



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

PETITION NO.1 OF 2018

IN THE MATTER OF ARTICLES 2, 3, 19 (20, 21, 22 AND 23 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 1, 3, 27, 28 & 40 OF THE CONSTITUTION OF KENYA AND ALL OTHER ENABLING PROVISIONS OF THE LAW.

AND

IN THE MATTER OF THE KENYA ROADS ACT, 2007 OF THE LAWS OF KENYA AND LEGAL NOTICE NO.86 OF 10TH MAY 2013

AND

IN THE MATTER OF DEMOLITION OF PROPERTY ON LAND PARCEL NAME TITLE NO. WEST KARACHUONYO/OKOTH 'B'/

343 IN HOMA BAY COUNTY

BETWEEN

SHEM OGOLA OKECH PETITIONER

AND

HOMA BAY COUNTY GOVERNMENT 1ST RESPONDENT

KENYA RURAL ROADS AUTHORITY 2ND RESPONDENT

NAIROBI LOGISTICS AND

CONSTRUCTION COMPANY LIMITED 3RD RESPONDENT

RULING

[1] In his petition dated 30th January 2018, and supported by an affidavit dated 10th January 2018, both filed in court on 18th January 2018, the petitioner, **SHEM OGOLA OKECH**, alleges that he is the registered proprietor of a portion of land known as **parcel No. West Karachuonyo/Okoth 'B'/343** in Homa Bay County which he occupies and had enjoyed on uninterrupted open possession thereof besides carrying out improvements thereon. His title and right to the property had never been changed, varied and/or relinquished to any person and/or institution nor challenged as being valid. The property borders the Kanaam-Nyangweso URA 22 road and in a bid to construct a new road branching from the Oluch-Kanaam road and leading to lake Victoria, the **Homa Bay County Government** (first respondent) and the **Kenya Rural Roads Authority** (second respondent) contracted **Nairobi Logistics and Construction Company Limited** (third respondent) to expand and/or rehabilitate the said Kanaam-Nyangweso URA 22 road.

[2] In the process, employees of the first respondent descended on the property on the 27th July 2016, without notice and right, and in a haphazard manner occasioned wanton trespass, destruction and damage to the petitioner's homestead in abrogation of the petitioner's constitutional right and without lawful cause or authority.

The petitioner contends that the suit land is not a Government road reserve nor has it been gazetted for acquisition and/or rehabilitation of the Kanaam-Nyangweso URA 22 road or fit any public purposes as provided under the constitution. The petitioner, further alleges that being dissatisfied with the respondents' decision to enter and encroach onto his land, he required the personnel on site to show him the necessary authority they were using to warrant such sheer exhibition of impunity but instead, the contractor on site demanded a bribe of Kshs.20, 000/= to save the fence and makere trees from obstruction. He declined to pay the bribe thereby causing the contractor to maliciously uproot his entire fence and trees using a tractor.

[3] It is the petitioner's further contention that the respondents acted with impunity and contravened his right to secure enjoyment of his property as protected under **Article 40** of the **Constitution**. Their (respondents') actions were to arbitrary deprive him of his property and have limited and restricted enjoyment of the same without due process of the law as stipulated under **Article 40** of the **Constitution**. They exhibited a biased disposition towards him and acted in excess of and/or was of jurisdiction and contrary to the express provisions of the law.

[4] It is thus, the petitioner's prayers that a conservatory order do issue to restrain the respondents and/or through their agents, servants, nominees or otherwise from interfering in any manner with his enjoyment of the suit land and a declaration that the respondents' actions contravened his rights to own and acquire any property in any part of this country as enshrined, guaranteed and protected under **Article 40** of the **Constitution of Kenya**.

Further, that as a consequence of the violation of the petitioner's right to property and the respondents' encroachment into the suit land, a declaration do issue that the petitioner is entitled to damages and an award of damages be made upon inquiry.

