



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CONSTITUTIONAL PETITION NO 58 OF 2013

IN THE MATTER OF: ARTICLE 22 OF THE CONSTITUTION OF KENYA (2010):

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2(5), 28, 31 (a) & 43 (1)(b) OF THE CONSTITUTION OF KENYA (2010):

AND

IN THE MATTER OF: THE REGISTRATION OF TITLES ACT (CAP.281) AND

IN THE MATTER OF: THE LAND ACT (2012):

AND

**IN THE MATTER OF: ALL THAT PARCEL OF LAND KNOWN AS LR. NUMBER:
64/III/MAINLAND NORTH, MOMBASA;**

BETWEEN

1. LAURENCO K. KARISA

2. ABUBAKAR K. OMAR

3. BIASHA S. SHABANI

4. ATHUMAN B. KALAMA

(Suing on their own behalf and on behalf of forty six (46) others,

as individuals and members of Ushindi Self Help Group)....PETITIONERS

VERSES

SALIM ALI JEMADAR

AS ADMINISTRATOR OF JEMADAR AMIN.....1ST RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT..2ND RESPONDENT

THE REGISTRAR OF TITLES, MOMBASA.....3RD RESPONDENT

THE SECRETARY FOR LANDS, HOUSING & URBAN DEVPT...4TH RESPONDENT

THE COUNTY GOVERNMENT OF MOMBASA.....5TH RESPONDENT

THE NATIONAL LAND COMMISSION.....6TH RESPONDENT

THE HON. ATTORNEY GENERAL.....7TH RESPONDENT

AND

KITHUMULA AND 33 OTHERS.....INTERESTED PARTIES

JUDGEMENT

1. The Petitioners brought this Petition dated 24th October 2013 seeking the following orders:

1) Spent

2) That this Application is set for hearing within seven days of the date of service of this Application on the Respondents or so soon thereafter as counsel for the Petitioners may be heard on behalf of the Petitioners for:

A. A declaration that the action by the 2nd, 3rd and 4th Respondents in issuing the 1st Respondent with a title deed in respect of all that parcel of land known as title number 64/III/MN/MOMBASA (hereafter the Suit Property) at a time when the Petitioners were in physical occupation of the Suit Property thereby rendering the Petitioners subject to demolition of their houses now erected on the Suit Property and forceful evictions therefrom and potentially subjecting the Petitioners to a state of homelessness contravenes the provisions of:

a. Article 2(5) of the Constitution of Kenya (2010), which provides that the general rules of International Law shall form part of the law of Kenya and in particular contravenes the United Nations General Comment 4 which provided for the right to adequate housing.

b. Article 28 of the Constitution of Kenya which guarantees human dignity that every person has inherent dignity and the right to have that dignity respected and protected;

c. Article 43 (1)(b) of the Constitution of Kenya (2010) which guarantees, *inter alia*, the right to accessible and adequate housing ; and

d. Article 47 (1) of the Constitution of Kenya (2010) which guarantees, *inter alia*, the right to fair administrative action.

B. A declaration that the right to adequate housing is a primary and/or fundamental right which may not be derogated from under the guise of the Government providing land to investors and that in the disposal of public land, allocation of land for housing of otherwise homeless citizens has great priority than allocation of land to investor and other business entities.

C. A declaration that the all rights set out in the bill of rights as may only be enjoyed by physical persons are superior to such right as may be enjoyed equally by physical

persons and bodies corporate; and

D. A declaration that the right to adequate housing is a primary and/or fundamental right which may not be derogated from under the guise of the Government providing land to other homeless or deserving applicants such as the 1st Respondent when the said land is already in the permanent adverse possession and occupation of other homeless persons, namely the Petitioners herein;

E. A declaration that the common law contractual relationship known as a tenancy at will is repugnant to mutually exclusive with and contravenes the provisions of:

a. Article 43(1)(b) of the Constitution of Kenya (2010) which guarantees, *inter alia*, the right to accessible and adequate housing;

b. Article 60 (1)(a) and (b) of the Constitution of Kenya (2010) which provided that all land in Kenya be held under and managed in a manner that is equitable, efficient, productive and sustainable and in accordance with the principles of *inter alia*, equitable access to land and security of land rights;

c. Article 27(1) of the Constitution of Kenya (2010) which guarantees equal protection of the land and equal benefit of the law between landlord and tenant alike;

d. Article 28 of the Constitution of Kenya (2010) which guarantees the protection and respect of every person's inherent dignity';

e. Article 29 (d) of the Constitution of Kenya (2010) which guarantees freedom from torture in any manner, whether physical or psychological; and

f. Article 29 (f) of the Constitution of Kenya (2010) which guaranteed freedom from cruel, inhuman or degrading treatment, including arbitrary termination of tenancy and arbitrary evictions contemplated under a tenancy at will.

F. A declaration that the common law principle of eminent domain pursuant to which the Government issues title deeds to land, including the title to the Suit Property is repugnant to mutually exclusive with and contravenes the provisions of Article 61(1) of the Constitution of Kenya (2010) which provided that all and in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals in so far as the Respondents may seek to enforce the principle of eminent domain through eviction of the Petitioners from the Suit Property.

3. That this Honourable Court do make such orders, issue such writs and give such directions as it deems appropriate to prohibit the Respondents for interfering with the peaceful stay of the residents of the said Suit Property until such time as the national land commission shall have addressed itself to the validity and propriety of the allocation of the Suit Property to the 1st Respondent over and above other landless Kenyan citizens such as the Petitioners.

4. That this Honourable Court do further make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing and/or securing that subordinate courts and/or administrative offices and/or officials.

5. That the cost of the Application be provided for. -

2. The Petition is supported by the Affidavit sworn jointly by Laurence K. Karisa, Abubakar K. Omar, Biasha S. Shabani and Athman B. Kalama. They deposed that the allocation and issuance of title to the 1st

Respondent was done contrary to and without any or any proper regard on whether the Suit Property is empty and against the rules of natural justice and fair administrative practice. That they entered the Suit Property with the consent of the 1st Respondent on the conditions of payment of stand premium, ground rent and an agreement and undertaking by the 1st Respondent to formally subdivide the Property and transfer each portion to the Petitioners.

3. The Petitioners contend that the 1st Respondent's right to protection of Property cannot override their rights of access to adequate and accessible housing and that the 2nd, 3rd, and 4th Respondents had no business purporting to provide the Suit Premises for business when there were homeless Kenyans living thereon. Therefore the 1st Respondent in exercising his alleged legal right to enforce the alleged terms of the tenancy at will to recover alleged ground rent at a time when the Petitioners were in occupation having bought from the 1st Respondents' predecessor in title did offend and or infringe on the Petitioners rights guaranteed by the Constitution. The Petitioner's bundle of documents referred to as **USHG** was not annexed. In their list of bundle of documents dated 24th October 2013 no document is mentioned and none was attached.

4. The Petitioners also filed a Further Affidavit dated 5th June 2017 in support of the Petition. In this Affidavit they annexed a bundle of documents referred to as "**USHG-1 & 2**" annexing correspondences exchanged and acknowledgment of payment of monies made on different dates between 2015 and 2017 to the 1st respondent. The payments are stated to be towards their plots. For instance the acknowledgment dated 3rd June 2017 for the sum of Khs.107,000 from the Chairman Ushindi Self Help Group by the 1st Respondent is received as part payment of their plots. The Petitioners deposed that they had not fully reached a final settlement of this Suit because the title of the Suit Parcel is in the custody of the 1st Respondent's Advocate and is held as lien for payment of legal fees. The total monies so far paid by the Petitioners summed up to Kshs.1, 374,500.00.

