



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 413 OF 2012

BETWEEN

SERAH MWERU MUHU.....PETITIONER

AND

COMMISSIONER OF LANDS 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

THE NATIONAL LAND COMMISSION 3RD RESPONDENT

JUDGMENT

Introduction

1. The petitioner seeks relief from this Court on the grounds that her rights to the protection of property and to fair administrative action under **Articles 40** and **47** of the Constitution respectively have been violated.
2. At the centre of the petitioner's case is a leasehold property whose lease has now expired. Before expiry of the lease and while an application for renewal of the lease was pending, the State agreed to purchase the land for re-settlement of Internally Displaced Persons ("IDP's"). The State has neither completed the sale nor renewed the lease leading to the filing of the petition.
3. The property in question is a parcel of land, **L.R. No. 5605** situated north of Gilgil, OI Kalou in Nyandarua County comprising 583 acres ("the suit property") registered under the James Kangari ("the deceased"). The land was held under leasehold title for 99 years from 1st November 1911 at an annual rent of Kshs 69/= expiring on 1st November 2010. The petitioner is the executrix of the deceased.

The Facts

4. The facts of the case are not in dispute. They are set out in the parties' depositions; the supporting affidavit of Serah Mweru Muhu sworn on 17th September 2012, the replying affidavit of Zablon Agwata Mabea, the Commissioner of Lands ("the Commissioner"), sworn on 22nd January 2013 and the supporting affidavit of Andrew Mondoh, Permanent Secretary in the Ministry for State for Special Programs, sworn on 14th March 2013.
5. The genesis of the dispute can be traced to advertisements published in the local newspapers in the months of July and August 2009 inviting members of public to submit proposals for the purchase of land by the State to be used for the settlement of IDP's. Acting through a company, Muhu Holdings Limited, the deceased offered to sell the suit property for a sum of Kshs 300,000 per acre by a letter dated 7th September 2009.
6. In December 2009, before completion of sale formalities, some IDPs took possession of part of the suit property at the instance of the local administration. The petitioner alleges that when the move of squatters was resisted by the deceased representatives, the District Commissioner informed them that he had directions from the Ministry of Lands and Settlement, Special Programmes and the Office of the President to secure a small portion on the parcel of land for temporary settlement of IDPs pending the completion of purchase of the property by the government. The government gave assurances that it was going to purchase the suit property. Further, petitioner hived off 60 acres from LR No. 5605 to settle the existing squatters. The balance of 523 acres, LR No. 5605/3 was set aside for sale to the State.
7. The State through the letter dated 7th April 2011 issued a letter of notification of award for 522 acres at Kshs 170,000 per acre. This offer was not accepted and after renegotiation, the Director of Land Adjudication and Settlement wrote to the petitioner the letter dated 3rd February 2012 notifying the petitioner of the award in the following terms;

LETTER OF NOTIFICATION OF AWARD: PURCHASE OF LAND REF: NO. 5605/3-MUHU HOLDINGS (OL KALOU)

This is to inform you that your offer to sell 523 acres to this Ministry has been accepted at the Government Valuation of Kshs 200,000/= per acre totaling to Kshs 104,600,000/= (One Hundred and Four Million, Six Hundred Thousand only).

Please acknowledge receipt of this letter of notification signifying your acceptance and attach a draft sale agreement for our consideration and processing.

The agreement shall be signed by the parties within thirty (30) days of the date of this letter. The purchaser is the Settlement Fund Trustees P.O Box 30297-00100 Nairobi.

You may contact the officer whose particulars appear below on the subject matter of this letter of notification of award.

DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT

8. The deceased's representatives in letter dated 7th February 2012 accepted this counter offer as follows;

LETTER OF NOTIFICATION OF AWARD; PURCHASE OF LAND REF: 5605/3-MUHU HOLDINGS (OL KALOU)

Thank you for your offer to purchase 523 acres at a valuation of Kshs 200,000 per acre as per request letter dated 15th April 2011.

We are forwarding this notification of acceptance and shall immediately follow it up with a draft sale agreement altogether with other relevant documents for your consideration and processing.

We also note the buyer is Settlement Fund Trustee of P.O Box 30297-00100 Nairobi.

Thanking you in advance.

Yours sincerely.

Kangari Muhu

Muhu Holdings

8. By the time the State was confirming the offer to purchase the suit property, the lease had expired and the deceased's representatives took steps to renew the lease. The County Council of Nyandarua, the District Surveyor, the District Physical Planning Officer and the District Land Officer all approved the extension of the lease term.

9. By the letter dated 30th January 2012 addressed to the Commissioner, the petitioner sought renewal of the lease on the following terms;

RENEWAL OF LAND LEASE FOR RESETTLEMENT OF IDPs ON LAND REF. NO. 5605 UPPER GILGIL OLKALOU

Further to our meeting held on 26th January in Nakuru at the provincial headquarters regarding the sale of LR 5605 Upper hill Olkalou, we met with the negotiating team charged with resettlement of IDPs in Ardhi House last Friday.

This team asked me to do among many other things to seek your assistance in renewing of this particular lease.

The leasehold on this property expired last year and went ahead and got all the required documents for the application for the renewal of the leasehold. These documents were launched in your office and we kindly request you to consider and renew this lease to enable the settlement of the IDPs who are currently camped on the farm.

We thank you in advance and await your positive answer.

Yours sincerely

KANGARI MUHU

MUHU HOLDINGS

10. The petitioner avers that the Commissioner has not responded to the letter dated 30th January 2012. She decries the fact that to date, after necessary approvals, the Commissioner has failed, neglected and or refused to exercise his statutory powers to extend the said lease to the

detriment of the petitioner. The petitioner argues that the Commissioner's inaction is arbitrary, discriminative and amounts to a violation of the right to fair administrative action protected under **Article 47** of the Constitution. The petitioner contends that the decision not to grant a renewal of a lease of the suit property is a violation of the right to property protected under **Article 40**.

11. Mr Kinyua, learned counsel for the petitioner, submitted that based on the fact outlined the petitioner had a reasonable and legitimate expectation that the sale would be completed. That the inaction of the State in renewing the lease and the failure to conclude the sale transaction coupled with the fact that IDP's were invited to occupy the entire land constituted a breach of **Article 40**.
12. In the Amended Petition dated 6th September 2013, the petitioner seeks the following reliefs from this court:
 - a. *That a declaration be issued to the effect that the refusal by the 1st respondent and/or the 3rd Respondent to renew, for a further term, the lease over parcel L.R. No. 5605 OI Kalou Nyandarua in favour of the petitioner is discriminatory, unconstitutional, ultra vires his powers and a violation of the petitioner's fundamental rights and freedoms and is therefore a nullity.*
 - b. *That an order of prohibition by way of judicial review be issued against the 1st Respondent prohibiting them or any officer from their offices or any officer in an office with a similar mandate as theirs, from transferring, offering for sale, allocating and or in any other manner interfering with the petitioner's proprietary rights over parcel L.R. No. 5605 OI Kalou Nyandarua.*
 - c. *That an order of mandamus by way of Judicial Review be issued directing and commanding the 1st respondent and the 3rd respondent therein to renew the lease over L.R. No. 5605 OI Kalou Nyandarua for a further term of 99 years in favour of the petitioner.*
 - d. *That a conservatory order by way of injunction be issued directed to the 1st Respondent restraining them or any officer from their offices or any officer in an office with a similar mandate as theirs, from transferring, offering for sale, allocating and or in any other manner interfering with the petitioner's proprietary rights over parcel L.R. No. 5605 OI Kalou Nyandarua except in favour of the petitioner.*
 - e. *THAT the cost of this petition be borne by the 1st Respondent and the 3rd Respondent*
 - f. *Any other relief or order that this court may deem fit in the special circumstances of this matter.*

Respondents' Case

14. The 1st and 2nd respondents ("the respondents") oppose the petition on the basis of the Commissioner's affidavit sworn 22nd January 2013.
15. The Commissioner, in his deposition, concedes the chronology of events relating to the lease and sale of the suit property. He, however, contends that the lease expired on 1st November 2010 whereupon title to the suit property reverted to the State and that as a result, it has now been registered and vested in the Settlement Land Trustees for settlement of IDP's. He avers that it would be irregular, in the circumstance, for the State to purchase its own land. Learned counsel for the respondents, Mr Motari, submitted that once the State realized that the property belonged to it, it could not proceed with negotiations for sale.
16. The Commissioner depones that in 1973 the deceased submitted an application for the extension of the term of the lease for 99 years unexpired. At the time the Commissioner raised three key issues among them being;

- The deceased had failed to take advantage of the provision of the provisions on conversion prevailing at the time to convert his 99 year lease to 999 years and he ought to have done this in 1962 prior to the 1965 Constitutional Amendment Act.
- That since the purchase of the property in May 1962, the deceased has been leasing the land to another party implying that he was visibly absent.
- Extension of the lease was dependent on the acceptance of appropriate development conditions requiring the deceased to carry out substantial developments on the property.

As a result of the failure to provide satisfactory answers his request for extension was rejected.

17. The respondents deny that any legitimate expectation accrues to the petitioner stating that the government had not made any promises or representations to the petitioner that could have given rise to a legitimate expectation that the lease would be renewed. They submit that the process of extension was initiated in October 2011 a month prior to the expiry of the lease with the intention of selling the land to the Government. They also argue that the extension of a lease is not a right but discretionary and that the continued use and ownership of the property by the petitioner depends on whether such an extension is granted.
18. The respondents submit that the lease could not be extended owing to a cabinet directive and ministerial memo directing that all dispositions on public land including new grants and renewal of leases be frozen following the establishment of the National Land Commission.
19. Regarding the resettlement of IDPs, the respondents conceded that there had been relocation of IDPs to the subject property on diverse dates on 12th January 2010 and on 28th February 2012 when an additional 74 displaced families were settled. It was the respondents' submission that it was not clear the arrangement under which the IDPs were settled on the property as there had been no documentation and the Ministry of Lands was not made aware of.
20. The Commissioner states that the issues arising during the intended transaction are contractual in nature and have no bearing on breach of fundamental rights and freedoms.

Determination

21. The petitioner's case is founded on **Articles 40 and 47** of the Constitution. **Article 47** protects the right to fair administrative action while **Article 40** guarantees protection of personal property against arbitrary acquisition by the State. In order to protect the right to property, a party must establish a proprietary right or interest in land as the Constitution does not itself create these rights or interests. In the case of ***Joseph Ihugo Mwaura and Others v The Attorney General and Others Nairobi Petition No. 498 of 2009 (Unreported)***, the Court, referring to **section 75** of the former Constitution which is the equivalent of **Article 40**, observed that, ***"[46] Section 75 of the Constitution contemplates that the person whose property is the subject of compulsory acquisition has a proprietary interest as defined by law. The Constitution and more specifically section 75 does not create proprietary interests nor does it allow the court to create such rights by constitutional fiat. It protects proprietary interests acquired through the existing legal framework."***
22. The State argues that since the lease to the suit property has expired, the property has reverted back to it while the petitioner contends that she is the owner of the property as she is entitled to renewal of the lease. This is the issue to be resolved in order to determine whether the petitioner is entitled to protection.

