



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

PETITION NO. 32 OF 2012

ROSEMARY WANJIRU NJIRAINI.....PETITIONER

VERSUS

THE OFFICER IN CHARGE OF STATION, MOLO POLICE STATION....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

(Petitioner claiming to own certain land; same land alleged by the respondents to form part of Molo Police Station; petitioner having purchased the land from the first allottees and issued with a certificate of title; petitioner preparing building plans which were all approved; allegation that land is part of the police station not supported by any part development plan, survey map, title or any other document; certificate of title is prima facie ownership of land and the burden of proof is on the one alleging that the title is not a good title; no evidence tabled to show that the petitioner's title falls within land set apart for a police station; petition allowed; respondents barred from interfering with the petitioner's right to property; general damages awarded)

1. This suit was commenced on 16 July 2012 by way of a constitutional petition. In her petition, the petitioner has pleaded that she is the registered proprietor of the land parcel Molo Township Block 11/157 (hereinafter referred to as "the suit land") which property is located in Molo Township. She has averred that as the proprietor of the suit land, she proposed to construct a petrol station on it, and she obtained all the requisite approvals. However, in April 2008, when working on the ground, she was stopped from doing so by one Dalmas Ongera, the Officer in Charge of Molo Police Station. She was then arrested together with her workers only to be released without being charged with any offence but with strict threats not to carry out any developments on the suit land. She sued the said Dalmas Ongera for abusing his powers as a police officer through the suit Nakuru HCCC NO. 53 of 2008. However, her efforts to develop her property continued to be hampered.

2. In the petition, the petitioner has sought the following principal orders which are prayers 2, 3, 4 of the petition (slightly paraphrased) :-

(a) A declaration that the arrest of the petitioner and her workers, the interference of her development, and enjoyment of the suit land, is arbitrary and illegal and consequently an infringement of the petitioner's constitutional rights.

(b) An order for compensation in terms of damages.

(c) A permanent order restraining the officer in charge Molo Police Station, by himself and/or agents, employees, subordinate officers, successors or anybody claiming from him from arresting, intimidating, or interfering in whatsoever manner with the Petitioner's and/or her agents, employees, successors or anybody claiming from her in so far as the same relates to the development she has embarked on the suit property and ownership of the same.

3. The petition was accompanied by a supporting affidavit sworn by the petitioner. No response was filed to the petition until 3 May 2015 when a replying affidavit sworn by Job Lesinkwa, SSP, the Officer Commanding Police Division, Molo, was filed. The gist of his reply was that the suit land is situated in land that was reserved for the development of Molo Police Station. He averred that Molo Police Station was gazetted as a police station, incorporating Molo Police Division, on 1 May 1951. He deposed that the land set aside for the police station measured 8 Hectares which he stated was evidenced by a map which he annexed but which map was not legible. He deposed that Molo Police Station was never fenced, and as a result, several individuals moved in and unlawfully carved out a total of 4 Hectares which were later divided into 14 plots. It is averred that the petitioner was a beneficiary of the unlawful excision of a public utility plot which had been set aside for a police station. He annexed a circular No. 10/2003 dated 14 April 2003, from the Ministry of Local Government, which directed that all public utility plots irregularly allocated, be repossessed with immediate effect. In line with the said circular, the Town Planning Works Committee, Molo Town Council held a meeting on 13 August 2004, and it is averred that in the said meeting, it was established that the suit land had been set aside for expansion of Molo Police Station, and upon further deliberation, it was decided that the illegal allocations be revoked. He annexed the minutes of this meeting. He deposed further that Molo Town Council, vide their letter dated 25 November 2004, informed the Ministry of Lands that the allocation of the suit property was among other plots which were irregular and he annexed the said letter. He also referred to some newspaper cuttings as demonstrating that it is common knowledge that the suit land is set aside for expansion of the police station. He stated that the Commissioner of Police sought the assistance of the Minister of Lands through a letter dated 11 January 2012, and that after investigations, the Minister in his letter dated 5 April 2012, confirmed that the disputed land was indeed reserved for Molo Police Station. He referred to another suit being Nakuru Misc. No.73 of 2012 which he stated was not a decision based on merits but a decision making process. He averred that allowing the petitioner to proceed with the construction of a petrol station within the police station will pose a great security threat.

