



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

PETITION NO. 15 OF 2015

IN THE MATTER OF ARTICLES 20, 21, 23 (3) & 40 OF THE CONSTITUTION, 2010

AND

IN THE MATTER OF THE VIOLATION OF AND OR INFRINGEMENT ON THE PROPERTY RIGHTS OF THE PETITIONER

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, NO. 3 OF 2012

IN THE MATTER OF THE LAND L.R. NO. WEST KITUTU/BOGUSERO/3138 AND

IN THE MATTER OF SECTION 19 (SIXTH SCHEDULE) OF THE CONSTITUTION, 2010

BETWEEN

CLEOPHAS ONDIEKI NYACHIEO.....PETITIONER

VERSUS

THE COUNTY EXECUTIVE ROADS,

PUBLIC WORKS, TRANSPORT & HOUSING,

KISII COUNTY.....1ST RESPONDENT

KISII COUNTY GOVERNMENT.....2ND RESPONDENT

RULING

BACKGROUND

1. The Petitioner instituted this suit by way of a Petition dated 7th April 2015 claiming that the 1st and 2nd Respondents had forcefully entered his land parcel number **WEST KITUTU/BOGUSERO/3138** and constructed a road. The Petitioner contends that by virtue of the 1st and 2nd Respondents actions, he is likely to be arbitrarily deprived of his rights and interests over the said land. He therefore seeks the following orders:

- (a) A declaration that the Petitioner is entitled to protection under the Constitution
- (b) A declaration that the 1st and 2nd Respondents have no right, mandate and/or authority to forcefully and/or enter upon and build a road on the Petitioner's land parcel number **WEST KITUTU/BOGUSERO/3138**
- (c) A declaration that the Petitioner herein is likely to be arbitrarily deprived of his rights and/or interests over the suit land. Consequently, the Petitioner's constitutional rights are bound to be infringed and/or violated.
- (d) A declaration that Land Parcel no. **WEST KITUTU/BOGUSERO/3138**lawfully belongs to the Petitioner

(e) An order of permanent injunction restraining the 1st and 2nd Respondents either by themselves, their agents, servants and/or anyone claiming under the Respondents from entering upon, trespassing onto, taking possession, building on destroying crops and /or in any other way whatsoever interfering with the Petitioner's right over the suit land that is **WEST KITUTU/BOGUSERO/3138**

(f) An order of damages for the damage caused as per the valuation report by Otundo Associates.

(g) Costs of the Petition to be borne by the Respondents jointly and/or severally.

2. In their response, the Respondents denied the Petitioner's claim and stated that the petitioners had encroached on a public 10 meter road. They stated that before the road works started, there was public participation and the Petitioner and his wife agreed to cooperate, therefore the issue of compulsory acquisition does not arise. They maintain that they have merely performed their constitutional mandate by opening the public road and there is no violation of the constitution as alleged. They contend that the Petition is an abuse of the court process and the court cannot be used as an avenue to protect the petitioner from an illegality as he has encroached on a public road.

3. On 25th May 2017 the court noted that the Petitioner's case related to the position of the access road and whether there was any encroachment by the Respondents when they sought to have the said road opened. The court observed that this is a fact that needed to be verified by the Land Registrar and Surveyor who are mandated by the law to establish and fix boundaries. The court then directed that the Land Registrar and County Surveyor, Kisii to visit land parcel no. **WEST KITUTU/BOGUSERO/3138** to delineate and fix the boundaries of the road of access and verify whether there was any encroachment on the road of access either by the owner of land parcel No. 3138 or by the County government when they set out to open the road of access and if so, the extent of such encroachment. The Land Registrar was given 90 days to file his report in court.

The County Surveyor visited the suit property and filed their report dated 7th June 2019. The report made the following observations:

“Measurements of parcel Bogusero 3138 versus the road were taken on the ground. The same were correlated with scaled map measurements. From this it was established that the road opened by the County Government had encroached into parcel Bogusero 3138 by 10 metres width over a length of 48 metres. The road had been displaced by 10 metres from its actual position into the Petitioner's land.”

4. The court then directed the parties to read the report and file their comments on the same.

In his submissions learned counsel for the Petitioner contended that the report had established that the Petitioner's rights over the suit property had been violated as the suit property had been interfered with. He was of the view that since the Land Registrar and Surveyor are the officers bestowed with the right to ascertain and demarcate boundaries, their visit to the suit property and report prepared thereafter had essentially resolved part of the dispute. He submitted that from the findings of the report the Petitioner was at liberty to file and/or commence appropriate proceedings to evict the respondents who were guilty of trespass and interference with the suit property so that he could be compensated for the damage occasioned thereon. It was his contention that since it had been ascertained that there was no road surveyed to pass through the petitioner's land, it was right to conclude that the respondents' actions of extending construction of the road to the petitioner's land was illegal. He submitted that the court ought to award the petitioner damages in terms of the report by Otundo Associates.

5. In its response counsel for the Respondents submitted that the road was opened due to public demand/ participation since the general public was affected by the actions of the Petitioner. It was his submission that all the residents living along the road, including the Petitioner herein, were informed in advance, vide a Public Notice dated 11th February 2015 which information was widely circulated after a public participation meeting and it was only the petitioner who raised issues because he had encroached onto the road illegally.

6. Counsel submitted that the County Surveyor went to the ground after the public participation meeting and established that the said road was measuring 10 metres wide and those whose properties had encroached onto the road were informed accordingly and the affected properties marked including the petitioner's.

7. He contended that even though the report that was filed in court on 10th June 2019 pretentiously indicated that it was prepared by the Land Registrar, Kisii and County Surveyor, it was not signed by the said officers and it was therefore fake. He was therefore of the view that the two officers be called for Cross-examination on the authenticity of the report before it could be relied upon.

Counsel submitted that the County Surveyor visited the land before the opening of the road and established that the road was 10 metres wide yet the petitioner was claiming that the County Government had encroached on his parcel of land to the extent of 10 metres.

8. He submitted that there was no encroachment by the Respondents since the road being opened was 10 metres wide and no other resident had come to court complaining except the petitioner.

Counsel took issue with the valuation report prepared by Maritime Valuers Ltd terming it vague and hollow in as far as it does not state the measurements of the portion encroached and its value. He submitted that the figures indicated in the report as the value of the developments on the disputed portion were exaggerated. He contended that it had been prepared by unqualified persons and therefore it could not be relied upon.

ISSUES FOR DETERMINATION

9. Having considered the pleadings, report of the Land Registrar and County Surveyor as well as the rival submissions, the following issues arise for determination:

- i. Whether the report of the Land Registrar and County Surveyor is genuine and if so, whether the court should adopt the said report as having determined the issues in dispute.
- ii. Whether the Petitioner is entitled to an award of damages based on the valuation report prepared by Maritime Valuers Ltd.

ANALYSIS AND DETERMINATION

10. From the report dated 7th June 2019 filed by the Land Registrar and County Surveyor it is clear that the persons present during the visit to the suit property included the County Surveyor, the Petitioner, the County Executive Roads, Public Works, Transport and Housing, Kisii County and Counsel for the Petitioner. Conspicuously absent was the Land Registrar. The absence of the Land Registrar or his representative casts doubts on the contents of the report as sections 18 and 19 of the Land Registration Act vest the power to fix boundaries in the Land Registrar. The role of the Land Registrar is spelt out under section 19(2) as follows:

19.(2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.

11. The role of the Land Registrar can therefore not be ignored. Additionally, the Respondents have also challenged the validity of the said report and in the circumstances, it would be in the interest of justice to have the Land Registrar and County Surveyor cross-examined on the said report before the court makes a decision on whether or not to adopt the same.

Based on my finding on the Land Registrar's report, there would be no basis for the court to award damages in line with the valuation Report prepared by Maritime Valuers.

12. In view of the foregoing, I direct that the case goes to full hearing so that the parties can testify and subject the makers of the two reports to cross-examination before the court can arrive at a final decision.

Dated, signed and delivered electronically via zoom this 23rd day of April 2020.

J.M ONYANGO

JUDGE