



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT HOMA BAY

ELC PET CASE NO. 6 OF 2021

(Formerly Migori ELC Pet no 7 of 2019)

SHEM OGOLA OKECH.....PETITIONER

VERSUS

HOMA-BAY COUNTY GOVERNMENT.....1ST RESPONDENT

KENYA RURAL ROADS AUTHORITY.....2ND RESPONDENT

NAIROBI LOGISTICS AND CONSTRUCTION CO. LTD.....3RD RESPONENT

JUDGMENT

A. INTRODUCTION

1. The central property in this petition is title No. West Karachuonyo/Koko/B/343 (The suit property herein). The same is located in Homa-Bay County. The petitioner, Shem Ogola Okech claims that the respondents' actions have limited and restricted his enjoyment of the suit property without due process of the law as stipulated under Article 40 of the Constitution of Kenya, 2010 (The Constitution herein).
2. The petitioner is represented by the firm of Orege and Odhiambo Advocates.
3. The 1st and 3rd respondents are represented by the firm of Nyauke and Company Advocates.
4. The 2nd respondent is represented by the firm of J.M. Rapando and Company Advocates.
5. Initially, the petition was lodged at the High Court of Kenya at Homa-Bay. By the ruling delivered on 14th March 2019, the court (J R. Karanja J) rendered and directed thus:-

“The basic issue for determination in this matter is whether the rights of the petitioner under Article 40 of the Constitution were violated and if so, whether the petitioner would be entitled to damages from the respondents and to what extent. This is an issue that may as well be determined by the Environment and Land Court. In that regard, rather than striking out this petition for want of jurisdiction and in the spirit of Article 159(2)(a), (d) & (e) of the Constitution, this court now orders that the Petition be transferred to the Environment and Land Court at Migori for hearing and disposal as the court may direct.”

6. On 28th July 2021, the petition was further transferred to this court upon its establishment, for delivery of this judgment; see Articles 6 (3) and 48 of the Constitution.

B. THE GIST OF PETITIONER'S CASE

7. The petition is dated 30th January 2018 supported by the petitioner's 18-paragraphed affidavit sworn on 10th January 2018 and both filed herein on 18th January 2018 and the annexed report and valuation marked as “SOO1 herein. Nonetheless, in the ruling referred to in paragraph 5 hereinabove which I hereby approve, the court remarked that the typographical slip is forgivable under Article 159 (2) (d) and section 19 (1) of the Environment and Land Court Act 2015.

8. Briefly, the petitioner's claim is as pointed out in paragraph 1 hereinabove. Furthermore, that the petitioner is the registered proprietor of the suit property and that the validity of his title thereto has never been challenged or at all. That he has enjoyed open possession and occupation of the suit property without any interruption. That the suit property borders the Kanaam Nyangweso URA-22 road. That the 1st respondent, Homa –Bay County Government and the 2nd respondent, Kenya Rural Roads Authority contracted the 3rd respondent, Nairobi Logistics and Construction Company Ltd to construct a new road branching from the Oluch- Kanaam Road and heading to Lake Victoria and also to expand and or rehabilitate the Kanaam Nyangweso URA 22 road.

9. The petitioner further claims that on 27th July 2016, employees of the 1st respondent descended upon the suit property and without notice and right and in a haphazard manner occasioned wanton trespass, destruction and damage to the petitioner's homestead in the process of expansion and or rehabilitation of Kanaam Nyangweso URA 22 road. That the suit property is neither public road nor has it been gazette for acquisition and or rehabilitation of the Kanaam Nyangweso URA 22 road. That the respondents' actions contravened the petitioner's rights to secure protection of the suit property as enshrined under **Article 40 (supra)**.

10. Wherefore, the petitioner prays that :-

i. A conservatory order do issue to restrain the respondents, each and all of them, either by themselves or through their agents, servants, nominees or otherwise from entering, remaining upon, or in any way interfering with the petitioner's enjoyment of the property known as title No. West Karachuonyo/Okoth B/343 Homa-Bay County.

ii. A declaration do issue that the respondents' action of entering into the petitioner's said property contravenes the rights to the petitioner to own and acquire property of any description in any part of the republic as enshrined, guaranteed and protected under Article 40 of the Constitution of Kenya.

iii. A declaration that as a consequence of the violation of the petitioner's right to property and encroachment into the said property by Acts of the 1st and 2nd respondents the petitioner is entitled to damages and upon inquiry, an award on damage be made.

iv. An order of injunction do issue restraining the respondents each and all of them, either by themselves or through their agents, servants, nominees or otherwise from entering, remaining upon, or in any interfering with the petitioner's enjoyment of the property known as title No. West Karachuonyo/Okoth B/343 Homa-Bay County.

v. The petitioner be awarded the costs of these proceedings

vi. Such other or further orders as this court may deem fit.

11. In a fifteen (15) paragraphed replying affidavit sworn on 9th February 2018 by George Illah, the County legal officer in charge of legal affairs in the 1st respondent and filed in court on 1st March 2018, the 1st respondent opposed the petition. He deposed inter alia, that part of the suit property is a road reserve and acquisition of part of it was in line with public purpose and **Articles 24 and 40 (3) of the Constitution and sections 107 and 110 of the Land Act, 2016 (2012)**.

