



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAJIADO
ELC. PETITION NO.10 OF 2019
IN THE MATTERS OF: ARTICLE 22, AND
ARTICLE 258(1) OF THE CONSTITUTION OF KENYA 2010
IN THE MATTER OF: ALLEGED THREAT OF VIOLATION OF
ARTICLE 3 AND 10 OF THE CONSTITUTION OF KENYA, 2010
IN THE MATTER OF: PROPER SURVEY AND SUB DIVISION OF
LAND NO. KAJIADO/OLCHORE ONYORE/96
IN THE MATTER OF: ISSUANCE OF TITLE DEED TO
PROPERTY LR. NO. KAJIADO/OLCHORO /ONYORE/1161
PETER GATHIGI MARIGI.....PETITIONER
VERSUS
THE DISTRICT LAND SURVEYOR, KAJIADO.....1ST RESPONDENT
THE DISTRICT LAND REGISTRAR, KAJIADO NORTH.....2ND RESPONDENT
CHIEF LAND REGISTRAR.....3RD RESPONDENT
THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGEMENT

By a Petition dated the 29th August, 2019 the Petitioner prays that:

- (a) This Honorable court be pleased to make a declaration that the acts by the 1st, 2nd and 3rd Respondents not to conduct a proper survey, open a new register and issue title pursuant to the Petitioner is unlawful and illegal.
- (b) The 1st, 2nd and 3rd Respondents be and are hereby directed by an order of mandamus to conduct a proper survey, open a register and issue a title deed for the land registration number Kajiado/Olchoro Onyore/1161 in the name of the late Marigi Gathika.
- (c) This Honorable Court be pleased to award the Petitioner punitive and exemplary damages for the losses caused by the 1st and 2nd Respondents.
- (d) Costs of this Petition be awarded to the Petitioner.
- (e) Any other order the Honorable Court may deem fit to grant be made.

The 2nd Respondent opposed the Petition and filed a replying affidavit sworn by Robert Gichuki District Land Registrar, Kajiado North District where he confirms that land parcel number Kajiado/Olchoro Onyore/96 was allocated to Ntimeri Ololotuno on 9th July, 1980 upon which a title deed was issued on 12th August, 1980. He explains that the Green Card for land parcel number Kajiado/Olchoro Onyore/96 was closed on subdivision on 23rd April, 1986 with the resultant parcels being Kajiado/Olchoro Onyore/1306 – 1316. He denies that land parcel number Kajiado/Olchoro Onyore/96 was subdivided to give rise to Kajiado/Olchoro Onyore/ 1161 among other parcels as alleged by the Petitioner. He contends that the Petitioner has not provided proof that Kajiado/Olchoro Onyore/1161 is indeed a subdivision of Kajiado/Olchoro Onyore/96 and registered in the name of Ntimeri Ololotuno or his estate. He reiterates that if the Petitioner purchased ten (10) hectares from the late Ntimeri Ololotuno, then it is incumbent upon him to file a claim against his estate instead of seeking to compel the Respondents to issue him with a title deed for land parcel number Kajiado/ Olchoro Onyore/1161.

The Petitioner filed a supplementary affidavit where he reiterated his claim as per the Petition. He contends that the 2nd Respondent acknowledges the subdivision of Kajiado/Olchoro Onyore/96 into portions from 1306 – 1313 but does not indicate the measurements of each of the said portions. He insists that it is ludicrous for the 3rd Respondent to dispute the existence of Kajiado/ Olchoro Onyore/1161 when his office had previously acknowledged its existence. Further, he disputes the way the survey was conducted as some areas were not covered in the survey which was done on 23rd April, 1986 with a big chunk of land left out that forms the basis of this Petition. He avers that from the documents attached in support of Kajiado/Olchoro Onyore/96 it indicates the area is approximately 150 hectares whereas the portions derived from its subdivisions add up to 208.2 hectares. He states that the subdivision was marred with errors and hence needs to be rectified.

The Petition was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the materials presented in respect to the Petition including the rivaling submissions, the issue for determination is whether the Petitioner is entitled to the Orders sought in the Petition.

The Petitioner in his submissions did not dispute that Kajiado/Olchoro Onyore/96 was adjudicated and allocated to the late Ntimeri Ololotuno in 1980 and a title deed issued to that effect. He claims the said land was initially subdivided in 1983 resulting in new parcels of land among them being Kajiado Olchoro Onyore/1161 hereinafter referred to as the ‘suit land’ which was bought by Marigi Gathuka (deceased) but this was not indicated in the land registry. Further, that another subdivision was undertaken in 1986 which did not recognize the initial survey as it indicated new parcels were Kajiado/Ol Choro Onyore/1306 - 1316 whose records are in the Lands Office. He further submitted that he had followed up on the parcel of land bought by Marigi Gathuka and a site visit was undertaken on 17th September, 2014 which indicated the existence of the suit land upon which the 1st Respondent recommended the opening of a new register to the said suit land through a Gazette Notice but the same was never opened. He reiterates that the Respondents being public officers are mandated by various legislations to discharge their duties in a fair and just manner. To support this argument, he relied on Section 97(1) and 100 of the Evidence Act to submit that the Respondents cannot contradict exhibits and court documents that the suit land does not exist as they are bound by Article 47 of the Constitution including Section 7(2) of the Fair Administrative Action Act. He submitted that he had made a case to warrant the issuance of the orders sought as his rights have been violated and relied on Articles 22, 23 and 165 of the Constitution including the case **Wareham t/a A.F Wareham & 2 Others –vs- Kenya Post Office Savings Bank (2004) 2 KLR 91**.

The Respondents in their submissions relied on the facts as deposed in the replying affidavit they had filed in opposition to the Petition. On whether the suit land is a resultant subdivision of Kajiado/Olchoro Onyore/ 96, the Respondents submitted that the Mutation Form dated 23rd September, 1985 for Kajiado /Olchoro Onyore/96 was registered on 23rd April, 1986. Further, the said title was closed on 23rd April, 1986 due to resultant subdivision of parcel Nos. Kajiado/ Olchoro Onyore/1306-1316. They submitted that as evident in the Green Cards which were produced, the said resultant subdivisions have since been further subdivided with some of the parcels being transferred to third parties. They reiterated that the suit land and Kajiado/Olchoro Onyore/96 have no relationship and the Petitioner’s prayer for issuance of a title deed for the suit land amounts to asking the Surveyor to approve a resurvey of an already surveyed land and by doing so, revoking procedurally including legally issued title deeds held by persons who are not parties to the suit. Further, the estate of the late Ntimeri Ololotuno being the original owner had no issue with the subdivision done on 23rd April, 1986 neither has the Petitioner produced any evidence of purchase of the suit land for consideration. They insist the Petitioner’s cause of action, if indeed the deceased purchased the suit land, is to follow up with the estate of the late Ntimeri Ololotuno, for transfer of one of the subdivisions of Kajiado/ Olchoro Onyore/ 96.

It is the Petitioner’s case that he is the eldest son of the late Marigi Gathigi and the beneficial owner of the suit land which was acquired from the late Ntimeri Ololotuno for consideration in 1983 upon sub division from the mother title and he took possession of the same, settled thereon until his death in 2002. He claims to have undertaken follow up on the processing of the title deed for the portion they had purchased and on 1st December, 2005, together with the late Ntimeri Ololotuno they visited the 1st Respondent, and upon presenting their issue, he promised to send a team of surveyors, who later visited the suit land and prepared a report; that indicated land size as 148ha with eleven (11) new land parcels and disregarded the original survey which had indicated land size as 204.46ha. The Petitioner claims to have paid Kshs. 6,000 to the 2nd Respondent on 22, May, 2015, for ascertaining the boundary dispute, and the 2nd Respondent through Kenya Gazette No. 3477 of 2015 dated 22nd May, 2015 and a corrigenda dated 11th September, 2015 notified the general public of opening of a new register with respect to the suit land upon which he paid Ksh.500 for issuance of its new title. He states that despite making several attempts through follow-up to have the title of the suit land issued to him, he has not been successful, hence there is infringement as well as violation of his rights including freedoms guaranteed by the Constitution.

On perusal of the various documents annexed to the Petition including the 2nd Respondent’s replying affidavit, I note the Mutation Form dated the 17th August, 1983 indicated Land Parcel number Kajiado/Ol choro Onyore/96 was subdivided into Kajiado/ Ol Choro Onyore/1104; 1103; 1161; 1162 and 1163 respectively, but the same was not registered at the Kajiado Land’s Office. I note the Mutation Form for Kajiado/Ol choro Onyore/96 dated 19th September, 1985 indicating the said parcel was subdivided into Kajiado/Ol Choro Onyore/1306; 1307; 1308; 1309; 1310; 1311 and 1312 was registered on 23rd April, 1986 at the Kajiado Land’s office. Further, the Petitioner has not furnished court with any Sale Agreement, Transfer Documents or relevant consent of the Land Control Board duly signed by the

vendor and purchaser to confirm the 2nd Respondent declined to issue him with a title after he presented the said relevant documents to him. I note he claims the deceased bought the suit land from the late Ntimeri Ololotuno but failed to enjoin the said estate in this suit. The 2nd Respondent on the other hand produced documents confirming that no register has ever been opened for title number Kajiado/ Ol Choro Onyore/1161. Further, the Mutation Form for Kajiado/Ol Choro Onyore/96 dated 19th September, 1985 indicating the said parcel was subdivided into 1306; 1307; 1308; 1309; 1310; 1311 and 1312 was registered on 23rd April, 1986 at the Kajiado Land's office. I note the Petitioner furnished court with a copy of a gazette notice dated 22nd May, 2015 which indicates that it was for issuance of a new title deed for Kajiado/Ol choro onyore/1161 for the deceased Ntimeri Ololotuno and Marigi Gathoka (owners of suit land) which was later amended on 11th September, 2015 to read opening of a new register. I however note the Petitioner admitted that Ntimeri Ololotuno died in 2008, and if this being the case, then who was issuing instructions to the Land Registrar to undertake opening of a new register as the deceased estate still owned the suit land. In the case of **ANARITA KARIMI NJIRU VS ATTORNEY GENERAL [1979] KLR 54**, it was held that any Petitioner seeking redress under the constitution must state his claim with precision, referring to the Constitutional provisions which have been violated.

Further in the case of **Mumo Matemo v Trusted Society of Human Rights alliance [2014] eKLR**, it was held that:

“...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”

The Petitioner's claim against the Respondents contain so many glaring inconsistencies. It is trite that for the Land Registrar to be compelled to issue a title, there has to be documents produced to prove the transaction indeed took place and parties have to be represented. In this instance the Petitioner has failed to enjoin the estate of Ntimeri Ololotuno in these proceedings. Further, there was a second mutation of the original parcel and other resultant subdivisions which have been disposed to third parties as evident in the extracts of the Green Cards produced by the 2nd Respondent, which parties are not represented in these proceedings. To my mind, I find that the Petition is premised on private law and the repealed Registered Land Act including the Land Registration Act which stipulated the process of acquisition and registration of land. Further, the Land Register is the key document proving ownership and it provides the history of a particular parcel of land which is devoid at this juncture. I further note that the Petitioner seeks a register to be created yet there is no registered mutation to prove the history of the suit land. To my mind, there were several gaps over this transaction which the Petitioner has failed to explain.

The Petitioner sought for punitive and exemplary damages but has failed to prove what damages he has suffered from, since they had waited from 2002 upto 2019 to institute a Petition against the Land Registrar and failed to include the estate of the vendor in the proceedings.

In the circumstances, I will decline to award him punitive as well as exemplary Damages.

It is against the foregoing that, I find the Petitioner does not have a remedy under the Constitution but should have adhered to the process outlined in the repealed Registered Land Act and the Land Registration Act. Further, I opine that his recourse is against the estate of Ntimeri Ololotuno for acquisition of his title to the suit land. It is my considered view that certain issues raised in this Petition require adducing viva voce evidence that cannot be undertaken in this forum but in a civil suit.

In the circumstances, I find the Petition unmerited and will proceed to dismiss it.

I direct each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20TH DAY OF SEPTEMBER, 2021

CHRISTINE OCHIENG

JUDGE