5. The record indicates that this Petition is only opposed by the 1st Respondent. He filed a replying Affidavit dated 2nd December 2013 in which he deposed that the Petitioners are indeed ground tenants having been allowed to put up a house without land and pay ground rent on month to month basis. That the tenants became uncooperative after the death of his father in 2006 and he thus notified them of his intention to subdivide and sell to each one of them the subdivisions. They met, discussed and he gave them an offer. That the tenants who cooperated gave their counter offers and have paid and he has since transferred their portions to them. The 1st Respondent denied imposing anything on the ground tenants and instead accuses them of filing this case instead of giving a counter-offer. That the Petitioners are only interested in using this case to waste time so that they do not pay ground rent owing and due. The 1st Respondent deposed further that in as much as the Petitioners have a right to pursue their claim, the same Constitution also gives him a right to enjoy Property under article 40. That the ground rent arrears out with the tenants are huge that they cannot even pay rates.

6. The 1st Respondent also filed a further affidavit dated 19th June 2017. He deposed further that Petitioners being aware that they are tenants at will cannot now claim ownership of the estate Property as a Constitutional right. That there is no consent reached in this matter since the negotiations collapsed due to the position taken by the Petitioners having been very difficult and refused to cede ground to allow for settlement. He denied the claim that the Petitioners have been paying the purchase price. That instead the money paid by the said petitioners has gone to cater for ground rent which each Petitioner is supposed to pay at the rate of Kshs.400 per month currently in arrears of Kshs.3,000,000.00 and continue to accumulate. That he has not been adequately compensated to cause his Property to be taken away. He urged the court to dismiss the Petition.

7. The parties' advocates filed written submissions in support and opposition to the Petition. The Petitioners submitted that their Petition aims at halting the Respondents from violating their Constitutional rights provided under article 28, 43(1)(b) and 31 (a) and (b) of the Constitution. That the 1st Respondent instructed Mugema Auctioneers to issue the Petitioners and the Interested Parties with

notices for distress for rent in respect of alleged arrears of ground rent for the houses without land built on the Suit Property. That having their houses auctioned and allowing eviction to be carried out will cause irreparable loss to the Petitioners as they will be rendered homeless. The Petitioners proceeded to submit under the subheadings of human dignity; economic and social rights and mandate of the National Land Commission. The submissions were supported with several case law annexed.

8. The 1st Respondent on his part submits that he is one of the beneficiaries of the estate of the late Ali Jemadar and for that reason one of the registered owners of the Suit Property no. 64/II/MN/BAMBURI now sub-divided. That the Petitioners are ground tenants on a monthly rent for the leased portions and they have been paying rent until some time ago when they began defaulting. The 1st Respondent continues that the situation became worse in 2010 after the promulgation of the Constitution when the petitioners completely refused to pay rent and it became the genesis of this Petition.

9. The 1st Respondent also submits that the Petition is premised on the wrong understanding of the law in Kenya. Further that there has been no breach of the Petitioners rights as alleged and if there is any, the same cannot be enforced as against the 1st Respondent. That the Petitioners admit in paragraph (f) of the Petition that the 1st Respondent has a right to own his Property but which right they argue cannot override the Petitioners to access housing. The 1st Respondent referred this court to the provisions of Article 40 of the Constitution and that the Petitioners want to use the Constitution for illegal means by intending to deprive the 1st Respondent of his Property. He therefore urged the court to dismiss the Petition with costs.

10. Taking the pleadings filed and the submissions rendered, I frame two issues for my determination.

a) Whether the Petitioners rights can be enforced as against the 1st Respondent being the registered owner of the Suit title

b) Whether the concept of tenancy at will is unconstitutional.

11. The register for the land in dispute was opened on 14th October 1921 as seen on the face of the copy of the title deed annexed in the pleadings. The 1st Respondent became the registered owner as an administrator of the estate of Jemadar Amir-deceased on 4th JULY 2014 by way of transfer by assent. He subsequently undertook the sub-division of the main title into sub plots. He stated that he offered the sub-plots for sale to the occupants of the land which include the petitioners. Some of them accepted his offer and the 1st Respondent states he has since given individual titles to such people who already paid for their land.

12. The Petitioners however have not given the 1st Respondent any count-offers. The 1st Respondent also alleged that the Petitioners have not been paying ground rent for some time and especially from the year 2010. The Petitioners admit they entered the Suit land with the consent of the 1st Respondent and his relatives on terms that they would pay ground rent and stand premium as well as on understanding that the land would be sub-divided and transferred to them (as pleaded in paragraph (e) of the Petition). The Petitioners did not however disclose in their pleadings when they entered this land. But it is clear that it was after the issuance of the title to the late Jermadar Amir-deceased from whom the 1st Respondent derives his title. Petitioners have also not denied they are in arrears of the ground rent as claimed by the 1st respondent.

13. In paragraph (i) and (j) the Petitioners pleaded that the allocation and issuance of the title deed to the 1st Respondent offends not only the letter and spirit of the Constitution 2010 and as demanded by article 47 thereof as pertains the rights to fair administrative action. This averment contradicts the position stated in paragraph (e) of the petition to the extent that the Petitioners admit they entered the Suit Property with the consent of the 1st Respondent's and predecessor in title. If it is the 1st Respondent and his relatives, who granted them permission, it is definite that their registration as the owner of the Suit

Property preceded the occupation of the Petitioners. Further by virtue that the title of the Suit Property was issued long before the rights being claimed by the Petitioners were put into law-the said rights cannot be applied ante- the Constitution 2010. The law does not apply retrospectively. Therefore the Petitioners claim that their rights override the rights of the 1st Respondent does not have any legal foundation to stand on.

14. The Petitioners did not demonstrate or prove to this court the particulars of illegalities in issuing the title to the 1st Respondent. If they agreed to take occupation on fulfillment of certain conditions then as correctly submitted by the 1st Respondent that they cannot use the Constitution of Kenya 2010 to enforce those rights for which they have not denied is result of their being in breach of the agreement voluntarily entered into as between them and the 1st Respondent. Secondly, the Petitioners have not shown under what provisions of the law requiring any/either of the Respondents with a duty to provide them with access to housing. Infact nowhere in the body of the Petition is it mentioned that the 1st, 2nd 3rd, 4th 5th, 6th and 7th Respondents have such a responsibility which they have failed to perform. The 2nd, 3rd and 4th Respondents are only mentioned in paragraph (g) as having no business purporting to provide the Suit Premises for business purposes when there were homeless citizens living thereon. Yet the title of the 1st Respondent has not been cancelled or challenged in the manner prescribed under the law (section 26 of the Land Registration Act previously section 143 of the Registered Land Act Cap 300 (repealed))

15. Consequently the Petitioners having come on the land with the consent of the 1st Respondent who derived his rights from a person that acquired title long before the Petitioners, their said rights cannot supersede those of the 1st Respondent that were first in time. Accordingly, my finding on the 1st issue is in the negative. The case laws cited by the Petitioners in support of their submissions are all distinguishable. The 1st Respondent annexed copies of notices demanding ground rent arrears from the Petitioners. The auctioneers' notice (annexures) is for demand for payment of the outstanding ground rent and not eviction as is pleaded by the petitioners.

16. In the case of William Musembi and 13 others vs Moi Education Centre Co. Ltd and 3 others (2014)eKLR, the Petitioners gave highlights that Mumbi Ngugi J stated that where evictions are necessary, the state and all persons are bound to observe certain procedural requirements on evictions to include

- a) an opportunity for genuine consultation with those affected.
- b) adequate and reasonable notice to those affected.
- c) information on the proposed eviction
- d) Eviction not to render individuals homeless or vulnerable to violation of other human rights. In this petition, the 1st respondent has given the Petitioners the first opportunity to buy the land and demand notice has been served. It is incumbent upon them to take this offer so that they are not rendered homeless and the 1st Respondent gets adequately compensated for his property.

17. The second issue is whether the concept of tenancy at will is unconstitutional. It is not in dispute that the Petitioners are on the land by virtue of the concept of "house without land" that was recognized under the Land Titles Act (repealed) under which this title was created and which is a common practice in the coast region of Kenya. The Land Titles Act has since been replaced by the Land Act and the Land Registration Act as the case may be. In the former Constitution, there was no definition of land given and what was applied was the common law definition. The Constitution 2010 does define land under Article 260 to include:

- a) the surface of the earth and the sub surface rock**
- b) any body of water or under the surface**

c) marine waters in the territorial seas and ECZ

c) natural resources contained on or under the surface

d) the air space above the surface

18. In article 64, private land is described as consisting of:

a) Registered land held by any person under freehold tenure

b) Land held by any person under leasehold tenure and

c) Any other land declared private land under an Act of Parliament.

The rights of a private land holder are protected under the provisions of article 40. Article 62 gives the National Land Commission authority to **administer public land and not private land**. This Petition relates to private land which then excludes the 6th Respondent from administering it. The 6th Respondent can only investigate it if it was public land that was illegally acquired or irregularly allocated. No such evidence was produced to show that the land was at one time public land for the court to direct the 6th Respondent to investigate it. The burden of proof always lies with the person alleging it (Section 107 and 109 of the Evidence Act)

19. The Constitution 2010 does not make any reference to the concept of “tenancy at will”. The Constitution has clearly specified the classification of land holding in Kenya. The Petitioners claim does not fall under any of the classifications specified therein. It behoves logic to ask this court to declare as unconstitutional that which the Constitution does not know or recognise. In my opinion the relationship between the Petitioners and the 1st Respondent can be equated to one of landlord/tenant. Either party can terminate and or vary the terms of that relationship upon serving adequate notice. Similarly, either party can enforce their rights if any under that contract against the party that is in breach. In this case, recovery of ground rents owing and due. This kind of relationship is not known in law to be capable of depriving an owner of his right over land or his ownership rights unless with the consent of both parties such as through sale. Therefore for the reason that the concept is not recognized under the 2010 Constitution it is my finding that it cannot be said to be unconstitutional. The contract was entered into consensually and no evidence of whatsoever coercion or duress has been shown to have been imposed on the Petitioners at the time they were getting into the land or agreeing on the amount of ground rent to pay per month. Consequently, I cannot declare that relationship as null and void for being contrary to the rules of natural justice or fair administrative action. Section 121 of the Evidence Act Cap 80 is self-explanatory and states that thus **“No tenant of immovable property or person claiming through such tenant, shall during the continuance of the tenancy be permitted to deny that the landlord of such tenant had at the beginning of the tenancy a title to such immovable property and no person who came upon any immovable by the license of the person in possession thereof shall be permitted to deny that such person had a right to such possession had at the time when the licence was given.”** This provision goes against the Petitioners averment that the 2nd, 3rd, 4th and 5th Respondents action of issuing the 1st Respondent with title to the suit property is unlawful neither do they have basis as tenants to now question the 1st Respondent’s title.

20. In conclusion, it is my opinion the Petitioners have chosen the wrong format to ventilate their claims if any. While they have annexed evidence of some payment, the pleading as filed does not permit me to make a determination that they are payments towards purchase price and or settling of outstanding ground rents because courts cannot make contracts for parties. Consequently I find no merit in the Petition and hereby dismiss it with costs to the 1st Respondent. No costs are awarded to the 2nd-7th Respondents who have not participated in the hearing of this Petition.

Dated, signed & delivered at Mombasa this 15th December 2017

A. OMOLLO

JUDGE