



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC PETITION NO. 4 OF 2017

HEZEKIAH MAVISI ONDENGO

GEORGE ONDEGO MAVISI

PHILIP ODARI

EVANS LUMBASIO MAVISI

JOSEPHINE NYANGASI

VIOLET ALIVITSA

DANIEL CHOGO

KEFA ONDEGO

EVANS IDIYI MWANZI.....PETITIONERS

VERSUS

COUNTY GOV. OF VIHIGA

THE EXECUTIVE MEMBER DEP.

LAND, HOUSING & URBAN DEVELOPMENT.....RESPONDENTS

JUDGEMENT

The petitioners submitted that, they are the registered owners of freehold land parcels as follows:- Hezekiah Mavisi Ondego, S. Maragoli/Bugonda/3216,

George Ondego Mavisi - S. Maragoli/Bugonda/3197, Philip Odari Mavisi - S. Maragoli/Bugonda/3198, Evans Lumbasio Mavisi, S. Maragoli/Bugonda/3200, Josephine Nyangasi Mavisi & Violet Alivitsa - S. Maragoli/Bugonda/3199 and Daniel Chogo Mavisi - S. Maragoli/Bugonda/3201. Whereas Kefa Ondego and Evans Idiye Mwanzi are beneficial owners by virtue of trusteeship and purchaser respectively. That the respondents have since August, 2015 issued irregular notices to the petitioners herein threatening them to vacate their respective land parcels S. Maragoli/Bugonda/3216, 3197, 3198, 3200, 3199 and 3201. That the petitioners occupy and utilize their respective land parcels for both commercial purposes cum-residential and some have permanent and semi-permanent houses on them. That on the 13th and 14th day of March, 2017, the 2nd respondent in company of about eight enforcement officers of the 1st respondent came into the petitioners' land parcels and wanted to demolish the petitioners houses together with a barbed wire fence erected by the 9th petitioner on his purchased portion of land out of land parcel S. Maragoli/Bugonda/3216. That the situation almost turned violent prompting the respondents' enforcement officers to retreat. That the petitioners now cannot freely conduct their normal day to day commercial business on their commercial plots and their rented tenants are now leaving in fear in view of the respondents' verbal threats to demolish houses of some of this land parcels. That the petitioners land parcels have never been at any time gazetted for compulsory acquisition by the National Land Commission on behalf of the respondents nor have their respective private land parcels been acquired now to be called public land as alleged in the notices irregularly issued by the respondents. That the petitioners contend that their respective land parcels are private properties and not public land since they have never been acquired nor have the petitioners ever been adequately compensated as required. That if their said land parcels were ever acquired (which is denied), then the said acquisition was done un-procedurally without any notice to the petitioners and were not accorded any hearing. That if the respondents therefore are left to enforce their unlawful and irregular acts of evicting the petitioners then the applicants/petitioners will be left landless with their families and their fundamental rights to own land as enshrined in the constitution and particularly in the Bill of rights will be infringed. That the petitioners are entitled to fair administrative action that is lawful

and reasonable in the circumstances as envisaged under Article 47 of the Constitution of Kenya 2010. That the petitioners are aggrieved that their right to own private property under Article 40 and 64 of the Constitution of Kenya is under threat of infringement as no prior arrangements have been made by the respondents and or any other agency to prompt payment in full or just compensation as to the damage and or inconvenience to be caused. That the respondents are acting with impunity and without due regard to the law and the procedures provided in the Law in acquiring private land for public use. That the petitioners are now unnecessarily inconvenienced by the restrictions lodged against their respective titles as they cannot carry on any further developments or alienate at the expenses of the respondents who have floated the law and procedures set out in the law. That the illegal acts or omissions of the respondents have subjected the petitioners to indignity and suffering contrary to Article 28 of the Kenya constitution. The petitioners therefore humbly pray for:-

- (a) A declaration that the respondents' actions to evict the petitioners from their respective land parcels S. Maragoli/Bugonda/3216, 3197, 3198, 3200, 3199 and 3201 are in contravention of Article 28, 40, 47 (2) of the Constitution of Kenya and are therefore illegal hence null and void.
- (b) A declaration that the due process should be followed and petitioners be adequately compensated if the respondents or any government agency wants to acquire their private properties for public use.
- (c) The respondents should be ordered to remove restrictions lodged on the petitioners' titles particularly land parcels S. Maragoli/Bugonda/3216, 3197, 3198, 3200, 3199 and 3201.
- (d) Costs of this petition.
- (e) Such other orders the court shall deem fit to grant to meet the ends of justice.

The respondents submitted that, the petitioners were all served with notices to vacate the respective land parcels way back on the 20th day of August, 2015 which notices they have defied and or failed to comply with and continue to use and or occupy the said land parcels in forcible detainer. That from the record held at the County Survey office, in the year 1998, the Government of Kenya which was then keen to acquire land for both central and local governments to operationalize Vihiga District which had been created in the year 1992 expressed interest in the acquisition of land parcel South Maragoli/Bugonda/2097 then registered in the name of Hezekiah Mavisi Ondego, the 1st petitioner herein amongst other land parcels in the locality. That after negotiations, those affected including the 1st petitioner Hezekiah Mavisi Ondego voluntarily agreed to move out of their respective land parcels within Mbale Town to the new settlement in Mautuma Central Settlement Scheme to a land owned by the Government of Kenya which was allocated to them in exchange for the respective land parcels they were vacating to give room to government offices for Vihiga District within Mbale town. The offices to be built included the new Vihiga District headquarters and Vihiga Municipal offices. That the agreement between the government and those affected was that they be given land in Mautuma of a higher acreage in exchange for the portions they were ceding to the government in Vihiga and as a result the 1st petitioner Hezekiah Mavisi was allocated land parcel known as Mautuma Central Settlement Scheme/1397 measuring 4 acres which was far bigger than land parcel South Maragoli/Bugonda/2097 which he was releasing to the Government in exchange. That pursuant to the aforesaid agreement with the national government, the 1st petitioner Hezekiah Mavisi Odongo moved out of land parcel South Maragoli/Bugonda/2097 to settle in his new home in Mautuma in or about the year 2001. He was not alone as others from the same locality in Mbale town moved to the same new settlement in Mautuma and they include Musa Magomere and Christopher Kidagwa who moved from land parcel South Maragoli/Bugonda/2448 to settle on Mautuma Central Settlement Scheme/1360 and Reuben Amuyunzu (survived by Francis Ambani) who moved from South Maragoli/Bugonda/2098 to settle on Mautuma location dated 24th June, 2015, the letters of County Surveyor dated 4th November, 2015, 10th August, 2015, Land Registrar letter dated 15th May, 2017, and the affidavit of one Francis Ambani sworn on the 19th day of June, 2017 annexed respectively as WMO-1, 2, 3, 4 & 5 supports the transactions between the government and the 1st petitioner. That from the information given by one Francis Ambani, the 1st petitioner Hezekiah Mavisi Ondego actually moved from land parcel south Maragoli/Bugonda/2097 to settle in Mautuma from the year 2001 and him and his son called Lumbasio constructed houses on the land parcel No. 1397 Mautuma where they lived until the year 2013 where they returned to Vihiga to unlawfully reoccupy the land now in dispute. That the reason why the 1st petitioner returned to Vihiga to resettle on the land designated for the government was that before he left for Mautuma, the government had not taken the original title deed for land parcel South Maragoli/Bugonda/2097 from him and did not immediately take possession of the land which remained unoccupied even as they got into devolved government under the new constitution 2010 thereby enabling the 1st petitioner to comfortably reoccupy the land as though it was his after being away for over 12 years.

That it was only after they had settled as a county government and were securing government properties in the year 2015 that they found out the 1st petitioner has not only re-entered land parcel south Maragoli/Bugonda/2097 wrongfully but gone ahead to subdivide it into plots a number of which he registered in his name and the names of his children who are petitioners, number 2, 4, 5 and 7 and the remaining portions which he fraudulently transferred to the other petitioners. That as is evident from annexures to the affidavit of Hezekiah Mavisi Ondego sworn on 17th March, 2017, the respective title deeds were all issued in December the year 2013 that is after devolved government took shape which explains the rush by the petitioners to grab land due to the County Government of Vihiga for speculative purposes. That by the 1st petitioner splitting the subject land and disposing off to third parties, he was only engaged in furtherance of fraudulent mission to increase the number of those affected in order to frustrate the County Government in its pursuit for recovery. That all the other petitioners who are either his sons and or person who resides within Mbale Town knew or ought to have known that the 1st petitioner had no recognized proprietary interest in the land he was purporting to transfer to them and instead chose to enter into the transactions. That the petitioners 2-9 got the respective land parcels transferred to them for free and never bought the respective land parcels for value without notice and hence have nothing to defend before this honourable court as the documents they have exhibited are forgeries designed to justify the fraud. That the 1st petitioner still retains land parcel Mautuma Central Settlement Scheme/1397 which he was given by the government in exchange. That by filing restrictions on the land parcels and issuing the notice, the County government was acting within its mandate to secure government land or land due to government from encroachment and unlawful interference. That by reason of the petitioners' conduct, the County Government is unable to undertake its infrastructural development within the affected area as programmed and this goes against public policy. The County Government is the successor of the national government for purposes of the suit land.

