



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**Petition 621 of 2009**

**KARANJA KARENJU.....PETITIONER**

**AND**

**THE ATTORNEY GENERAL.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioner is the registered proprietor of the piece of land known as Nyandarua/Muruaki/114 (hereinafter 'the suit property'). In his petition dated 16<sup>th</sup> October 2009 he seeks the following orders;
  - a) *THAT a declaration be issued to declare that the order by court to sanction taking part of the petitioner's land for purposes of constructing an access road violates the petitioner's right as to property guaranteed under section 75 of the Constitution.*
  - b) *THAT a declaration be issued to declare that taking of part of the petitioner's land for construction of an access road as the District Surveyor is seeking to do can only be done after due process has been followed.*
  - c) *THAT a declaration be issued to declare that taking of part of the petitioner's land for construction of an access road as the District Surveyor is seeking to do can only be undertaken after strict compliance with the provisions of Land Acquisition Act including the requirement of prompt payment of adequate compensation by the Government within the meaning of section 75 (1) (c) of the Constitution.*
  - d) *THAT a declaration be issued to declare that the enforcement of the order of the court violates the petitioner's right as to the protection of law pursuant to sections 70 and 77 to the extent that the said enforcement ignores the provisions of Land Acquisition Act relating to compulsory acquisition and sections 27 and 28 of the Registered Land Act relating to rights and privileges of the petitioner with respect to LR. No. Nyandarua/Muruaki/114.*
  - e) *THAT an order of prohibition to restrain the Respondent through the District Surveyor, Nyandarua District and the Road Engineer from continuing with the impending excision of part of the petitioner's land for purposes of giving way for the construction of the alleged access road.*
  - f) *THAT an order of prohibition to restrain the District Officer, South Kinangop and the area Assistant Chief from forcing the petitioner to remove his fence for purposes of giving way for the construction of*

*the alleged access road by issuing of threats and menaces to him.*

*g) THAT the Respondent be ordered to bear the costs of this Petition.*

### **Petitioner's Case**

2. Apart from the petition, the petitioner has filed a supporting affidavit sworn on 16<sup>th</sup> October 2009 which sets out the facts of the case. Counsel for the petitioner, Mr Wanyaga, who made oral submissions to support the case also relied on written submissions dated 6<sup>th</sup> February 2012 and annexed authorities. I have also examined the record of **Nairobi HCCC No. 63 of 1993**.

3. In 1993 the petitioner filed civil case being ***Karanja Karenju v Attorney General & Joel K Mungai Nairobi HCCC No. 46 of 1993***. According to the plaint, the Director of Survey through his servants and agents entered the suit property and excised a 20ft wide portion thereof which was made into a public road. The plaintiff asserted that the excision was without authority and or consent of the plaintiff and amounted to compulsory acquisition of the land and was therefore unconstitutional. The plaint in that suit sought, inter alia, the following reliefs;

- a) That the excision of the said portion of land was illegal and unconstitutional.
- b) That the said portion be returned to the plaintiff alternatively the plaintiff be compensated for the suit land.

4. On 22<sup>nd</sup> February 2001, the parties to the suit recorded a consent order (hereinafter “the consent order”) with a view to resolving the dispute once and for all on the following terms;

***1. THAT the dispute is referred to the District Surveyor, Nyandarua District, Mr. Andrew Musoi for determination from the Registry Maps whether or not the disputed road officially existed.***

***2. The District Surveyor to file his Report within 30 days.***

***3. The determination by the District Surveyor Nyandarua shall be final and binding on the Plaintiff and the 2<sup>nd</sup> Defendant.***

5. Pursuant to the consent order, the District Surveyor forwarded to the Court a Registry Index Map (RIM) which opined that the disputed access road indeed existed on the suit property. The petitioner objected to the RIM on the ground that it did not represent the true position on the ground. The petitioner then commissioned a firm of surveyors to prepare a report on the excision of the access road on his land. That firm of surveyors confirmed that the issue of the access road arose after the neighbouring land was subdivided.

6. On 12<sup>th</sup> June 2006, the petitioner filed an application seeking inter alia, an order directing the District Surveyor, Nyandarua to visit his land with a view to pointing out the location of the access road on the suit property.

