



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

LAND AND ENVIRONMENTAL DIVISION

PETITION NO.144 OF 2013

IN THE MATTER OF ARTICLES 2, 3(1),19,19,20,21, 22(1)& (2)(a),23,25(c),27(1) and (2), 40, 47,48,50(1), 61(2),64, 162(2)(b),165(3) and (6), 258, 259 & 262 OF THE CONSTITUTION

IN THE MATTER OF RULES 11 AND 13 OF THE CONSTITUTION OF KENYA(SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMNETAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2006

AND

IN THE MATTER OF SECTIONS 13(1), (2),(3),(5) & (7), 14,17,19,20 & 29 OF THE ENVIRONMENTA AND LAND COURT ACT, 2011

AND

IN THE MATTER OF ALLEGED CONTRAVENTION AND/OR APPREHENDED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FEREEEDOMS UNDER ARTICLES 21, 40 AND 47(1) OF THE CONTITUION OF KENYA, 2010; THE RELEVANT SECTIONS OF THE LAND ACT 2012 AND THE ENERGY ACT

AND

IN THE MATTER OF LAND REFERENCE MANGO 820 SITUATED AT MANGO, KAMWALA LOCATION, MWALA/KANGUNDO ROAD-MACHAKOS COUNTY

AND

IN THE MATTER OF THE UNLAWFUL ENTRY, INTERFERENCE AND OR UNLAWFUL ENCROACHMENT OF LAND REFERENCE MANGO 820 SITUATED AT MANGO, KAMWALA LOCATION, MWALA/KANGUNDO ROAD-MACHAKOS COUNTY

BETWEEN

PETER MAINGI MULE(SUING THRO' HIS REGISTERD

LEGAL ATTORNEY JOSHUA MUTHAMA MUTUA).....PETITIONER

AND

KENYA POWER & LIGHTING COMPANY LIMITED.....1ST RESPONDENT

STEPHEN NGAVA.....2ND RESPONDENT

JUDGMENT

INTRODUCTION

The petitioner's case as pleaded in the petition dated 29th January 2013 is that the proprietor and beneficial owner of Land Reference Mango 820 situated at Mango, Kamwala Location, Mwala/Kangundo Road-Machakos County (herein referred to as the suit property). The petitioner alleges that on diverse dates, the respondents illegally trespassed into the suit property and caused the laying of electric poles and wires towards and unto the 2nd respondent's premises.

The particulars of illegality on the part of the respondents have been stated as entering the suit property without permission, collusion in laying electric poles and wires without following the due process of the law as well as knowing that the petitioner's property does not constitute and/or that there exists no known approval by the relevant statutory body as a way leave.

PETITIONER'S CASE

The petitioner has alleged that effort to seek intervention, investigations, restraint and rectification of the said anomaly as well as protection of his title by the respondents have not been successful and that instead, the intrusion, illegal and unlawful invasions on the suit property has continued.

The petitioner has sought general and special damages in addition to the following prayers:-

1. A declaration that although the 1st Respondent is mandated to execute statutory duties under the provisions of the Energy Act, that does not entitle it to arbitrary enter into the suit property and/or lay electric poles and wires over the suit property without consent and or/ without following the due process of the law and hence, that the unlawful action not only constitutes a violation of the petitioner's constitutional protection against deprivation of his property, but is unlawful and untenable and contrary to the mandatory provisions of the law and the constitution.
2. A declaration that the petitioner is entitled to compensation for the infringement and/or violations of his rights and freedoms and as such, an inquiry on the amount of compensation payable as a result of the violation be conducted.
3. A mandatory injunction does issue to compel the respondents to reinstate the suit property to its original form by removal of the electric poles and wires over the suit property.
4. In the alternative, that the petitioner be given leave to remove the electric poles and wires at the respondent's cost.
5. A permanent injunction be issued to restrain the respondents by themselves, their agents, servants and or employees from trespassing, alienating or interfering with the petitioners quiet and peaceful possession of the suit property.
6. Costs of the petition and interest thereon.

