



**Brothers of our lady mother of mercy registered trustees v National
Land Commission & another (Environment & Land Petition
10 of 2018) [2023] KEELC 110 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 110 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND PETITION 10 OF 2018
A OMBWAYO, J
JANUARY 19, 2023**

BETWEEN

**BROTHERS OF OUR LADY MOTHER OF MERCY REGISTERED
TRUSTEES PETITIONER**

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

JUDGMENT

1. Brothers of our lady Mother of Mercy registered trustees has come against the National Land Commission and the Chief Land Registrar claiming that she purchased for value without notice all that piece of land known as Nakuru Municipality/Block 23/523 with development from Salome Njeri Gichuru. The petitioner conducted due diligence entered into a sale agreement with the vender, paid as deposit of Kshs3,500,000 and letter cleared the purchase price and both parties executed transfer forms and transfer instrument was registered and effected. He paid the relevant taxes and certificate of lease was issued. He has been paying rates to the County Government Nakuru.
2. On the 17th July 2017 the 1st respondent through a Gazette Notice Vol CXIX- No 97 Nairobi. In a special issue indicated that the Government of Kenya had revoked the petitioner's title. A restriction was entered by the Naka Residents Association.
3. The petitioner contends that the revocation was unconstitutional and a travesty to justice as no notice was issued. The petitioner further contends that her right to a fair administrative action as enshrined in Article 47 (1) and 50(1) of *the constitution* was infringed as no notice was issued.
4. The petitioner prays that this court issues a declaration that the petitioner is the legal owner of all that parcel of land known as Title Number Nakuru Municipality/Block 23/523 and further to Issue a



- declaration restraining the Respondent by themselves, servants and agents from interfering in any way with the register relating to suit property Nakuru Municipality/Block 23/523.
5. Moreover, to issue a declaration that the respondent by themselves, servants, agents to delete any entry on the Petitioner's certificate of title made as a consequence to or in furtherance of all that parcel of land comprised in title number Nakuru Municipality/Block 23/523.
 6. Lastly, to quash the decision of the respondents to revoke a title in the names of Brothers of Our Lady Mother of Mercy (Registered Trustees) herein the Petitioner through a Gazette Notice Vol CXIX-No.97 Nairobi, contained in the Kenya Gazette Special Issue dated on 17th July, 2017 and payment of Damages
 7. The 1st respondent filed grounds of opposition whose import is that the petition does not meet the laid down threshold for a Constitutional Petition and is otherwise an abuse of this Court's special Constitutional Jurisdiction. That the facts as pleaded touch on ownership of a suit land which issue can be competently determined under the ordinary Civil jurisdiction of this court within the documentary and oral evidence can be interrogated. That in any case, the decision complained of was arrived at after due process sanctioned and entrenched within *the Constitution* and statutes and hence the proper forum for any aggrieved party is by way of an appeal and not Constitutional Petition as herein. That enjoyment of Constitutional rights is not absolute but is subject to the enjoyment of rights by others and where public interest is involved such as in the instant case, the public interest takes precedence. That the order sought cannot issue as the same are not supported by the facts in the petition. Petitioners allege violation of rights and yet the prayers sought are for declaration of ownership to the property.
 8. The court directed parties to file submissions. I have seen the petitioner's submissions but I do not have the respondent's submission.
 9. I do agree with the petitioner that the petition meets the threshold for a constitutional petition as the same revolves on Articles 47 (1) 40 (2) and 50 (1) of *the Constitution* of Kenya 2010. The Act of revoking the petitioners title without affording him a hearing raised a serious constitutional issue to be resolved by the court.
 10. The principle set in *Anarita Karimi Njeru -vs- The Republic* (1979) eKLR was that was that a Constitutional petition should set out with a degree of precision the petitioner's complaint, the provisions infringed and the manner in which they are alleged to be infringed.
 11. In *Mumo Materi -vs- Trusted Society* (2013) eKLR the principle in the Anarita Karimi case was reaffirmed by the Court of Appeal at paragraph 44 of the judgment when the learned Judges stated as follows:-
 - (44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior Court below to lament that the petition before it was not the "epitome of precise, comprehensive or elegant drafting , without remedy by the 1st respondent"
 12. Further at paragraph 87(3) in the same judgment the Court on its findings stated as follows:-

"It is our finding that the petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the petition and supporting affidavit



we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of *the constitution* of Kenya and the Ethics and Anti-corruption Commission Act, 2011, accordingly the petition did not meet the standard enunciated in the Anarita Karimi Njeru case.

