



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**ELC PETITION NUMBER E2 OF 2020**

**IN THE MATTER OF: ARTICLE 10(2), 21 (1) (2), 23 (1), 27(1),**

**40(2), 162 (2) & 258 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF: THE VIOLATION AND/OR INFRINGEMENT**

**OF THE PROPERTY RIGHTS OF THE PETITIONER**

**IN THE MATTER OF: THE LAND REGISTRATION ACT, NO 3 OF 2012**

**IN THE MATTER OF: LR. NO. MAJOGI/BOOCHI/1582**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS**

**AND FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE RULES, 2013.**

**BETWEEN**

**BOSIRE OBWACHI.....PETITIONER**

**VERSUS**

**THE LAND REGISTRAR, KISII COUNTY.....1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....2<sup>ND</sup>RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The Petitioner commenced this suit by way of a Petition dated 2<sup>nd</sup> October 2020, seeking the following reliefs;

a) A declaration that the Petitioner is entitled to the protection under the Constitution of Kenya 2010.

b) A declaration that the entries, number 3 and 4 reflected on the register of LR. NO. MAJOGI/BOOCHI/1582 (hereinafter referred to as '*the suit property*') which were entered on 14<sup>th</sup> May, 2011 were illegal, fraudulent, null and void for all intents and purposes.

c) An order for cancellation of entries number 3 and 4 reflected on the register of **LR. NO. MAJOGI/BOOCHI/1582** which were entered on 14<sup>th</sup> May, 2011 and reinstatement of entry number 2 on the register, reflecting the registration of the suit property in the name of the Petitioner.

d) An order of prohibition, prohibiting the Respondents and in particular the 1<sup>st</sup> Respondent from further interfering with the register in respect of the suit property and/or otherwise altering the entries thereon, with a view of defrauding the Petitioner of his lawful

rights and or interests thereto.

e) Payment of damages, arising from the illegal and void action by and/or at the instance of the response.

f) Costs of the Petition and any other relief that this court may deem fit expedient.

2. In support of the Petition the Petitioner averred that he was the registered owner of the suit property, which property was transferred and registered in his name on 21<sup>st</sup> November, 1969.

3. The Petitioner further averred that on 21<sup>st</sup> February, 2020 when he obtained a copy of the Green Card of the suit property, he discovered that the 1<sup>st</sup> Respondent had fraudulently caused an erroneous entry to be entered and endorsed against the register of the suit property purporting that the Petitioner herein had (sic) transferred and thereby caused the suit property to be registered in the name of one Wilkister Moraa Boera on 14<sup>th</sup> April, 2011.

4. He further averred that the entry was erroneous and fraudulent since on the date it was entered there were proceedings before the Honourable High Court vide **KISII HCC MISC. APPLICATION NO. 6 OF 2011 (JR)** in which the Honourable Court had issued conservatory orders pending the hearing and determination of the application which was finally determined in his favor.

5. He deponed that upon the issuance of the conservatory orders he had served the same upon the 1<sup>st</sup> Respondent who acknowledged receipt of the same.

6. He also further averred that on 21<sup>st</sup> November, 2014 he had obtained an official search from the 1<sup>st</sup> Respondent which indicated that the suit property was still in his name.

7. He contended that the erroneous entries on the Green Card that indicated that the property had changed hands on 14<sup>th</sup> April, 2011 was at variance with the official search issued to him by the 1<sup>st</sup> Respondent on 21<sup>st</sup> November, 2014.

8. He contends that his examination of the Green Card issued to him on 21<sup>st</sup> February, 2020 established that the 1<sup>st</sup> Respondent had edited the Green Card and eliminated the legitimate entries which were previously contained on the register.

9. He further contends that the transactions or other entries made in the register of the suit property, particularly entry number 3 and 4 contained on the Green Card issued to him on 21<sup>st</sup> February, 2020 were undertaken by the 1<sup>st</sup> Respondent on the basis of fraud, corruption and abuse of office. It was also his contention that such actions have defrauded him of his rights over and in respect of the suit property. Consequently, he concludes that the said actions of the 1<sup>st</sup> Respondent amounted to an infringement of his property rights contained in article 40 (2) of the Constitution of Kenya 2010.

10. He also contended that the alterations in the register to include the erroneous entries were made without his knowledge or consent.

11. He finally contends that the 1<sup>st</sup> Respondent's actions amounted to an infringement of his constitutional and fundamental rights as particularized in his Petition. The said rights require to be protected by the court.

12. On 22<sup>nd</sup> February, 2021 when the Petition came up for directions on how the same should proceed, the court noted that the Respondents had not entered Appearance despite being served. The court thereafter directed the parties to dispose of the Petition by way of written submissions whereby the Petitioner was given 21 days to file and serve same upon all the Respondents. The Petitioner filed his submissions dated 1<sup>st</sup> April, 2021 to articulate his position.

#### **ISSUES FOR DETERMINATION**

13. Having considered the Petition, the Supporting Affidavit, the annexures thereto as well as the written submissions filed by the Petitioner, I have deduced the following as the issues for determination.

a) Whether the Petition is merited.

b) Whether the Petitioner should be granted the orders prayed for in the Petition.

#### **ANALYSIS AND DETERMINATION**

##### **a) Whether the Petition is merited**

14. Even though this Petition is undefended, it will still be necessary to first and foremost determine whether the same has met the threshold of a Constitutional Petition worth being determined by this court.

15. From the outset, it worth noting that any person who wishes to institute a claim through a Constitutional Petition must ensure that he or she meets the threshold set in the case of Anarita Karimi Njeru-vs- Republic 1976-1980 KLR wherein Trevelyan & Hancox, JJ, summarized it as follows;

*“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”*

16. Further in **Ostenah Ogero Taracha v Ethics & Anti-Corruption Commission & Attorney General [2017] eKLR** the court held that:

*It is not however, enough to allege that one’s fundamental freedoms or rights have been violated. The violation must be proved. Section 107 (1) of the Evidence Act Cap. 80 Laws of Kenya is clear in this regard and provides as follows;*

*“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”*

*The letter and spirit of the above provision has been captured in several decisions of the superior courts including but not limited to the cases of **Anarita Karimi Njeru –vs- Republic [1979] eKLR and Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**. Ancillary to the foregoing is the requirement that any prospective petitioner ought to set out his or her complaint with precision and clarity to enable the court to ascertain whether or not a given right or fundamental freedom has been infringed.*

17. From the foregoing cases, it is clear that the Petitioner was called upon to state with clarity, the alleged violation and/or threatened violation of his fundamental rights, the manner in which the fundamental rights are being violated and or threatened to be violated and the provisions of the constitution, that anchor the said rights. In an attempt to meet the threshold, the Petitioner has in his Petition specifically particularized and demonstrated how the 1<sup>st</sup> Respondent’s alleged actions of altering the Green Card violated articles 10(2), 21 (1),22(1), 27(1), 40(2), and 50 of the Constitution. Additionally, he has clearly and precisely shown how the 1<sup>st</sup> Respondent has infringed on his constitutional rights.

18. It is therefore my finding that the Petition has met the threshold set in the **Anarita Karimi** case and the same is therefore merited.

**Whether the Petitioner should be granted the orders as prayed for in the Petition.**

19. The main order that the Petitioner seeks is his Petition is a declaration that the entries on the Green Card that were made on 14<sup>th</sup> April, 2011 showing that the Petitioner had transferred the suit property to one Wilkister Moraa Boera were illegal, fraudulent, null and void for all intents and purposes and the same should be cancelled and the property reverted back to him.

20. In support of his claim the Petitioner has presented to me among many other documents, four key documents in order to prove that the actions of the 1<sup>st</sup> respondent were illegal and fraudulent.

- a) A copy of a court order issued on 24<sup>th</sup> January, 2011 vide KISII HCC MISC. APPLICATION NO. 6 OF 2011 (JR).
- b) A copy of the ruling issued on 17<sup>th</sup> August, 2012 vide KISII HCC MISC. APPLICATION NO. 6 OF 2011 (JR).
- c) Copy of an official search in respect of the suit property issued to the Petitioner on 21<sup>st</sup> November, 2014.
- d) A copy of the green card dated 21<sup>st</sup> February, 2020.

21. Essentially the Petitioner is alleging that the Respondent’s actions apart from being unconstitutional were against a clear court determination in **KISII HCC MISC. APPLICATION NO. 6 OF 2011 (JR)**. This conclusion can be drawn from Petitioners averments that the entries in the register were made on 14<sup>th</sup> April, 2011 in favor of one Wilkister Moraa Boera.

22. A perusal in **KISII HCC MISC. APPLICATION NO. 6 OF 2011 (JR)** reveals that the Petitioner herein had filed a judicial review application seeking to have the award issued by the Ogembo Land Disputes Tribunal in favor of Wilkister Moraa Boera and subsequently adopted as a decree of the Court by the Ogembo Principal Magistrate Court quashed. The said application was determined in his favor. It is also revealed that Conservatory orders were issued on 24<sup>th</sup> July, 2011 conserving the property from any interference pending the hearing and determination of the application. The said application was eventually determined on 17<sup>th</sup> August, 2012 preserving the suit property in the name of the Petitioner.

23. It is clear from my analysis of the above suit that the Respondents especially the 1<sup>st</sup> Respondent was not party to the Judicial Review application. It therefore means that for him to be held culpable of acting against the court orders preserving the suit property in the name of the Petitioner, there must be proof that he or she was served with the conservatory orders dated 24<sup>th</sup> July, 2011 and the Ruling of the court dated 17<sup>th</sup> August, 2012. At paragraph 9 and 11 of the Petitioners Supporting Affidavit, he deposes that the conservatory orders were served upon the 1<sup>st</sup> Respondent. However he has not attached any documentary evidence to prove the same which therefore throws doubt as to whether the 1<sup>st</sup> Respondent was served and was therefore aware of the orders of the court maintaining the property in the name of the Petitioner.

24. However, the redemption of the Petitioner lies in the Official Search dated 21<sup>st</sup> November, 2014 which clearly shows that the property as at that date was in the name of the Petitioner. As at this date, there was still in place a prohibition placed by the Petitioner courtesy of the conservatory order issued on 24<sup>th</sup> January, 2011. From this revelation it’s clear that the erroneous entries in the Green Card in favor of

Wilkister Moraa Boera were made by the Respondents in full knowledge of the conservatory orders. The same must have been entered illegally and fraudulently on a date later than 21<sup>st</sup> November, 2014 and backdated to show that the same were made before the court made its final order on, 17<sup>th</sup> August, 2014.

25. The Petitioner's learned counsel has submitted, which submission I agree with, that the 1<sup>st</sup> Respondent while altering the Register and making the impugned entries thereon, did not notify the Petitioner. Counsel argued that the Petitioner who in accordance with the provisions of section 24 and 25 of the Land Registration Act, 2012 has absolute proprietorship of the suit property ought to have been notified in order to grant any approval to the alteration of the register. In support of his argument, the learned counsel relied on the case of **Shimoni Resort of Tittles Vs Registrar of Titles and 5 Others [2016] eKLR** where court held that;

*"....The alteration affecting the title and instruments thereof were made without the proprietor's consent and were therefore a nullity ab-initio"*

26. In view of the foregoing and noting that the Petitioners averments are uncontroverted, it is in the interest of justice that I allow this Petition. Accordingly, I make the following final orders;

(a) A declaration is hereby issued that the Petitioner is entitled to protection under the Constitution of Kenya 2010.

b) A declaration is hereby issued that the entries, number 3 and number 4 reflected on the register of LR. NO. MAJOGE/BOOCHI/1582 entered on 14<sup>th</sup> May, 2011 are illegal, fraudulent, null and void for all intent and purposes.

c) An order be and is hereby issued cancelling the entries number 3 and 4 reflected on the register of LR. NO. MAJOGE/BOOCHI/1582 entered on 14<sup>th</sup> May, 2011 and reinstating entry number 2 on the register to reflect the registration of the suit property in the name of the Petitioner.

d) An order of prohibition be and is hereby issued prohibiting the Respondents and in particular the 1<sup>st</sup> Respondent from further interfering with the register in respect of the suit property or otherwise altering the entries thereon, with a view to defrauding the Petitioner of his lawful rights and or interests thereto.

e) The costs of this Petition shall be borne by the 1<sup>st</sup> Respondent.

**DATED, SIGNED AND DELIVERED AT KISII THIS 21ST DAY OF JULY, 2021.**

**J.M ONYANGO**

**JUDGE**