



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC PETITION CASE NO.22 OF 2013**  
**IN THE MATTER OF ARTICLE 22(1)**  
**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL**  
**FREEDOMS UNDER ARTICLES 40, 47 & 50**  
**IN THE MATTER OF CONTRAVENTION OF RIGHTS TO PROPERTY**  
**IN THE MATTER OF PURPORTED REVOCATION OF TITLE**  
**KISUMU MUNICIPALITY/BLOCK 7/509**

**DR. OBURO ODINGA.....PETITIONER**

**VERSUS**

**DISTRICT LAND REGISTRAR - KISUMU.....1<sup>ST</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**ETHICS & ANTI-CORRUPTION COMMISSION.....INTERESTED PARTY**

**JUDGMENT**

1. The Petitioner, **Hon. Dr. Oburu Ondiga**, filed this petition dated 28<sup>th</sup> November 2013 against **The District Land Registrar, Kisumu** and **The Hon. The Attorney General**, the Respondents, seeking for the following prayers:-

- “a) A declaration that the Respondents purported, revocation of the Petitioner’s title to all that parcel of land comprised in title No. **Kisumu Municipality/Block 7/509** is unconstitutional, null and void.
- b) An order of judicial review under **Article 23 (3)** in terms of certiorari do issue to bring into this Honorable court for the purposes of being quashed, the 1<sup>st</sup> Respondent gazette notice number 15577 dated 26<sup>th</sup> November 2010, purporting to revoke the petitioner to all that parcel of land comprised in title number Kisumu Municipality/Block 7/509.
- c) An order of prohibition do issue to prohibit the Respondents by themselves, servants, agents or whomsoever from alienating the Petitioner’s parcel of comprised in title number Kisumu Municipality/ Block 7/509 or in any manner interfering with the Petitioner possession of the said premises.
- d) An order of prohibition do issue to prohibit the Respondents by themselves, servants, agents or whomsoever from in any manner issuing any title and or license in respect to the Petitioners land comprised in the title number to **Kisumu Municipality/Block 7/509** or register any encumbrance thereon.
- e) An order of mandamus do issue to compel the Respondents by themselves, servants, agents to delete any entry on the Petitioner’s certificate of lease made as a consequence to or in furtherance of all that parcel of land comprised in the title number Kisumu Municipality/block 7/509.
- f) A declaration that the certificate of lease to the Petitioner in respect to the suit property in conclusive and that the petitioner is the absolute and indefeasible owner of the suit property.

g) Damages.

h) Costs of and incidental to this suit.

i) Or that such other orders as this Honorable court shall deem just.”

2. The Petition is supported by the affidavit sworn by the Petitioner on the 28<sup>th</sup> November 2013 in which he among others depones to the following:

a. That he applied for an allocation over the suit property in 2000 and received a letter of allotment from the Commissioner of Lands.

b. That he paid the stand premium and other fees as required and a lease in his favour was issued.

c. That he has had quiet and uninterrupted possession of the suit property for ten (10) years since 2001 without any third party claims.

d. That through an application of 25<sup>th</sup> September 2013 filed in H.C.C.C. No.29 of 2010 by Kenya Anti-Corruption Commission, the forerunner of Ethics and Anti-Corruption Commission), the Petitioner learned of the publication of gazette notice No.15577 of 26<sup>th</sup> November 2010 on the revocation of his title to the suit land.

e. That he had not been notified of the intention to revoke his title or given an opportunity to be heard before the title was revoked.

f. That the 1<sup>st</sup> Respondent do not have the power to revoke the title as it amounts to infringing on his right to property guaranteed under **Article 40 of the Constitution**.

g. That the action also infringes on **Articles 47 (1) and 50 of the Constitution**.

h. That the Kenya Anti-Corruption Commission, (KACC), the forerunner of the Ethics and Anti- Corruption Commission, filed H.C.C.C. No.29 of 2010 on the 4<sup>th</sup> March 2010 against the Petitioner and another, claiming that the title to the suit property was acquired illegally and fraudulently, which claim he has opposed. That suit is still pending in court and the Plaintiff has applied for judgment to be entered on the basis of the title having been revoked under the aforementioned gazette notice.

3. That Kenya anti-Corruption Commission was enjoined as the Interested Party through the leave granted first on oral application on the 23<sup>rd</sup> March 2014, and 17<sup>th</sup> March 2015 following their chamber summons application dated 16<sup>th</sup> May 2014. The Interested Party opposed the petition through their replying affidavit sworn by John Nyangara, an investigator, who among others deponed to the following;

a. That pursuant to the investigations conducted by the Interested Party over land reserved for Kenya Railways Corporation, several suits, including No.29 of 2010 against the Petitioner and another, were filed to recover the land parcel Kisumu Municipality/Block 7/509.

b. That the Petitioner obtained lease to the said land without adherence to the Government Land Act as the consent of Kenya railways Corporation, to whom the land vested vide Legal Notices No.24 No.24 of 1986 issued under the Kenya **Railways Corporation Act Chapter 397 of Laws of Kenya**, was not obtained.

c. That the issuance and registration of the lease in favour of the Petitioner over the suit land was fraudulent as the land was not available for allocation.

d. That the Commissioner of Land had written to the Petitioner a letter dated 1<sup>st</sup> March 2009 informing him of withdrawal of the offer to allocate him the land on realizing the illegality involved in the Petitioner being issued with the lease over the suit land.

That the letter among others required the Petitioner to surrender the title documents of the suit land for cancellation for reasons that it belonged to Kenya Railways Corporation.

e. That as Kisumu H.C.C.C. No.29 of 2010 was pending, the government revoked the title deed vide gazette notice No.15577 of 26<sup>th</sup> November 2010 and the Petitioner did not contest it except through filing this petition. That the Petition is made in bad faith and that the Petitioner is guilty of laches, inordinate and unexplained delay.

f. That contrary to the Petitioner's claim that the suit land may be transferred, the Interested Party, as the Plaintiff in Kisumu H.C.C.C. No.29 of 2010, had obtained injunctive order on 29<sup>th</sup> October 2010 to maintain the status quo by all parties pending the hearing and determination of that suit.

g. That as the Petitioner's title to the suit land was not protected under **Article 40 of the Constitution**, the Petition do not raise any constitutional issues for determination, but is only aimed to subvert justices process and defeat the recovery of the illegally acquired public property.

h. That the Petitioner had been given the opportunity to present his case before the Lands office before the revocation of the title notice was issued and he chose not to.

4. The counsel for the Petitioner, Respondents and Interested Party appeared before the court on the 27<sup>th</sup> October 2016 for the hearing of the Petition. After hearing the counsel, the court gave directions on filing of written submissions. The counsel for the Petitioner filed their written submissions dated 3<sup>rd</sup> April 2017, while that for the Interested Party filed theirs dated 28<sup>th</sup> September 2017.

5. The following are the issues for the court's determinations;

a. Whether the gazette notice revoking the Petitioner's title to the suit land is unconstitutional, null and void.

b. Whether the due process was followed in issuing the revocation gazette notice in respect of the suit land.

c. Which of the prayers sought by the Petitioner should be issued.

6. The court has considered the grounds on the Petition, the prayers, the affidavit evidence and submissions by both the Petitioner and Interested Party and come to the following findings;

a. That land parcel Kisumu Municipality/Block 7/509, the suit land, was registered by the 1<sup>st</sup> Respondent in the name of the Petitioner on the 12<sup>th</sup> February 2001.

b. That the suit land, according to the Interested Party, is among the parcels of land excised from Kenya Railways Corporation land without following the due process, and therefore null and void. That the Petitioner's position is that he applied for the land in the usual way and that the allocation and registration of the lease in his favour was proper. The court having considered the opposing positions taken by both sides notes that the Interested Party's contention that the suit property came from a larger parcel of land vested in the Kenya Railways Cooperation has not been disputed or controverted.

c. That it follows that the suit land could only have been available for allocation to any other person only in accordance with **Section 14 of the Kenya Railways Act Chapter 397 of Laws of Kenya**. That the Petitioner, having known that the claim of title to the suit land was under challenge through H.C.C.C. No. 29 of 2010 and the gazette notice No. 15577 of 26<sup>th</sup> November 2010, had the duty to show that he had obtained the title procedurally and without misrepresentation. [See Court of Appeal decision in **Munyu Maina – V\_ Hiram Gathina Maina** {2013} eKLR. The court held, that where one's title's legality is questioned, he/she must show that the acquisition of the title **"was legal formal, and free from any encumbrances including any and all interests which would not be noted in the register."**

The legality or otherwise of the Petitioner's title to the suit land is subject matter of H.C.C.C.No.29 of 2010 which reportedly is pending before this court and conclusive decision on that issue will await the determination of that suit.

d. That though the Petitioner has stated that he was not given an opportunity to be heard before the title was revoked, and that he did not know of the revocation notice until a copy of the gazette notice was served to him with an application filed in HCCC No.29 of 2010, the Interested Party has availed a copy of a letter dated 10<sup>th</sup> March 2009, addressed to the Petitioner under the reference **"cancellation of Kisumu Municipality Block 7/509"**. The letter signed for the Commissioner of Lands stated as follows:

**"I refer to my letter of allotment ref.30973/LXIX of 12<sup>th</sup> October 1998 allocating you the above plot and wish to inform you that the offer has been withdrawn as the land belongs to Kenya Railways Corporation who are in the process of developing it. Please surrender to this office the original documents that you hold concerning this plot for cancellation."**

The court take judicial notice that the Petitioner's address **"P.O. BOX 6644, Kisumu"** which is the same address used in the letter dated 29<sup>th</sup> January 2001 by the Commissioner of Lands forwarding the lease documents to the Land Registrar Kisumu, and the one dated 20<sup>th</sup> April 2000 on contribution in lieu of rates, both annexed to the Petitioner's supporting affidavit has not been disowned. The said postal address belongs to the Petitioner for purposes of posting and the court therefore takes it that he indeed received the letter dated 10<sup>th</sup> March 2009.

e. That it is apparent from the evidence availed, including the fact that the Petitioner still has the original certificate of lease as confirmed at paragraph 6 of the supporting affidavit, that the Petitioner did not surrender the documents as requested under the said letter. That further, the Petitioner has not controverted the Interested party's position that he did not make any representation either way on receiving the said letter and cannot therefore claim that he was not given the opportunity to be heard. That the court finds that indeed the said letter, not only required the Petitioner to surrender the documents but amounted to affording him an opportunity to make any presentation for consideration before any decision to cancel the title or otherwise could be reached.

f. That though the decision to cancel the suit land's title in favour of the Petitioner was first communicated through the letter dated 10<sup>th</sup> March 2009, it was further pursued through the filing of Kisumu H.C.C.C. No.29 of 2010, on the 4<sup>th</sup> March 2010 and gazette notice No.15577, of 26<sup>th</sup> November 2010. That all through that time, the Petitioner had not made any representation to the Commissioner of Land as to why the cancellation threat should not be carried out.

g. That this petition was filed after the Interested Party moved the court in Kisumu HC.C.C. No.29 of 2010, through the notice of motion dated 25<sup>th</sup> September 2013 seeking for judgment to be entered in view of the gazette notice No.15577 of 26<sup>th</sup> November 2010. The court notes that the Plaintiff in Kisumu HCCC No.29 of 2010 had not been included as a party in this petition until after they sought to be included as an Interested Party. The court agrees with the Interested Party's position that the Petitioner has delayed for unnecessarily too long before seeking for judicial review orders in respect of the cancellation of his title.

h. That the issues the Petitioner seeks to pursue through this petition are already raised in the plaint filed and pending for determination Kisumu HCCC No.29 of 2010. The issue of ownership of the suit land, and the legality or otherwise of the Petitioner's title should better be decided in the said suit instead of this petition whose scope of evidence taking is limited to affidavit evidence.

7. That flowing from the foregoing, and in view of the fact that the issue of the legality of the title to the suit land is already an issue to be determined in the Kisumu HCCC No.29 of 2010, which is pending before the court and was filed before this petition, the court finds no merit in this petition. The petition is dismissed with costs to the Interested party only.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 13<sup>TH</sup> DAY OF DECEMBER 2017**

In presence of;

Petitioner Absent

Respondents Absent

Interested party absent

Counsel Absent

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**13/12/2017**

13/12/20`17

S.M. Kibunja Judge

Joane/Oyugi court Assistant

Parties absent

Order: the judgment dated and delivered in open court in the absence of all the parties and their advocate. The Deputy Registrar do notify all the parties counsel for the delivery of the judgment.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**13/12/2017**