In a further supplementary affidavit sworn on 20th September 2013 by Joshua Muthama Mutua in whose favour the petitioner executed a power attorney dated 17th September 2012, the petitioner stated that the 1st respondent had failed to demonstrate that its fraudulent interference, entry and lay of electric poles and

wires over the suit property did not amount to an abuse of the due process of the law and did not contravene the petitioner's right to property. It is the petitioner's case that as a result of the unlawful encroachment and intrusion into the suit property, the petitioner incurred a further cost of Kshs 25,000.00 to the department of linguistics and languages of the University of Nairobi for purposes of translation of the documents of ownership.

1ST RESPONDENT'S RESPONSE

The 1st respondent filed a notice of appointment of advocate dated 12th February 2013 as well as an answer to the petition dated 28th June 2013 and an affidavit sworn on the same date by **Kennedy Omwenga**, a way leaves officer employed by the 1st respondent. The 1st respondent denied the petitioner's claim in its entirety and in particular, denied the petitioner's proprietorship to the suit property stating that the same had not been proved and/or established.

Further, the 1st respondent stated that she was a public company tasked with the provision of electric power and obligated under the Constitution of Kenya 2010 to ensure that her services are proximate to each Kenyan and particularly under her rural electrification program.

It is the 1st respondent's case that no titles were available for the suit property and the adjoining properties and that in securing way leaves agreements, she consulted the persons in possession of the said properties and secured four way leaves agreements dated 6th November 2011 which were annexed as evidence. According to the 1st respondent, the indeterminate nature of the properties in question is illustrated by the fact that in all transactions entered into by the petitioner, the title numbers, acreage and location of the properties is not specified.

Further, the 1st respondent stated that the valuation report dated 27th March 2013 exhibited by the petitioner indicates that the mother title is registered in the name of **Makau Nzioko Nzomo** while the sale agreements availed indicates that the subject property had been sold to the petitioner. The 1st respondent denied that the petitioner had suffered loss and damage and stated that the petitioner had not been impeded in any way in his use of the property.

2ND RESPONDENT'S RESPONSE

The 2nd respondent in a replying affidavit sworn on 18th February 2013 stated that a new survey for the way leave was conducted by the 1st respondent on 14th February 2013 and that the power lines complained of have since been removed and therefore, that there is nothing to adjudicate over. According to the 2nd respondent, the petition has been overtaken by events as the alleged power lines are not in the petitioner's land.

SUBMISSIONS OF THE PARTIES

Parties were directed to file submissions and the petitioner filed submissions dated 20th September 2013 where he reiterated the facts of the case and argued that there existed a violation under Articles 21, 40 and 47(1) of the Constitution. Counsel urged that the respondents failure to follow the due process of the law violated his right to protection of the property, to security and to privacy as envisaged by the Constitution. It is the petitioner's submission that from the pleadings and documentary evidence, he has possessory rights over the suit property and that since his claim was not controverted, the question for determination was whether there was trespass and infringement of the right to property by the respondents. Counsel argued that the action of trespass entitled the petitioner to damages so as to put him where he would have been if the damage had not occurred.

While submitting that Article 23(2) of the Constitution 2010 vests the High Court with wide discretion to award relief in order to vindicate the violation of the Bill of Rights, Counsel argued that the High Court is granted wide latitude to frame appropriate relief according to the circumstance of each case. Counsel

referred the court to the cases of **Intoil Ltd & anor -vs- Ministry of Energy & others Petition no. 156/08(ur)**, **Samura Engineering Ltd & 10 others-vs- Kenya Revenue Authority(2012)eKLR**, **Rashid Odhiambo Aloggoh & 245 others -vs- Haco Industries Kenya CA No. 110/01(ur)**, **Gachoka & 3 others -vs- Kenya Power & lighting Co. Ltd(2004)1KLR(E & L)** and **Chrispin Maina Gaturu -vs- Muya Macharia(2006) KLR**.

The 1st Respondent filed submissions dated 3rd October 2013 where Counsel argued that the petitioner's cause of action lies in the law of trespass and not constitutional law. The 1st Defendant referred the court to the case of **Methodist Church in Kenya Trustees Registerd & anor -vs- Rev. Jeremiah Muku & anor(2012)eKLR** and **Uhuru Muigai Kenyatta -vs- Nairobi Star Publications Ltd(2013)eKLR** where the court's findings were that constitutional remedies should not be invoked where a remedy lies in some other legislative provision.

Counsel for the 1st respondent further contended that the allegations advanced by the petitioner are of a general nature, lack specificity and do not meet the standard set in **Trusted Society of Human Rights Alliance -vs- Attorney General & 2 others(2012)eKLR**. It was argued that the petitioner has not given details how the 1st respondent breached Articles 21, 40 and 47 of the Constitution.

In further submission, Counsel averred that the petitioner had not proved ownership of the suit property. It was submitted that the sale agreement produced by the petitioner in evidence do not identify the property being sold or its location and further, that the sale agreements cannot be relied upon to claim ownership of the suit property. Counsel referred the court to the case of **Bernard Kimeu Mutie -vs- Francisca Kavuli Mutavi & 2 others (2004)eKLR** where the court stated that where there was no evidence to show that the sale agreements related to the land in question there can be no case for infringement of any rights attaching to the land. It is the 1st respondent's case that since there is no proof that the petitioner is the owner of the suit property, the petitioner lacks locus standi to bring this petition.

Counsel for the 1st respondent further argued that the valuation report produced by the petitioner which indicated that the mother title of the suit land was registered in the name of **Makau Nziuko Nzomo** did not aid the case for the petitioner as the same did not identify the property as being owned by the petitioner. It is the 1st respondent's submission that the valuation report failed to disclose which portion of the 4.6 hectares belonged to the petitioner or whether the petitioner owns the whole or part of the suit property. Counsel stated that none of the sale agreements relied upon by the petitioner shows that he purchased the property or any part of it from Makau Nziuko Nzomo. It was also contended that it is not clear where on Title Number Mwala/Mango 820 the electricity line and pole passed.

Counsel for the 1st respondent argued that since the valuation report described the suit property as agricultural land, the petitioner did not provide proof that the transactions reflected by the sale agreements were approved by the Land Control Board, and therefore, that the validity of the sale agreements is questionable. To the extent that no land Control Board's consents were procured within the prescribed periods these agreements have become void for all purposes under the provisions of the Land Control Act (cap 302) Laws of Kenya.

In respect to special damages claimed, the 1st respondent submitted that they were not specifically proved since no receipts were produced. The court was referred to the case of **Abudi Ali Mohadhi -vs- Ramadhani Saidi & anor CA No. 212 of 1998** for the submission that special damages should not only be pleaded but must also be proved. Further, it was argued that legal costs for preparation and registration of the general power of attorney should not be awarded since the power of attorney is not limited to these proceedings.

Lastly, it was submitted that from the photographs produced by the petitioner as well as the valuation report, the suit property is used for maize farming and that the electricity wire and pole did not impeded the petitioner's use of the property and therefore, that the petitioner had not shown any damage suffered

due to the existence of the pole.

The 2nd respondent in submissions dated 25th September 2013 argued that he was not an agent for the 1st respondent and does not work for her. It is the averment of Counsel for the 2nd respondent that there is no connection between the petitioner and the 2nd respondent. In further submission, the 2nd respondent stated that he had no duty in law to instruct on survey and or laying of cables. Lastly, it was submitted that there is no cause of action or wrong doing established against the 2nd respondent.

DETERMINATION

Whether the petition is properly before the court.

The 1st respondent contended that the cause of action in this matter is based on the law of trespass and therefore, that this is not a proper case for the invocation of constitutional relief. Whereas the court in the cases of **Hon. Uhuru Kenyatta –vs- The Nairobi Star Limited High Court Petition No 187 of 2012** and **Jeremiah Muku Methodist Church Of Kenya Registered Trustees & Another** [2007] eKLR has stated that not all disputes should attract a constitutional adjudication, it has also been held in the case of **Samura Engineering Ltd & 10 others-vs- Kenya Revenue Authority** (2012)eKLR that the right of access to the court provided by Article 22 and 23 of the Constitution is independent and constitutionally guaranteed and not subject to any other alternative remedies existing in law. In any event, a claim based on trespass would still be properly before the Environment and Land Court pursuant to section 13 of the Environment and Land Court Act. Under Article 22 and 23 where a person considers that his fundamental rights have been infringed he is of right entitled to seek redress before a court of law in accordance with the constitution.

Whether the Petitioner's right to property as enshrined and protected under Article 40 of the Constitution has been violated Article 40 of the Constitution protects proprietary rights under the law. In my view, the petitioner has not established proprietary rights in respect to **Mwala/Mango/820** capable of being protected under Article 40 for the foregoing reasons:

- a. A certificate of title issued on 16th May 2006 and a certificate of official search dated 3rd April 2013 shows that **Mwala/Mango/ 820** is registered in the name of **Makau Nziuko Nzomo**. The court cannot tell how and when the petitioner became the proprietor of the suit property because none of the sale agreements indicates that **Makau Nziuko Nzomo** transferred the land to the petitioner.
- b. The sale agreements produced do not establish the petitioner's proprietary rights in the suit property. None of the agreements describe the property being sold, its location and acreage. Secondly, the sale agreements dated 08/02/05, 22/08/08, 05/01/09, 17/03/06 and 17/02/06 do not meet the requirements of section 3(3) of the Law of Contract Act which requires that contracts relating to disposition of an interest in land be in writing and be signed by the parties to it and the parties signatures thereto be attested by a witness.
- c. The valuation report and the photographic evidence do not prove that the property in question belongs to the petitioner. There is no proof that the land where the 1st respondents lay electric poles and wires belongs to the petitioner and therefore, no violation of the petitioner's right to property has been established.
- d. The petition does not state the time when the alleged violations occurred. Paragraph 6 of the petition states that the alleged acts of trespass took place on "on diverse dates". In the case of **Disa Enterprises Ltd v Kenya Power & Lighting Co Ltd [2013] eKLR**, the court stated that there was no evidence placed before the court that the Petitioner had acquired any proprietary interest in the suit land when the electricity transmission lines were installed by the respondent. The situation in the present suit is similar as the Disa Enterprises Ltd case (Supra) and there cannot be a basis to hold that the petitioner had acquired any proprietary interest in the suit property.

Whether the Petitioner's right to fair administrative action under Article 47 of the Constitution has been violated

It is alleged that the Petitioner's right to administrative action was violated. However, the petitioner provided no particulars of this allegation and the manner of the alleged violation. The court of appeal in the case of **Mumo Matemu -Vs- Trusted Society Of Human Rights Alliance & 5 others** reaffirmed the principle in **Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272** requiring that constitutional petitions be pleaded with reasonable precision and stated thus:-

"In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to..."

In my view, the petition does not meet the substantive test established in the **Anarita Karimi Njeru's** case (**supra**) and therefore fails. The petitioner has not established that any of his rights were infringed by the Respondents and in particular that he had acquired any proprietary rights over Land Reference Mango 820 that the Respondents can be held to have contravened pursuant to articles 21, 40 and 47(1) of the constitution.

In the result I hold that the petitioner has fallen short of establishing that his rights under the constitution and/or the Environment and Land Court Act were infringed and/or contravened in any manner and I accordingly order the petition dismissed with costs to the Respondents.

Orders accordingly.

Judgment dated signed and delivered at Nairobi this 28th day of March, 2014.

J.M. MUTUNGI

JUDGE

In presence of:

..... For the Plaintiff

.....For the Defendant