Analysis and Determination

Upon consideration of the Petition dated the 14th December 2018 including the supporting affidavit and replying affidavits as well as submissions filed herein, the following are the issues for determination;

- Whether or not the title of the suit land held by the petitioners is valid and lawful;
- Whether the Petitioners' fundamental rights and freedoms have been infringed upon;
- Whether the Petitioner is entitled to Compensation; and
- Who should bear the costs of the Petition?

Whether or not the title of the suit land held by the petitioners is valid and lawful;

That the petitioners submitted that, they are the registered owners of freehold suit land parcels. That the respondents have since August, 2015 issued irregular notices to the petitioners herein threatening them to vacate their respective land parcels S. Maragoli/Bugonda/3216, 3197, 3198, 3200, 3199 and 3201. That the petitioners occupy and utilize their respective land parcels for both commercial purposes cum-residential and some have permanent and semi-permanent houses on them. That on the 13th and 14th day of March, 2017, the 2nd respondent in company of about eight enforcement officers of the 1st respondent came into the petitioners' land parcels and wanted to demolish the petitioners houses together with a barbed wire fence erected by the 9th petitioner on his purchased portion of land out of land parcel S. Maragoli/Bugonda/3216.

In the Court of Appeal in the case of Dr. Joseph Arap Ngok Vs Justice Moiwo Ole Keiwua & 5 Others (supra), the Court held that:-

“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of title and the entire system in relation to ownership of property in Kenya would be placed in jeopardy”.

See the case of David Peterson Kiengo & 2 Others Vs Kariuki Thuo, Machakos HCCC No.180 of 2011, where the Court held that:-

“The Registered Lands Act is based on the Torrens System. Under this system, indefeasibility of title is the basis for land registration. The state maintains a Central Register of land title holdings which is deemed to accurately reflect the current facts about title. The whole idea is to make it unnecessary for a party seeking to acquire interest in land to go beyond the register to establish ownership. The person whose name is recorded on the register holds guaranteed title to the property. Since the state guarantees the accuracy of the register, it makes it unnecessary for a person to investigate the history of past dealings with the land in question before acquiring an interest”.

On the issue of whether the Petitioners' fundamental rights and freedoms have been infringed upon; Whether the Petitioner is entitled to Compensation; and Who should bear the costs of the Petition?

In the instant case, the certificate of title herein was issued by the lands officials. The issue for determination is whether or not the petitioners herein hold a good title to the suit property which title has not been cancelled and/or revoked. In the case of Munyu Maina Vs Hiram Gathiha Maina, Civil Appeal No.239 of 2009, where the Appeal Court held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

The respondents submitted that from the record held at the County Survey office, in the year 1998, the Government of Kenya which was then keen to acquire land for both central and local governments to operationalize Vihiga District which had been created in the year 1992 expressed interest in the acquisition of land parcel South Maragoli/Bugonda/2097 then registered in the name of Hezekiah Mavisi Ondego, the 1st petitioner herein amongst other land parcels in the locality. That after negotiations, those affected including the 1st petitioner Hezekiah Mavisi Ondego voluntarily agreed to move out of their respective land parcels within Mbale Town to the new settlement in Mautuma Central Settlement Scheme to a land owned by the Government of Kenya which was allocated to them in exchange for the respective land parcels they were vacating to give room to government offices for Vihiga District within Mbale town. The letter from the Chief confirms this “WMO 1st”. That the agreement between the government and those affected was that they be given land in Mautuma of a higher acreage in exchange for the portions they were ceding to the government in Vihiga and as a result the 1st petitioner Hezekiah Mavisi was allocated land parcel known as Mautuma Central Settlement Scheme/1397 measuring 4 acres which was far bigger than the acres of land parcel South Maragoli/Bugonda/2097 which he was releasing to the Government in exchange (letter from the Director of Lands Vihiga County confirms the same “WMO 2”). That pursuant to the aforesaid agreement with the national government, the 1st petitioner Hezekiah Mavisi Odongo moved out of land parcel South Maragoli/Bugonda/2097 to settle in his new home in Mautuma in or about the year 2001. He was not alone as others from the same locality in Mbale town moved to the same new settlement in Mautuma and they include Musa Magomere and Christopher Kidagwa who moved from land parcel South Maragoli/Bugonda/2448 to settle on Mautuma Central Settlement Scheme/1360 and Reuben Amuyunzu (survived by Francis Ambani) who moved from South Maragoli/Bugonda/2098 to settle on Mautuma location dated 24th June, 2015, the letters of County Surveyor dated 10th August, 2015(WMO 3), Land Registrar letter dated 15th May, 2017(WMO 4), and the affidavit of one Francis Ambani sworn on the 19th day of June, 2017 as (WMO 5) supports the transactions between the government and

the 1st petitioner. That the 1st petitioner Hezekiah Mavisi Ondego actually moved from land parcel South Maragoli/Bugonda/2097 to settle in Mautuma from the year 2001 and him and his son called Lumbasio constructed houses on the land parcel No. 1397 Mautuma where they lived until the year 2013 where they returned to Vihiga to unlawfully reoccupy the land now in dispute. That the reason why the 1st petitioner returned to Vihiga to resettle on the land designated for the government was that before he left for Mautuma, the government had not taken the original title deed for land parcel South Maragoli/Bugonda/2097 from him and did not immediately take possession of the land which remained unoccupied even as they got into devolved government under the new constitution 2010 thereby enabling the 1st petitioner to comfortably reoccupy the land as though it was his after being away for over 12 years. That it was only after they had settled as a county government and were securing government properties in the year 2015 that they found out the 1st petitioner has not only re-entered land parcel south Maragoli/Bugonda/2097 wrongfully but gone ahead to subdivide it into plots a number of which he registered in his name and the names of his children who are petitioners, number 2, 4, 5 and 7 and the remaining portions which he fraudulently transferred to the other petitioners.

The meaning and intent of the Article 40 (3) of the Constitution. Article 40, reads in part 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.

The Land Acquisition Act (now repealed) provided for the procedure to be followed in the compulsory acquisition of property by the Government of Kenya. When the compulsory acquisition herein began, the Land Acquisition Act Cap 295 Laws of Kenya, Section 3 of the Land Acquisition Act provided as follows:-

“Whenever the Minister is satisfied that the need is likely to arise for the acquisition of some particular land under section 6, the Commissioner may cause notice thereof to be published in the Gazette, and shall deliver a copy of the notice to every person who appears to him to be interested in the land.”

Under **Section 24, 25 and 26** of the **Land Registration Act 2012** upheld the indefeasibility of title:

Section 24 stipulates as follows;

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; and

(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 or expressed agreements, liabilities or incidents of the lease.

Section 25 of the act provides;

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all

privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

Section 26 is to the effect that;

Certificate of title to be held as conclusive evidence of proprietorship

(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.

I find that the 1st petitioner was duly compensated by accepting alternative land and he moved out. It is also a finding of fact that the 1st petitioner subdivided the suit land and the respective title deeds were all issued in December the year 2013. That by the 1st petitioner splitting the subject land and disposing off to third parties, he was engaged in fraud. I find that 1st petitioner still retains land parcel Mautuma Central Settlement Scheme/1397 which he was given by the government in exchange. It has been proved that the petitioners were guilty of fraud and/or misrepresentation or that they obtained the certificate of title illegally, unprocedurally or through a corrupt scheme. From the above law, cited authorities and my observations, the 1st and 2nd Respondents have proved that their actions are in accordance with the law hence their actions are illegal. The respondents' actions are not in contradiction with Sections 2, 2(4), 3, 10, 40 and 47 of the Constitution of Kenya. The law as discussed above, provides for compensation in cases of compulsory acquisition and the 1st petitioners was compensated way back in 1998. I concur with the respondents' submissions that, petitioners' titles having been obtained through or in furtherance of fraud, the same lack legal entity and are defeated by the application of Article 40 (6) of the Constitution on protection of the right to property which provides:-

“(6) the rights under this article do not extend to any property that has been found to have been unlawfully acquired”

The provisions governing compulsory land acquisition by the government do not apply to the instant case, the 1st petitioner took land parcel Mautuma Central Settlement Scheme/1397 in exchange for South Maragoli/Bugonda/2097. The 1st petitioner's proprietary interest in land parcel South Maragoli/Bugonda/2097 was extinguished when he accepted to move to Mautuma and hence he had no title in the original parcel to subdivide and/or transfer to the co-petitioners or at all. I find that the petition is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 27TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE