



IN THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA

ELC. PETITION NO. 93 OF 2015

IN THE MATTER OF ARTICLES 2(6), 10, 19, 20(1), (2) (3) & (4), 21(1)& (2), 22(1) & (2), 23(1) & (3), 32(1), (2), (3) & (4), 39(3), 40(1) & (3), 47(1) & (2), 62, 64, 67(2) (a), 162(2) (b), 165(3) (b) & (d) 25 8(1) & (2) (a) & (b), 259 OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLE 32(1), (2), (3) & (4), 39(3), 40(1) & (3), 47(1) & (2), OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 12 & 18 (1) (2) & (3) OF THE INTERNATIONAL CONVENTION ON CIVIL & POLITICAL RIGHTS

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 8, 12(1), 14 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS.

AND

IN THE MATTER OF SECTIONS 3, 4, 13 & 18 OF THE ENVIRONMENT AND LAND COURT ACT, CAP 12A OF THE LAWS OF KENYA

AND

IN THE MATTER OF SECTIONS 3& 5 OF THE NATIONAL LAND COMMISSION ACT, CAP 5D OF THE LAWS OF KENYA

AND

IN THE MATTER OF SECTIONS 3, 4, 7, 9, 107-121, 128, 150 & 158 OF THE LAND ACT, CAP 5D OF THE LAWS OF KENYA

IN THE MATTER OF SECTIONS 3, 4, 9, 107 -121, 128, 150 & 158 OF THE LAND ACT, CAP 280 OF THE LAWS OF KENYA

AND

IN THE MATTER OF SECTIONS 3, 14, 24, 36, 80- & 101 OF THE LAND REGISTRATION ACT, CAP 300 OF THE LAWS OF KENYA

AND

**IN THE MATTER OF SECTIONS 1, 3, 4, 10, 14, 15 & 27 THE WAKF COMISSIONER ACT,
CAP 109 OF THE LAWS OF KENYA**

**IN THE MATTER OF RULES 3, 4, 10, 11 & 15 OF THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDMANTAL FREEDOMS) PRACTICE AND
PROCEDURES RULES**

BETWEEN

**SAID SOOD MOHAMED SAID SHIKELY (suing on his own behalf, as an Administrator of
the estate of Sood Mohammed Said Shikely, as a trustee of the Shikely Family Wakf
and on behalf of the Shikely Family Wakf Beneficiaries).....PETITIONER**

AND

NATIONAL LAND COMMISION.....RESPONDENT

JUDGMENT

1. In the Petition dated 8th May 2015, the Petitioner sought the following reliefs.

a. A declaration that the acquisition, possession, failure to hand over vacant possession and sub-letting of the Wakf property (or any portion of the Wakf Property), Mombasa/Block XVII/635 (formerly Land Reference Number 1149 (sub division numbers 635-6) (C.R. Number 8858/1), by the Respondent comprises a infringement of the Petitioner's right to property in breach of Article 40 of the Constitution;

b. A declaration that the acquisition, possession, failure to hand over vacant possession and sub-letting of the Wakf property (or any portion of the Wakf Property), Mombasa/BlockXVII/635(formerly Land Reference Number 1149 sub division numbers 635-6) (C.R. Number 8858/1), by the Respondent comprises a violation of the Petitioner's right to freedom of religion in breach of Article 32 of the Constitution;

c. A declaration that the acquisition, possession, vacant to hand over vacant possession and sub-letting of the Wakf property (or any portion of the Wakf Property), Mombasa/Block XVII/635(formerly Land Reference Number 1149 sub division numbers 635-6) (C.R. Number 8858/1), by the Respondent comprises a violation of the Petitioner's right to freedom of residence contrary to Article 39 of the Constitution;

d. A declaration that the acquisition, possession, failure to hand over vacant possession and sub-letting of the Wakf property (or any portion of the Wakf Property), Mombasa/BlockXVII/635(formerly Land Reference Number 1149 sub division numbers 635-6) (C.R. Number 8858/1), by the Respondent comprises a violation of the Petitioner's right to freedom of culture contrary to Article 44 of the Constitution;

e. A declaration that the acquisition, possession, failure to hand over vacant possession and sub-letting of the Wakf property (or any portion of the Wakf Property), Mombasa/Block XVII/635(formerly Land Reference Number 1149 sub division numbers 635-6) (C.R. Number 8858/1), by the Respondent comprises a violation of the Petitioner's right to fair administrative action contrary to Article 47 of the Constitution;

f. A declaration that the acquisition, possession, failure to hand over vacant possession and sub-

