



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
ENVIRONMENT & LAND COURT
PETITION CASE NO.13 OF 2015
IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER CHAPTER FOUR, ARTICLES 40, AS READ TOGETHER WITH CHAPTER 60,61,68 CHAPTER SIX, ARTICLE 73 & 75 CHAPTER TEN, ARTICLES 159, 165, CHAPTER THIRTEEN, ARTICLE 232 CHAPTER SEVENTEEN ARTICLES 258 & 259, AND CHAPTER EIGHTEEN, ARTICLE 262 OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF THE LAND ACT NO.6 OF 2012 AND THE RULES MADE THEREUNDER

BETWEEN

GABRIEL OCHONG ORIWO

PHILISTER ACHAPA OBUOR.....PETITIONERS

VERSUS

AUGSTINO OMWANDA.....1ST RESPONDENT

THE DISTRICT LANDS SURVEYOR, UGENYA.....2ND RESPONDENT

JUDGEMENT

1. **Gabriel Ochong Oriwa** and **Philister Achapa Obuor**, the petitioners filed the petition dated 5th November 2012, against **Augstino Omwanda** and the District **Land Surveyor**, Ugenya, the 1st and 2nd Respondents, respectively alleging contravention of fundamental rights and freedoms "under Chapter four, Article 40 as read together with chapter five Article 60, 61, 64, 68, chapter six Article 73 and 75, Chapter ten, Article 159, 165, Chapter 13, Article 232, Chapter seventeen Article 258 and 259 and Chapter eighteen Articles 262 of the Constitution", the Land Act No.6 of 2012 and the Rules made thereunder. The petitioner seeks the following nine prayers.

" (i) A conservatory order barring the Respondent from evicting or in any manner interfering with the Petitioners' quiet possession of Land Parcels Nos. NORTH UGENYA/SEGA/1216 and 1217.

(ii) A conservatory order of stay be issued to stop the fencing off of the Petitioners land pending the hearing and determination of the application/petition

(iii) A conservatory order of prohibition be granted to prohibit the 1st Respondent from using part of the Petitioners land that he had encroached into

(iv) A declaration that the status quo prior to the survey done by the 2nd Respondent on invitation of the 1st Respondent be maintained and a defalcation that the 1st Respondent has trespassed into the petitioners' parcels of land.

(v) A Declaration that the Respondents are in breach of the provisions of Article 40 of The Constitution of Kenya by interfering with the boundaries that have been there for more than 30 years and thus denying the Petitioners the rightful use of their land.

(vi) A Declaration that the 2nd Respondent lacks moral probity, has betrayed public trust, has failed to ensure objectivity and impartiality in decision making has practiced favoritism, discrimination, improper motives and has engaged himself in corrupt practices and does not deserve to exercise the functions of a state officer and should be thus removed and barred from holding a state office in future.

(vii) A Declaration that the 2nd Respondent is perpetuating breaches of the law, the constitution of Kenya and carrying out and legalizing impunity contrary to the Constitution of Kenya and exhibiting arrogance and ignorance in performance of the public duties contrary to law.

(viii) An order be issued directing the District Land Registrar, Ugenya to restore boundaries between the petitioners and the 1st Respondent to where they were the established process of adjudication originally towards the settlement of the boundary dispute.

(ix) Damages for infringement of rights of the petitioners to be paid by the Respondents jointly and severally.

2. The 1st Respondent filed an answer to the petition and cross petition dated 18th November 2013 disputing the Petitioners petition.

3. The court notes that the petitioner had contemporaneously filed a notice of motion dated 5th November 2012 at the time the petition was filed. The notice of motion has been heard and ruling dated 7th October 2014 delivered. Then on 15th October 2014, the Petitioner filed a notice of appeal dated 13th October 2014. There is however no information on the file to shed light on whether or not the appeal was eventually filed and if so its status.

4. The counsel for the petitioner and 1st Respondent attended the court on the 27th May 2015 for the hearing of the petition and agreed that the petition be disposed of through written submissions. The petitioners counsel filed their submissions dated 3rd July 2015 on the 6th July 2015, while the 1st Respondent counsel filed theirs dated 23rd September 2015 on the 28th September 2015.

5. The following are the main issues for courts determination;

(a) Whether the petitioners complaint amounts to contravention of their constitutional rights.

(b) Whether any of the orders sought should issue and against which Respondent.

(c) Who pays the costs.

6. The court has considered the grounds on the appeal, the answer to the petition and the submissions by both counsel and come to the following conclusions:

(a) That the submissions filed by the Petitioners counsel on 6th July 2015 and dated the 3rd July 2015 appear to address the petitioners notice of primarily objection dated 6th February 2015 that deal with taxation of the bill of costs before the Deputy Registrar. The 1st Respondent's submission dated 23rd September 2015 and filed on 28th September 2015 addresses the petition dated 5th November 2012, the answer to the petition and cross petition dated 18th November 2013. The court has traced another copy of the petitioners submissions dated 30th April 2013 and filed in court on 2nd May 2013. The submission had been referred by my brother Justice Kaniaru in the ruling of 7th October 2014. This court will take it that the Petitioners did not wish to file any further submissions in relation to the petition and will therefore consider that dated 30th April 2013. Right from the outset, it important to state that this court has jurisdiction hear and determine constitutional petitions on matters relating to the environment and land. See Article 23, 162(2)(b) of the constitution, Section 13 (3) of the Environment and Land court Act No.19 of 2011 specifically on matter covered under Article 42, 69 and 70 of the Constitution. The issue of jurisdiction was not disputed as properly observed by Justice Kaniaru in the ruling of 7th October 2014 herein. Before the ruling of 7th October 2014 was prepared, the court wrote the letter dated 2nd October 2013 to the parties counsel asking them to list the matter for mention to confirm two things. First whether the submission filed were for the application or the petition and therefore whether what was expected from the court was a ruling or a judgment. Secondly whether the 2nd Respondent had been served as some of the prayers in both the application and the petition where directed to the 2nd Respondent. The first issue was addressed and the court proceeded to prepare and deliver the ruling dated 7th October 2014. The second issue of service on 2nd Respondent was not and has not been addressed todate. The petitioner have not availed evidence of service of the petition on the 2nd Respondent and it would be contrary to the rules of justice to issue adverse orders on the 2nd Respondent without according them a chance to have their say in court. The court therefore considers that the petitioners had abandoned the petition in respect of the 2nd Respondent and the petition against the 2nd Respondent is hereby marked lapsed. Prayers vi, vii, viii and ix in respect of the 2nd Respondent cannot therefore be considered and the court will not pronounce itself in respect of those prayers.

(b) That the petitioners land parcel North Ugenya/Sega/1216 and 1217 borders the 1st Respondents parcel North Ugenya/Sega/12. Both the Petitioners and 1st Respondent have admitted that position in their petition and answer to the petition and cross petition filed herein.

(c) That though the petitioners claim is that the 1st Respondent land has encroached onto their land and that the 2nd Respondent placed a boundary in their land in total disregard of the existing boundary, the 1st Respondent has explained the sequence of events that led to the land Registrar issuing notices to all the registered owners of the affected parcels of land. The provision of Section 19 of the Land Registration Act No.3 of 2012 allows the land Registrar in receiving an application from an interested person, like the 1st Respondent, to issue notices to the owners and occupiers of adjacent land, like the petitioners herein, and after hearing those appearing define the boundary position. That the 1st Respondent was entitled to seek the assistance of the state organ, land Registrar who is empowered by the law to determine the position of the disputed boundary and that does not amount to a contravention of the petitioners rights. The party not satisfied with the decision of the land Register has recourse in accordance with the law but not necessary a constitutional petition.

(d) That superior courts have in several cases expressed themselves to the effect that where the facts constituting the alleged constitutional contravention could adequately be pursued through an existing legislative framework, then the court will decline to pronounce itself on the alleged contravention. In the case of Alphonse Mwangemi Munga & 10 others – V – Africa Safari Club Nairobi Petition No.564 of 2004(Unrepresented) cited in Anne Nyokabi Mugoyi - V - NIC Bank Limited Milimani Constitutional and Human Rights Division Petition No.202 of 2014, the court held that parties should not overlook existing statutory provisions and processes and file

constitutional petitions, thus converting everything into a constitutional issues. As the court states in that case:

" ... We wish to emphasize the point that parties should make use of the normal procedures under the various laws to pursue their remedies instead of all of them moving to the constitutional court and making constitutional issues of what is not."

The case was cited by the 1st Respondent's counsel in their submissions and this court concurs with the position taken by the court. The courts have also held the position that the other constitutional bodies or state organs under a legislative framework should be given the opportunity to resolve the dispute before they can exercise its jurisdiction under the Constitution: In the case of International Centre for Policy and Conflict & 5 others – V – The Hon. Attorney General & 4 Others (2013) eKLR cited in Anne Wangui Ngugi & 2222 Others - V – Edward Odundo C.E.O. Retirement Benefits Authority {2015} eKLR the court had this to say:

"{109} An important tenet of the concept of the rule of Law is that this court before exercising its jurisdiction under Article 165 of the Constitution in general must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or state organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act....."

{110} where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanism have been exhausted....."

In the cases of Republic – V – the National Environment Tribunal & 2 others Exparte Abdulhafidi Sheikh Ahmed Zebendi {2013} eKLR, Busia Petition No.1 of 2014 Joseph Owino Muchesia & Another – V – NEMA & 2 others, Busia Petition No.8 of 2014 Joseph Ojuang Ounde – V – NEMA & 8 Others, Busia H.C.MISC. Appl.No.84 of 2015, REPUBLIC - V – Kenneth Okuku Olulu & Another Exparte Busia Sugar industry & Another, the courts held that where an infringement can be redressed within a legislative framework, the course to follow is to take out proceedings under the framework and not under the constitution unless that the framework does not provide efficacious and satisfactory answer to the litigants grievance.

This court do not find fault in the step taken by 1st Respondent to lodge a boundary dispute with the Land Registrar. In any case the land Registrar is the one with power to precisely define the boundary under the provisions of Section 19 of the Land Registration Act . The land Registrar is not a party in this petition and the decision he made has not been challenged by any of the owners or occupiers of the lands adjacent to that of the 1st Respondent.

(e) That flowing from the foregoing this court is of the view that the Petitioners grievances could easily have been addressed through the land Registrar's office and or an ordinary Civil suit. There has been no evidence tendered to show any infringement of the Petitioners constitutional rights to property by the act of the 1st Respondent seeking assistance of the Land Registrar to determine the disputed boundary between their parcels of land

7. That for reasons set out above the Petitioners petition dated 5th November 2012 is without merit and is dismissed with costs to the 1st Respondent.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

12/11/2015

Dated and delivered this **12th day of November 2015**

In presence of;

Petitioners N/A

Respondents N/A

Counsel Mr Opondo for Nyamweya for 1st Respondent.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

12/11/2015

12/11/2015

S.M. Kibunja j

Oyugi court clerk

Parties absent

Mrs Opondo for Nyamweya for Respondents

Court: Judgment delivered in open court in presence of Mrs Opondo for 1st Respondent.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

12/11/2015