



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

PETITION NO. 32 OF 2012

ROSEMARY WANJIRU NJIRAINIPETITIONER

VERSUS

THE OFFICER IN CHARGE OF STATION

MOLO POLICE STATION1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING AND DIRECTIONS

(Petition alleging breach of the right to property; state applying that property was not lawfully acquired and cannot be protected; initial directions being that matter be heard by affidavit evidence; on consideration matter considered weighty and requires oral evidence; new directions issued for matter to be heard orally).

1. This is a constitutional petition filed on 16th July 2012. The petition is supported by an affidavit of the petitioner and is opposed by the respondent. In brief, the case of the petitioner is that she is the lawful proprietor of the land parcel Molo Township Block 11/157 (the suit land) situated in Molo Township and that the State, through the OCS Molo Police Station, has been interfering with her use and possession of the land. There is a response filed by the State which contests the petitioner's title and which asserts that the title of the petitioner could not have been properly acquired as the suit property was set aside as a public utility for the use and/or expansion of the Molo Police Station.

2. Initially, the State did not file their response within time and since the petition was then unopposed, I directed that the petition be heard by way of affidavit evidence. Later, the State did apply to file their reply out of time and I admitted it. Both counsel for the petitioner and respondent filed their respective submissions and I retired to write the judgment.

3. I have considered all material presented to me. The case of the petitioner is that her right to property is protected by Article 40 of the Constitution. The same 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.*

4. It will be seen from the above, that Article 40 of the Constitution, does indeed protect the right to property. However, this right, as provided in sub-article 6, does not extend to any property that has been found to have been unlawfully acquired. The only way in which property may be found to have been acquired illegally certainly has to be through an acceptable, legitimate and legally acknowledged process. Where there has been a previous finding that the property in issue was not lawfully acquired, it follows that the court cannot protect such title. But where there has not been a previous finding that the title was unlawfully acquired, the court in my view has jurisdiction to make the finding, if need be, within the proceedings seeking to protect the title in issue. In other words, where a person files a suit or petition, seeking protection of the right to property under Article 40, the court may within the said case, proceed to declare the title as one that is unlawfully acquired and decline to protect it. I believe that the court would also have jurisdiction to cancel the said title, and if necessary, make appropriate orders as to who should be registered as proprietor.

5. In our case, the position of the petitioner, of course, is that she properly acquired the suit property through purchase from the previous allottees. The position of the State is that this property was never available for allocation or alienation to private individuals in the first place, because the same was set apart for a public purpose, that is, the establishment and/or expansion of the Molo Police Station.

6. In my view, there are serious questions of fact which must first be determined before reaching a conclusion as to whether the petitioner's title is a good title worthy of protection or whether it is a title in which a finding can be made that it was unlawfully acquired. These include questions such as, was the property set aside to be public utility or was it not? If it was public utility, did the property lawfully devolve to the hands of private individuals? Is the property one that is set aside for use as a police station?.

7. There are instances in which such questions may be answered in a suit such as this and through the affidavit evidence presented. Other times, it may not be possible depending on the nature of the suit. I am afraid that this suit falls in the latter category and the issues raised, especially on the legality of the title of the petitioner, cannot be answered solely by the utility of the affidavit evidence tabled by the parties.

8. I am of the considered view that the matters raised are weighty and require further interrogation. I am aware that I had earlier directed that the petition be canvassed by way of affidavit evidence and the parties did so. Regretfully, I have to change these directions so that the question of the legality of the petitioner's title may be interrogated and a finding made as to whether or not it was lawfully acquired. This can only be done through a full hearing akin to the hearing conducted in ordinary suits where parties call witnesses to support their claims. There is nothing unusual in this as The Constitutional of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, allow for this. Rule 20 (3) thereof is drawn as follows :-

20.(3) The Court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence.

9. Upon assessing the matters raised by the parties in their affidavits, I am of the considered opinion that the matter needs to be heard by way of oral evidence. Following this, I am afraid that I will not be making a judgment on the affidavit evidence. Instead I direct that the petition be heard by way of oral evidence. I will give further directions as may be appropriate but for now I do direct the parties to prepare and exchange their lists of witnesses and witness statements, and the bundle of documents that they will be relying upon, within 30 days from today.

10. It is so ordered and directed.

Dated, signed and delivered in open court at Nakuru this 10th day of February 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :-

Mr. Gatonye D.M instructed by M/s Mirugi Kariuki & Co. Advocates for petitioner.

Ms Yvonne Khatambi instructed by State Law Office for respondents

CA: Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU