



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

PET NO. 41 OF 2013

TENDULKAR PROPERTY LIMITEDPETITIONER

VERSUS

SHAMSHUDIN KHOSLA & 4 OTHERS..... RESPONDENTS

JUDGMENT

(Constitutional petition seeking declaration that action of Director of Survey in excising petitioner's land is illegal; that action of surveying an alleged Government land is illegal; and prohibition to stop the respondents from interfering with the land that the petitioner believes to belong to her; evidence showing that there is a boundary issue on the extent of the petitioner's land vis-à-vis the land of the 1st and 2nd respondent and also an issue as to whether a v-shaped parcel of land between the two plots of the petitioner and the 1st and 2nd respondents belongs to the Government or whether it is part of the land of the 1st and 2nd respondents; the Director of Surveys having sent the District Land Surveyor, Mombasa to undertake a survey of the three plots and a report forwarded to the Director of Surveys for him to make a decision; the report more or less stating that the v-shaped land and part of the petitioner's land belongs to the 1st and 2nd respondents; nevertheless no final decision having been made by the Director of Surveys over the extent of the land of the petitioner thus cannot be said that there is any action by the Director of Surveys that has excised the land of the petitioner; order cannot issue to stop Director of Surveys not to survey Government land; there cannot issue a prohibition to stop interference with what the petitioner alleges to constitute its land if there is a dispute on the extent of its boundaries; a person cannot be stopped from exercising the right to challenge another's title or extent of boundaries; petition dismissed with costs)

A. Introduction and Pleadings

1. This suit was commenced through a constitutional petition filed on 8 July 2013. The petitioner is a limited liability company. The 1st and 2nd respondents are individuals. The 3rd and 4th respondents are the Director of Surveys and the Commissioner of Lands. The 5th respondent is the National Land Commission. In the petition, the petitioner avers to be the registered owner of the title CR 18483 Subdivision No. 3635/VI/MN (hereinafter simply referred to as Plot No.3635) measuring approximately 0.975 Hectares, which land is said to be delineated in Plan No. 91659 authenticated on 14 July 1987. It is pleaded that the original grantee of the Plot No. 3635 is Kenya Rayon Mills Limited who became registered as proprietor on 16 March 1988 and through a transfer dated 21 December 1989, it transferred its interest to Bahari Mills Limited. On 9 June 2000 the property was transferred to Birch Investments EPZ Limited and subsequently to the petitioner on 6 May 2009. The petitioner has pleaded that the suit property is enclosed with a boundary wall which has been in place for over 24 years without any interference, a portion of which covers some Government land i.e a water pipeline wayleave, and a v-shaped portion next to the wayleave marked GL on the Deed Plan No. 91659. It is pleaded that in pretended exercise of powers conferred by the Survey Act, Cap 299, the 3rd respondent (Director of Surveys) in collusion with the 1st and 2nd respondents, purported to carry out a survey which altered the boundaries and excised a portion of the petitioner's land from the Deed Plan No. 91659. It is further pleaded that the 3rd respondent in cahoots with the 1st and 2nd respondents are in the process of creating title, from amongst others, the v-shaped Government land that neighbours the water wayleave road and also from the petitioner's land. It is pleaded that a suit, being Mombasa ELC No. 87 of 2013 was mischievously lodged against the former owner of the Plot No. 3635, excluding the petitioner who was the rightful owner, purporting that there is overlap of boundaries between the suit property and the Plot MN/VI/2332/2. The petitioner pleads that the actions of the 1st – 3rd respondents in infringing on the petitioner's land as delineated in Deed Plan No. 91659 amounts to an infringement of its private property. It is averred that it is not in the public interest for the v-shaped Government land to be given out without the approval of the 5th respondent (the National Land Commission) and without due process.

2. In the petition, the petitioners seek the following orders :-

(a) Declaration as unconstitutional the 1st – 3rd respondents' actions of attempting to excise any portion out of Title Number CR 18483 Subdivision No. 3635/VI/MN, which land with dimensions, abutments and boundaries thereof is delineated and edged in red on the Deed Plan No. 91659 duly authenticated on 14th July 1987.

(b) A declaration as unconstitutional the 1st – 3rd respondents' actions of surveying the V-shaped Government land neighbouring the water pipeline wayleave and main road which is described/shown on the authenticated Deed Plan No. 91659 without due process of the law governing Government land.

(c) An order prohibiting the Respondents, their servants, employees, agents or otherwise whosoever from in any manner dealing and interfering with the Petitioner's interest in Deed Plan No. 91659 authenticated on 14th July 1987.

(d) Costs of the petition be provided.

3. The petition is supported by the affidavit of Janardanan Myliat, a director of the petitioner. He has averred inter alia that the petitioner has been in occupation of its property uninterrupted until recently when the 1st – 3rd respondents purported to excise a portion of the petitioner's land to add to the v-shaped Government land so as to create a title or increase the size of the land owned by the 1st and 2nd respondents through an unlawful process. He also referred to survey reports prepared by B.C. Mwanyungu and Rose Munupe and averred that they show that the petitioner's plot is intact as occupied by the petitioner excluding the water pipeline wayleave and v-shaped Government land which are enclosed by the petitioner's boundary wall. He reiterated that the actions of the 1st – 3rd respondents were illegal.

4. The 1st respondent swore a replying affidavit to oppose the petition. He deposed inter alia that he together with the 2nd respondent, are the registered proprietors of the Plot No. MN/VI/ 2332/2 (Plot No. 2332/2 also identified as Plot No. 2552). He did not dispute that the petitioner is the registered proprietor of the Plot No. 3635. He thought that what was in dispute was a v-shaped parcel of land on one side of the road after creation of a wayleave by the Government, through compulsory acquisition, of the land of the 1st and 2nd respondents. He deposed that the petitioner has illegally annexed this v-shaped piece of land owned by the 1st and 2nd respondents and is now laying claim to the same. He found it curious that the petitioner is claiming this v-shaped portion of land and at the same time asserting that it is Government land. He deposed that the petitioner or the prior owners of the Plot No. 3635 mistakenly annexed it and included it in their boundary wall. He averred that this portion of land has never been Government land but remains their property. He averred that they filed the suit Mombasa HCCC/ELC No. 87 of 2013 to assert their rights. He thought that this is a simple boundary dispute that does not raise any constitutional issues.

5. Through an application dated 1 August 2013, the 2nd and 3rd respondents applied to have the Director of Surveys visit the plots No. 3635 and 2332/2 and furnish a report. I have seen that on 27 November 2013, when the application came up for hearing, the parties agreed by consent to file and serve deed plans and survey plans relating to the suit property within 30 days and the case to proceed for hearing. There was a proposal for a site visit which the court (Mukunya J) acceded to but no site visit was ever undertaken. When the matter came up before Omollo J on 17 February 2015, she stated that the court would not make a site visit but directed that the surveyors who had prepared their reports appear in court.

6. Three surveyors prepared reports and they presented them to court. They are Denis Malekemba, Bartholomew Mwanyungu, and Phillippe Armand Zimmerlin. They gave their opinions regarding the extent of the boundaries of the Plots No. 3635 and 2552. Mr. Malekemba and Mr. Zimmerlin opined that it is actually the petitioner who has usurped part of the land of the 1st and 2nd respondents and fenced it off as part of the Plot No. 3635. Mr. Mwanyungu on the other hand was of opinion that the petitioners have not, and what they have fenced is their land and part of Government land, without interfering with the Plot No. 2552 belonging to the 1st and 2nd respondents. It is not necessary for me to delve deeply into their evidence, for it will shortly be seen that the same is not necessary for the determination of this petition.

B. Submissions of Counsel

7. Mr. Mogaka, learned counsel for the petitioner, inter alia submitted that the 1st – 4th respondents clandestinely, without involving the petitioner, initiated a process of excision of a portion of land from Deed Plan No. 91659 for the Plot No. 3635 and the impugned process must have started around the year 2012. He referred me to various correspondences and to the provisions of Section 23 of the Survey Act, Cap 299. He also questioned the motive of the 1st and 2nd respondents in filing the suit Mombasa ELC No. 87 of 2013 against Birch Investment Limited, the former owner of the Plot No. 3635, instead of the petitioner, and proceeding to obtain mandatory orders which led to them demolishing part of the petitioner's perimeter wall. His client later applied to be joined to that suit and the orders were discharged. He submitted that a letter dated 16 January 2013 was not copied to the petitioner albeit it was copied to the 1st and 2nd respondents and that the Director of Surveys has not explained why he only copied one party. He pointed out that the Director of Surveys did not respond to the petition and has not given reasons justifying his actions. He referred me to the case of *Kagenyi vs Musiramo & Another (1968) EA 43*, on the effect of failure to file a counter affidavit. He submitted that the actions of the 1st – 4th respondents in attempting to excise a portion of the petitioner's land without notice amounts to a violation of the rule of law and private proprietary rights contrary to the Constitution at Articles 10, 27 and 40. He referred me to the case of *Law Society of South Africa & Others vs Minister for Transport & Another* on the idea of the rule of law. He assessed the evidence of the surveyors and submitted inter alia that there is absence of a survey map to support creation of Deed Plan No. 82888 dated 2 July 1985 for the Plot No. 2552 belonging to the 1st and 2nd respondents.