letting of the Wakf property (or any portion of the Wakf Property), Mombasa/Block XVII/635(formerly Land Reference Number 1149 sub division numbers 635-6) (C.R. Number 8858/1), by the Respondent comprises an infringement of the Petitioner's freedom of religion and residence contrary to Article 18(1) and 12(1) of the International Convention on Civil and Political Rights;

g. A declaration that the acquisition, possession, failure to hand over vacant possession and sub-letting of the Wakf property (or any portion of the Wakf Property), Mombasa/Block XVII/635(formerly Land Reference Number 1149 sub division numbers 635-6) (C.R. Number 8858/1), by the Respondent comprises a violation of the Petitioner's freedom religion, residence, right to property and culture contrary to Article 8, 12, 14 and 17 of the African Charter on Human and Peoples Rights;

h. A declaration that the lease, transfer and occupation of the Wakf property, Mombasa/Block XVII/635 (formerly land Reference Number 1149 (subdivision numbers 6635-6) (C.R. Number 8858/1) or any portion of the Wakf property, by the Respondent to other persons is illegal, null and void;

i. A declaration that any title, the lease or interest granted, created or acquired in the Wakf property or a portion of the Wakf property in the name of the respondent, other State offices, State officers, public officers, private persons, bodies and entities is hereby revoked , null and void;

j. A mandatory injunction is hereby issued compelling the Respondent to immediately give vacant possession of Wakf property, Mombasa/Block XVII/635 (formerly land Reference Number 11449 9sub division numbers 6635-66) (C.R. Number 8858/1), within 30 days from the date of this order to the Petitioner and his fellow Wakf trustees Khadija Sood and Hemed Sood;

k. In consequence, a mandatorily injunction is hereby issued compelling the Chief Lands Registrar to rectify the Land register to ensure that the names of tee Wakf Trustees are registered as the sole proprietors of the Wakf property, Mombasa/Block XVII/635 (formerly Land Reference Number 1149 (sub division numbers 635-66) (C.R. Number 8858/1), within 30 days of the date of this order;

l. The Respondent and the Chief Lands Registrar are hereby ordered to report to this Honourable Court within 30 days of this Judgment of their compliance with the orders in paragraphs j and k respectively. Failure to which, thee Petitioner is at liberty to institute contempt proceedings against the Respondent and the Chief Lands Registrar;

m. A permanent injunction is hereby issued preventing the Respondent from occupying, selling, transferring, leasing and sub-dividing the Wakf property Mombasa/Block XVII/635 (formerly Land Reference Number 1149 (sub division numbers 635-6) (C.R. Number 8858/1);

n. An order of compensation is hereby issued against the Respondent consequential to the declarations for violating the Petitioner's fundamental rights and freedoms as set out in paragraphs a, b, c, d, e, f and g above;

o. Such other orders that this Honourable Court shall deem just.

2. The petition is supported by the background facts set on the face of the Petition and the facts deposed to in the affidavit of Said Sood Mohamed Said Shikely. Mr. Sood deposed that he is a duly appointed Trustee of the Shikely Family Wakf and authorized to swear the affidavit on behalf of the other beneficiaries. In his affidavit, Mr. Sood gave the history of the Wakf and how Wakf property was acquired in paragraphs 2- 8 of the affidavit.

3. In paragraph 9, he deposed that they received news that the then Commissioner of Lands had illegally and unlawfully subdivided the Wakf property and proceeded to issue 99 year sub-leases and titles to a

number of 3rd parties who were unknown to the Shikely family without the consent of the Wakf Trustees or Beneficiaries. He proceeded to annex copies of leases issued to Gharib Suleiman, Peter Mwaura Kasanya, Harith Saleh Shahbal and Fraiss Saleh, & Ali Ubwa Tifu.

4. Mr. Sood deposed further that in 1994, they filed Nairobi high court case No. 4315 of 1994 against the Commissioner of Lands and the 3rd parties named above to protect the Wakf property. This suit was later withdrawn. In paragraph 13, he deposes that to date the 3rd parties continue to occupy the property.

5. The Petitioners aver that upon their appointment as trustees, they secured the registration of the Wakf property in their name vide a title deed annexed as SSM 21 and issued on 19th March, 2014. The Petitioners contend that any acquisition, subdivision, lease or transfer contrary to the Wakf deed is illegal, null and void. Further that since the valid indenture of lease expired without any attempt at renewal, the Respondent's failure to hand over vacant possession is unprocedural and unlawful. That in spite of notice and demand to vacate the Wakf property, the Respondent has failed, or refused and neglected to revert the Wakf property to the petitioners in its original state.

6. The Respondent did not defend the petition although served. I will however proceed to determine the petition on its merits or otherwise. In doing so, I will analyse all documents and facts presented in support of the petition together with the written submissions filed.

7. In the Petition, only the National Land Commission was sued as a respondent on account of it being charged with the responsibility of managing all public land on behalf of the County and National governments. The Respondent is also sued as the successor in title of the Commissioner of Lands whose actions the petitioner is unhappy with.

8. The petitioner has listed several rights which he avers has been infringed by the Respondent and has sought the court to grant them redress as per the reliefs contained in paragraph 68(a) – (o) of the petition. In summary the Petition avers that the acquisition, possession and failure to handover vacant possession and sub-letting of the Wakf Property (or any portion of the Wakf property) Mombasa/Block XVII/635 (formerly L.R. No. 1149. sub-divisions numbers 635-6) CR No. 8858/1) is an infringement of the petitioner's rights as provided in articles 40, 32, 39, 44, 47 of the Constitution 2010 and Article 8, 12, 14 and 17 of the African Charter on Human and People's Rights and the applicable international instruments.

9. In the affidavit in support of the Petition, Mr. Sood deposed that the predecessor to the Respondent sub divided part of the Wakf property and issued leases to third parties unknown to the Wakf Trustees and Beneficiaries. In the documents annexed as SSM- 11-14 are the documents issued to those third parties. For instance SSM 12 is a transfer of lease in respect of Mombasa/Block XVII/1232 from Sudi Mwasirima to Hazeth Saleh Shahbal & Francis Saleh Mbarak Shahbal.

The document shows it was registered on 11th May, 1992 as entry No. 33 at 12:03 p.m. SSM II is a lease in favour of Gharib Suleiman Gharib in respect of Mombasa/Block XVII/1234 and dated on 22nd April, 1992. It is not clear whether it was registered or not.

10. These third parties are deposed to be in occupation of portions of the Wakf property (paragraph 17 – 20 of the Petition and paragraphs 9 and 12 of the affidavit) and were even issued with leases. The Petitioner's claim the issuance of the leases to them were unlawful. The orders/reliefs sought in the petition will directly affect these 3rd parties as it appears from the pleadings that they are the ones in occupation yet they were not joined to this petition. The petitioner was aware of their interests in the land as far back as 1994 when they filed NBIHC case No. 4315 of 1994 but which was withdrawn before the third parties were served.

11. In light of the petitioners own disclosures and admissions that the Respondent is not in occupation, can the reliefs sought be granted without affording a hearing to parties who would be adversely affected by the orders? In support that the reliefs can be granted the petitioners, they cited the following case laws;

- i) *Everlyn College of Design Ltd. vs Director of Children’s Department & Ano. (2013) eKLR.*
- ii) *Joseph N.K. Arap Ngok vs Moljo Ole Kewua & 4 Others (1997) eKLR.*
- iii) *Seventh Day Adventist Church (E.A) Ltd. vs Minister for Education & 3 Others (2014) eKLR.*
- iv) *Onyango Oloo vs A.G. (1986 – 1989) EA 456.*

12. Taking the quotation in the Onyango Oloo case, that **“the principle of natural justice applies where ordinary people would expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard”**. If the Petitioner felt that they were not heard before their property was hived off, then for this dispute to be conclusively resolved, the parties who the order would affect should have also been brought on board.

13. The facts of the case in the Seventh Day Adventist Church Supra are quite distinguishable from the circumstances of this case. There is no relation of the facts presented that the **“acquisition”** of the Wakf property does infringe on the Petitioner’s right to worship and or interference with their religious beliefs. The allegation on infringement of freedom of religion, culture and belief in my view was far-fetched and lacks merit as they have not pleaded that the suit premises was intended for purposes of worship or conduct any cultural activities.

14. The Petitioners annexed a copy of a title deed as SSM 21 issued to them on 19th March, 2014 in respect of Mombasa/Block XVII/635. If they are holding a valid title then it is perplexing what is meant by the allegations of illegal and unlawful sub divisions carried out by the Respondent. I did ask the petitioner’s advocate holding brief enquiring about this Judgment when it was first due on 16th November, 2016 to supply me with a copy of the white /green card to enable me understand the current status of the entries in the register in regard to the suit property. The white card provided does certify that the Petitioner and his co-trustees are the registered owners of the two parcels of land. In my view and I so hold this Petition only succeeds in so far as his entitlement to the orders of vacant possession is sought in terms of the reliefs contained in paragraph **68 a, e, h, j & m.**

15. The rectification of the register does not lie since the register shows they are the owners. The claim for compensation also fails as the nature of the loss was not proved. In conclusion, I make a finding that the petition has partially succeeded in terms of reliefs granted in paragraph 14 above. Since it was not defended, I make no order on costs.

DATED and SIGNED at MOMBASA on this 24th day of JAN, 2017.

A. OMOLLO

JUDGE