that he is not aware when the gazette took place and that the gazette notice of 1941 is the one which gazetted the forest.
19. He admitted that the gazette notice of 1941, paragraph 2 of the first schedule, removed some areas as forest land and declared others as forest land as per paragraph 3 of the 3rd schedule paragraph 3 and acknowledged that their land features in the gazette notice Proclamation No. 102.
20. Concerning legal notice No.500 of 1962 (Annexure AM 2) in the respondents replying affidavit, he stated that he does not agree that Block II and III were exercised as part of Kapchorua forest. He further stated that the gazette notice degazetted parts of Kapchorua forest to wit Block II and III and that the other blocks remained as forest land.



21. He admitted that their parcels of land fall under Block IV which is not named as one of the degazetted areas as per gazette notice No.500. That notwithstanding, he informed the court that there is human settlement in the area.
22. He admitted that legal notice No.174 dated 20th May 1964 which is a declaration of central forest, supersedes the other gazette notices which had been previously issued. He acknowledged that Kapchorua forest is one of the forests that were declared as central forest by Proclamation No. 102 of 1941 and legal notice No. 500 of 1962. That notwithstanding, he denied the respondent's contention that their parcels of land were issued over gazette forest area.
23. He stated that their land was under the defunct County Council of Elgeyo Marakwet and that the Land Control Board gave them consent to obtain titles. He stated that he is not aware that their land was trust land and was not aware of the procedures that exist to degazette trust land.
24. In reexamination, he stated that although Bundotich Kimugul is deceased, all the other petitioners are alive.
25. He stated that according to annexure AM 1, Kapchorua forest falls under the 1st schedule and that legal notice No. 500 (AM 2) did not affect Kapchorua Block IV. It only affected Block II and III.

Respondent's Case

26. RW1 Antony Musyoka, the Regional Forest Conservator North Rift Region, relied on his replying affidavit sworn on 30th March 2023 after it was adopted as his evidence in chief and the affidavit he swore in support of the respondent's cross petition after they were admitted as his evidence in chief. He produced the documents annexed to his replying affidavit namely gazette notice, Proclamation No. 102 as Rexbt 1, legal notice No. 500 as Rexbt 2, legal notice No.174 as Rexbt 3, Boundary plan No.180/10 showing Blocks 1, II, III and IV as Rexbt 4; boundary plan showing neighbouring plots as Rexbt 5; a map showing Kapchorua block IV (47 plots as Rexbt 6); pleadings filed in Eldoret ELC Petition No.15 of 2015 filed by the petitioners which was withdrawn as Rexbt 7; complete version of Proclamation notice No. 102 of 1941 as Rexbt 10.
27. RW1 informed the court that he is aware that the petitioners hold titles to the forest area described as Block IV. He further informed the court that Kapchorua Block IV is forest land; that it was not available for titling and that the titles issued from it were irregularly obtained as it was degazetted and excised from the forest area and transferred to the Ministry of Lands for titling.
28. He urged the court to declare the petitioners' titles fraudulent and a nullity as they were unlawfully acquired. He further urged the court to cancel the titles issued to the petitioners and to issue a permanent injunction to restrain the petitioners from ever laying claim to the suit properties.
29. In cross examination, he acknowledged that there are hand written alterations in Rexbt 1 but stated that the alterations were captured in gazette notice No. 500, Rexbt 2.
30. Regarding the remarks in Rexbt 3, he stated that they are not handwritten. He acknowledge that on page 353 of the same notice under Kapchorua forest there are some alterations which do not significantly alter the information contained in the gazette notice.
31. Regarding Rexbt 10, he acknowledged that page 372 is missing but stated that the page has no relevance to the case before court.
32. He acknowledged that the petitioners have title deeds for their parcels of land but asserted that their parcels are within Block IV Kapchorua forest, Rexbt 6.



33. In re-examination, he stated that the alterations on Rexbt 1 were clarifications on Block I-350 acres, Block II-290 acres, Block III-150 acres and Block IV-360 acres. He further stated that the alterations did not affect the content and context of Kapchorua forest in 1941.
34. Regarding Rexbt 3, page 349, he stated that the hand written notes are only talking of the supplementary gazette notice giving the date. The other alterations do not affect the content and context of the gazette notice as they merely capture what is contained in gazette notice No. 500; Rexbt 2.
35. Concerning Rexbt 1 and 10, he stated that the only difference between the two is that Rexbt I is missing page 372 which is a list of native forests and that Kapchorua forest is in page 373 and not page 372.
36. He said filing of Rexbt 10 was important because they wanted the court to see all the native forests in the second schedule.
37. RW2, Evans Kigode, an employee of Kenya Forest Service (KFS), Head of Survey, informed the court that there are 4 Blocks of Kapchorua forest as shown in Proclamation No.102 of 16th December 1941. These are Block I-350 acres; Block II-290 acres, Block III-150 acres and Block IV-360 acres; that in 1962, two of the blocks namely Block II and III were excised through legal notice number 500 of 1962; that vide legal notice No.174 of 1964 Block I and IV were declared forest land.
38. Concerning Rexbt 4, he informed the court that it is a boundary plan, No. 180/10 for gazette notice No.102.
39. Terming the petitioners' allegation that Blocks I and IV were degazetted as forest area false, he told the court that the two blocks still exist as forest areas.
40. Like RW1, he informed the court that he is aware that the petitioners have titles issued on Block IV and stated that their position is that the titles are irregular as they were issued in respect of land that had another legal owner as per legal notice No. 174 of 1964.
41. Concerning Rexbt 6, he informed the court that it shows all the titles falling under Block IV.
42. On whether there is a legal notice degazetting Blocks I and IV as forest areas, he stated that there is none.
43. He further informed the court that he has on several occasions visited the site and confirmed that no one was in occupation.
44. In cross examination, he stated that Rexbt 6 was prepared by their office; that the forest has beacons and that he has produced a map showing where the disputed parcels are located.
45. In re-examination, he stated that Rexbt 6 was prepared on behalf of KFS to confirm the locations of the impugned parcels. It bears the logo of KFS. He maintained that he is an employee of KFS, the Chief Surveyor and Mapping Officer.
46. At close of hearing, parties were accorded opportunity to file written submissions. However, at the time of writing this judgment, only the Petitioners' submissions were in the court file.