8. For the 1st and 2nd respondent, Mr. Wafula, learned counsel, inter alia submitted that the issue in question is a boundary dispute between the Plot No. 3635 and Plot No. 2552. He submitted that what the petitioner seeks is an order to bar the Director of Survey from exercising his powers under Section 23 of the Survey Act, and this is not a constitutional issue at all. He submitted that reliance on a constitutional provision does not always elevate the matter to the constitutional level and he referred me to the case of *International Centre for Policy & Conflict and 3 Others vs Attorney General & 4 Others (2013) eKLR*. He submitted that ordinary remedies under common law and statute must be pursued in the ordinary manner and he referred to the Indian case of *Re Application by Bahadur (1986) LRC (Const)*, and also the cases of *Minister of Home Affairs vs Bickle & Others (1985) LRC (const)* and *COD & Another vs Nairobi City Water & Sewerage Company Limited (2015) eKLR*. He submitted that the question of boundaries is to be determined by the Land Registrar as provided under Sections 16 – 23 of the Land Registration Act and Section 23 of the Survey Act, and added that this court lacks jurisdiction to entertain a boundary dispute through a Constitutional petition. He submitted that any infraction in respect of marking or establishing the boundary does not in any manner whatsoever amount to a violation of the constitution. He submitted that if the petitioner is aggrieved by the boundary re-establishment, he is required to move the court through the ordinary suits and not through a constitutional petition. He referred to the case of

Speaker of National Assembly vs Njenga Karume (1992) eKLR and Geoffrey Muthinja & Another vs Samuel Muguna Henry & 1756 Others (2015) eKLR on the doctrine of exhaustion of other remedies. He also relied on the case of *Taib Investment Limited vs Fahim Salim Said & 5 Others (2016) eKLR, Godfrey Paul Okutoyi vs Habil Olaka & Central Bank of Kenya (2015) eKLR, and Anarita Karimi Njeru vs Republic (1979) KLR 154*. Without prejudice to his above submissions, he submitted that under the Survey Act, the Director of Surveys and the Land Registrars have power under Section 16 – 23 of the Land Registration Act, to rectify boundaries. He submitted that the survey reports and the letter dated 16 January 2013 from the District Surveyor, points to the fact that there are issues on the ground that can be determined through survey, or ordinary disputes, but not through a constitutional petition. He relied on the reports of Mr. Malembeka and Mr. Zimmerlin and stated that they affirm that there is an overlap of the property of the petitioner with that of the 1st and 2nd respondents.

9. For the Attorney General, Mr. Makuto, learned State Counsel, inter alia submitted that the petitioner alleges that the decision of the 1st – 3rd respondent in attempting to excise part of her land was unconstitutional but did not place before court the decision that he alleges to be unconstitutional. He referred to the letter dated 16 January 2013 written to the Director of Surveys and submitted that no decision has been made to excise the petitioner's property which can be declared as unconstitutional. He stated that through the letter, the Director of Surveys was being requested to make a final decision. He submitted that the survey reports presented show that no rectification and excision of land has occurred to warrant grant of the orders. He submitted that the second prayer in the petition is ambiguous and referred to the case of *Anarita Karimi Njeru vs Republic* on the need to set out the specific right and article of the constitution allegedly breached and how it has been violated. He submitted that grant of the prayers will hinder the 3rd respondent from undertaking his statutory duties. He was of opinion that there is a boundary dispute between the petitioner and the 1st and 2nd respondents which remains unsolved and that even the survey reports presented have not answered the question. He submitted that under Section 16 of the Land Registration Act, the Land Registrar and has power to determine boundary disputes. He further referred me to Section 23 of the Survey Act on the powers of the Director of Surveys. He asked that the petition be dismissed with costs.

