



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC PET. NO. 5 OF 2016

DR. SAMMY CHEGE NJENGA.....1ST PETITIONER

DR. JOHN KIPLAGAT RUTTO.....2ND PETITIONER

VERSUS

THE COMMISSIONER OF PRISONS.....1ST RESPONDENT

THE LAND REGISTRAR

TRANS-NZOIA COUNTY.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. The petitioner filed this petition dated **18/8/2016** on **25/8/2016** seeking the following orders:

(a) A declaration that the petitioners' constitutional rights under Article 21, 22, 23, 47, 48, 50(1), 60 (b) and 64 of the Constitution have been breached and violated.

(b) A declaration against the respondents jointly and severally that respondents' decision to forcefully take away the petitions' land parcel number LR. No. 2116/1059 is a violation of Article 40(1) and 60 (b) of the current Constitution which entitles the petitioners either individually or in association with others to acquire and own any property of any description in any part of Kenya and that the respondents action amount to a deprivation of the petitioners right to property and therefore unconstitutional.

(c) A declaration that the petitioners are the lawfully registered owners of land parcel No. 2116/1059.

(d) An order of permanent injunction barring the respondents jointly in dealing in whatsoever manner with that parcel of land known as LR. No. 2116/1059.

(e) Costs.

The Petitioners' Case

2. The said petition is supported by the affidavit of the 2nd petitioner sworn on the **18/4/2016**. The petitioner's case is that in **1998** the petitioners requested the Municipal Council of Kitale for land to construct a hospital on; the application was approved and processed to completion whereupon the petitioners were registered as owners of **LR. No. 2116/1059** and a Certificate of Title issued on **28/4/1992**; that one of the conditions in the certificate of title was that the land would be used for putting up a maternity and nursing home; that as at the time of allocation of the land it was vacant and it still remains vacant to date; that rent and rates demand notes were issued by the Government of Kenya and the Municipal Council of Kitale respectively after the issuance of title; that the petitioners obtained approval of building plans and permission to construct the hospital on **16/12/2009**; that the petitioners together with their strategic partners, Ebenezer Health Services Limited made necessary arrangements to begin construction but they were prevented from delivering and/or depositing building materials on the site by officers from the Kitale Remand Prison; that the reason for the said bar to the delivery and deposit of material on the site has not been given despite request; that no written response has been forthcoming and recently all efforts to deliver materials were blocked by prison officers without any explanation despite personal visits by the petitioners to the Prisons Department, Kitale.

The Respondents' Case

3. The respondents filed a response to petition and cross-petition on **6/6/2018**. In that response and cross petition they state that the Trans Nzoia District Executive Committee did not have statutory or constitutional mandate or power to deliberate or give consent to the allocation of land set aside for public purposes; that the Commissioner of Lands had no authority to allocate the said land; that the Kitale Government of Kenya Prison has been in continuous open and uninterrupted and peaceful occupation of the land which is part of the larger Kitale prison farm; that in the alternative the respondents aver that the suit land falls under the then agricultural experimental farm Kitale **L.O. Plot Number 2197/2/2** which was surveyed on **30/10/1926** and gazetted on the **3/4/1943** as Kitale prison farm vide **Government Notice 359 - Kitale Prison Farm**.

4. It is averred that **Kitale L.O. Plot Number 2197/2/2** was upon the said gazettelement a prison farm and it remained government land or public land reserved exclusively for use by the Kenya Prisons Department hence no good title could be derived therefrom in violation of the Prisons Act and the Gazette Notice. The respondents state that boundaries to the land comprised in **Kitale L.O. Plot Number 2197/2/2** as contained in **Survey Plan Number 6700** have never been altered and that the **Gazette Notice Number 359** has never been amended or revoked and so the title if any created in favour of the petitioners was created without following due process, fraudulent and null and void. Particulars of illegality and fraud are pleaded against the petitioners.

5. In the cross-petition the respondents aver that **Article 2** of the constitution binds all persons and organs at both levels of government and any action in contravention of the constitution is invalid.