Petitioners' Submissions

47. In their submissions filed on 24th January 2024, the petitioners have submitted that they have demonstrated ownership of the suit properties by producing registration documents; that their titles are protected by law, in particular sections 24(a) 25(1) and 26 (1) of the *Land Registration Act*, and Article 40 of *Constitution*; that upon producing registration documents in respect of their properties,



the burden shifted to the respondents to prove that the said titles were obtained fraudulently and or illegally; that the respondents did not prove that the suit properties lie within beacons forest area and that the suit properties and Kapchorua Block IV are distinct parcels of land;

48. Maintaining that the burden was on the respondents to prove that the said parcels were excised from the said forest, which burden the respondents did not discharge to the required standards, the petitioners urge the court to allow the petition and grant them the orders sought. The court is also urged to dismiss the respondent's cross petition.

Analysis and determination

49. The issues arising from the pleadings, evidence and the submissions are:-
- i. Whether the suit properties fall within gazetted forest area;
 - ii. If the answer to (i) above is in the affirmative, whether the area was degazetted before titles were processed and issued to the petitioners;
 - iii. Whether the titles held by the petitioners are protected by the law?
 - iv. What orders should the court make?
50. On whether the suit properties fall within gazetted forest area, a review of the totality of the evidence adduced, shows that the suit properties fall within Block IV of Kapchorua forest, a fact that was proven by the respondent's witnesses and admitted/acknowledged by the petitioner's witness, Isaac Kiprotich Kiptoo.
51. On whether the area from which the petitioners' titles were curved was degazetted before the titles were created, no evidence capable of proving that fact was produced by the petitioners on whom the burden of proof of that fact lay.
52. As to whether the titles held by the petitioners are protected by law; In their submissions the petitioners have made reference to section 24, 25 and 26 of the [Land registration Act](#) and argued that their titles enjoy legal protection. The petitioners have also cited Article 40 of the [Constitution of Kenya](#) to adverse their argument.
53. On that issue, whereas it is true that registration of the petitioners as the owners of the suit properties conferred on them the status of being the absolute and indefeasible owners of the suit properties, their titles are impeachable under Article 40(6) of the [Constitution](#) as read with Section 26(1)(b) of the [Land Registration Act](#) which sections of law do not accord protection to titles that are proven to have been acquired illegally, unprocedurally or through a corrupt scheme.
54. In the circumstances of this case, the respondents proved that the titles held by the petitioners were created from gazetted forest land without the requisite procedure being undertaken; that is, the suit lands being degazetted as forest land. That being the case, the titles do not enjoy legal protection. In that regard see the case of [Clement Kipchirchir & 38 others vs. Principal Secretary Ministry of Lands Housing and Urban Development & 3 others](#) (2015) eKLR where it was stated/held:-

“There have been several decisions where the court has refused to protect a title acquired illegally. I will only mention one, the case of Henry Muthee Kathurima vs. Commissioner of Lands & Another, Court of Appeal sitting at Meru, Civil Appeal No.8 of 2014 (2015) eKLR. In this case, the High Court held that the title of the plaintiff had been illegally acquired as the land was public land. The Court of Appeal upheld the position.



Owing to the provisions of Article 40(6) and section 26 of the *Land Registration Act*, I am unable to bring myself to protect the titles of the petitioners, which to me, were not lawfully acquired and/or were acquired unprocedurally for the reason that they were titles issued on land that was a gazette forest, before such forest was degazetted. Such titles of the petitioners, if at all they can be said to be titles, cannot be protected.”

55. The upshot of the foregoing is that the Petition is found to be lacking in merits and I dismiss it. The respondent’s cross-petition is found to be merited and is allowed as prayed save for the prayer for costs.
56. With regard to costs, in exercise of the discretion vested in this court, I order that each party bears its own costs as the petitioners were not solely to blame for being issued with titles on degazetted forest land.
57. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 30TH DAY OF JANUARY, 2024.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:-

Mr. Korir for the Petitioner

Ms. Chelagat holding brief for Mr. Odongo for the Respondent

Court Asst.: Christine