7. According to the petitioner, the District Surveyor Nyandarua District forwarded his report to Court. This report stated that that a small bend on sketch map was not reflected on the RIM. Subsequently, the administration officers started asking the petitioner and other land owners to remove their respective fences to give way for the access road.

8. The petitioner submitted that the consent order adopted by the Court is unconstitutional for violating his rights under **sections 70 and 77** of the Constitution in that the enforcement of the same infringed the petitioner's rights as the District Surveyor had no powers to order part of the petitioner's land be used as an access road.

9. The petitioner further contended that not only is the consent order illegal for violating the protection, rights and privileges provided for under **sections 27 and 28** of the **Registered Land Act**, it is also unfair, oppressive and discriminatory due to the fact that it was made on the basis of erroneous misrepresentation of the relevant RIM.

10. The petitioner avers that the consent order is unconstitutional for violating his rights under **sections 70 and 77** as the taking of part of the petitioner's land was done in blatant disregard of the **Land Acquisition Act**. In addition, the petitioner contended that the enforcement of that order infringed the petitioner's right to a fair hearing guaranteed under **section 77 (9)** of the Constitution in that the petitioner's surveyor's report tendered to the Court was never considered.

11. The petitioner further submitted that the consent order contravened his property rights guaranteed under **section 75** of the Constitution in that:-

(a) The taking of part of the suit property for purposes of creating an access road amounted to acquisition of the same to the detriment of the petitioner's interest in and right over the said land.

(b) The Government, through the District Surveyor has not yet satisfied the conditions of **section 75 (1) (a) and (b)** of the Constitution in purporting to compromise or take-away the petitioner's rights and interest in the land and taking part of it for purposes of giving way for an access road.

(c) The petitioner has not been paid prompt and full compensation in accordance with **section 75 (1)(c)** of the Constitution for the purported taking of part of the petitioner's land to be excised for purposes of an access road.

(d) The procedure set out in the **Land Acquisition Act (Cap 295)** has not been followed by the Government.

12. Counsel for the petitioner submitted that notwithstanding the unsuccessful challenge of the erroneous part relevant RIM by the District Surveyor, Nyandarua District which formed the basis of the consent order, this Court has jurisdiction under **section 84** of the Constitution to determine whether the said order violates the petitioner's fundamental rights and freedoms under **sections 70, 75 and 77** of the former Constitution.

13. It was further submitted that under **section 84** of the Constitution the petitioner's rights to seek redress for violation of his constitutional rights is without prejudice to any other relief available to him and cannot be defeated by failure to obtain relief through other legal procedures available to him in respect of a given subject matter or set of grievances.

14. The petitioner therefore prays that the petition be allowed as prayed.

### **Respondents Case**

15. Since this suit was filed, the respondent has not responded to the petition in any manner. When the matter came up for directions on 24<sup>th</sup> October 2011 and 5<sup>th</sup> December 2011, the respondent was given an opportunity to file its response. On the hearing date, counsel for the respondent applied for an adjournment on the ground that he was not aware of the matter. I rejected the application for adjournment and ordered the matter to proceed for hearing.

16. In the circumstances I shall consider this petition as undefended. I shall take the facts stated therein as true and correct and proceed to determine whether they constitute a violation of the petitioner's rights and if so, whether the petitioner is entitled to relief.

### **Record of previous suit**

17. According to the proceedings in **HCCC No. 46 of 1993**, after the consent order was recorded and the

petitioner applied to review and set it aside under the provisions of **section 80** of the *Civil Procedure Act* by an application dated 9<sup>th</sup> August 2001. The grounds for the review of the consent order were that;

- (a) The map presented to the District Surveyor Nyandarua did not reflect the true position on the ground.
- (b) There was a fundamental difference between the map presented and the latest map issued by the Director of Surveys.
- (c) That there was a likelihood that the map presented may have been tampered with.

18. In determining the application for review, Hon. Mr Justice Githinji reviewed the evidence and in particular he scrutinized the maps and concluded that the map produced by the District Surveyor was the accurate one. By a ruling dated 19<sup>th</sup> November 2001, the judge dismissed the application. The judge stated, ***“As the District surveyor has determined that the Road reserve (Road of access) exists, and as that determination is final in terms of the order No. 3 of the consent orders of 22/2/2001, and in view of my findings above, the Plaintiffs suit should be dismissed with costs to both defendants. Consequently, I dismiss the application for review ..... In view of order No. 3 of the consent orders of 22/2/2001 I dismiss the Plaintiff’s suit with costs to the defendants.”***

19. In coming to the conclusion that he did, the learned judge relied on the case of ***Kenya Commercial Bank v Benjoh Amalgamated Limited and Another Nairobi Civil Appeal No. 276 of 1997 (Unreported)*** where the Court of Appeal held that prima facie an order made in the presence and with the consent of counsel of all parties to the proceedings or action and those claiming under them cannot be varied or discharged unless obtained by fraud or collusion, or by agreement contrary to public policy of the court or if it was entered into without sufficient material facts or generally on grounds that would justify the setting aside of a contract. The judge found that none of the facts presented to him that would justify the setting aside the consent were available.

20. The petitioner was not deterred by this loss. He filed another application dated 26<sup>th</sup> July 2007 in which he sought, *inter alia*, to set aside the consent order. The application was once again dismissed by Hon. Lady Justice Nambuye by a ruling dated 24<sup>th</sup> April 2008 where she held that in view of the ruling by Hon. Mr Justice Githinji, that application was *res-judicata*.

### **Whether petition an abuse of process**

21. It is now clear to me that the issue which the petitioner is trying to litigate through a petition for enforcement of fundamental rights and freedoms has been determined; firstly, by the consent order recorded by the parties and adopted by the court and secondly, by two decisions of the court which have confirmed the validity of the consent order. It is also to be noted that in the plaint that was filed, the plaintiff had prayed that the court do find that the excision of his land was *‘illegal and unconstitutional.’* Thus the issue of constitutionality of the excision was at the center of that case and is deemed to have been determined by virtue of the consent and the subsequent rejection of the application for review.

22. This matter is in my view *res-judicata*. Justice Githinji considered the complaints raised by the petitioner concerning the survey map and dismissed them. Those issues cannot be re-litigated. Apart from that, the consent order was clear that ***‘the determination of the District Registrar Nyandarua was final and binding’*** on the parties.

23. In the case of ***Edwin Thuo v Attorney General and Another Nairobi Petition No. 212 of 2011 (Unreported)***, the court considered the status of a consent order and doctrine of *res-judicata* in relation to an application made under **section 84** of the Constitution. After considering several decisions and the policy upon which the doctrine is founded, the court stated, ***‘What the decisions I have cited and considered show is that whether the issue before me approached as an attack on a consent judgment,***

*issue estoppel, res judicata or an abuse of process of court, the principles upon which the court acts in such circumstances are clearly within the limitations to fundamental rights and freedoms envisaged under section 70 of the Constitution. I therefore hold that as long as the Agreement remains binding on the parties, neither party can circumvent the effect and consequences of this Agreement by attacking it under the guise of a petition to enforce fundamental rights and freedoms.’* (See also *Richard Nduati Kariuki v Leonard Nduati Kariuki & Another* Nairobi Misc. Civil Appl. No. 7 of 2006 (Unreported)).

### **Conclusion**

24. The parties in **HCCC No. 46 of 1993** agreed on a course of action captured in the consent order. That determination was given effect by the court and the petitioner’s grievances duly adjudicated. I therefore find and hold that this petition is an attempt to re-open matters which are now closed.

25. I am of the firm view as that of Justice R. Kuloba in his book, *Judicial Hints on Civil Procedure, 1984 (Vol 1)* at page 46 in a paragraph headed, “**Guard against attempts to evade the doctrine[of res-judicata]**” where he states that, “**One of the greatest difficulties which face those courts which try land suits is the disposition of the disappointed litigant to dress up a suit which has failed in a new guise and to try his luck once more .... Once a man has had his say, has taken his case as far as the law permits him, and has failed, he must be stopped from re-litigating the same matter.**”

26. The petitioner has had his say. He must be stopped by dismissal of this petition. The petition is hereby dismissed with no order as to costs.

**DATED and DELIVERED at NAIROBI this 17<sup>th</sup> day of FEBRUARY 2012**

**D. S. MAJANJA**  
**JUDGE**

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Mr O. Wanyaga instructed by Kinoti & Kibe Company Advocates for the Petitioner.

Mr Opondo, Litigation Counsel, instructed by the State Law Office for the Respondent.