6. The cross-petition further states as follows: that this court is bound by **Article 10**, that under **Article 24** of the Constitution there are set circumstances under which any right or fundamental freedom in the bill of rights may be limited by law; that protection of the right to property from any acts of unfair deprivation by the state and any other person as provided for by **Article 40** does not extend to property that has been found to have been unlawfully acquired; that under **Article 62(4)** of the constitution public land shall not be disposed of otherwise than as prescribed by the law; that land reserved for a particular public purpose is alienated government land and that it is not available for further allocation and no good title can pass upon such further allocation; that one acquires title only if the allocation was legal proper and regular and the court of law should not give its seal of approval to an illegally or irregularly obtained title; that the petitioner's alleged acquisition of the suit land was irregular and unlawful and will deprive the Prisons department of its legal use of gazetted prison land and that the allocation was subject to the **Ndungu Commission** of inquiry.

7. The particulars of irregularity are pleaded at **paragraph 27** of the cross petition. It is said that the Permanent Secretary to the Ministry of Foreign Affairs was not asked for his consent to the allocation; that the petitioners knew that the land was not available for allocation, it having been duly gazetted and alienated and that compliance with the provisions of the **Cap 280** was not adhered to during the acquisition of the suit land.

8. Further it is alleged that if the land registry created and registered the suit land in the petitioner's names it was done without any statutory powers on the part of any land registration officer or land surveyor with the result of likelihood of loss of public land in circumstances that constitute malfeasance in public office the beneficiaries of whom were the petitioners. Particulars of malfeasance are stated as knowledge of want of authority to excise the land, knowledge of illegality of actions; willful failure to comply with statutory provisions of **Cap 2, Cap 280(Repealed), Cap 300(Repealed) The Physical Planning Act, The Surveys Act** and the **Constitution**, abuse of public office powers and authority to alienate public land contrary to the spirit and intent of the **Public Officers' Ethics Act 2013**. It is alleged that the issuance of title over the suit land contravenes the constitution (**Articles 12, 10, 24, 40, 62 and 67**) and is ineffectual to confer good title to the petitioners.

9. It is therefore sought that judgment be entered against the petitioners and a declaration be made that the suit land was irregularly, fraudulently and unlawfully excised out of gazetted land; that the title documents are null and void; that an order do issue cancelling the titles, that a declaration do issue that the Kitale prison is entitled to peaceful and quiet possession and use of all the land forming the suit land; and an order permanently injunctioning the petitioners from laying claim to or interfering with the suit land.

10. The reply to petition and cross-petition are supported by a sworn affidavit of **Barnaba Kipsang Keino** the **Assistant Commissioner of Prisons and Officer In charge** of the **Kitale Main Prison**. It reiterates the facts stated in the petition. Attached thereto are some supporting documents including **Gazette Notice 359** and a survey plan for **LR Number Kitale L.O. Plot number 2197/2/2**.

11. I have perused through the file record and I find no reply to the response to the petition and the cross-petition. On the **30th July 2018** this court ordered that this petition would be disposed of by way of written submissions and that the parties to file submissions within a given time frame. This order was not complied with by any of the parties. I find this to be a mark of great disinterest by the parties. Notwithstanding that default, this court relied on the documents on the record to issue its judgment.

12. I have examined the instant petition the response and the cross petition and the respective supporting affidavits. Whereas the petitioners appear to believe that they have indefeasible title to the suit land and that therefore the respondents should not interfere with that title, the respondents believe that the suit land was purported to be excised from the land that had been gazetted in favour of the Prison Department for the use of the Kitale Prison and they exhibit a number of documents to prove the same.

13. In considering whether the rights of a registered proprietor of land are protected under **Article 40** of the **Constitution Of Kenya 2010** it is proper to remember the dicta of the Court of Appeal in the case of **Chemey Investment Limited v Attorney General & 2 Others [2018] eKLR**. In that case the court stated as follows concerning the provisions of **Sections 28 and 143 (1) and 143 (2)** of the **Registered Land Act** (now repealed) which seemed to guarantee sanctity of title:

“The above provisions have consistently been held to guarantee sanctity of title, which cannot be defeated except on the specific and serious grounds set out therein. However, we must hasten to add that title to property that is obtained fraudulently or illegally in violation of the provisions of the statute is and was not sacrosanct and did not enjoy protection of the law under the repealed Act. Recently in, Denis Noel Mukhulo & Another v Elizabeth Murungari Njoroge & Another, CA No. 298 of 2013, this Court explained the situation as follows:

“While we agree with the appellants that title registered under the Registered Land Act was sacrosanct, we are not able to agree that the Act protected title registered under it in all and sundry cases, irrespective of how the title was acquired. By section 27 of the Act, the registration of a person as a proprietor of land vested in him the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto, while section 28 of the Act insulated the rights of a proprietor from challenge except in the manner set out in the Act, which really does not afford the blanket protection that the appellants claim it did. Section 143 of the Act, which granted the court power to order rectification of the register provided as follows...The effect of the above provision is that the court had power to order rectification, save in the case of a first registration, where the registration was obtained by fraud or mistake to which the registered person was party.”

Decisions abound where courts in this land have consistently declined to recognise and protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor. See for example Niaz Mohamed Jan Mohamed v. Commissioner for Lands & 4 Others [1996] eKLR; Funzi Island Development Ltd & 2 Others v. County Council of Kwale (supra); Republic v. Minister for Transport & Communications & 5 Others ex parte Waa Ship Garbage Collectors & 15 Others KLR (E&L) 1, 563; John Peter Mureithi & 2 Others v. Attorney General & 4 Others [2006] eKLR; Kenya National Highway Authority v. Shalien Masood Mughal & 5 Others (2017) eKLR; Arthi Highway Developers Limited v. West End Butchery Limited & 6 Others [2015] eKLR; Munyu Maina v Hiram Gathiha Maina [2013] eKLR and Milan Kumarn Shah & Others v. City Council of Nairobi & Others, HCCC No. 1024 of 2005. The effect of all those decisions is that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense”.

14. When the respondents filed documents alleging that the title issued to the petitioners is not clean by reasons of impropriety on the part of the petitioner's the land registration officer, and the surveyor involved in its acquisition, this ceased being a matter of violation of rights and morphed into a dispute over the legality of the title to the land.

15. In the case of *Shimoni Resort v Registrar of Titles & 5 Others [2016] eKLR* the court observed as follows:

“The petition as presented was not an appropriate avenue to try issues of fraud which were clearly contested as between the parties. The standard of proof in fraud cases is such as would invite oral testimony where the veracity of the parties' evidence is tested through cross-examination. However, in the present petition the parties would not have had the opportunity to ventilate the fraud allegations as the petition clearly was challenging the acts of the respondents to cancel the entries against the title held by the petitioner. The issue for determination at the outset was whether the respondents acted lawfully in executing the acts that they did and having found and held that they acted unlawfully there was no basis to proceed to consider whether they were justified to cancel the petitioner's title. The respondents' acts were null and void ab initio”.

16. Where there is a dispute regarding legality of title therefore, a petition is not the appropriate mode of seeking orders. To put it differently, this court is meant to issue only declarations and other orders related to violation of rights with regard to the suit land when good title is established.

17. In the above circumstances this court is not in a position to issue any orders as to whether the rights of the petitioners have been violated or not as the title is still under dispute. This court would only issue those declarations and other orders related to such violations only if it was a firmly established or agreed position that the petitioners owned the suit land.

18. When a title is disputed the appropriate thing to do is to present the claimant's claim in a proper suit began by way of plaint for the purpose of determination of the legality of the title.

19. In those circumstances the court can not also issue any orders as sought by the respondents in their cross petition for the same reasons.

20. The petition dated **18th August 2016** is therefore not merited. The same is dismissed. I also direct that the petitioners shall if they so desire file a suit by way of plaint within **180 days** from the date hereof in respect of the said title for the court's determination of the same. However owing to some of the pleading that is contained in the cross-petition in which I note that malfeasance is claimed against some of the very officers who were instrumental in the issuance of the title and the survey of the suit land to enable the issuance of title to the petitioners, I order that each party shall bear their own costs.

Dated, signed and delivered at Kitale on this 19th day of November, 2018.

MWANGI NJOROGE

JUDGE

19/11/2018

Coram

Before - Hon. Mwangi Njoroge Judge

Court Assistant: Picoty

N/A for the parties

COURT

Judgment read in open court.

MWANGI NJORGE

JUDGE

19/11/2018