



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MILIMANI

ELC NO.1326 OF 2012

IN THE MATTER OF ARTICLE 22 AND 258 OF THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLES 19(2), 20(1), 26(1), 27(4) & 5, 28, 35, 40,43(b) & (f),48, 56 AND 22 OF THE
CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF ARTICLE 2(5) & (6), 10, 67, 68(c) AND 258 OF THE CONSTITUTION
OF KENYA 2010**

BETWEEN

MUUNGANO WA WANAVIJIJI AND THE OTHER PETITIONERS

**AS NAMED IN THE SCHEDULE NO.1 ANNEXED TO THE
PETITION.....PETITIONER**

VERSUS

**THE HONOURABLE ATTORNEY GENERAL.....1ST
RESPONDENT**

THE MINISTER FOR LANDS.....2ND RESPONDENT

MINISTER OF STATE, OFFICE OF THE PRESIDENT

IN CHARGE OF PROVINCIAL ADMINISTRATION.....3RD RESPONDENT

COMMISSIONER FOR LANDS.....4TH RESPONDENT

RETIRED PRESIDENT HIS EXCELLENCY

DANIEL ARAP MOI.....5TH RESPONDENT

WILSON GACANJA.....6TH RESPONDENT

JULIUS MACHARIA MAINA.....7TH RESPONDENT

STEPHEN KANYAGIA MWANGI.....	8 TH RESPONDENT
JAMES MURIUKI KAMWERE.....	9 TH RESPONDENT
SAMUEL MUCHOMBA KINUTHIA.....	10 TH RESPONDENT
MARGARET NJOKI CHEGE.....	11 TH RESPONDENT
PAUL NDIRANGU NDUNGE.....	12 TH RESPONDENT
EUNICE WANGUI MBUGUA.....	13 TH RESPONDENT
RACHEAL MUTHONI NDIANG'UI.....	14 TH RESPONDENT
DECIMAL INVESTMENTS LIMITED.....	15 TH RESPONDENT

JUDGMENT

INTRODUCTION

1. The Principal Petitioner Muungano Wa Wanavijiji which describes itself as a federation of slum dwellers with presence in various informal settlements in the Republic of Kenya together with the other Petitioners brought this petition against the respondents claiming the following reliefs:-

- (a) **An order compelling the 4th respondent to cancel, rescind, nullify and or revoke the title deeds the subject of this suit.**
- (b) **An order directed at the 2nd and 4th respondent to publish the ownership profile of the land in Gathara Village/Marurui Jua Kali Settlement and avail this information to the respondents.**
- (c) **An order directed at the 4th respondent herein to re-inter into and upon the whole suit properties on behalf of themselves and on behalf of the members of Marurui Jua Kali Settlement/Gathara Village.**
- (d) **Conservatory orders prohibiting the 7th – 15th respondents or their agents/servants or assignees from evicting, harassing or in any other way interfering with the Petitioners or any other member of Gathara/Marurui Jua Kali enjoyment, occupation, use and utilization of the suit properties pending the completion of review of all leases, grants or dispositions of public land to establish their propriety or legality by the National Land Commission as required by law.**
- (e) **Conservatory orders prohibiting the 7th – 15th respondents and owners of all properties comprising the current Gathara/Marurui Jua Kali settlement from leasing, transferring, mortgaging or such other dealings that would prejudice the petitioners' right to property and or housing.**
- (f) **In the alternative, a declaration that the Petitioners have become proprietors, in common of the suit by prescription.**
- (g) **A declaration that the conduct of the respondents is a gross, violation of the Petitioners' right to housing, life, property and dignity.**
- (h) **Damages for violations of physical integrity and dignity of the Petitioners.**

(i) Costs of this suit.

(j) Any other further relief that this Honourable Court may deem fit and just to grant.

2. The 7th - 15th respondents are the registered owners of **LR Nos. Nairobi/Block 110/1028 to 1036** respectively. These are the parcels which are currently occupied by Petitioners who were initially registered as Thome Jua Kali Village Self Help Group but who later changed their name into Gathara Self Help Group in the year 2000. The Petitioners contend that the portion they are occupying was public land which was set aside as a buffer zone between two farms which were held by colonial settlers. The two farms were Thome Farm and Marurui Farm.

PETITIONERS' CONTENTION

3. It is the Petitioners' contention that the portions held by the 7th -15th respondents were given to them in a fraudulent manner when the Petitioners were in the said parcels and the grant of the said parcels to these respondents amounted to land grabbing. That the said grabbing was facilitated by a Government Surveyor who is the 9th respondent who also benefited from the land which they contend was public land.

4. The Petitioners now contend that they are faced with imminent eviction from the property occupied by them. That they cannot construct decent houses for fear of eviction. That the county Government of Nairobi has been roped into the corrupt scheme and has gone ahead to issue an enforcement notice on the pretext that the Petitioners have encroached on a public road reserve.

5. When the enforcement notice was issued by the Nairobi City Council who are the predecessors of the County Government of Nairobi, a suit was filed on behalf of the Petitioners to protect their interests. This suit is ELC No. 697 of 2012 which is still pending. The Petitioners were advised that this suit was not of much help to them hence their filing of this petition.

1ST, 2ND, 3RD AND 4TH RESPONDENTS CASE

6. The Petitioners petition is opposed by the 1st to 4th respondents through a replying affidavit sworn by Gordon Ochieng, a principal Land Administration Officer who contends that the parcel which was subdivided to create the parcels held by the 7th to 15th respondents was LR No. 30/1 and not LR No. 1267/2-5 as alleged in the supporting affidavit of the Petitioners. LR No. 30/1 was owned by Thome Estate Limited for a term of 999 years with effect from 1st June 1913. The land measured 476 acres. Between 1993 and 1994 Thome Estate Limited caused sub division of LR No. 30/1 into a number of plots measuring approximately 0.20 hectares for residential purposes.

7. As part of administrative measures, Thome Estate Limited was required to surrender the title to the original land (LR 30/1) in exchange for new grants for a term of 99 years with effect from 1st December 1994. Thome Estate Limited requested that subdivision approvals be issued directly to the individual owners. In accordance with the request by Thome Estate Limited, sub division approvals were issued to the 7th to 15th respondents. The 1st to 4th respondents maintain that the land has never been public land as it was on leasehold to Thome Estate Limited for 999 years with effect 1st June 1913. There was no element of fraud or corruption in the sub division process.

7TH, 8TH, 9TH, 14TH AND 15TH RESPONDENTS' CASE

8. The 7th, 8th, 9th, 14th and 15th respondents have stated their case through replying affidavit of the 9th respondent James Kamwere Muriuki. The 9th respondent denied that he was a Government Surveyor as at the time he undertook the survey as alleged by the Petitioners. He contends that he had retired from Government employ as at the time he carried out survey of the property which was by then held by Thome Farmers Company Limited. The portion he is holding was given to him as part settlement of his fees which Thome Farmers company Limited owed him for the work done.

9. The 9th respondent gave a history of **LR No. 30/1 and 30/2** which had been purchased by Thome Farmers Company Limited. He was given instructions to amalgamate the two titles. After the amalgamation of the two titles, he embarked on the subdivision in phases. He created a 10 metre road of access to the river as instructed. All the subdivisions were approved by the Survey of Kenya. He denied that the land was public land. He stated that the petitioners had been occupying the neighbouring Marurui Farm and that they only encroached into the suit properties in the year 2012 necessitating filing of ELC 297 of 2012. He contends that the Petitioners are illegal trespassers to private property and that their pleas should not be granted.

THE 10TH, 11TH, 12TH AND 13TH RESPONDENTS' CASE

10. The 10th, 11th, 12th and 13th respondents have associated themselves with the affidavit of the 9th respondent. They contend that the suit properties have never been public land and that they got the land from a private company known as Thome Farmers Company Limited. That the petitioners have filed a case in court being ELC 697 of 2012 and there is another case against them being ELC No. 297 of 2012 which are both pending. That the filing of this petition is an abuse of the process of court. That the petitioners are seeking to violate their rights to own property as enshrined in the Constitution.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

11. I have carefully considered the petitioners' case as well as the respondent's opposition of the same. Of all the respondents, it is only the 5th and 6th respondents who did not respond to the petition. The 5th respondent is Daniel Toroitich Arap Moi who is retired President of the Republic of Kenya. The 6th respondent is Wilson Gacanja who used to be Commissioner of Lands.

12. The petitioners have premised their petition on the fact that the portion they occupy was public land which was grabbed by the 7th to 15th respondents. The petitioners allege that there was fraud involved in the registration of the 7th to 15th respondents. The issues which emerge for determination are the following:-

(a) whether the portion which are occupied by the petitioners was public land which was irregularly acquired by the 7th to 15th respondents.

(b) whether any constitutional rights of the petitioners have been violated.

(c) Are the petitioners entitled to the reliefs sought in the petition.

Whether the portion which is occupied by the Petitioners was public land which was irregularly acquired by the 7th to 15th respondents

13. The petitioners alleged that the portion they are occupying was public land which was fraudulently registered in the names of the 7th to 15th respondents. Allegations of fraud are serious allegations which ought to be proved. The standard of proof required is that beyond balance of probabilities. In the case of **Ratilal G. Patel –vs- Lalji Makanji (1957) EA 314** the Judges of the East African Court of Appeal had this to say regarding burden of proof in fraud cases:-

“There is one preliminary observation which we must make on the learned judges treatment of this evidence:- he does not anywhere in the judgment expressly direct himself on the burden of proof or the standard of proof required. Allegations of fraud must strictly be proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

14. The petitioners merely allege that the land was public land and that it was grabbed. There is no evidence at all that the land they occupy was at any given time public land. Contrary to the petitioners'

allegations, the 9th respondent has shown through documentary evidence that the land in issue was private land. This is further confirmed by the affidavit of Gordon Ochieng who clearly shows that the land in issue was private land since 1st June 1913. There is no evidence that the land reverted to the Government as to become public land. The allegation that the 9th respondent was a Government employee when he surveyed the land has been refuted by the 9th respondent who demonstrated that as at the time he carried out the survey, he had voluntarily retired from Government Service.

Whether any constitutional rights of the petitioners have been violated

15. In a Constitutional petition where a petitioner is alleging that his rights have been violated, the petitioner is expected to state with precision the provisions of the constitution which have been violated and in what manner they have been violated. In the instant case, the petitioners are claiming that they are faced with eviction from land which they claim was public land. As I have said hereinabove, it has been demonstrated that the portion occupied by the petitioners was private land. It was never public land as they claim. It is therefore clear that they have no right to claim the land which is privately registered.

16. The petitioners are claiming in the alternative that they have acquired the land through prescription. If indeed their contention is that the land in issue was Government land, then they cannot be heard to claim that they have acquired the same by way of adverse possession as one cannot claim adverse possession against land held by the Government. There is no credible evidence that the petitioners have been staying peacefully, continuously and uninterrupted in the land as to acquire it by adverse possession. There are allegations which are not contested that the petitioners were living in a neighbouring farm and that they only encroached on the suit properties in 2012 and there is a case against them in court seeking their eviction. The petitioners have admitted that there is a case pending in court in their supporting affidavit. The effect of this case is that it stopped time from running against the registered proprietors if at all the petitioners were in occupation prior to 2012 as they allege.

17. The petitioners cannot invoke the provisions of **Article 40 of the Constitution**. This Article relates to protection of right to property. The petitioners have no proprietary rights capable of being protected. The petitioners are squatting on private land and they cannot seek protection of the court to violate other peoples' rights.

18. Economic and social rights can only be provided by the State and the petitioners cannot claim the same from private citizens. In any case the petitioners have not put forth a case to warrant the court to delve into the issue whether the state ought to consider their case to housing or other amenities. There is no evidence that the State or any individual has treated them in an undignified manner.

Whether the petitioners are entitled to the reliefs sought in the petition

19. The petitioners' main prayer was protection of right to property. I have already found that none of the petitioners' right to property has been violated. All other reliefs flow from this main prayer. As the petitioners' right to protection of property has not been violated, it follows that they are not entitled to any compensation or any other reliefs claimed in the petition.

CONCLUSION

20. Based on the analysis given hereinabove, I find that the petitioners' petition is misconceived. The same is hereby dismissed with no order as to costs.

Dated, signed and delivered at Nairobi on this 20th day of June 2017.

E.O. OBAGA

JUDGE

In presence of:-

Mr. Wachira for the 10th, 11th, 12th and 13th Respondents

Ms. Sankai for Mr. Omuga for 7th, 8th, 9th, 14th & 15th Respondents

Court Assistant - Hilda