C. Analysis and Final Orders

10. I have considered all the above. I have also taken into account the case law presented by counsel in as much as I may not make any mention of the same in my analysis herein. I will start by going back to the petition and I beg to be forgiven for repeating some of what I have already pointed out in the beginning of this judgment. The cause of action of the petitioner is contained in paragraphs 12 and 13 of the petition. In paragraph 12, the petitioner contends that *"in pretended exercise of the powers conferred by the Survey Act, the Director of Surveys in collusion with the 1st and 2nd respondents have purported to carry out a survey that purports to alter the boundary and excise a portion of the petitioner's land from the Deed Plan No. 91659 which is a clear threat, infringement and violation of the petitioner's proprietary rights to private property..."*. In paragraph 13, the petitioner has pleaded that *"the 3rd respondent acting in cahoots/collusion with the 1st and 2nd respondents in breach of Rule of Law and in non-transparent manner are in the process of creating Title from amongst others the v-shaped Government Land that neighbours the water way leave road as described in the Deed Plan No. 91659 and a Portion of the intended illegal excision of Land from the Petitioner's Parcel contained in Deed Plan No. 01659 dated 14th July, 1987."* The petitioner at paragraph 17 of the petition contended that the action of the 3rd respondent is inconsistent with the principles of good governance, transparency and accountability under Article 10 and 21 of the Constitution and further that his actions are without authority of the relevant officer in the 4th respondent's office. The first prayer in the petition seeks a declaration that the actions of the 1st – 3rd respondent of attempting to excise any portion out of the Plot No. 3635 is unconstitutional. The second prayer is also to declare as unconstitutional the action of surveying the v-shaped Government land next to the petitioner's land. The third prayer is to prohibit the respondents from in any manner dealing or interfering with the petitioner's land as delineated in the Deed Plan No. 91659. The supporting affidavit alleges at paragraph 6 that the 1st – 3rd respondents purported to excise a portion of the petitioner's land and add to the v-shaped Government land so as to create a title and/or increase the size of the land of the 1st and 2nd respondents.

11. It has of course been argued that there is nothing constitutional about this petition and that what the petitioner and the 1st and 2nd respondents have is nothing but a boundary dispute. There is merit in this argument. In fact, after hearing the evidence of the three surveyors, it is apparent to me that there is an issue as to the extent of the boundaries of the land of the petitioner vis-à-vis the land of the 1st and 2nd respondents. This dispute seems to have reached the Director of Surveys. The letter that is on record is one dated 16 January 2013 and it refers to a letter dated 13 November 2012, Ref No. CR 274S/Vol 44/110, from the Director of Surveys which must have been to the District Surveyor Mombasa, for in the letter of 16 January 2013, District Surveyor wrote to the Director of Surveys making reference to the letter dated 13 November 2012. In the letter dated 16 January 2013, the District Land Registrar Mombasa stated that he has relocated some beacons. He also mentioned that he noticed an overlapping area between the Plot No. 3635 and the Plot No. 2552, the overlapping area being approximately 0.0719 Ha. In concluding his letter he stated as follows :-

"Based on the above findings; we leave it to your office to make the final decision."

12. There is no evidence before me of any final decision having been made by the Director of Surveys. I cannot tell what prompted the letter of 13 November 2012 from the Director of Surveys to the District Surveyor, Mombasa, but what is apparent is that the District Surveyor, Mombasa, was making a report to the Director of Surveys, on an issue touching on the two parcels of land, and this must have been upon a directive by the Director of Surveys. I do not see any issue here because it is the business of the Director of Surveys to be aware of the boundaries of all parcels of land and it is also his business to be appraised of any issue relating to overlapping boundaries. I see no problem if he sends one of his subordinates to the ground to fact find and give him a report. On the face of the letter of 16 January 2013, without anything more, and there is indeed nothing more, I am unable to find fault in the action of the District Surveyor, Mombasa, or the Director of Surveys.

13. All counsel referred me to Section 23 of the Surveys Act which provides as follows :-

23. Powers of Director and of surveyors to enter upon land
(1) The Director or any surveyor, or any person authorized in writing by the Director in that behalf either generally or specially, may enter upon any land, with such assistants as may be necessary, for the purpose of—
(a) making or supervising any survey or resurvey; or

- (b) affixing or setting up thereon or therein any survey mark; or
- (c) inspecting any survey mark; or
- (d) altering, repairing, moving or removing any survey mark; or
- (e) doing anything necessary for carrying out any of the aforesaid purposes; or
- (f) examining or inspecting the conduct of any survey.

(2) Before so entering upon any land, the Director or other surveyor or person duly authorized shall, whenever practicable, give reasonable notice to the owner or occupier of the land of his intention to enter thereon, and shall, on so entering, produce written evidence of his authority to any person reasonably requiring the same.

(3) Compensation shall be paid to the owner of any trees or crops cut or damaged in the exercise of any of the powers conferred by this section, and such compensation shall be calculated and paid in the prescribed manner.

