



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 204 OF 2016

CONSTITUTIONAL PETITION NO. 43 OF 2015

IN THE MATTER OF CHAPTER FOUR OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLES 23, 40, 47 OF THE CONSTITUTION

AND

IN THE MATTER OF PETITION BY JAPHETH NZILA MUANGI, CHALLENGING INFRINGEMENT OF HIS CONSTITUTIONAL RIGHTS BY THE ARBITRARY DEMOLISION AND ATTEMPTED COMPULSORY ACQUISITION OF HIS LAND PLOT NO'S MOMBASA/BLOCK/IX/277 AND MOMBASA/BLOCK/IX/294, PERMANENTLY BY UNCONSTITUTIONAL MEANS BY THE COUNTY GOVERNMENT OF MOMBASA

BETWEEN

JAPHETH NZILA MUANGI.....PETITIONER

AND

THE MINISTER FOR LAND AND ENVIRONMENT

OF THE COUNTY GOVERNMENT

OF MOMBASA.....1ST RESPONDENT

COUNTY GOVERNMENT OF MOMBASA.....2ND RESPONDENT

JUDGEMENT

1. The Petitioner Japheth Nzila Muangi sued the County government of Mombasa named as the Respondents in his petition dated 23rd July 2015. The petition was later amended on 8th June 2016. In the amended petition, the Petitioner sought the following remedies, contained in paragraph 12 of the petition to wit;

a. A declaration under Article 23 (3) (a) of the Constitution that you petitioner has constitutional

rights to own A term of 99 years with effect from 1st September 1994 Mombasa/Block/IX/227 and A term of 99 years with effect from 1st January 1992 Mombasa/Block IX/294 as a lessee of the State for the remainder of the term.

b. A declaration under Article 40 (1) of the Constitution that the respondents by themselves, their agents and/or assignees cannot forcefully and arbitrarily, develop, occupy and or in any manner whatsoever compulsorily take possession in any manner A term of 99 years with effect from 1st September 1994 (Mombasa/Block IX 277) and A term of 99 years with effect from 1st January 1992 (Mombasa/Block IX/294 without the consent of the Petitioner and/or without a lawful court order/decreed or unless they comply with Article 40 (3) of the Constitution

c. An order of judicial review under Article 23 (3) (f) in the form of prohibition barring the Respondents by themselves, their servants, agents and/or assignees from carrying on further destructions, demolitions, occupation and/or in any manner whatsoever interfering with the ownership and possession of A term of 99 years with effect from 1st September 1994 (Mombasa/Block IX/277) and A term of 99 years with effect from 1st January 1992 (Mombasa/Bock IX/294.

d. An order of judicial review under Article 23 (3) (f) in the form of mandamus compelling the Respondents by themselves, their servants, agents and/or assignees to reconstruct at their cost all the demolished structures and restore the conditions of A term of 99 years with effect from 1st September 1994 (Mombasa/Block IX/277) and A term of 99 years with effect from 1st January 1992 (Mombasa/Block IX/294 as they were before the complained of interference.

(dd) **ALTERNATIVELY** an order of mandamus compelling the respondents by themselves, their servants, agents and/or assignees to promptly compensate your petitioner in the sum of Kshs.13,406,580/= 133,406,580/= together with interests at commercial rates with effect from 24/7/2015 until payments in full.

e. A declaration that all officers who authorized enforced and/or supervised the demolition of the petitioner's property be declared to have breached the provisions of Chapter 6 of the Constitution and be permanently barred as long as they live from occupying a public office either in the county government or in the national government

f. The costs of the petition

2. The petition is supported by the affidavits of the petitioner sworn on 23rd July 2015 and 8th June 2016 respectively. The Petitioner deposes that he is the registered leasehold owner from the defunct Municipal Council of Mombasa for a term of 99 years (effective 1. 9. 1994) in respect of title numbers Mombasa/Block IX/277 and Block IX/294 (effective from 1st January 1992) which properties are hereinafter referred to as the *suit properties*. He continued that he has been paying rates and has developed the suit properties with several buildings and a perimeter wall.

3. Mr. Muangi continued that on 23rd July 2015, the Respondents through a contingent of County Security guards and a bull dozer ordered his employees to vacate the premises and proceeded to pull down the perimeter wall and demolished all the developments on the suit premises. According to the petitioner, his property rights are protected under article 40 and that he is also entitled to fair administrative action as provided under article 47 of the Constitution. That he was never served with any notice questioning the legality of his titles. Lastly that the Respondents' action has breached his rights as set out in the petition. He proceeded to assess the cost of estimated loss at Kshs.133,406,580 together with costs of this petition and interests.

4. The petition is opposed by the Respondents vide a replying affidavit sworn by Jimmy Waliaula, the director of legal services dated 9th March 2016. He began by deposing that he is advised by their

advocate on record that the petition is incompetent, bad in law and an abuse of the court process. Secondly Mr. Waliaula deposes that he is advised by their Chief Planning Officer that the suit properties were not available for alienation for private use as the same is located on land that is environmentally fragile, wetland and riparian.

5. Mr. Waliaula made reference to the provisions of section 2 of the Land Act that defines what a riparian reserve is and section 110 of the Survey Act Cap 299 regarding distance of the high water mark. He deposed further that if any allocation of such land as made then the same was illegal/irregular. Consequently the petitioner cannot assert any right over the suit properties whose title has been acquired illegally. Further Mr. Waliaula deposed that the petitioner ought to avail to court evidence that he acquired the land legally.

6. The Respondents also claimed that the suit properties hosts major sanitary public utilities for Tudor Estate to the treatment plant and that the Respondents need the land in vacant state to enable it remove dumping refuse and disposal of solid waste. Therefore the public interest on the plots supersedes the private claims of an individual. That the Petitioner did not show a lease if any existed between him and the defunct council for the court to know the terms of that lease or any building plans that were duly approved. The Respondents urged the court to dismiss the petition.

7. The parties' advocates filed rival submissions which I have read and considered and made references to the case law cited in support thereof. From the pleadings and the submissions, I find two issues arising for my determination;

i. Whether the Petitioner was lawfully registered as the owner of the two suit parcels.

ii. Whether his rights under the Constitution have been breached and therefore he is entitled to compensation.

8. On the issue of ownership of the suit premises, the Petitioner produced copies of certificate of leases showing he is the registered owner for a lease term of 99 from the defunct Municipal Council of Mombasa. The Respondents questioned petitioner's ownership by stating that the land was illegally and unlawfully allocated to him since the land comprises an environmentally fragile area being a riparian area as defined under section 2 of the Land Act and also located within the range of the high water mar as defined in the Survey Act.

9. The Respondents admit the suit parcels were allocated to the petitioner but fault the process that was used since according to them, the same was not based on any technical ground report by a physical planner or a surveyor. Secondly that the land was excised from the government housing estate. Thirdly that the land is environmentally fragile as it is a wetland. These grounds are contained in an undated report signed by Manyala P.O.

10. Under the provisions of the Land Registration Act section 24 & 25 confers upon a registered proprietor all rights and interests to use and enjoy the land. Such ownership can only be questioned in the manner provided under section 26 of the land Registration Act i.e.

a) on account of fraud or misrepresentation which the person is proved a party to

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

11. The burden of proof that the certificate of title is irregularly or unlawfully acquired lies on the person making such allegation. This is in line with the provisions of section 107 & 108 of the Evidence Act Cap 80. In this petition, the Respondents have alleged that the suit premises were irregularly allocated to the petitioner

since it is a riparian area. In the course of the proceedings herein, the Respondents were given time to do a site visit and file a report since they did not agree with the contents of the report filed by a Mr Paul Munayo of Ecosense Consultants on behalf of the Petitioner. Up to the time of writing this judgment, no such report was presented to the court.

12. Mr. Munyao in his report said there were no sewer facilities on the suit land and that he confirmed this from Mr. John Mwamburi of Mombasa Water & Sewerage Company. He also stated at page 4 of his report that the suit premises is approx. 440 metres measured from the high water mark. The Respondents on their part as I have stated above have not presented any document e.g from an environmental expert or a surveyor to confirm that indeed the suit premises is riparian or fragile land. Neither did they present the technical report detailing the process the defunct Municipal Council of Mombasa ought to have undertaken before allocating the land to the Petitioner. The Respondents still had the option to apply for oral evidence to be taken on this matter but no such request was made to the court.