13. This court finds that the petitioner herein has stated with precision the provisions of *the constitution* of Kenya 2010 that have been violated and moreover, the types of violation such as the revocation of the petitioner title without affording him a hearing which was in breach of Article 40 (6) as to constitution that provides: -

40. Protection of right to property

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

This sub-Article presupposes that there must be a court process before ones property is concluded as to having been unlawfully acquired. In *Evelyn College of Design Ltd v Director of Children’s Department & another* [2013] eKLR, Justice Majanja observed:-

- “ 16. “While I agree that the Commissioner has no right to alienate land which has been reserved for public purpose, the process of such a determination must be through a process recognised by the law. Likewise, if the land has been illegally acquired, then the State must use due process to recover it. The requirement of due process is underpinned by several provisions of *the Constitution*. First, it is implicit in Article 40(2)(a) which prohibits the legislature from passing legislation that arbitrarily deprives a person of any interest in or right over any property of any description. Second, Article 40(6) is clear that rights acquired under this Article do not extend to any property that is found to have been unlawfully acquired. Such “finding” cannot be by any other means other than due process. Third, Article 47(1) guarantees every person fair administrative action which includes due process.”

14. The unlawful acquisition envisaged in Article 40(6) of *the Constitution* must be determined by the court but by force or some unlawful process. Thus, it was held in the case of *Adan Abdirabani Hassan and 2 Others v The Registrar of Titles and Others* Nairobi Petition No. 7 of 2012 [2013] eKLR that,

“Even if the Respondents held the view that the Petitioners had no right to own the suit property because the property was reserved for a public purpose, which view they were entitled to hold being the custodians of public land, the Petitioners had legitimate expectation in the proprietorship of the property and they should have been accorded a hearing before any administrative action could be taken in respect of the suit property.”

15. The upshot of the above is that even where property is said to be illegally acquired; it cannot be dispossessed without due process. Such dispossession cannot be effected by preventing the petitioner from enjoying the incidents of ownership of the land. Since the issue in this case concerns due process,

16. The action taken by the respondents was also breach of Article 47 (1) of *the constitution* that provides:-

47. Fair administrative action



- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

17. Article 47 of *the Constitution* of Kenya 2010 has constitutionalised the right to be given written reasons for administrative actions and decisions. The same has been set out in Sections 4 and 6 of the Fair Administrative Action Act 2015. The court finds that the entry of restriction and revocation of title was shrouded with procedural impropriety contrary to article 10 and 47 of *the constitution* of Kenya. In *Judicial Service Commission vs. Mbalu Mutava & Another* [48] the Court of Appeal held that:-

“ Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

18. The importance of fair administrative action as a Constitutional right was appreciated in the South African case of *President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others* [49] where it was held as follows with regard to similar provisions on just administrative action in Section 33 of the *South African Constitution*:-

“ Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

19. Moreover, the act of the respondents by making a determination without hearing the petitioner was in breach of Article 50 (1) of *the constitution* that provides:-

50. Fair hearing

- (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

20. In conclusion, I do find that the petitioner has satisfied this court that her constitutional rights were breached hence I do declare that the petitioner is the legal owner of all that parcel of land known as Title Number Nakuru Municipality/Block23/523 and do Issue a declaration restraining the Respondent by themselves, servants and agents from interfering in any way with the register relating to suit property Nakuru Municipality /Block23/523.



21. This court further issues an order quashing the decision of the respondent to revoke a title in the names of Brothers of Our Lady Mother of Mercy (Registered Trustees) herein the Petitioner through a Gazette Notice Vol CXIX-No.97 Nairobi, contained in the Kenya Gazette Special Issue dated on 17th July, 2017. I do Issue an order that the respondent by themselves, servants, agents to cancel any entry on the Petitioner’s certificate of title made as a consequence to or in furtherance of their action on all that parcel of land comprised in title number Nakuru Municipality/Block 23/523. Costs of the petition to the petitioner

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY IN AT NAKURU THIS 19TH DAY OF JANUARY 2023.

A O OMBWAYO

JUDGE