12. The 1st respondent's County Legal Officer further deposed that the petitioner was duly notified of the intended project and was directed to make necessary adjustments to ease the activities of the 2nd and 3rd respondents. That in the interest of public rights to development, the petition be dismissed with costs. Copies of the provisions of Articles 40 (3), 107 to 110 and Article 24 (supra sections) marked as MMV-1, MMV-2 and MMV-3, respectively are annexed to the affidavit in support of the same.

13. The 2nd respondent also strongly opposed the petition by way of a 19-paragraphed replying affidavit sworn on 9th May 2018 by one Onyango Charles John, a Principal Superintendent Roads working for the 2nd respondent. It was disposed therein, among others, that the petitioner's allegations in the petition are denied. That the petition is incompetent thus, it be dismissed with costs.

14. In an eight (8) paragraphed replying affidavit sworn on 22nd May 2018 and filed herein on 13th June 2018, the 3rd respondent denied the petitioner's claim in the petition. One Geoffrey Sichey, the site manager administration of the 3rd respondent company deposed in the affidavit, inter alia, that the 3rd respondent is unfamiliar to the suit property and that the enjoinder of the 3rd respondent to the petition, is wrongful, malicious, vicious and frivolous. That the 3rd respondent be exempted from the petition and all legal liabilities accruing therefrom.

15. On 24th September 2018, the court directed that the petition be argued by way of affidavit evidence and written submission. The order was restated herein on 17th February 2021.

D. THE PARTIES' SUBMISSIONS

16. By submissions dated 18th October 2018 duly filed in court on 23rd October 2018, learned counsel for the petitioner made reference to the background of the petition the respondents' case and framed triple issues for determination including whether the petitioner's constitutional rights have been violated in any way and whether he is entitled to damages. In the analysis of those issues in favour of the petitioner, counsel cited Article 40 (supra), section 152 (2) of the Land Act, 2016 (2012), Section 95 of the County Governments Act and various authoritative pronouncements, inter alia, **Kiambu County Tenants Welfare Association =vs= Attorney General and another (2017) e KLR and Gujral Sandeep Singh Ragbir =vs= Minister of Public works Roads and Transport County Government of Kajiado and another (2018) e KLR**. Counsel submitted that the respondents acted in pure malice to the detriment of the petitioner and the respondents are jointly liable and responsible hence the court to grant the orders sought in the petition.

17. Learned counsel for the 1st respondent filed submission dated 5th March 2019 on 6th March 2019 giving a brief background of the matter and identified twin issues for determination namely whether the petitioner's right to property protected under **Article 40 (supra)** have been violated by the 1st respondent and whether the orders sought in the petition should be granted. In the discussion of the issues, counsel urged the court to dismiss the petition with costs in the interest of the public right to development. To reinforce the submissions, counsel relied on Article 40 (1), (3) and (6) as read with sections 24 (1) 107 and 110 of the Land Act (supra) and the case of **Kenya National Highway authority =vs= Shakiem Masood Mughai and 5 others (2017) e KLR** on acquisition of land for specific purposes.

18. In the submissions dated 14th December 2018 and filed herein on 17th December 2018, learned counsel for the 2nd respondent gave brief facts of the case, and submitted that the petition is baseless, irregular, incompetent and defective, hence it be dismissed with costs to the 2nd respondent. That the same has not been proved to the requisite threshold and falls within the ordinary civil claims. To fortify the submissions, the case of **Ernest C.O. Muga =vs= Attorney General (2018) e KLR, John Githinji Wangondu and 6 others =vs= Nyeri South Sub County Co-operative officer and 3 others (2019) e KLR** and **Anarita Karim Njeru =vs= Republic (1979) eKLR**, were relied upon therein.

19. The 3rd respondents did not file any submission herein.

E. ISSUES FOR DETERMINATION

20. I subscribe to the Court of Appeal decision in **Great Lakes Transport Company (U) Ltd =vs= Kenya Revenue Authority (2009) KLR 720** on issues for determination in a suit generally. I bear in mind the definition of the term "Suit" in section 2 of the Civil Procedure Act Chapter 21 Laws of Kenya.

21. I have carefully examined the petition, the supporting affidavit, the respondents' replying affidavit and written submissions of the petitioner, the 1st respondent and the 2nd respondent. In that regard, the issues framed in the 1st respondent's submission are hereby approved.

F. ANALYSIS AND DETERMINATION

22. The petitioner originated this Petition pursuant to Articles 1,3,27,28,40 of the Constitution which I take into account. Articles 22 (1) and 258 (1) of the Constitution stipulate that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights and the Constitution has been contravened or threatened with contravention.

23. Article 23 (30) provides for appropriate relief that a court may grant. The orders sought in the petition are included thereunder.

24. This court is not precluded from dealing with the petition pursuant to **section 13 (3) of the ELC Act, 2015 (2011)**; see also the decision in **Christopher Gatuiri =vs= Commissioner of Police (2008) eKLR**, among other authorities.

25. The petitioner asserted that the 1st respondent descended upon the petitioner's property which is not Government reserve. That the 1st respondent damaged the petitioner's homestead and property without notice or right.

26. Sections 151 and 152 of the Land Act, 2016 (2012) govern rights of entry upon public land. Requisite notice is contained thereunder; see also **Gujral Ragbir case (supra)**.

27. A report and valuation dated 6th February 2017 marked as 'SOO1' and annexed to the petition as shown at paragraph 11 of the petitioner's supplementary affidavit was prepared by Dantu Valuers Ltd of D.M Gachangi Registered and Practicing Valuers. It is an opinion that the damage that allegedly occurred to the suit property was estimated at Kshs. 545,000. The opinion is merely persuasive and general damages can only be assessed subject to the analysis infra.

28. Article 40 (6) (supra) provides that the protection of the right to property does not extend to any property that has been found to have been unlawfully acquired. The sub article contemplates that the finding of unlawful acquisition must be by due process as held in the case of **Isaac Gathungu Wanjohi and another –vs-The Honourable Attorney General and 6 others (2012) eKLR** and **Eunice Grace NJambi Kamau and another-vs-The Hon. Attorney General and others (2013) eKLR**.

29. Observation of the procedural requirements for compulsory acquisition of private property as absolutely necessary. Therefore, such acquisitions have to be carried out in strict conformity with the Constitutional provisions and in good faith as held in the case of **Onyango and others-vs- Town Council of Awendo (2010) 1 EACA 321**.

30. Additionally, land has to be used for the purposes for which it was acquired. That the use of land for any other purpose amounts to an illegality; see **Re Kisima Farm Ltd (1978) KLR 36**.

31. I subscribe to the Court of Appeal decision in the case of **Kenya Highway Authority-vs- Shalien Mughal (supra)** where it was held, inter alia;

“...Mughal was entitled to his property to the extent that such property did not encroach upon land that was acquired and set aside for a public purpose...”

32. **Article 40 (3) and (4) of the Constitution** provides for, inter alia, state deprivation of private property of any description for public

purpose or in the public interest. It must be done in consonant with the Constitution and any Act of Parliament for prompt and just compensation to the affected person(s).

33. Indeed, Article 40 of the Constitution must be read as a whole to appreciate the extent of protection of right to property; see also **Isaac Wanjohi case** (supra).

34. Limitation of rights and fundamental freedoms is stipulated under **Article 24 of the Constitution**. Moreover, fundamental rights and freedoms that may not be curtailed are enshrined in **Article 25 of the Constitution**.

35. In respect of a petition such as the instant one, in **Anarita Njeru case** (supra), Trevelyn J was emphatic that a petitioner must set out with reasonable degree of precision ;

- a) That of which he or she complains
- b) The provisions said to be infringed and
- c) The manner in which they are alleged to be infringed.

36. Similarly, in **Kiambu County Tenants Welfare Association case** (supra), Mativo J stated;

“.....for a party to prove violation.....extent of injury suffered, if any....”

37. In the instant petition, some articles of the Constitution are stated on the face of the same. Article 40(1), (2) and (3) of the Constitution is set out at paragraph 15 of the Petition and referred to in paragraph 14 of the petitioner’s affidavit in support of the Petition.

38. Be that as it may, the petitioner has failed to demonstrate the conditions as stated in **Anarita Njeru case** (supra) which I hereby approve. So, I find that this petition is quite speculative as noted in **Wang’ondu case** (supra) which I also endorse accordingly.

39. In **Ernest Muga case** (supra), the Court of Appeal held in part:

“This court has consistently and variously stated that the constitutional court should not be misused for the determination of ordinary civil and legislative disputes that are made to masquerade as constitutional litigation seeking to enforce fundamental rights”

40. **The Halsbury’s Laws of England 4th Edition Volume 45 paragraph 26 1503**, states that there may be computation of damages in an action for trespass including recovery of nominal damages even if there is no actual loss. That general damages may be increased in aggravating circumstances.

41. It is trite law that it is the duty of a claimant to not only plead special damages but to prove the same, see **Great Lakes Transport Co. (U) Ltd vs Kenya Revenue Authority (2009) KLR 720**.

42. The totality of the foregoing is that this petitioner who is seeking damages among other orders, as stated in paragraph 10 hereinabove, has failed to plead and prove special damages. He has also failed to prove his claim for the grant of a conservatory order, declaration, injunction and general damages as sought in the petition. Therefore, this petition is speculative, unclear and unprecise as to the petitioner’s complaint. I find the same devoid of merits.

43. A fortiori, the petition dated 30th January 2018 be and is hereby dismissed.

44. By dint of the proviso to Section 27(1) of the Civil Procedure Act and the circumstances of the matter, parties to bear their own costs of this petition.

DELIVERED, DATED AND SIGNED IN HOMA BAY THIS 28TH DAY OF SEPTEMBER 2021.

G.M.A. ONGONDO

JUDGE

In the presence of:

Mr. Peter Onyango, Learned Counsel for petitioner

Mr. S. Nyauke, Learned Counsel for the 1st and 3rd Respondents