4. The petitioner filed a further affidavit on 27 May 2015. She contended that contrary to the allegations of the respondents, the police station land was and still is comprised in 4 Hectares of land. She as denied being a beneficiary of any allocation, as she purchased the suit land from the original allottees, who had received a grant from the Government under the Registration of Titles Act, for a leasehold title of 99 years from 1 March 2006. She annexed the letters of allotment and the grant. She explained that the regime of the land changed from the Registration of Titles Act, to the Registered Land Act, and she was then issued with a Certificate of Lease in the year 2009. She deposed that when she applied for change of user from agricultural to petrol station, no one raised any objections, despite the same being advertised in the Daily Nation newspaper. That application was subsequently approved. She averred that had Molo Town Council had any issues, they would not have approved her proposed development plans. She pointed out that the Circular No. 10/2003, was a general circular, which did not affect her land. She stated that a purported revocation of her title was subjected to the suit Nakuru Misc. Application No. 73 of 2012, where she was the applicant, and her title was restored.

5. Directions had earlier been taken for the petition to be disposed of by way of the affidavit evidence and written submissions, which was done. I then retired to write a judgment. However, upon going through the material that had been presented by the parties, I formed the view that there were serious questions of fact to be determined, including the question whether the land had been set aside for public utility or whether it was one set aside as a police station. I came to the conclusion that I am unable to determine all issues based solely on the affidavit evidence before me, and on reflection, I directed that the case be heard by way of oral evidence. At some point, the respondents filed an application dated 29 August 2016, seeking to be allowed to file a defence and counterclaim. I thought this was a strange procedure, given

that this is a constitutional petition for the protection of fundamental rights and freedoms, and I instead directed the respondents to file suit against the petitioner within 21 days of 17 October 2016, if only to avoid technicalities of procedure. To my knowledge, no such suit was ever filed.

6. In her evidence, the petitioner testified that she purchased the suit land from several persons, being Peter Njuguna, Nehemiah Kiplangat, and Nancy Ondicho, and they wrote a sale agreement for the purchase. She testified that the sellers had an allotment letter for the plot which allotment letter she tendered in evidence. She later obtained a Grant and a Lease over the suit land. She then applied for change of user and for development permission which were granted. She wished to use this plot as a petrol station and all her applications for this type of user and building plans were approved without any objection being raised at any point. She testified that it is when she embarked on constructing the premises that she was accosted and arrested. She stated that she pays land rent and land rent of which she produced the receipts. At some point, her title was revoked through a Gazette Notice and she filed the case Nakuru HCC JR No. 73 of 2012 which was decided in her favour with no appeal being filed against the decision.

7. The respondents called SSP Job Lesikinwa as their witness. He is currently the OCPD of Tetu Police Station. He served as the OCPD of Molo Division between the years 2012 and 2016 having taken over from the late Mr. Achesa Litabalia. He stated that he was informed by the late Mr. Achesa, of encroachment by persons, of land belonging to the police station one of whom is the petitioner. He stated that the police station, was gazetted in May of 1951 and measured 8 Ha. He was not aware that the petitioner has title to the suit land and according to him, her title was meant to be revoked. He did not produce any documents to support his evidence.

8. I thought it fit to see the land in dispute and I directed a site visit which was done on 20 June 2017. The main police station is at the end of a murram road which deviates from one of the tarmac roads within Molo Town. The suit property is to the left of this road, just about the third plot from where the murram road begins. In between the plot and the police station is an unused area which is planted with trees, save that just before the police station, again on the left side, is a house which I came to learn belongs to one James Mwangi. I learnt on site, that there is a plot No. 158, located where the trees are situated and which have been in dispute in other suits. I was informed that the Plot No. 158 was the subject matter in JR No. 79 of 2012.

9. In his submissions, Mr. Kahigah Waitindi, learned counsel for the petitioner, pointed me at the evidence tendered demonstrating that the suit land is owned by the petitioner. He further referred me to the case Nakuru JR No. 73 of 2012, wherein the title of the petitioner which had been revoked, was reinstated. He submitted that the petitioner is an innocent purchaser of land without notice, and that there was no caution, or objection, at the time of purchase, nor at the time she proposed a change of user. He submitted that the petitioner holds a first registration under Section 143 of the Registered Land Act (repealed) and the same cannot be defeated. He relied on the case of **Obiero vs Opiyo & Others (1972) EA 227** and **Kanyi vs Muthiora (1984) KLR 712**. He also referred me to Section 23 of the repealed Registration of Titles Act as protecting the title in issue. He submitted that her arrests over the suit land are illegal and he proposed the sum of Kshs. 2,000,000/= as damages relying on the case of **Juma Khamisi Kariuki vs East Africa Industries Ltd & Another (1986) eKLR**. He submitted that the petitioner is entitled to enjoy the rights of a registered owner. He referred to the site visit as evidencing that the petitioner's land is far from the police station and that there are other owners between the petitioner's land and the police station, and which persons are much closer to the police station.

10. In her submissions, Ms. Winnie J. Cheruiyot, learned State Counsel appearing for the respondents, inter alia asked this court to look at the annexures to the replying affidavit, despite her witness not having produced any documents. She submitted that the averment that the Molo Police Station was established on 1 May 1951 was not refuted. She was of the view that the petitioner would not be privy to how large the police station land is. She pointed out that the petitioner did not produce a search certificate and did not call any other witness to corroborate her evidence. She therefore submitted that the petitioner has not established on a balance of probabilities that the title which she acquired was valid. She submitted that the interests of the public outweigh the private interests of the petitioner. She relied on the case of **Kenya**

Guards Allied Workers Union vs Security Guards Services & 38 Others, Misc. Suit No. 1159 of 2003; Nelson Kazungu Chai & 9 Others vs Pwani University (2014) eKLR ; and ***Henry Muthee Kathurima vs Commissioner of Lands & Another (2015) eKLR***. She submitted that the petitioner did not call any evidence to prove that the initial allotment was done legally and cannot claim to be a bona fide purchaser for value. She ventured to submit that the allotment letter was acquired irregularly and illegally and referred me to the case of ***Norbixin Kenya Limited vs Attorney General (2014) eKLR***. She submitted that the petitioner did not demonstrate that in allocating the land the Commissioner of Lands undertook due process or had power to allocate the land. On the case JR No. 73 of 2012, she submitted that the court only quashed the revocation of the petitioner's title because of procedure, and the initial reasons why the Registrar of Titles cancelled the said title still remain. On the approvals that were made without any objection, she submitted that it was never shown that the respondents were aware of the same. She also argued that the law gives occupation rights to a person in possession, and that the petitioner found the respondents on the property. She asked that the petition be dismissed.

11. I have considered the matter. What is at stake is the ownership of the land parcel Molo Township Block 11/157. On one hand, the petitioner claims that the same is her land, whereas on the other hand, the respondents claim that the said land is part of the land reserved for Molo Police Station and hence a public utility plot.

12. From the documents tendered by the petitioner, I have deciphered that the land in dispute was on 28 February 1996 allotted to three persons, namely Nancy Ondicho, P. Njuguna and N. Kiplagat. The plot was then described as UNS. Residential Plot No. G - Molo Township. After this letter of allotment was issued, a grant under the Registration of Titles Act (now repealed), was issued on 1 July 1997 to the said allottees. The said grant is noted as Grant No. IR 82914 and the land was now identified as LR No. 533/694 being a lease of 99 years from 1 March 1996 at the annual rent of Kshs. 2,400/= for residential use. On 10 September 1998, the petitioner entered into an agreement with the leasehold owners, and purchased the said land at a consideration of Kshs. 200,000/=. A transfer of the lease was then effected on 26 July 2000 and the petitioner became the new proprietor of the leasehold title comprised in the said land. On 3 June 2008, there was conversion of the title from the regime of the Registration of Titles Act, to the Registered Land Act regime, and the land now became registered as Molo Block II/ 157 and noted in the Registry Index Map (RIM). There is evidence that the petitioner has consistently been paying her land rent and rates. Through an advertisement placed in the Daily Nation newspaper of 7 September 2006, the petitioner applied to change the user of the suit land to a petrol station. The change of user was allowed. Her building plans to develop the petrol station were also approved and she also got a Environmental Impact Assessment Licence for the proposed petrol station issued on 17 April 2007. In the year 2003, she had proposed to construct some feeder roads for inlet and exit of the proposed petrol station which was also approved vide a letter dated 24 November 2003. Her plans to develop the petrol station were however frustrated by interference by police officers from Molo Police Station who arrested her and her workers. In the meantime, her title was revoked through a Gazette Notice which led her to file the suit Nakuru High Court Misc. Application No. 73 of 2012, for orders of certiorari to quash the said notice. Orders of Certiorari were issued on 8 November 2013, meaning that her title to the suit property was reinstated. It is on the basis that she has title to the land, which she considers to be a good title, that the petitioner has sought protection from this court.

13. Although Mr. Kahigah hinged quite a bit of his submissions on the argument that the title of the petitioner is a first registration, this cannot be the case since there were previous owners who held title and thereafter sold the same to the petitioner. It is not therefore necessary for me to consider the effect of a first registration, and the cases of ***Obiero vs Opiyo*** and ***Kanyi vs Muthiora***, in so far as they relate to rights acquired through a first registration as this is not applicable.

14. The position of the respondents is that the suit land forms part of Molo Police Station. They state that Molo Police Station was gazetted in the year 1951 as having 8 Hectares. It is claimed that there was an illegal allocation of part of this land. Unfortunately, apart from the mere oral statement that Molo Police Station was gazetted as being land measuring 8 Hectare, I have no documentary evidence of such. One would expect that there be a Part Development Plan (PDP) for the police station which would have clearly demarcated the area assigned to the police station, but no such PDP was produced either in the

affidavit or oral evidence of SSP Lesikinwa. In his replying affidavit, SSP Lesikinwa annexed a copy of a map said to be of the police station but the said map is no legible and one cannot tell what it is meant to demonstrate. It would not have been too hard to call the Director of Surveys or District Surveyor or other appropriate officer, to produce a map showing the dimensions of the police station, and explain, if indeed that is the position, that the suit land is within the police station land.

15. In matters such as these, it is the documents which speak, and any oral evidence must be backed up by the necessary documentation. I have absolutely no document before me which goes to show the dimensions of what was reserved to be land for the Molo Police Station. The reason why I directed that this suit be heard by way of oral evidence, was so as to give the respondents opportunity to call witnesses to demonstrate that indeed, the suit land is land assigned to the police station or other public utility. Save for SSP Lesinkwa, whose evidence cannot be said to be of much worth to say the least, the respondents did not call any person to show that the suit land is within the Molo Police Station.

16. I was pointed to various letters regarding illegal allocation of public land. One was that of 14 April 2003. That was a general letter written to the Nairobi City Council, and the various Municipal and Town Councils, directing that all public utility plots illegally allocated be repossessed with immediate effect. They were advised to search into the approved PDPs in this action. This letter does not cite the suit property as one of the plots to be repossessed, and as I have mentioned, the respondents did not tender any PDP to show that the suit land is among the plots set apart for the development of Molo Police Station or indeed was land set apart for any public purpose. I have however seen that in the Town Planning Works Committee Meeting of the Molo Town Council held on 13 August 2004, there was resolved that title to the suit land, and others, be revoked as they were on police station land. The basis for that decision is not clear since no PDP was referred to in the said meeting. Apart from this, it should be recalled that at this point in time, there was title already issued to the petitioner, and one would have expected that she be given a hearing before any such decision could be reached. I have also seen the letter dated 25 November 2004, from Molo Town Council to the Commissioner of Lands, asking the Commissioner of Lands to revoke the title to the suit land. I do not know what may have happened to this request since I have not seen any response to the said letter. Another letter was written on 11 January 2012 by the Commissioner of Police to the Minister of Lands asking for revocation of some titles allegedly within Molo Police Station. The Honourable Minister replied, stating that he has instructed that the titles be revoked and the land revert back to the police. I believe that it is after this that the Registrar of Titles made the gazette notice revoking the petitioner's title, which notice was quashed by the order of certiorari.

17. It has been the law, and it still is the law, that the Certificate of Title issued to a person is prima facie evidence, that the said person holds title to the land noted therein. In the pre-2012 land regime, this was provided for in Section 28 of the Registered Land Act and Section 23 of the Registration of Titles Act which were drawn as follows :-

RLA S.27. 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;

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

RTA S.23 (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of

fraud or misrepresentation to which he is proved to be a party.

(2) A certified copy of any registered instrument, signed by the registrar and sealed with his seal of office, shall be received in evidence in the same manner as the original.

18. The current law is in Section 26 of the Land Registration Act, 2012, which provides as follows :-

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

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

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

19. It follows that when a person has been issued with a Certificate of Title, that title, prima facie, demonstrates that the individual named therein is the proper owner of the freehold or leasehold title noted in the said certificate. The law already presumes that the said title is a good title, and therefore if another person claims that the said title is not genuine, then the burden of proof is upon the person claiming as much. Such person must tender evidence, that despite what is noted in the Certificate of Title or register, the said title is not a good title and can seek to have it revoked. In our instance, prima facie, the petitioner is a genuine holder of the title to the suit property. If the respondents hold the opinion that the title of the petitioner is not genuine, then the burden of proving as much is on them. It is them who need to bring in evidence that the land in dispute was reserved as police station land; that the allocation of the said land was irregular; and that the petitioner ought not to have been issued with the title to the same. That burden is not upon the petitioner. It cannot therefore be argued that the petitioner has not called evidence to prove that the allotment of the land was regular; or that the petitioner has not called evidence to show that the acreage of the police station land was 4 Ha and not 8 Ha. That was the burden of the respondents to discharge. I really do not see the place of the argument by Ms. Cheruiyot that the petitioner needed to call a witness to corroborate her evidence. What is there to be corroborated? The petitioner already has title and that in itself, as the law provides, is a presumption that she holds a good title.

20. Various cases were referred to me by counsel for the respondent and I have looked at them, but the same are clearly distinguishable from the circumstances of this case. In the case of **Norbixin Kenya Limited vs Attorney General** (supra), there was also a dispute as to whether the land in issue was police station land. In that case, the Attorney General produced a development plan No. 309 which recognized the existence of a police station on the suit property. There had also been two allotment letters, one issued to the police, and the other to the plaintiff's predecessors in title. The court held that there was evidence that the land had been planned and reserved for use as a police station. I do not have such evidence in this case, in that no PDP was produced, and no allotment letter or document of title in favour of the police station, was tendered. In the case of **Nelson Kazungu Chai & 9 Others vs Pwani University** (supra), the issue was whether certain land belonged to the individual plaintiffs or to the defendant which is a public university. Evidence was tendered that the land had been reserved for public use and affirmed as such through a PDP. The same was the position in the case of **Henry Muthee Kathurima vs Commissioner of Lands & Others** where the question was whether certain land had been reserved for use by the National Youth Service. In the suit, there was produced a PDP No. 167/89/8 to demonstrate that the land was indeed reserved for use by the Service. This is not what we have in this suit. There is no document whatsoever, whether in the form of a PDP, or survey map, or indeed anything, to show that the suit land was ever part of the land belonging to the Molo Police Station. In fact I have no evidence to inform me of

what the police station land is, or how big it measures. For a court to cancel a title, it must be fully convinced that such title is a bad title that cannot be protected. A court cannot cancel a title on the mere statement, without anything more, that the land comprised therein is public land.

21. I would be the last person to liberally give away police station land, or indeed public land, which has been irregularly acquired. However, on the facts of this case, I have absolutely nothing to persuade me that the suit land was ever part of police station land or was ever land set aside for use as a public utility. The respondents have hopelessly failed in discharging their burden that the title held by the petitioner is not a good title which ought not to be protected. I am therefore of opinion that the petitioner fully deserves the protection given in Article 40 of the Constitution which enshrines the right to property. That provision of the law is drawn as follows.

40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

22. I repeat, I have nothing before me that would lead me to the conclusion that the title of the petitioner was one that was unlawfully acquired so as to make it fall under Article 40 (6). I hold that the petitioner is the rightful proprietor of the suit land and issue an order of permanent injunction to restrain the respondents from interfering with her use and quiet possession of the said land. If indeed the State is of opinion that they need this land for Molo Police Station, they can embark on the process of compulsory acquisition as set out in law.

23. On the question of damages, it is not denied that the respondents have prevented the petitioner from using her land. There was no basis to do so. The petitioner has suffered loss as she has been unable to economically utilize her land. She was harassed and arrested for no other reason other than her wish to exercise her proprietary rights over land that she owns. I note however that the petitioner did not table before this court any specific pecuniary loss. But in recognition of the fact that her rights to property were violated, and considering that she was arbitrarily arrested without any charges being preferred against her, merely for wishing to utilize her property, in my discretion, I award the petitioner the sum of Kshs. 500,000/= in general damages.

24. I believe that I have dealt with all issues in the matter. I now make the following orders :-

(i) That a declaration is hereby issued that the petitioner is the lawful proprietor of the leasehold interest comprised in the land Molo Township Block 11/157.

(ii) That an order of permanent injunction is hereby issued, restraining the respondents, and/or their servants/agents from interfering with the petitioner's use and quiet possession of the land parcel Molo Township Block 11/157.

(iii) That a declaration is hereby issued that the respondents have violated the petitioner's constitutional right to property as granted by Article 40 of the Constitution of Kenya, 2010.

(iv) That the petitioner is hereby awarded general damages in the sum of Kshs. 500,000/= in recognition that her rights to property were violated by the respondents.

(v) The petitioner shall have the costs of this petition.

25. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 19TH day of October 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of: -

Mr. Kibet instructed by M/s Mirugi Kariuki & Company Advocates, for the petitioner.

Ms. Winnie J Cheruiyot instructed by the State Law Office, for the respondents.

Court Assistant: Carlton Toroitich

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU