



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC PETITION NO.38 OF 2017

(FORMERLY CONSTITUTIONAL AND HUMAN RIGHTS DIVISION PETITION NO.543 OF (2014)

IN THE MATTER OF AN APPLICATION UNDER ARTICLES 2,3, 4, 10, 19, 20, 21, 22, 23, 27(2), 39(3), 40, 47(1), 47(2), 60, 186, AND 232 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE CONTRAVENTION AND FURTHER THREATENED CONTRAVENTION OF ARTICLES 27,39,40,47,60 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT (NOW REPEALED) COUNTY GOVERNMENT ACT NO.17 OF 2012, THE LAND ACT NO.6 OF 2012, LAND REGISTRATION ACT NO.3 OF 2012,THE PHYSICAL PLANNING ACT CAP 286,THE SURVEY ACT CAP 299,RATING ACT,URBAN AREAS AND CITIES ACT(NO.3 OF 2011),COUNTY GOVERNMENTS ACT NO.17 OF 2012,FAIR ADMISISTARTIVE ACTION ACT 2015 AND THE ENVIRONMENT AND LAND COURTACT, 2011

BETWEEN

SAMUEL WAMUTU WAIGANJO.....PETITIONER

- VERSUS -

NAIROBI CITY COUNTY.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

THE DIRECTOR OF SURVEY.....3RD RESPONDENT

CHIEF LAND REGISTRAR.....4TH RESPONDENT

THE HON.ATTORNEY GENERAL.....5TH RESPONDENT

MUCHANGA INVESTMENTS LIMITED.....6TH RESPONDENT

JOHN GAKUNGA KAMUYU AND ELIZABETH WAITHIRA KAMUYU.....7TH RESPONDENT

HORATIUS DA GAMA ROSE.....8TH RESPONDENT

JUDGMENT

1. This is the re-amended petition dated 22nd March 2017.

2. It seeks;

- a. That declaratory orders do issue that the Petitioner's rights and freedoms under Article 27, 39, 40, 43, 47, and 60 of the Constitution have been violated or infringed and are in further danger of being threatened and violated.
- b. An order of certiorari to remove into the High Court and quash the decision of the 2nd Respondent made in or about May 2013 and contained in a letter dated 10th May 2013 Ref 13942 to revert L.R3586/3 to its original Status.
- C. An order of prohibition directed to 2nd, 3rd, 4th Respondents prohibiting the Respondents from cancelling title Number L.R 3586/3/1 and any survey map and deed plan related to the access road L.R 3586/3/1 surrendered to the 1st Respondent.
 - d.A permanent injunction directed at the 6th Respondent by themselves or by or through their servants, agents, or independent contractors from obstructing or interfering in any way whatsoever with the Petitioner's rights of access to Lang'ata road through the delineated access road L.R 2586/3/1.
 - e. Orders of mandamus directed to 1st,2nd,3rd and 4th Respondents to enforce subdivision conditions of L.R 3586/3 and L.R 12243 with particular reference to ensuring compliance to the following matters:-
 - a. Pull down, demolish and/or remove any fence, structures or buildings, dumped soil, debris, trees existing and planted on L.R No.3586/3/2/1 and L.R No.12243/1 within a reasonable time not being more than 30days from the date of order with the option to recover such costs from the 6th and 7th Respondents.
 - b. Supply of wholesome water to L.R 12243/2.
 - c. Develop/construct access roads to L.R 3586/3/2/1 and L.R NO.12243/2/1 to adoptive standards as provided for in the subdivision conditions including surface water drainage and recover costs thereof from the 6th and 7th Respondents.
 - d. Install street lighting to enhance security and facilitate the residents realize the full potential of their land.
 - e. Disallow individual vehicular plot entrances of L.R.12243/5, L.R.12243/6, L.R.12243/7, L.R. 12243/8, and L.R.12243/9 to Lang'ata road unless on the approved access road L.R 3586/3/2/1 or any approved road of access.
 - f. Provide L.R.12243/2, L.R.12243/3 and L.R.12243/4 with access to Lang'ata Road.
 - g. Collect land rates in respect of L.R. 3586/3/2 and L.R.3586/3/3.
 - h. The 4th Respondent to register deed plans in respect of L.R. 3586/3/2/1 and L.R 12243/2/1 as public roads.
 - i. The 4th Respondent places a caveat on L.R. 3586/3/2/2 and L.R 12243/2/1 pending registration of the deed plans L.R. 3586/3/2/1 and L.R.12243/2/1 as public roads.
 - f. An order that the 1st Respondent is the proprietor of roads L.R. 3586/3/2/1 and L.R.12243/2/1.
 - g. An order of permanent injunction restraining the 2nd Respondent and all state officers answerable to the 2nd Respondent, their agents or representatives, or any persons claiming through the 2nd Respondent from causing or converting the access road L.R No.3586/3/2/1 to be private property.
 - h. An order for payment of general, exemplary and special damages and interest thereon, the special damages thereof being kshs.112,005,642/= and/or an enquiry into the quantum be gone into.
 - i. An order that for purposes of maintenance of peace that the officer commanding police station Karen Division do avail the Petitioner with security to facilitate entry to his property.
 - j. An order for mandamus directed at the 3rd Respondent to re-establish beacons and boundary of the access road that have been interfered with by the 6th Respondent within 30 days of the order at the cost of the 6th Respondent.
 - k. Declaration that the occupation and fencing off the road, dumping soil, planting trees by the 6th Respondent on the public L.R 3586/3/1 is irregular and illegal and is in contravention of subdivision conditions and the law governing subdivisions of land.
 - l. A direction should issue directed at the Director of public prosecutions to investigate and prosecute the 6th and 8th Respondents in case they have committed crimes in the matter related to the subdivision of L.R 3586/3.

m. Any other or further relief that this Honourable court may deem fit and just to grant pursuant to Article 23(3) of the Constitution.

n. The costs of this petition and interest.

o. Any further orders, writs, directions, as this Honourable court may consider appropriate.

3. The Petition was supported by the annexed Petitioner's supporting affidavit sworn on 3rd November 2014 and his further supporting affidavit sworn on 22nd March 2017.

4. The Petitioner deponed that he is the registered proprietor of all that parcel of land known as **L.R.2243/2 (I.R.72891)** while the 6th Respondent is registered proprietor of **L.R.3586/3 (I.R. 37285)**.

5. He further deponed that he acquired the property, which was a subdivision of **L.R.No.122343** by public auction following failure by the 7th Respondent to repay a loan owed to National Bank Limited where it had charged **L.R.No.122343**. He added that following subdivision, his title was issued alongside others namely; **L.R.12243/3, L.R.12243/4, L.R.12243/5, L.R. 12243/6, L.R.12243/7, L.R.12243/8, L.R.12243/9**.

6. He deponed that being issued with his title, the 2nd Respondent provided that he would access his property through access roads **L.R.3586/3/1** and **L.R. 12243/2/1** surrendered to the 1st and 2nd Respondents pursuant to subdivision schemes of **L.R. 3586/3** and **L.R.2443**. He further deponed that the 2 roads were entrusted to the 1st Respondent under the Local Government Act, cap 265 (now repealed) and the 1st Respondent has control and care of those roads and is vested with power to keep and maintain the roads for the benefit of the public.

7. He also deponed that the 6th Respondent has unlawfully occupied and blocked access road **L.R.3586/3/1** leading to his property from Lang'ata road and made it inaccessible by fencing with electrified wire and timber boarding on cedar posts, planting trees along the passage, dumping uneven huge soil dumps which collect and retain run-off water from Lang'ata road.

8. He deponed that the 1st and 2nd Respondents have allowed owners of **L.R.12243/5, L.R. 12243/6, L.R.12243/7, L.R.12243/8** and **L.R.12243/9** vehicular access to Lang'ata Road contrary to law but denied him similar access to lang'ata road thus openly discriminating against him in accessing Lang'ata road.

9. He deponed that the 6th Respondent submitted a subdivision scheme to the 1st and 2nd Respondents and the 2nd Respondent approved the subdivision scheme on the recommendations of the 1st Respondent and the 6th Respondent agreed to fulfill several subdivision conditions which included Surrender to the 1st Respondent title Numbers **L.R. 3586/3/2/1** for use as a public road as well as a condition to surrender public purpose plots to the 1st Respondent.

10. He deponed that he intended to develop his property but by closing the access road and keeping it closed, the 1st, 2nd and 6th Respondents prevented him from building a house on his plot and have contravened his rights to accessible and adequate housing enshrined in Article 43(1)(a) of the Constitution of Kenya, 2010.

11. He further deponed that he commissioned a valuer on 1st March 2013 to report on the property and to report on the loss occasioned by the closure of the access road and the report showed that he had suffered loss of kshs.47,280,000/=.

12. He deponed that by the letter dated 2nd November 2012, the 6th Respondent requested the 2nd Respondent to cancel the subdivision scheme in respect of **L.R. 3586/3** and cancel the tiles issued pursuant to the subdivision scheme and by the letter dated 10th May 2013, the 2nd Respondent confirmed to the 6th Respondent that **L.R.3586/3** has reverted to its original status and that the 6th Respondent should confirm with director of surveys whether the deed plans had been cancelled.

13. He deponed that the 2nd Respondent's cancelling the subdivision scheme which has a road of access being used by the public and does not provide alternative access road is to act unreasonably and the decision ought to be quashed. He added that the 6th Respondent has no proprietary, legal, equitable, and /or any registrable interest howsoever over road of access **L.R.3586/3/1**.

14. He also deponed that the 6th and 7th Respondents have interfered with and/or removed survey beacons showing the boundaries of the access road **L.R. 3586/3/1** and **L.R.12243/2/1** in relation to his property and an order ought to issue directed at the Director of survey to affix the beacons at the cost of the 6th and 7th Respondents.

15. He deponed that it was the 1st and 2nd Respondents' duty to enforce the subdivision conditions in respect of **L.R. 3586/3/1** and **L.R.12243** but they failed to do so therefore they are in breach of his rights to property enshrined in Articles 39 and 40 of the Constitution of Kenya.

16. He also deponed that the 2nd Respondent having issued him with title **L.R No.12243/2** and indicating that its access to Lang'ata is through **L.R.3596/311** created a reasonable expectation that that would be the road he would use to access Lang'ata road.

17. He deponed that the 2nd Respondent acted arbitrarily and unfairly and abused its powers by cancelling the subdivision of **L.R. 3586/3/2/1**

without involving holders of title numbers **L.R.12243/2, L.R.12243/3, L.R.12243/4, L.R.12243/5, L.R. 12243/6, L.R.12243/7, L.R.12243/8, L.R.12243/9** whose access to Lang'ata road is through **L.R 3586/3/1**.

The 2nd Respondent's response

18. The 2nd Respondent filed grounds of opposition dated 13th October 2015 contending that the petition is scandalous as it does not raise any constitutional matters to be determined by the court.

The 3rd, 4th and 5th Respondents response

19. They filed grounds of opposition dated 14th January 2015 contending that that this suit cannot be maintained under Article 22 and 23 of the Constitution of Kenya under which it is brought as it fails to disclose any cause of action against the 3rd, 4th and 5th Respondents since it does not meet the requirements of a constitutional petition.

The 7th Respondent's response

20. The 7th Respondent opposed the petition by way of the replying affidavit sworn by John Gakunga Kamau on 6th February 2013. He deponed that he complied with all the conditions required prior to subdivision and no new titles and deed plans could have been issued if he did not fulfill the conditions. He denied closing any access road and removing beacons as alleged by the Petitioner.

21. The 6th and 8th Respondents did not file a reply. They entered appearance and filed submissions. The 1st Respondent did not file a reply as well as it also entered appearance and filed submissions.

Petitioner's submissions

22. They are dated 31st January 2019. Counsel for the Petitioners submitted on the following issues:-

- a. Have the Defendants/Respondents breached rights under Articles 27, 39, 40, 43, 47 & 60 of the Constitution of Kenya?**
- b. What orders should the court make?**
- c. What is the appropriate quantum of damages/compensation payable in the circumstances of this case?**
- d. Is the 1st Respondent in breach of its statutory duty?**
- e. Is interest payable?**
- f. Who is to bear costs of this petition?**

23. Counsel for the Petitioner submitted that the 1st, 2nd, 3rd, 4th, 5th, 6th and 8th Respondents did not file any replying affidavits in opposition or in support of the petition despite having been duly served with the petition, thus the court should take it to mean that the facts presented by the Petitioners are uncontroverted.

24. Counsel cited Order 2 Rule 11 of the Civil Procedure Rules as and relied on the case of **Dick Joel Omondi v. Hon Attorney General [2013] e KLR** to submit that unchallenged facts stood uncontroverted.

25. It was his submission that the Petitioner's rights under Article 27 of the constitution were infringed in that the 1st Respondent has allowed holders of title number **L.R.12243/4, L.R.12243/5, L.R. 12243/6, L.R.12243/7, L.R.12243/8, and L.R.12243/9** to access their property from Lang'ata road while denying the Petitioner similar access to his property **L.R. 12243/2**.

26. He also submitted that the 1st and 2nd Respondents collect rates and land rent from the Petitioner in respect of **L.R. 12243/2** and failed and/or neglected to collect rates and land rent in respect of **L.R 3586/3/2** and **L.R. 3586/3/3** belonging to the 6th Respondent.

27. He relied on the cases of **James Nyasora Nyarangi & 3 Others v Attorney General [2008] e KLR, Peter K. Waweru v Republic [2006] e KLR**, and the case of **Mohamed Balala v The Attorney General, Commissioner for lands & 6 Others [2012] e KLR** as well as the case of **Elgal Mohamed Osman v Cabinet Secretary, Ministry of Interior and co-ordination of National Government & 2 Others [2015] e KLR** to submit that his right to equal protection and equal benefit of the law had been infringed by the discrimination visited upon the Petitioner.

28. On breach of the Petitioner's rights under Article 39, he submitted that the Petitioner's plot **L.R.12243/2** has no access yet the Constitution and the Registration of Titles Act do not permit the 2nd and 4th Respondents to issue titles that have no access.

29. He submitted that the 2nd Respondent has unlawfully interfered with the Petitioner's property rights as expressed in Article 40 of the Constitution by unlawfully restricting the Petitioners from accessing, planning its use, cultivation, charging or selling or leasing it.

30. He also submitted that the Petitioner's right to accessible and adequate housing and to reasonable standards of sanitation enshrined under Article 43 of the Constitution was infringed by the 1st and 2nd Respondents following the 1st Respondent's failure to open the access road to the Petitioner's property, the 1st Respondent's failure to enforce subdivision conditions towards the 6th and 7th Respondent and the 2nd Respondents action of merging **L.R.3586/3/1** with **L.R.3586/3** and permanently depriving the Petitioner of his property.

31. He submitted that the Petitioner's rights under Article 47 entitles that he would be informed in writing by the 1st, 2nd and 4th Respondents of any dealing/action taken by them which is adverse to him in relation to the access road but the 2nd and 4th Respondents wrongly interfered with the road **L.R 3586/3/1** serving **L.R 12443/2** and merged it with **L.R3586/3** without notice to the Petitioner and without providing him alternative access to Lang'ata Road thus the Respondents' actions were unreasonable, unfair, and influenced by disregard of the law and/or an error of law and contrary to Section 4(1) of the Fair Administrative Action Act. He relied on the case of **Orion East Africa Limited v The Permanent Secretary, Ministry of Agriculture & Another [2012] e KLR** and **Rachael Ouma Owiti v Municipal Council of Kisumu [2012] e KLR**.

32. On breach of Article 60 of the Constitution, he submitted that the Petitioner invested his resources in 2001 in acquiring the property in order to make it productive by constructing a dwelling house but he was not able to put the land to use therefore his security of land rights have been prejudiced.

33. On whether orders of certiorari, prohibition, injunction and mandamus should be issued, he submitted that the orders should issue to compel the 1st Respondent to construct road on **L.R 12243/1** and **LR 3586/3/2/1** serving the Petitioner's plot to adoptive standards including surface water drainage and street lighting with the option to recover the costs thereof from the 6th and 7th Respondent. He cited the case of **Peter K.Waweru v R [2006] e KLR** where orders of certiorari, prohibition, injunction and mandamus were granted in a constitutional petition.

34. On the issue of legitimate expectation, he submitted that the 6th and 7th Respondents should be held to their bargain under the doctrine of estoppel and be obliged to comply with agreed subdivision conditions which were; for the 6th Respondent, to surrender title Number **L.R.3586/3/1** to the 1st and 2nd Respondent and to develop/construct it to adoptive standards and install street lighting. Similarly, the 7th Respondent obtained titles **L.R. 12243/2-9** and agreed to develop/construct access roads on **L.R 12243/1** and supply water to the plot but failed to do so. He relied on the case of **Titus Muiruri Doge v Kenya Cannery Ltd [1988] e KLR** and the case of **Rodgers Mwema Nzioka V Attorney General & 8 others [2006] e KLR** to submit that that the 1st, 2nd, 6th and 7th Respondents are estopped from backing out on their promises.

35. On the issue of payment of damages, he submitted that a party whose constitutional rights are found to have been violated by the state and other state parties is entitled to damages and the court has discretion in the quantum of damages to award. He cited the case of **Otieno Makonyango v Attorney General & Another [2012] e KLR** to persuade the court to award damages.

36. He also submitted that as at 17th October 2018, he had incurred total losses of Ksh.115,124,562/= He relied on the case of **Mike Maina Kamau v Attorney General [2017] e KLR** to ask the court to enhance the loss and award special damages as pleaded.

37. Counsel submitted that the 1st Respondent breached its statutory duty owed to the Petitioner provided under Section 29 of the Physical Planning Act, cap 286 and under Section 182 of the Local Government Act (now repealed), by failing to open the access road thus causing the Petitioner harm and damage. He added that the rule in **Rylands v Fletcher [1861-73] ALL ER Rep 1** applies. He relied on the case of **Kenya Wildlife Services v Rift Valley Agricultural Contractors Limited [2014] e KLR** where the court awarded damages for breach of statutory duty.

38. He also submitted that Section 26 of the Civil Procedure Act gives this court authority to award interest before and after institution of suit and urged the court to order the Respondents to pay compounded interest. He relied on the case of **Peter Waweru Waititu v Cyrus J. Karanja [2008] e KLR** and the case of **Feroz Nulralji v. Housing Finance Company Ltd & Another [2015] e KLR** to persuade the court to award compound interest.

1st Respondent's submissions.

39. They are dated 5th June 2019. Counsel for the 1st Respondent submitted that while the Petitioner accuses the Respondent of failing to apply the law in Section 147 of the Local Government Act to open the access road **L.R. 3586/3/2/1** for the Petitioner to access his property, the proprietary interest on **L.R. No.3586/3** is before this court in **ELC No.1180 of 2014** where the Petitioner and the 2nd -6th Respondents are parties in that suit.

40. He added that this suit is a violation of Section 6 of the Civil Procedure Act, cap 21 as it touches on the same subject matter and involves the same parties. Counsel cited the case of **Thiba Min Hydro Co. Ltd v Josephat Karu Ndwiga [2013] e KLR** to submit that this court has no jurisdiction to entertain the suit. He also cited the cases of **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd and 2 Others [2009] e KLR** and **Heritage Insurance Company Limited v Patrick Kasina [2015] e KLR** to submit that the suit was an abuse of the court process.

6th and 8th Respondents' submissions.

41. They are dated 5th February 2019. Counsel for the 6th and 8th Respondents submitted that while the Petitioner claims to have been denied access to Lang'ata road through **L.R.3586/3**, ownership of **L.R.3586/3** is contested in **ELC No.1180 of 2014** and is pending before the court. He added that by filing this petition while aware of the pending dispute, the Petitioner violated Section 6 of the Civil Procedure Act which prohibits multiplicity of suits. He and urged the court to stay the petition until **Elc No.1180 of 2014** is heard and determined.

42. I have considered the Petition and the grounds and the affidavit in support. I have also considered the responses, the written submissions filed on behalf of the respective parties, and the authorities cited. The issue for determination are:-

i. Whether this Petition is subjudice.

ii. Whether the Petitioner's rights have been infringed by the Respondents.

iii. Is the Petitioner entitled to the reliefs sought?

42. The Respondents contention is that this petition is subjudice as ownership of LR NO 3586/3 is subject of dispute in ELC 1180 of 2014. That the land suit is pending.

44. The Petitioner's case is that there was closure of access road LR NO 3586/311 that blocked him from accessing his plot NO LR NO 12243/2.

45. It is further his case that the 1st Respondent's failure to open the access road and the 4th Respondent's actions of permanently depriving the Petitioner of his rights over his property amounts to infringement of his right to property and access.

46. The Petitioner stated that LR NO 12243 was subdivided into nine (9) plots and titles were issued namely LR NO 12243/1 to 9 respectively. That the 6th Respondent who owns LR NO 3586/3 also subdivided into three (3) titles namely LR NO 3586/3 1 to 3. The 6th Respondent was supposed to surrender LR NO 3586/3 to be used as an access road, as a condition for subdivision which the 7th Respondent was to surrender LR NO 12243/1 to be used as an access road to be used by the owners and on holders of the subdivided plots. He further stated that he cannot access his land LR NO 12243/2 as the access road has been closed by the 6th Respondent thus infringing on his constitutional right to free movement, right to housing and to property.

47. It is not in dispute that the proprietary interest in LR NO 3586/3 is before court in ELC 1180 of 2014 where the Petitioner, the 2nd – 6th Respondents are parties. The court is yet to determine if the same is public land.

48. Section 6 of the Civil Procedure Act provides that:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

49. In the case of **Kenya National Commission on Human Rights vs AG; IEBC & 16 Others Interested parties** [2020] e KLR , The Supreme Court of Kenya stated thus:

“The purpose of the subjudice rule is to stop the filing of multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts with competent jurisdiction, issuing conflicting decisions over the same subject matter.”

50. Similarly, in the case of **Thika Min Hydro Co. Ltd vs Josphat Karu Ndwiga** [2013] e KLR where it was held that it is the substance of the suit that determines whether the matter is subjudice.

51. The Petitioner herein filed this petition in 2015 knowing very well there existed ELC 1180 of 2014 he is a party in this suit. The subject of that suit is LR NO 3586/3 which is the same in this petition. ELC 1180 of 2014 is pending determination. This court is barred by Section 6 of the Civil Procedure Act from granting any orders in this matter.

52. There is also the issue of decision by the 2nd Respondent to cancel the subdivisions of LR NO 3586/3 which essentially did away with LR NO 3586/3/1 which was said to have been an allegedly surrendered for public use. LR NO 3586/3 therefore reverted to its original status.

53. To this issue I am of the view that the petitioner was not drafted with the requisite reasonable precision as was stated and held in the case of **Anarita Karimi Njeru vs Republic** [1987] 154 and **Mumo Matemu vs Trusted Society of Human Rights and 5 Others** [2013] eKLR. I will therefore not delve into the allegation of violation of constitutional rights.

54. The issue of the pendency of ELC 1180 OF 2014 was raised way back on 27th January 2020 but the Petitioner insisted on proceeding with this matter.

55. In conclusion, I find that the prayers sought in this petition are incapable of being granted until ELC 1180 of 2014 whose subject is the ownership of LR NO 3586/3 is determined.

56. This Petition is therefore struck out for being subjudice with costs to the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 24TH DAY OF FEBRUARY, 2022

.....

L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Petitioner

.....Advocate for the Respondents

.....Court Assistant