13. From the foregoing, the Respondents have only made allegations without any proof that the suit land is riparian or fragile or is within the high water mark. Lastly, the Respondents did not comply with the provisions of section 26 of the Land Registration Act to have the petitioners' title annulled before taking possession. It is therefore my finding that the Petitioner's registration as owner of the suit premises is not in doubt. My answer to the first question posed is that the Petitioner legally owns the suit premises.

14. The second issue is whether the rights of the petitioner were breached by the actions of the Respondents. The petitioner pleaded that he was not served with any notice before the Respondents employees moved into the suit premises to commence the demolitions. The Respondents have not denied this averment neither have they annexed any notice which they issued or served on the petitioner. The Respondents have also not denied carrying out the alleged demolitions on the land.

15. Article 47 (2) of the Constitution provides that **“if a right or 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.”** (underline mine for emphasis). Article 47 (3) gives parliament duty to enact legislation which shall

a) Provide for the review of the administrative action by a court or if appropriate, an independent and impartial tribunal and

b) Promote efficient administration.

16. The cases cited by the Respondents for instance **Multiple Hauliers E.A. Limited vs Attorney General & 10 others (2013) e KLR** dealt substantially with the right under article 47. It does not support the Respondents case in any way. Justice Mumbi Ngugi at paragraph 48 of her judgement stated this;

“I agree that public interest considerations are critical factors for a court to consider and in the circumstances of this case, construction of a road is for the public good. However the public interest will be better served if the state and all organs of state and public authorities scrupulously act in accordance with the dictates of the Constitution.”

17. In the **Multiple Hauliers E.A. Limited supra**, the respondents had averred that notice was served when the property was marked 'X' and an advertisement placed in the newspaper. The learned Judge found this was not sufficient notice as none was addressed to the Petitioners.

18. The above case also addresses the issue whether this petition is incompetent or not as raised by the Respondents herein. Mumbi J. quoting Majanja J. in the case of **Sonia Kwamboka Rasugu vs Sandalwood Hotel & Resort Limited & others (2013) e KLR** where the learned Judge had this to say;

“(26) When the court is faced with such contradictory assertions and evidence, the court will seek to establish where the truth lies and this is by placing the evidence of the contesting parties and determine the likelihood of one version over the other. It does not matter

whether the matter is an ordinary civil suit or a petition filed under article 22. In each case the duty of the court is to weigh the facts and evidence on either side whether presented orally or by affidavit and make a finding. The Respondents submission that the contested evidence can only be solved in a civil court is mistaken and lacks merit.”

19. The Petitioner filed a valuation report giving the value of the land together with the developments therein at Kshs.133,000,000 only. In the amended petition, the Petitioner pleaded that despite being served with the conservatory orders of 14th July 2015, the Respondents continued with their acts of trespass with total immunity. Thus he has been deprived of access and use of his land and is therefore entitled to compensation as set out in paragraph 11A.

20. The Respondents in reply stated that the valuation report was unreliable as it was based on untenable presumption that the petitioner had a good title and that the Petitioner had obtained requisite consents and plans prior to developing the suit properties. In effect the Respondents have not denied dispossessing the Petitioners of the suit premises. This they have done without following due process as provided for under article 47 or compensating him under article 40 (3) (b) of the Constitution. For these reasons, I find merit in the prayer for compensation.

21. Consequently I do grant the reliefs sought in terms of paragraph **12 (a), (b) (c) & (d) of the petition**. If the Respondents default to comply with the reliefs in 12 (c) and (d) within 60 days of delivery of this judgement, then automatically prayer (dd) becomes available to the petitioner and he shall be liberty to execute for the same. However I decline to grant **prayer E** as being ambiguous since no names were given. The cost of the petition is awarded to the Petitioner. Interests on the liquidated sum shall accrue from date of default.

Dated and Delivered at Mombasa this 25th day of January 2017

A. OMOLLO

JUDGE