



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**PET. No. 35 OF 2016**

**TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE.....PETITIONER**

**VERSUS**

**MOHAMMED HUSSEIN MULLA NANJI TRUST.....1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

***(Petition seeking a declaration that the intended sale and/or lease of land private land owned by the 1<sup>st</sup> respondent is in violation of Article 62(4) of the constitution and therefore, unlawful, illegal and hence null and void; petition lack merit; dismissed with costs)***

**Introduction**

1. The proceedings in this matter were commenced by way of petition dated 3<sup>rd</sup> August 2016 and filed in court on 4<sup>th</sup> August 2016.
2. The petitioner describes itself as a Human Rights Society with a mandate to protect human rights which is closely intertwined with democracy, the rule of law and constitutionalism.
3. The petition is brought against the 1<sup>st</sup> respondent which is a trust duly registered pursuant to a deed of trust, the 2<sup>nd</sup> respondent which is a constitutional commission established under Article 67 (1) of the constitution and the 3<sup>rd</sup> respondent in his capacity as the chief legal advisor of the government of Kenya.
4. The petitioner seeks the following reliefs:
  - a) A declaration that the intended sale and/or lease of land parcels No. Kiambogo/Kiambogo Block 2/527 and 528 by the 1<sup>st</sup> respondent is in violation of Article 62(4) of the constitution and therefore, unlawful, illegal and hence null and void.
  - b) A declaration that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have abdicated their constitutional and legal roles and are therefore escapists.
  - c) Any other relief the court may deem fit to grant.

d) An order for payment of costs of this petition by the respondents.

### **Petitioner's Case**

5. The petitioner's case is based on the petition dated 3<sup>rd</sup> August 2016, the supporting affidavit of Elijah Sikona sworn on 3<sup>rd</sup> August 2016 and filed in court on 4<sup>th</sup> August 2016, the further affidavit of Elijah Sikona sworn and filed in court on 19<sup>th</sup> August 2016 and Written Submissions filed on 26<sup>th</sup> December 2016.

6. The petitioner avers that the 1<sup>st</sup> respondent is the owner of land parcels number Kiambogo/Kiambogo Block 2/527 and Kiambogo/Kiambogo Block 2/528 and that the purpose of the properties is to further the interest, education and welfare of the public. That the 1<sup>st</sup> respondent is supposed to own and manage the properties to the benefit of the public in general and not as private property.

7. It is deposed in the supporting affidavit that there is erected on the suit properties a primary school comprising buildings, fittings and installation and that the 1<sup>st</sup> respondent has put up the properties for lease and ultimately sale under the watch of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. That the properties constitute public land and are therefore to be used for the benefit of the public generally.

8. The petitioner further argues that under Article 62(4) public land shall not be disposed of or used except in terms of an Act of parliament specifying the nature and terms of the disposal or use. That though the land is currently owned by the 1<sup>st</sup> respondent, it was initially owned by the government and hence it is public land.

9. The petitioners therefore urge the court to protect the rights of the community by stopping the intended lease and sale.

### **Respondents' Case**

10. Upon being served with the petition, the 1<sup>st</sup> respondent entered appearance through its advocates while the 2<sup>nd</sup> and 3<sup>rd</sup> respondents entered appearance through the office of the attorney general. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not however take any further step in the matter beyond filing the memorandum of appearance.

11. The 1<sup>st</sup> respondent relied on the replying affidavit of **Ramzan Mohamedhusein Nanji** sworn on 3<sup>rd</sup> November 2016 and filed in court on 7<sup>th</sup> November 2016.

12. The 1<sup>st</sup> respondent agrees with the petitioner that it is a trust established pursuant to a trust deed. The objectives of the 1<sup>st</sup> respondent are to advance education for Muslims resident in Kenya and general humanity. The 1<sup>st</sup> respondent confirms that it is the registered proprietor of the two suit properties and that its proprietorship is absolute. That in furtherance of its objectives it operated on the suit properties a primary school until December 2010 when it decided to let the properties to third parties to run the school since the trustees are not resident in Nakuru. The decision to let the properties to a third party was also triggered by several events such as armed robbery, arson attacks and financial constraints all of which conspired to make it difficult for the 1<sup>st</sup> respondent to run the school.

13. That the decision to let the premises was well within the mandate of the trustees as per clause 3 of the Trust deed which states:

*(a) The trustees shall invest the aforesaid fund and all moneys it may receive by way of donation, grants and gifts in such investments as they deem fit.*

*(b) .....*

(c) *The trustees may in their absolute discretion either allow the Trust Fund or any other trust property, or any part or parts thereof to remain as actually invested or may sell, exchange, sell in or convert into money the same and may invest the net sale proceed thereof in the name of the trust in or upon such investments as the trustees may think proper.* (Emphasis supplied)

14. In conclusion, the 1st respondent maintains that the suit properties are private land as defined under Article 64 of the constitution and that the trustees are therefore free to dispose of the properties as they deem fit in terms of their powers under the trust deed. That the petitioner is a busy body who has brought the petition in bad faith. That the petition does not clearly state the provisions of the constitution which have been infringed and the manner of such infringement. The 1<sup>st</sup> respondent therefore urges the court to dismiss the petition and to condemn the petitioner to pay costs.

### **Analysis and Determinations**

15. At the core of these proceedings is the question of whether or not the two parcels of land known as Kiambogo/Kiambogo Block 2/527 and Kiambogo/Kiambogo Block 2/528 constitute public land as asserted by the petitioner or private land as maintained by the 1<sup>st</sup> respondent. Both parties however agree on one thing: the 1<sup>st</sup> respondent is the registered proprietor of the two parcels of land. The petitioner's further affidavit makes this clear as can be seen from the copies of the green cards in respect of the suit properties and certificate of search annexed thereto. The titles were issued under the Registered Land Act (now repealed) and the proprietorship is absolute. No encumbrance other than the inhibition ordered by the court on 10<sup>th</sup> August 2016 has been registered against any of the titles.

16. Article 64 of the constitution defines private land as consisting of:

- a) *registered land held by any person under any freehold tenure;*
- b) *land held by any person under leasehold tenure; and*
- c) *any other land declared private land under an Act of Parliament.*

17. It is therefore plain beyond argument that the suit properties herein constitute private land since the tenure is freehold. In the circumstances, the 1<sup>st</sup> respondent is entitled to the full protection of its right to property in terms of Article 40 of the constitution. The 1<sup>st</sup> respondent is also entitled to the full benefits of sections 24 and 25 of the Land Registration Act which state:

#### **24. Interest conferred by registration**

*Subject to this Act—*

- (a) *the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;* (Emphasis supplied)

#### **25. Rights of a proprietor**

- (1) *The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, ...* (Emphasis supplied)

18. In the case of **Joseph N.K. Arap Ng'ok v Moiwo Ole Keiwua & 4 others** [1997] eKLR the Court of Appeal stated as follows with regard to the rights of a registered proprietor under the provisions of Section 23(1) of Registration of Titles Act, Cap. 281(now repealed):

*Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.*

19. I have considered the pleadings, affidavits, submissions and authorities filed by the parties.

20. The petitioner's argument that the 1<sup>st</sup> respondent is supposed to own and manage the suit properties to the benefit of the public in general and not as private property does not hold water and cannot justify granting the orders sought. As a holder of a freehold title, the 1<sup>st</sup> respondent is free to use the suit properties as the trustees may in their absolute discretion determine in terms of the trust deed. For the avoidance of doubt, this includes selling or leasing. I therefore find that the petition lacks merit. I dismiss it.

21. The 1<sup>st</sup> respondent has urged the court to award it costs. The **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** state as follows:

*26. (1) The award of costs is at the discretion of the Court.*

*(2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.*

22. The court therefore has discretion on whether or not to award costs. The discretion must be exercised in such a way as to ensure that litigants are not unduly kept from accessing the court to determine their rights and fundamental freedoms.

23. The Supreme Court in **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR** held as follows:

*It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation..... Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant.*

24. Similarly in **JOSEPH ODUOR ANODE VS. KENYA RED CROSS SOCIETY [2012] eKLR** Odunga J. stated as follows:

*...whereas this court has discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general principle as adumbrated in the aforesaid statute (the Civil Procedure Act), is that costs follow the event unless the court is satisfied otherwise. The satisfaction must, however, be patent on record. In other*

*words, where the court decides not to follow the general principle, the court is enjoined to give reasons for not doing so. In my view it is the failure to follow the general principles without reason that would amount to arbitrary exercise of discretion....*

25. In the present case, the 1<sup>st</sup> respondent is the successful litigant and has had to invest time and resources to defend itself in these proceedings. The 1<sup>st</sup> respondent's rights and privileges as far as the suit properties are concerned couldn't be more glaring. The litigation herein could have been avoided if the petitioner made appropriate enquiries and took counsel prior to filing the petition. An award of costs in these circumstances cannot be said to hinder access to court. It would be unjust to deprive the 1<sup>st</sup> respondent of costs.

26. I therefore award costs to the 1<sup>st</sup> respondent.

27. In conclusion the petition is dismissed with costs to the 1<sup>st</sup> respondent.

Dated, signed and delivered in open court at Nakuru this 20<sup>th</sup> day of April 2017.

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr. Langat holding brief for Mr. Kipkoech for the petitioners.

No appearance for the respondents.

Court Assistant: Gichaba