



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. PETITION NO. 137 OF 2018

(Formerly Nairobi Petition No. 601 of 2013)

IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23, 40 AND 64 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER ARTICLES 20(2), 21(1), 27, 40 (1) AND 40(3) OF THE CONSTITUTION OF KENYA, 2010

AND IN THE MATTER OF THE LAND, 2012 AND THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF COMPULSORY ACQUISITION OF LAND REFERENCE

NUMBER 22423, MACHAKOS WITHOUT DUE PROCESS AND IN

CONTRAVENTION OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

DAVID GITAU THAIRU.....PETITIONER

AND

THE COUNTY GOVERNMENT OF MACHAKOS.....1ST RESPONDENT

THE GOVERNOR, COUNTY GOVERNMENT OF MACHAKOS.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Introduction

1. In the Petition dated 20th December, 2013, the Petitioner has averred that he is the proprietor of Land Reference number 22423 (*the suit property*) situated in Machakos Town; that the 1st Respondent entered into the suit property and continues to remain on the said land without the Petitioner's permission and that the Respondents have committed acts of wastage on the suit property.

2. The Petitioner has averred that due to the 1st Respondent's acts of trespass on the suit property, the Respondents are in violation of his rights as set out in the Constitution under Articles 23 (1) and (3). The Petitioner has prayed for an order prohibiting the Respondents from trespassing or committing acts of wastage or depositing or dumping any waste on the suit property.

3. The Petitioner has also prayed for a declaration that the 2nd Respondent's entry onto the suit property is unconstitutional, illegal and a

breach of his constitutional rights; compensatory and exemplary damages in the sum of Kshs. 10 million and for the costs of the Petition.

4. In his Replying Affidavit, the 1st Respondent's Secretary deponed that the 1st Respondent deposited soil on the suit property during the construction of a road that passed through the suit property; that the 1st Respondent is ready and willing to remove the soil deposited on the suit property and that prior to the deposit of the soil on the suit property, the said land was not in use. As such, it was averred, the Petitioner is not entitled to damages.

5. The 1st Respondent's Secretary finally deponed that the Petition contravenes the provisions of Rule 8 (1) of the Constitution of Kenya (*Protection of Rights and Fundamental Freedoms*) Practice Rules, 2013 which require that every case should be filed in the High of Kenya within whose violation the alleged violation of rights and freedoms took place.

6. The Petition proceeded by oral evidence and written submissions. It was the evidence of the Petitioner that he is the registered proprietor of the suit property; that he has charged the suit property to a bank and that when he visited the land, he found the 1st Respondent had deposited a lot of cotton soil on the land.

7. According to the Petitioner, the 1st Respondents' agents also dug trenches on the suit land without his permission; that the Respondents admitted having deposited soil on the suit land and digging of the trenches; that he had planned to put up a hotel on the land, which he could not do because of the Respondents' acts and that the Respondents had agreed to pay him Kshs. 20,000,000 as compensation for the suit property.

8. PW1 finally testified that due to the deposit of the cotton soil on the suit land, he was unable to build a hotel on the suit property; that he is currently leasing out a building for the purposes of his hotel known as 'Ikinu' and that he has not been able to utilize his land since the year 2013 because of the acts of the Respondents.

9. In cross-examination, PW1 stated that the dumping of the soil on the suit property was done on the entire land; that the Respondents did trenches and put water pipes on the land and that the land is no longer in the original form it was in before the Respondents' acts of trespass and waste.

10. Although the 1st Respondent's agent showed him an alternative land, it was the evidence of PW1 that the said land does not have a Title document; that the 1st Respondent had agreed to purchase the suit property for Kshs. 20,000,000 and that he did not retain a valuer to prepare a valuation report. The Petitioner denied having been paid for the land.

11. The 1st Respondent's Chief Officer in charge of Lands and Physical Planning relied on the Replying Affidavit on record and her witness statement. In her witness statement, the 1st Respondent's witness stated that the 1st Respondent deposited soil on the Petitioner's land to allow for the construction of a road that was passing in the Petitioner's land; that the Petitioner's claim of Kshs. 10,000,000 is unfounded and unjustified and that the 1st Respondent is ready and willing to remove the soil from the suit property.

12. According to DW1, the 1st Respondent entered into negotiations with the Petitioner to acquire the suit property; that the 1st Respondent agreed to compensate the Petitioner by paying him Kshs. 20,000,000 and that upon signing the consent order, the 1st Respondent was caught up in financial difficulties and was unable to pay the Petitioner the said amount.

14. According to DW1, the compensation fee of Kshs. 20,000,000 was arrived at after a survey and valuation was done by the 1st Respondent's Department of Lands and Urban Development; that the 1st Respondent has been willing to pay the said sum of Kshs. 20,000,000 in instalments, an arrangement that the Petitioner has refused and that the Petition was prematurely filed.

15. In cross-examination, DW1 stated that by 2016, the value of the suit property was Kshs. 20,000,000; that the land needed to be restored to its previous state and that the valuation report that was prepared by the 1st Respondent was for the purpose of compensating the Petitioner. According to DW1, it is the Petitioner who frustrated the offer they had given him.

Submissions

15. The Petitioner's advocate submitted that according to the 1st Respondent's valuer, Mr. Wambua S.N, the value of the subject property was Kshs. 20,000,000 as on 5th April 2016; that owing to the current market value, the property has appreciated in value and that the current market value of the suit property could range from Kshs. 40,000,000 to Kshs. 50,000,000.

16. The Petitioner's counsel submitted that the Petitioner's land has depreciated in value since the year 2013 because the land was used as a dumping ground by the 1st and 2nd Respondents; that the land could not be utilized for the purpose it was bought for, and that due to the actions of the 1st and 2nd Respondents, the Petitioner he has not been able to relocate his hotel to the suit property which has subjected him to great economic loss.

17. According to counsel, the Petitioner has not been able to secure a Further Charge from the bank using the suit property to enable him enhance his business because the land was converted to a dumping ground by the 1st and 2nd Respondents; that the Petitioner has been unable to develop the land in any useful manner owing to its current state and that the Petitioner has also been unable to dispose the said parcel of land.

18. The Petitioner's counsel submitted that from the evidence adduced, and on account of the Petition which was filed on 20th December

2013, the Petitioner had sought for exemplary damages of a sum of Kshs. 10,000,000 as at the time of filing the Petition, that the amount should be moved up to a sum of Kshs. 35,000,000 and that the court should take notice that the matter has been in court for a period of over six (6) years.

19. It was submitted that in the case of *Rhoda S. Kiilu vs. Jilanxi Water and Hydropower and Another, ELC Case No. 34 of 2018 at Meru High Court*, the court found that the Defendants had unlawfully trespassed into the Plaintiff's land without his consent and rendered it to a waste and accordingly compensated him.

20. Counsel also relied on the case of *Noah Kaisha Kedogo vs. Chania Construction Company Ltd (2018) eKLR*, where the court held that the Defendant had unlawfully trespassed into the Plaintiff's land and awarded him a sum of Kshs. 1,500,000 as damages. It was submitted that due to inflation rate, The Petitioner is entitled to a sum of Kshs. 40,000,000 or Kshs. 50,000,000 as compensation. According to the Petitioner's counsel, an award of a sum of Kshs. 40,000,000 as compensation to the Petitioner, and a further sum of Kshs. 35,000,000 as exemplary damages should be given by this court.

21. The Respondents' advocate submitted that it is a settled principle of law that he who asserts must prove and that whereas the Petitioner purports to rely on photographs annexed to his Supporting Affidavit as evidence of wastage on the subject suit property, the said photographs as presented are undated; that it is not certain when they were taken, where they were taken and who took them and that the photographs are inadmissible as evidence in court in support of the Petitioner's case.

22. The Respondent's advocate submitted that the Petitioner has failed on a balance of probability to prove trespass, wastage and degradation of the subject suit property; that his entire case hangs on hearsay and unproven allegations and that the Petitioner did not produce any expert report or valuation report to show how the alleged actions by the Respondents have devalued his parcel of land. Counsel submitted that it is not clear how the Petitioner arrived at the sum of Kshs. 10,000,000 without making reference to the market value of the suit property before and after the alleged trespass by the 1st and 2nd Respondents.

23. The Respondents' counsel relied on the case of *Nakuru Industries Limited vs. S. S Mehta & Sons [2016] eKLR* where it was held that the value of land before and after trespass is vital in determining the damages to be awarded by the Honourable Court and that the Petitioner in this case has not successfully proven trespass by the Respondents to warrant the award of Kshs. 10,000,000.

24. The Respondents' advocate submitted that the Petitioner is equally not entitled to an award of exemplary damages since the circumstances of this case do not warrant the award of the said damages and that exemplary damages are awarded at the discretion of the court, with a degree of caution and in limited situations. Counsel relied on the case of *Mikidadi vs. Khaigan & Another [2004] eKLR* which listed the circumstances under which exemplary damages can be awarded as follows:

“Exemplary damages are only to be awarded in limited instances namely. (a) Oppressive arbitrary or unconstitutional action by servants of government. (b) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff, or (c) Cases in which the payment of exemplary damages is authorized by statute.”

25. Counsel submitted that this Petition does not fit the circumstances under which exemplary damages can be awarded and that the Petitioner has neither demonstrated how the cited Articles of the Constitution have been breached by the Respondents nor explained how the 1st and 2nd Respondents have breached his constitutional right to property under Article 40(3) of the Constitution.

26. The Respondents' advocate relied on the case of *Anarita Karimi Njeru vs. Republic [1979] eKLR* where the court held that where a Petitioner is alleging a contravention or threat of contravention of a constitutional right, the Petitioner must set out the right infringed and the particulars of such infringement or threat; that the Petition falls short of the above stated principle and that the Petitioner has failed to demonstrate how the 1st and 2nd Respondents have contravened Articles 19, 20, 21, 22, 23, 40, 64, 20(2), 21(1), 27 and 40(3) of the Constitution.

27. Counsel also relied on the case of *Trusted Society of Human Rights Alliance vs. Attorney General & 2 Others Civil Appeal No. 290 of 2012 eKLR* where the Court of Appeal held as follows:

“We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the Court from the embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

28. Counsel submitted that none of the listed provisions of the Constitution cited by the Petitioner in his petition have been infringed by the 1st and 2nd Respondents; that it is not true that the Petitioner's right to property under Article 40(3) of the Constitution has been breached by the 1st and 2nd Respondents and that it is not the work of this Court to fill the gaps in the Petitioner's Petition or even try to help the Petitioner to make his case. Counsel relied on the case of *Anthony Francis Wareham t/a AF Wareham & 2 Others vs. Kenya Post Officer Savings Bank [2004] eKLR*, where the Court of Appeal held as follows:

“Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on

the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or nonexistence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support that facts pleaded, the party with the burden of proof should fail. It also follows that a court should not make findings on unpleaded matters or grant any relief which is not sought by a party in the pleadings.”

29. The Respondents’ advocate submitted that it is not in dispute that the 1st and 2nd Respondents are not in actual possession of the suit property; that the suit property has always been under the ownership of the Petitioner and that the Petitioner has not suffered or demonstrated how he has suffered any damage that would warrant compensation as pleaded in his Petition.

30. Counsel submitted that the Petitioner has equally neither proven trespass nor made a case for an award of damages for trespass because he has not availed evidence of the previous market value of the suit property before and after the alleged trespass by the 1st and 2nd Respondents and that the Petitioner should not be awarded the costs of the Petition since he is the one who has dragged the Respondents into unnecessary litigation occasioning him to suffer costs of this suit.

Analysis and findings

31. In the Petition, the Petitioner is seeking for an order of prohibition to restrain the Respondents jointly and severally, whether by themselves, their servants, agents or persons acting under their direction or authority from trespassing or committing acts of waste or depositing or dumping any waste whatsoever on parcel of land known as Land Reference Number 23423, Machakos, the (*suit property*).

32. The Petitioner is also seeking for an order directing the 1st and 2nd Respondents by themselves, their servants or agents to remove all deposits of waste, soil and other debris deposited by the said 1st and 2nd Respondents on his Land Reference Number 23423, Machakos and to restore the land to the original state it was before they committed their acts of waste and trespass.

33. Lastly, the Petitioner has prayed for a declaration that the 1st and 2nd Respondents’ entry into Land Reference Number 23423, Machakos is unconstitutional, illegal, a breach of his constitutional rights; A declaration that the Petitioner’s right from deprivation of property under Article 40(3) of the Constitution has been contravened by the 1st and 2nd Respondents; compensatory and exemplary damages in the sum of KShs. 10 Million and costs of and incidental to this Petition.

34. It is not in dispute that the Petitioner is the registered proprietor of Land Reference Number 23423, Machakos, situated within Machakos Town. Indeed, the Petitioner produced a copy of the Grant of Title, as proof of ownership of the said land.

35. The Petitioner deponed, and testified, that the 1st and 2nd Respondents have trespassed on the suit property, and that while trespassing, the said Respondents have continued to construct on the suit property various roads, storm water drainage and sewer lines and have also committed other acts of wastage on the suit property by dumping deposits of soil and other debris. The Petitioner annexed on his Affidavit photographs showing the alleged acts of wastage on the suit property.

36. The Petitioner’s allegation that the 1st and 2nd Respondent trespassed on the suit property and committed acts of waste was admitted by the 1st Respondent’s Secretary who deponed in his Affidavit as follows:

“4. That in response to paragraphs 3, 4 and 5 of the Affidavit, the 1st Respondent avers that it deposited soil on the Petitioner’s land when a road was passing through the Petitioner’s land was being constructed but deny that they are in occupation of the land in any way.

10. That the 1st Respondent is ready and willing to restore the land to its original state by removing the deposits of the soil it has deposited on the land.”

37. While testifying in this matter, the 1st Respondent’s Chief Officer in charge of Lands and Physical Planning, adopted her witness statement in which she stated as follows:

“3. The 1st Respondent deposited soil on the Petitioner’s land to allow for construction of a road that was passing through the Petitioner’s land. The 1st Respondent has therefore not been in occupation of the subject land and hence the claim for loss in excess of KShs. 10,000,000 as alleged in the Petition is unfounded and unjustified.

4. The 1st Respondent has always been ready to remove the soil deposited on the subject land and restore the Petitioner’s land to its original state and has not infringed on the Petitioner’s constitutional rights in any manner whatsoever, contrary to the allegations by the Petitioner.

5. ...the 1st and 2nd Respondents entered into negotiations with the Petitioner to acquire the subject property and compensate the Petitioner KShs. 20,000,000 and the 1st Respondent to pay the Petitioner the costs of this suit.

8. The 1st Respondent has been willing to make good the consent entered into by the parties to pay the Petitioner KShs. 20,000,000 as compensation but the Petitioner has taken a hard line position that the compensation has to be paid in one instalment, a position the 1st Respondent is unable to honour, owing to the difficult economic situation being experienced by County Governments. ”

38. The averments by the 1st Respondents' Secretary and the Chief Officer in charge of Lands and Urban Development, which I have quoted verbatim, confirms the Petitioner's allegation that the 1st and 2nd Respondent trespassed, and continues to trespass on the suit property. Indeed, the 1st and 2nd Respondents have not upto date removed the mounds of soil that they deposited on the suit property, neither have they paid to the Petitioner the money that they had agreed to pay him for the purpose of acquiring the suit property.

39. Indeed, the Respondents produced in evidence the valuation report in respect to the suit property dated 5th April, 2016. According to the said report, the suit property was vacant with approximately 30% having been excavated. The Respondents' valuer put the valuation of the suit property at Kshs. 20,000,000, a value confirmed by the Respondents' witness.

40. It is trite that under Article 40 of the Constitution, the Petitioner has the right to property, which right includes the use of the suit property. Article 40 of the Constitution provides 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.”

41. The Respondents have argued that the Petitioner has neither demonstrated how the cited Articles of the Constitution have been breached by the Respondents nor explained how the 1st and 2nd Respondents have breached his constitutional right to property under Article 40(3) of the Constitution.

42. The Petitioner has prayed for a declaration that the 1st and 2nd Respondents' entry into and trespass onto his land is unconstitutional, and a breach of his rights. The Plaintiff has sort for a declaration that his rights to property under Article 40 (3) of the Constitution has been contravened by the 1st and 2nd Respondents.

43. Having cited the provisions of Article 40 of the Constitution, and having shown how he has been deprived the use of the suit property by the Respondents, which allegation has been admitted by the 1st Respondent, the Petitioner has particularized the provisions of the Constitution which have been allegedly contravened by the 1st and 2nd Respondents.

44. In the case of *Trusted Society of Human Rights Alliance vs. Attorney General & 2 Others Civil Appeal No. 290 of (2012) eKLR*, the Court of Appeal held as follows:

“However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy

due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

45. The Petition clearly brings out the complaint that the Petitioner has as against the Respondents, that is the breach of the Petitioner’s right to not only own the suit property, but also to use the property. Consequently, the Petition is validly before this court.

46. The 1st and 2nd Respondents having admitted to have trespassed on the suit property, and in view of the continuing trespass, the only question for determination is the quantum thereof. In the Petition, the Petitioner has prayed for declaratory orders; compensatory and exemplary damages in the sum of Kshs. 10,000,000.

47. According to the Petitioner’s counsel, an award of a sum of Kshs 40,000,000 as compensation to the Petitioner, and a further sum of Kshs 35,000,000 as exemplary damages should be given by this court. However, these figures only arose in the Petitioner’s submissions, and not the Petition. It is trite that parties are bound by their pleadings. That being so, these court can only consider the claims in the Petition, which is the prayer for exemplary damages and declaratory orders.

48. In the case of *Mikidadi vs. Khaigan & Another [2004] eKLR*, the court listed the circumstances under which exemplary damages can be awarded as follows:

“Exemplary damages are only to be awarded in limited instances namely. (a) Oppressive arbitrary or unconstitutional action by servants of government. (b) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff, or (c) Cases in which the payment of exemplary damages is authorized by statute.”

49. The 1st Respondent is a government recognized and established by the Constitution. The 1st Respondent knew, and its officers have admitted as much, that the suit property is owned by the Petitioner. While constructing a road, and the sewerage system, it dug trenches on the suit property, and deposited soil on the land to the extent that the Petitioner was unable to utilize the land.

50. Indeed, according to the valuation report produced in evidence, 30% of the suit property was excavated, meaning that the same could not be put to any use by the Petitioner. Indeed, due to the extent of the damage occasioned on the suit property by the Respondents, in the letter dated 8th October, 2015, the 1st Respondent’s Chief Legal Officer stated as follows:

“It is apparent that the road to the new city has trespassed the Plaintiff’s land by some meters. Our instructions are that you do a proposal to the Plaintiffs advocate as follows:

- a. We compensate the Plaintiff for the 10 meters that has been utilized by the road OR
- b. We compensate them their 1 hectare along the main road not too far from their land.”

51. The actions of the 1st Respondent’s agents in trespassing on the Petitioner’s land, and digging trenches, and creating a public road thereon without following the law pertaining to acquisition of private land was oppressive, arbitrary and unconstitutional. Indeed, even after promising to remove the debris deposited on the Petitioner’s land, they have never done so to date. In the circumstances, this is a fit case for the award of exemplary damages, in addition to the declaratory orders.

52. Although the Petitioner has sought for an award of Kshs. 10,000,000 as exemplary damages, I am of the view that a sum of Kshs. 5,000,000 will suffice. I say so because the suit property is valued at Kshs. 20,000,000, which the Petitioner will still retain. Therefore, an award equivalent of Kshs. 5,000,000 as exemplary damages is just.

53. Considering that the Petitioner will still own the suit property, the issue of compensatory damages does not arise.

54. For those reasons, I allow the Petition dated 20th December, 2013 as follows:

a. An order of prohibition do issue prohibiting the Respondents jointly and severally, whether by themselves, their servants, agents or persons acting under their direction or authority from trespassing or committing acts of waste or depositing or dumping any waste whatsoever on the Petitioner’s parcel of land known as Land Reference Number 23423, Machakos.

b. An order do issue directing the 1st and 2nd Respondents by themselves, their servants or agents to remove all deposits of wastes, soil and other debris deposited by the said 1st and 2nd Respondents on the Petitioner’s Land Reference Number 23423, Machakos and to restore the land to the original state it was in before the Respondents committed acts of waste and trespass thereon.

c. A declaration is hereby issued that the 1st and 2nd Respondents’ entry into and trespass onto the Petitioner’s Land Reference Number 23423, Machakos is unconstitutional, illegal, a breach of the Petitioner’s constitutional rights and was done without due process.

d. A declaration is hereby issued that the Petitioner’s right from deprivation of property under Article 40(3) of the

Constitution has been contravened by the 1st and 2nd Respondents.

e. The Petitioner to be paid by the 1st Respondent exemplary damages in the sum of Kenya Shillings five (5) million.

f. Costs of and incidental to this Petition to be paid by the 1st Respondent.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 30TH DAY OF JULY, 2020.

O.A. ANGOTE

JUDGE