



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC. CASE NO. 62 OF 2012

HOUD MAHMOUD ATHMANPETITIONER

VERSUS

THE ATTORNEY GENERAL1ST RESPONDENT

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

RISHAD HAMID AHMED3RD RESPONDENT

ABDULBASIT SWALEH MOHDIN.....4TH RESPONDENT

SWALEH MOHAED WAZIRI.....5TH RESPONDENT

NASRA HASSAN MOHAMED6TH RESPONDENT

AHMED ABDULHASIM KASSIM7TH RESPONDENT

MATANO AHMED.....8TH RESPONDENT

NDOVU MASAUD MOHAMED9TH RESPONDENT

JAMILA YUSUF MAHAMED.....10TH RESPONDENT

JUDGMENT

1. In the Amended Petition dated 6th February, 2013, the Petitioner has averred that by way of a letter of allotment dated 20th August, 1997, the 2nd Respondent allocated him an unsurveyed agricultural plot number (c) at Manda Island; that the said land was later on surveyed and renamed as parcel number 93, Manda and that he paid all the requisite fees.
2. It is Petitioner's case that he later on learnt that land known as Manda Island/58 had overlapped on Manda Island/93 and that the said title was subsequently cancelled and that thereafter, he learnt that parcel of land known as Manda Island/88 had been carved out of the suit land.
3. The Petitioner averred that the title document for plot number 88 was forged because the Field Reports and data were based on a survey report for a piece of land in Nairobi and that even after protesting, the said title was issued to the 3rd and 4th Respondents who have subdivided the land into parcel numbers 176 to 185.
4. The Petitioner is seeking for a declaration that he is the legal and beneficial owner of land known as Lamu/Manda Island/93 and for cancellation of the title in respect to parcel numbers Lamu/Manda Island/88 and 176 -185.
5. The 1st and 2nd Respondents filed a Replying Affidavit through a land's officer who deponed that parcel of land number 93 was allocated to the Petitioner as unsurveyed agricultural plot number C vide a letter of allotment dated 20th August, 2007; that the said offer was accepted; that upon payment of the requisite fees, the director of surveys forwarded to the Commissioner of Lands the Registry Index Map to facilitate the preparation of a Lease and that on checking the records, the Director of Surveys realised that parcel number 58 of 88 was overlapping parcel number 93.
6. According to the 1st and 2nd Respondents, the survey plan for parcel number 58 was based on a fake authority letter of allotment and was

erased from the Director of Surveys records, and that parcel number 88 was found to be represented in F/R No. 466/87 for land situated in Nairobi and not Lamu Island.

7. The 1st Respondent's representative finally deponed that further surveys were done on "top" of the suit land creating parcels number 176-185 and 56-60 and that when the National Land Commission invited the registered owners of the overlapping parcels of land, they declined to honour the summons.

8. The 3rd and 4th Respondents filed a Notice of Preliminary Objection in which they averred that Article 40 of the Constitution only protects proprietor's interests acquired through an existing legal framework; that a Certificate of Title is the only conclusive evidence of proprietorship and that fraud and misrepresentation cannot be challenged by way of a Petition.

9. In their Affidavit in reply, the 3rd-10th Respondents deponed that they are the registered proprietors of parcels of land known as Lamu/Manda Island/176, 177, 183,184,185 and 259; that the issuance of the Title Deeds for the said parcels of land was procedural and that parcel of land number 93 was not in existence in the year 2007.

10. It is the 3rd-10th Respondents' case that the Ministry of Lands confirmed in its internal memo that parcel of land number 93 could not have been created because parcel number 58 had been drawn in its position way back on 27th November, 2007 and that parcels number 68 and 69 existed independent of parcels number 93 and 58.

11. According to the 3rd-10th Respondents, after the creation of parcel number 88, the area remained vacant until 19th March, 2012 when the Registry Index Map was amended to include F/R No. 504/166 which represents plot numbers 176-185.

12. The Respondents finally deponed that this court does not have jurisdiction to entertain the Petition because: the Petitioner has admitted that he does not have rights over the suit premises; that the Petition is an attempt to enforce a non-existent right and that the issues raised in the Petition fall within the mandate of an ordinary civil court.

13. The Petition proceeded by way of *viva voce* evidence.

14. The Petitioner, PW1, adopted his Affidavit sworn on 17th December, 2012 which I have summarized above. The Petitioner also produced all the annexures on his Supporting Affidavit as exhibits in the matter.

15. In cross-examination, PW1, stated that he was allocated the suit land in 1997 and that he paid the requisite stand premium in the year 2007; that although the land was unsurveyed as at the time of the allocation, it had an approved Part Development Plant (P.D.P) and that the suit land was surveyed in the year 2007.

16. It was the evidence of PW1 that the overlap on the land that was allocated to him was occasioned by the creation of parcels of land numbers 88-58 and 176 to 185.

17. The Principal Land Administration Officer, with the National Land Commission, DW1, informed the court that parcel number 93 was allocated to the Petitioner by the former Commissioner of Lands; that the land that was allocated to the Petitioner was initially known as plot "C" and it measured 60Ha and that the Petitioner accepted the offer by paying the sum indicated in the Letter of Allotment.

18. DW1 relied on his Replying Affidavit and added that the initial overlap on plot number 93 was by parcel number 58 and 88 and that he did not have records for the two plots.

19. It was the evidence of DW1 that after the survey of plot number 93, there could have been no other surveys in respect to the same parcel of land.

20. In cross-examination, DW1 stated that there were no documents to support the survey of plot numbers 58 and 88 and that the survey plans for those plots could be in a different area. According to DW1, parcel number 93 could not be entered in the Registered Index Map because of the overlap and that although plot numbers 58 and 88 were in the R.I.M, they had no supporting documents.

21. A licenced surveyor, DW2, informed the court that although he prepared a report of plot numbers 58, 68 and 93, he did not undertake the survey for any of the three plots.

22. According to DW2, he did a search and obtained survey plan number 466/83 which was in respect of plot numbers 68, 69 and 93; that the records at survey's office indicated that only Plot Nos. 68 and 69 had been approved and that he also obtained a letter of the surveyor showing that the survey for Plot No. 93 had been approved. However, it was the evidence of DW2 that the authenticity of approving the survey of plot number 93 was suspect and that the survey plan for plot number 93 was not authenticated by the director of surveys.

Submissions:

23. The Petitioner's advocate submitted that the right to own property is a fundamental right; that DW1 confirmed that the suit land was allocated to the Petitioner; that the survey plan that was used to generate the titles that were issued to the 3rd-10th Respondents were for a piece of land in Nairobi and that it is the Petitioner who is entitled to the suit land.

24. The 3rd-10th Respondents' advocate submitted that the Petition is an attempt to enforce premature/non-existent rights; that under Article

23, a Constitutional Court can only enforce existing rights and that this matter should have been filed as an ordinary civil suit.

25. The Respondents' counsel submitted that the letters of allotment do not create rights that can be protected through proceedings of this nature; that there is no conclusive evidence to show that the Petitioner is the legal owner of the suit land and that there has been no breach of Article 40 of the Constitution.

Analysis and findings:

26. This suit was commenced by way of a Petition. However, *viva voce* evidence was called, and the parties were given an opportunity to tender evidence.

27. The first issue that I will determine is if the court has jurisdiction to deal with the claim as presented by the Petitioner.

28. The Respondents have argued that the Constitution can only protect rights which have crystallized and that in the present Petition, the Petitioner is seeking to enforce non-existing rights. According to the Respondents, the Petitioner should have filed an ordinary suit and not a Petition.

29. The Petitioner's claim is hinged on the letter of allotment that was issued to him by the 2nd Respondent on 20th August, 1997 and the subsequent survey report which created parcel of land known as Lamu/Manda Island/93 (*the suit land*).

30. According to the Petitioner, having accepted the offer from the government by paying the requisite fees, the suit land was not available for allocation and issuance of a Lease to any other party. To the extent that the 3rd -10th Respondents are in possession of Certificates of Lease in respect of the same land that he was allocated, then, according to the Petitioner, his right to own property is being violated.

31. The Petitioner's right, just like that of the Respondents, to own property is provided for under Article 40(1) of the Constitution. The right to acquire and own property is only limited under Article 40(6) and 65 of the Constitution and the Limitation of Actions Act. Article 40(6) provides that the right to acquire and own property does not extend to any property that has been found to have been unlawfully acquired. Article 65 provides that a person who is not a citizen can only hold land on the basis of a leasehold tenure not exceeding 99 years.

32. The right to acquire and own land is not limited to people who have title documents. Indeed, all that is required is for one to show that he acquired the land lawfully. Although another person may have a title document for the same land, the person can only have a right over such land if he shows that he procured the title lawfully.

33. It is therefore permissible for one to be protected by the provision of Article 40(1) of the Constitution even when the person does not have a title document to the land in dispute. Therefore, to the extent that the Petitioner is asserting that the 3rd -10th Respondents obtained the title documents in respect of the suit land unlawfully, and that he is the one entitled to the same land, he can seek for the protection of his right to own land by way of a Petition. However, just like in any other ordinary suit, he has to prove his claim on a balance of probabilities.

34. The Petitioner informed the court that he was allocated the suit land, which was known as unsurveyed agricultural land Plot No. "C" – Manda Island Lamu, vide a letter of allotment dated 20th August, 1997. The said letter of allotment was accompanied by an approved Part Development Plan Number (P.D.P) Lamu 609.95 B dated 1st August, 1995.

35. The Part Development Plan that was annexed on the Petitioner's letter of allotment was in respect of three plots, which were marked as "A", "B" and "C". Plot marked as "A" and "C" measured approximately 60Ha each while plot marked as "B" was approximately 80Ha.

36. The evidence before the court shows that the Petitioner accepted the offer from the government on 7th September, 2007 when he paid the requisite fees.

37. The Petitioner produced in evidence the survey plan F/R No. 532/34 which he says was used to survey plot number "C". According to the survey plan, plot number "C" became parcel number Lamu/Manda Island/93.

38. The allocation of plot number "C" to the Petitioner by the government was confirmed by the Principal Land Administration Officer (DW2). According to DW2, after plot number 93 was surveyed, it could not be entered into the Registered Index Map because there was an overlap on the said land by parcel number 58 and 88.

39. DW2 informed the court that the Director of Surveys and the Commissioner of Lands did not have documents to support parcel number 58 and 88 and that the creation of the two parcels of land was a fraud.

40. The 3rd-10th Respondents did not testify in this matter. Indeed, the Respondents did not produce the letter of allotment to show that they were allocated the suit land. Although produced in evidence was a report casting aspersion on the survey report that generated plot number 93, DW2 did not produce any evidence to show that the survey plan that gave rise to plot number 93 did not emanate from the survey of Kenya.

41. The titles that were issued to the 3rd-10th Respondents have no basis at all. In the absence of evidence to show the process that was followed before the titles were issued to the 3rd-10th Respondents, I find that the same were not obtained lawfully.

42. Considering that the Petitioner produced in evidence a letter of allotment together with an approved Part Development Plan, it is the

Petitioner who is entitled to land known as Lamu/Manda Island/93. The purported titles that the 3rd-10th Respondents obtained for parcels of land known as Lamu/Manda Island/88 and Lamu/Manda Island/176 to 185 were fraudulently acquired and cannot be protected by the Constitution.

43. For those reasons, I allow the Amended Petition dated 6th February, 2013 as prayed.

DATED AND SIGNED AT MACHAKOS THIS 12TH DAY OF JULY, 2018.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 19TH DAY OF JULY, 2018.

J.O. OLOLA

JUDGE