The petitioner also prays for an order of injunction to restrain the respondents and/or their agents, servants, nominees from entering, remaining upon or in any manner interfering with his enjoyment of the suit property.

[5] It is intriguing that the petition is dated 30th January 2018 yet the supporting affidavit is dated 10th January 2018 and both were filed in court on 18th January 2018. This means that the petition was filed even before it was made or that it was non-existent when it was filed. This by itself would render the petition incompetent and fatally defective. However, the error is forgivable in terms of **Article 159 (2) (c)** of the **Constitution** and that most likely than not was as a result of what we may refer to as a typographical error although it was actually a slip in the handwriting in one of the copies.

Be that as it may, the first respondent filed a response to the petition vide a replying affidavit dated 9th February 2018, deponed by its legal officer, **GEORGE ILLAH**. The second respondent did likewise vide a replying affidavit dated 9th May 2018, deponed by its Principal Road Superintendent, **ONYANGO CHARLES JOHN** and so did the third respondent vide a replying affidavit dated 22nd May 2018, deponed by its site manager, **GEOFFREY SICHEY**.

[6] As directed by the court, the petition was canvassed by way of affidavit evidence and written submissions. In that regard, the petitioner's submissions dated 18th October 2018 were duly filed by **OREGO & ODHIAMBO ADVOCATES**, and those by the first respondent dated 5th March 2018 were filed by **NYAUKE AND COMPANY ADVOCATES**.

The second respondent's submissions dated 14th December 2018 were filed by **J.M. RAPANDO ADVOCATE**.

The third respondent did not file any submissions.

[7] From the pleadings and in as much as this case is styled as a Constitutional Petition, it is clear that the constitutional right alleged to have been violated against the petitioner by the respondents is the right to property under **Article 40** of the **Constitution**. The property in question is parcel **No. West Karachuonyo/Okoth 'B'/343** belonging to the petitioner. As such, the jurisdiction of this court to deal with this matter comes to the fore. This is because, whereas **Article 165 (3)** of the **Constitution** provides that the High Court shall have original jurisdiction in criminal and civil matters and jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, the provisions is subject to **Clause (5)** which divests this court's jurisdiction in respect of matters falling within the jurisdiction of the court's contemplated in **Article 162 (2)** of the **Constitution**.

[8] Such courts include the Employment and Labour Relations Court (Formerly Industrial Court) and the Environment and land court whose jurisdiction is provided by relevant statutes enacted pursuant to **Article 162 (3)** of the **Constitution**. The subject matter of this petition is land and therefore, the applicable statute is the **Environment and Land Court Act**, which outlines the jurisdiction of the Environment and Land Court under **Section 13(1)** as follows:-

“(2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the court shall have power to hear and determine disputes –

a) relating to environmental planning and protection, climate issues, land use, planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b) relating to compulsory acquisition of land;

c) relating to land administration and management;

d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e) any other disputing relating to environment and land.

(3) Nothing in this Act shall preclude the court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Article 42, 69 and 70 of the Constitution”.

[9] This dispute, whether constitutional or otherwise, falls within the jurisdiction of the Environment and Land Court which is of equal status with the High Court. However, as was held in **REPUBLIC –VS- KITSAO CHARO NGALI SUPREME COURT PETITION NO.5 OF 2015 (2017) e KLR**, status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the court’s operation. Courts can therefore be of the same status, but exercise different jurisdictions.

As **Article 165 (5)** precludes the High Court from dealing with matters reserved to the Environment and Land Court and since jurisdiction is everything as was held in the celebrated case of **M/V LILLIAN”S” –VS- CALTEX OIL COMPANY LIMITED (1989) KLR 1**, and without it a court has no power to make one more step, this court must now down its tools for want of jurisdiction.

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) and (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.

Ordered accordingly.

J.R. KARANJAH

JUDGE

14.03.2019

[Read and signed this 14th day of **March, 2019**].