23. What is clear is that the State entered into a written binding agreement to purchase the property. The offer of sale was accepted by the Letter of Notification of Award dated 3rd February 2012 executed by the Director of Land and Adjudication and Settlement. This being an acceptance of the offer, it is one that would entitle the petitioner to an order of specific performance. The State did not take any further steps to complete the sale nor inform the petitioner of its intent to take any further steps in the matter.
24. The State contends that the lease had expired hence it could not complete the sale. The reason, in my view, cannot stand scrutiny for several reasons. First, paragraph 9 of the Commissioner's affidavit states that, *"THAT the family of the late Muhu Kangari initiated the process of extension of the lease in 2009 and on 7th of September 2009 while in process of extension was on-going, the family offered to sell the property to the government. It would therefore appear that the application for extension was sought to enable them sell the property."* The State therefore concedes that in fact the process of extension had already been invoked.
25. Second, in the event the State was not willing to renew the lease it ought to have informed the petitioner of its decision in writing. No communication to that effect was received by the petitioner nor does the State contend that it indeed communicated such a decision to the petitioner.
26. The third reason is the fact that by entering into a contractual relationship with the petitioner prior to the expiration of the lease, the State demonstrated its intention to renew the lease. If the State has no intention of renewing the lease, it would not have accepted the petitioner's offer to sell the suit property. The reason is buttressed by the fact that the deceased's offer was accepted by the officers from the Ministry of Lands, who are the custodians of the land records and who ought to have known that the lease was expiring.
27. The fourth reason that negatives any intention by the State not to renew the lease it to be found in the fact that the petitioner was permitted to subdivide the land to resettle squatters on the land despite the fact that the lease was about to expire. Lastly, after nothing was done to complete the sale or inform the petitioner the outcome of the process of renewal of the lease, the petitioner sought to restart the process of renewing the lease the relevant offices in the District who all approved the extension of the lease.
28. The Commissioner, in his affidavit refers, to the fact that the deceased's application to renew the lease was rejected in 1973. I have looked at two documents annexed to the affidavit to support this contention. The first document annexed as "ZAM" appears to be an internal opinion on whether Mr Kangari ought to have applied for conversion of leasehold to a freehold. The second letter is dated 14th June 1973 which seeks information from Mr Kangari information necessary for extension of the lease. I have examined both documents and they do not lead to the conclusion that extension of the lease was sought and declined way back in 1973. If this was the position, the Commissioner ought to have exhibited the request for extension and the response declining the extension. Furthermore, Commissioner's office would not deign to enter into negotiations for the purchase of land with the knowledge that the renewal of the lease had been rejected in 1973.
29. It is also worth noting that once the Government confirmed the offer to purchase the suit property by the letter dated 3rd February 2012, the lease had already expired hence it was necessary for the petitioner to commence the process of extension of the lease in order to complete it after the State had not taken any step to conclude the sale transaction. In light of the Commissioner's

own averment contained in paragraph 9 of his affidavit, I conclude that the purpose of pursuing the application after the lease had expired was to restart the process which has stalled while the sale was being consummated.

30. I therefore find and hold that the petitioner has established a proprietary interest in the suit property which is worthy of protection by the Bill of Rights. I would also add the facts I have outlined above are the firm basis for legitimate expectation by the petitioner that the lease would be renewed and or the suit property purchased. In ***Diana Kethi Kilonzo & another v Independent Electoral & Boundaries Commission & 10 others, Nairobi Petition No. 359 of 2013 [2013] eKLR***, the court described the term legitimate expectation as follows; *[133] At its core, and in its broad sense, the doctrine of legitimate expectation is said to arise out of a promise made by a public body or official which the person relying on anticipates will be fulfilled. It is also said to arise out of the existence of a repeated or regular practice of the public body or official which could reasonably be expected to continue. Essentially, once made, the promise or practice creates an estoppel against the public body or official, so that the person benefitting from the promise or practice would continue to so benefit, and that the promise or practice would not be withdrawn without due process or consultation."*
31. Thus, where there is a clear and unambiguous representation upon which it was reasonable for a person to rely, then the administrator or other public body will be held bound in fairness by the representation made unless only its promise or undertaking as to how the power would be exercised is inconsistent with the statutory duties imposed on it. **(See *R v Devon County Council exp Baker (1999) [1995] 1 ALL ER 73, 88-89*).**
32. It is common ground that the final offer for the purchase of the subject property was accepted when the quest to renew the lease was ongoing. As I have outlined above the petitioner must have expected, and reasonably so, that following the State's acceptance of its offer in full knowledge of the situation of the lease term, that it was going to extend the lease for purposes of completing the sale or otherwise purchase the property. Such reliance, in my view cannot be termed as illegitimate or unreasonable in the circumstances. Indeed, even the respondents seem to admit of this fact in its submissions when it says, *"It is our humble submission that the vendor was alive to the fact that the lease was at the verge of expiry and relied on the intended sale to have the lease renewed. At the later stage of the subsistence of the lease, the family of the late Muhu Kangari initiated the process of extension of the lease in 2009 and on 7th of September 2009 while the process of extension was ongoing, the family offered to sell the property to the government... This leaves the Ministry with one conclusion that the said extension was calculated and was aimed at enabling the intended sale."*
33. The intention of the petitioner to sell the property does not negate the legitimate expectation of the petitioner because the ability to sell or dispose of property is one of the incidents of the right to own property. The State's argument in this respect lacks merit as it is the one which accepted the offer to purchase the suit property despite the fact that it had full knowledge that the lease was about to expire.
34. The Commissioner has admitted that the process of extension of the lease was started way back in 2009. That process was interrupted by the sale to the State. Under **section 13(1)** of the **Land Act** the lessee has the right of first refusal should the State wish to extend the lease. It provides that, *"Where any land reverts back to the national or county government after expiry of the leasehold tenure the Commission shall offer to the immediate past holder of the leasehold interest pre-emptive rights to allocation of the land provided that such lessee is a Kenya citizen*

and that the land is not required by the national or the county government for public purposes." In the absence of reasons for refusal to extend the lease, the lessee would be entitled to an extension of the lease. In this case though, any intention to extend the lease was superseded by the State's acceptance of the offer to purchase the land.

35. In the circumstances therefore, I am afraid that the State cannot play victim and claim the petitioner's occupation of the suit property is illegal based on the facts. The State, in essence, proceeded to sanction an acquisition process and even made assurances towards the same fully aware of the expiry of the term of the property subject of the sale agreement.
36. I find and hold that it was not unreasonable for the petitioner to have held legitimate expectation that the lease would be extended in view of the unfolding of events. To conclude otherwise would be to suggest that the State was oblivious of the expiry of the lease term of its own parcel of land or that it was playing a hoax in order to deny the petitioner the opportunity to extend the lease by entering into a dud sale of the suit property.
37. I am in agreement with the petitioner's submission that the neglect, refusal and or failure by the Commissioner of Lands to exercise its statutory duty to renew the petitioner's lease over the suit property is a violation of **Article 47(1)** of the Constitution. These provisions are also augmented by **Article 232** which enunciates various values and principles of public service including "(c) responsive, prompt, effective, impartial and equitable provision of services" and "(f) transparency and provision to the public of timely, accurate information."
38. The petitioner's concern regarding the renewal of the lease was brought to the Commissioner's attention by the letter of January 2012. In the written submissions, the Commissioner attributes the failure to renew the lease term owing to a cabinet directive freezing such dealings in public land. The decision was not exhibited to the Commissioner's affidavit nor was it communicated to the petitioner as the reason for refusal or failure to renew the lease or otherwise complete the transaction. One would expect that a decision of such magnitude and public interest would be contained in some form of documentation. The constitutional duty imposed on the Commissioner is to notify the lessor the reasons why the lease could not be renewed or any expectations or conditions demanded on the part of the petitioner/lessee prior to such renewal or indeed why the modalities of the sale could not be completed. This was not done, in breach of the petitioner's right to fair administrative action under **Article 47(2)** which provides that, "*If a right or fundamental freedom of a person has been or is likely to be affected by administrative action, the person has the right to be given written reasons for the action.*" Silence cannot be a substitute for written reasons.
39. The State had already accepted to purchase the subject property for IDPs resettlement and despite the submission by the respondents that it is not clear how IDPs were settled on the suit property, the evidence points to tacit participation of the State in resettlement of IDPs. In the letter dated 27th February 2013, the Permanent Secretary in the Office of the President to the Permanent Secretary of the Ministry of Land and Ministry of State for Special Programmes stated, "*As you are aware, the Government moved 174 IDP families to the above mentioned farm before its lease expired in 2010.*" This is also confirmed by the deposition of Andrew Mondoh. It was unreasonable and unfair for the Commissioner not to conclude the contractual arrangement or communicate the fate of those arrangements to the petitioner after IDPs were settled on the farm. The State's action has in effect kept the petitioner under a cloud of mystery, not knowing and not sure whether she is still the legal owner of the subject property. Such inaction on the part of the State is not only a failure to discharge of its duty but is also unfair,

unreasonable and in violation of the petitioner's right to fair administrative action guaranteed under **Article 47** and I so find.

The National Land Commission

40. As I conclude, I note that following the overhaul of land management in the country following the promulgation of the Constitution and the establishment of the National Land Commission, the office of the Commissioner of Lands ceased to have overall responsibility over land management in the country. I also take judicial notice that it was not until 20th February 2013 that the Commission's members were gazetted. Thus, the Commissioner was at all material times the office responsible for the matters at hand. Under **Article 67** of the Constitution, the National Land Commission is established, to *inter alia*, manage public land on behalf of the national and county governments and to monitor and have oversight responsibilities over land use planning throughout the country. The Commission under **section 5(2)** of the **National Land Commission Act (No. 5 of 2012)**, also bears other responsibilities including to alienate public land on behalf of, and with the consent of the national and county governments, monitoring the registration of all rights and interests in land and ensuring that public land and land under the management of designated state agencies are sustainably managed for their intended purpose and for future generations.
41. By an order issued on 19th August 2012, I granted leave to the petitioner to amend the petition by joining the National Land Commission. The Commission was served with process but failed to enter appearance or participate in these proceedings. I am however satisfied that since the proceedings pre-date the establishment of the Commission and that the 1st and 2nd respondents were ably represented, its position was not prejudiced.

Reliefs

42. The petitioner calls upon this court to issue various judicial review orders of prohibition, mandamus and injunctive reliefs. **Article 23(3)** of the Constitution mandates this court to grant appropriate relief including a declaration of rights, an injunction, a conservatory order, an order for compensation and an order of judicial review in order to vindicate effectively the rights protected under the Bill of Rights. What amounts to an appropriate relief depends on the nature and the circumstances of each particular case (See **Nancy Makokha Baraza v Judicial Service Commission and 9 Others Nairobi Petition No. 23 of 2012 [2012]eKLR**, **Bidco Oil Refineries Ltd v Attorney General and 3 Others Nairobi Petition No. 177 of 2012 [2012]eKLR**).
43. The orders the petitioner seeks in effect call upon the court to recognise the lease and renew it for a further term of 99 years and consequential relief. As I stated earlier, the lessor has a pre-emptive right of first refusal in the event the lease is to be renewed. The term of renewed lease is however discretionary. It would be inappropriate to grant such a relief in the instance particularly having regard to the term of the lease. The Commissioner has deponed that the suit property has already been registered in the name of the Settlement Fund Trustees but no evidence of this fact was furnished. The clear intent of the petitioner was to sell the land to the State and for the State to acquire the land.
44. It entered into a contract and issued a notification of award dated 3rd February 2012 in which it accepted the petitioners' offer to sell 523 acres for the sum of Kshs. 200,000.00 per acre totaling Kshs. 104,600,000.00. The intention of the State crystallised in the State taking steps to re-settle 174 families of IDP's of the suit property.

45. Ordinarily the petitioner would be entitled to a sum equivalent the purchase price had the contract of sale been completed. The value of the land had already been agreed upon as the purchase price. I am also cognizant of the fact that by the letter dated 14th August 2012, the petitioner through her advocates demanded vacant possession of the property as the State failed to formalize the sale after the notification of award.

Disposition

46. In light of what I have stated I think the State and the petitioner should be given another chance to explore settlement of the matter in accordance with the mandate imposed on the court by **Article 159(2)(c)** of the Constitution. My reason for this is that the State has already taken steps to settle IDPs on the land and part of it may not be available for the petitioner. If the petitioner is given an extension of the lease, without taking into account the IDPs already settled thereon, she will be saddled with IDPs and this may lead to further disputes. Furthermore, to insist on the State providing vacant possession would in effect undermine the State's obligation to persons who are in vulnerable circumstances contrary to the national values and principles of governance contained in **Article 10** of the Constitution.

47. Having given consideration to the matter outlined aforesaid, I direct as follows;

- i. The parties shall enter into negotiations in good faith in order to resolve the matter in light of the judgment within the **next ninety (90) days** from the date hereof and in the absence of any agreement the Court shall pronounce the final reliefs.
- ii. Either party is at liberty to apply for further and other orders.

DATED and DELIVERED at NAIROBI this 30th day of January 2014

D.S. MAJANJA

JUDGE

Mr Kinyua instructed by Kahari and Kiai Advocates for the petitioner.

Mr Motari, Litigation Counsel, instructed by the State Law Office for the respondents.



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