14. It will be seen from subsection 1, that the Director of Surveys, or a person authorised by him, has power to enter land, for purposes inter alia, of affixing survey marks, inspecting survey marks, or altering a survey mark. Subsection 2 does oblige the Director, to whenever practicable, give reasonable notice to the owner of his intention to so enter. I have read and re-read the petition together with the supporting affidavit and nowhere does the petitioner state that it was never aware of the actions of the Director of Surveys. It is not said that the Director of Surveys went to the disputed properties without any notice or that the petitioner was not made aware of the presence of the District Surveyor when he undertook the survey. The District Surveyor must have entered the land of the petitioner for he proceeded to make an assessment of the beacons and his presence must have been obvious for all to see. If the petitioner had an issue to raise regarding the entry of the District Surveyor into her land, you would expect a letter of complaint to follow. I have not been shown any. It cannot therefore be that the petitioner is complaining of the manner in which the District Surveyor went to her land and the process that he followed to arrive at the letter dated 16 January 2013.

15. Indeed, if you read the petition, the complaint of the petitioner is that her land has been excised to add to the land of the 1st and 2nd respondents, and/or that the v-shaped land, which the petitioner considers to be Government land, is intended to be given to the 1st and 2nd respondents without due process being followed. I have not seen any document, or any decision that has been made, excising the land that the petitioner considers to be her's. Neither have I seen any decision by the Director of Surveys that the v-shaped land belongs to the 1st and 2nd respondent.

16. What has happened is that the Director of Surveys has sent the District Land Surveyor to the ground for him to be appraised and he has been so appraised. There is nothing wrong in that. Even if there was something wrong with the manner in which the Director of Surveys or the District Land Surveyor conducted the survey, that would not be a basis for filing a constitutional petition. You do not file a constitutional petition because the surveyor failed to call you to be present when he is conducting a survey. There are avenues of complaint including writing a formal letter to the Director of Surveys or making a demand for the survey to be repeated now in the presence of the individual. If we are to say that for every infraction of a surveyor in conducting his survey, then the avenue is to file a constitutional petition, that would be stretching the jurisdiction regarding constitutional petitions too far. Anyway, as I have said, the petition does not state that there was an issue with the manner of survey but claims that there is an excision of the petitioner's land or the next v-shaped land, which as I have demonstrated above, is certainly not the case.

17. There is therefore no action of attempting to excise any portion of the Plot No. MN/VI/3635 which I can declare to be unconstitutional as sought in prayer (a) of this petition. True, there has been a survey, and a report has been made, but I have seen no act of any attempt to excise a portion of the petitioner's land. Prayer (a) is thus dismissed. I am also unable to grant prayer (b) of the petition which seeks a declaration as unconstitutional the action of surveying the v-shaped land said to be of the Government. Assuming that the v-shaped land is Government land, what is unconstitutional if the Director of Surveys goes to survey it? Prayer (b) is therefore dismissed. Prayer (c) seeks an order to prohibit the respondents from interfering with the petitioner's interest in her land as shown in Deed Plan No. 91659. I cannot issue such a blanket order. It is within the rights of the respondents to challenge the title of the petitioner and to challenge the Deed Plan No. 91659. There was in fact such challenge in the suit Mombasa ELC No. 87 of 2013. You cannot prohibit people from challenging title. That would in fact result in an infringement of their rights to access court and their rights to property in the event that the Deed Plan No. 91659 interferes with what they own. This court cannot stop a person from exercising the right to challenge another person's title. I proceed to dismiss prayer (c). Prayer (d) seeks for the provision of the costs of the appeal. I have dismissed all prayers in the petition. The result is that the petition is dismissed. The petitioner will bear the costs of this petition to the respondents.

18. Before I close, I know that a lot was said about the two parcels of land in dispute. A wealth of evidence was taken from the surveyors. However, it is beyond the scope of this petition to make a firm pronouncement of the dispute between the petitioner and the 1st and 2nd respondent. It is indeed a complex dispute that cannot be determined within this petition. What is clear is that there is a question as to whether the Plot No. 3635 overlaps with the Plot No. 2552. There is also a question as to whether the v-shaped land is Government land or whether it is part of Plot No. 2552. That dispute remains unsolved, and as I have said above, cannot be resolved within the ambit of this petition. This petition only sought loose declarations and never sought any declaration that the land of the petitioner is as described in Deed Plan No. 91659. There is also no cross-suit seeking to quash this Deed Plan. or seeking orders for a declaration to be made over the extent of the boundaries of the Plot No. 2552. or that there be determined whether the v-shaped land belongs to the Government. If parties wish to have these issues determined, they need to consult and see the best way of going about it, but it certainly cannot be within this petition as I have explained.

19. The long and short of it is that this petition is hereby dismissed with costs to the respondents.

20. Judgment accordingly.

DATED AND DELIVERED THIS 20TH DAY OF APRIL 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA.