



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

LAND PETITION NUMBER 5 OF 2017

(Formerly Kisii ELC Petition No. 10 OF 2013)

PETER ODHIAMBO OLOO.....PETITIONER

-VERSUS-

THE SCHOOL MANAGEMENT COMMITTEE

MAGWAR PRIMARY SCHOOL.....1ST RESPONDENT

THE COUNTY LAND REGISTRAR HOMA BAY COUNTY.....2ND RESPONDENT

JUDGMENT

1. On 19th March 2013, the Petitioner, PETER ODHIAMBO OLOO through Nyauke and company Advocates, filed the present constitutional petition dated evenly seeking the following orders;

- a. A declaration that the 1st respondent is occupying land parcel number NORTH NYOKAL/GONGO/677 (Hereinafter referred to as the suit land) unconstitutionally particularly with respect to the rights of the petitioner.
- b. That any purported judicial or quasi judicial process that was employed by the 1st respondent to gain any right over the suit land was unlawful and oppressive against the petitioner.
- c. An order that the 2nd respondent is not under any duty to enforce the orders of the Land Disputes Tribunal that purportedly ordered for a contract between the petitioner and the 1st respondent.
- d. Order of specific performance compelling the 1st respondent jointly and severally to compensate the petitioner in general damages on account of trespass and for unlawful and unconstitutional occupation of the petitioner's parcel of land.
- e. Costs of the petition be borne by the 1st respondent.

2. The petition is anchored on a 12-paragraphed supporting affidavit sworn on even date by the petitioner who referred to and relied on the following documents;

- a. A copy of certificate of official search dated 23rd February 2013 thereto annexed and marked as POO-1 in respect of the suit land herein.
- b. A certified copy of proceedings and decision of Rangwe Division Land Disputes Tribunal, Homa Bay (Hereinafter referred to as the defunct Tribunal) annexed thereto and marked as POO-2.

3. Briefly, the petitioner's case is that he is the absolute registered proprietor of the suit land. That the defunct Tribunal attended to the dispute which has escalated to the present matter but went beyond its powers by ordering the 1st respondent to pay the petitioner a sum of Ksh 35,000/= as compensation for the alleged illegal occupation thus contravening the constitutional rights of the petitioner.

4. The 1st respondent represented by the firm of S.M Sagwe and company Advocates, opposed the petition by a 15-paragraphed answer to petition dated 2nd May 2018 sworn by **DAVID OCHOLA OWINO**, the Chairman of the 1st respondent wherein the deponent stated that the 1st respondent's school was accepted by the community and it is operation. That the instant dispute was heard and determined by the defunct Tribunal and its verdict was filed and adopted as judgement in Homa Bay Senior Resident Magistrate's court Misc Civil Application No. 100 of 2011. That pursuant to the judgement, the decree issued was that the suit land be subdivided into two whereby the petitioner and the 1st respondent were to get one (1) hectare and 0.2 hectares respectively.

5. The 1st respondent further stated that the petitioner did not file any appeal from the judgement and decree or file judicial review to quash the decision. That the requisite period of six (6) months has since lapsed. That the instant petition is res judicata and an abuse of the process of the court hence the same be struck out with costs. That the 2nd respondent be asked to issue title to the 1st respondent for land measuring 0.2 hectares as the dispute is long concluded.

6. Besides, by a replying affidavit sworn on 11th June 2013 and filed in court on even date, by David Oduola Owino, again deposed in the terms of the answer to the petition. The replying affidavit is further supported by;

a. A copy of the decree in Homa Bay Senior Resident Magistrate's Court Misc Application No. 100 of 2011; Peter Odhiambo Oloo-vs- The 1st respondent. The decree is annexed to the affidavit and marked as D001.

b. A copy of a letter dated 5th June 2013 to the Attorney General by the Permanent Secretary Ministry of Education annexed thereto and marked as D002.

7. In a supplementary affidavit sworn on 19th August 2013 and filed in court on 20th August 2013, the said chairman of the 1st respondent deposed, inter alia, that the Government of the Republic of Kenya financially supported the 1st respondent's reconstruction in the year 2009. That in the year 2006, in spite of the approval of Rangwe Land Control Board, Shem Oloo Adika who had donated 0.2 hectares to the 1st respondent, transferred 1.2 hectares to his son but failed to inform the Board that the said 0.2 hectares of the land was for the school. That there exists Kisii HCCC No 103 of 2008(O.S) as disclosed in the originating summons and order annexed thereto and marked as D001 and D002 respectively.

8. On 20th March 2019, this court directed and ordered that the instant petition be argued by written submissions. In compliance thereto, learned counsel for the petitioner filed submissions dated 22nd July 2019.

9. Learned counsel for the 1st respondent failed to file submissions in this petition.

10. The 2nd respondent neither filed answer to the petition nor submissions in this petition.

11. Learned counsel for the petitioner submitted by providing a brief background of the petition as well as framed and analysed four (4) issues for determination including whether the petitioner is the legal owner of the suit land and whether his constitutional rights have been breached in the present matter. To reinforce his submissions, counsel cited sections 24(a) and 26 of the Land Registration Act, 2016 (2012), Articles 25,40 and 80 of the Constitution of Kenya, 2010 as well as cited **Obadiah K Macharia v Kenya Power and Lighting Co Ltd (2016) eKLR** and **John Mining Temol and another-vs- Governor of Bungoma County and 17 others (2014) eKLR**.

ISSUES FOR DETERMINATION

12. I have carefully considered the entire petition, the answer thereto and the petitioner's submissions inclusive of issues framed and analysed therein. So, what are the issues for determination in the present petition?

13. It is trite law that issues for determination in a matter generally flow from either the pleadings or as framed by the parties for the court's determination; see **Great Lakes Company (U) Ltd-vs- Kenya Revenue Authority (2009)KLR 720**.

14. It is important to note that in **Odd Jobs-vs- Mubia (1970)EA 476**, Duffus P remarked that:

“In this respect a trial court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates, and on which a decision is necessary in order to determine the dispute between the parties.....”
(Emphasis added)

15. In view of the foregone discourse, the points for determination in concise and precise terms are whether;

a. The actions of the defunct Tribunal instigated by the acts of the respondents did violate the petitioner's constitutional rights.

b. Depending on the outcome in issue number (a) herein above, what are the appropriate and just orders to make in the instant petition?

ANALYSIS AND DISPOSITION

16. The petitioner generated this petition for enforcement of his allegedly violated rights as envisaged under Article 22 (1) of the Constitution (supra) which reads;

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”

17. The petition is further mounted pursuant to Article 258 of the said Constitution on enforcement of the Constitution. I also note the Constitutional provision accordingly.

18. In this petition, reference was made to sections 24 (a) and 26 (1) of the Land Registration Act, 2016 (2012). The petitioner therefore asserted that he is the lawful registered owner of the suit land.

19. Besides, I do not lose sight of the exceptions under section 26(1)(supra) as regards the right to property. Simply put, the exceptions include fraud, misrepresentation and acquisition of property through a corrupt scheme.

20. In *Salim-Vs- Boyd (1971) EA 550*, it was held that rights and registrations to land can be challenged on grounds inter alia, fraud, misrepresentation and adverse possession; see also *Vijay Morjaria-vs- Nansingh Madhusingh Darbar and another (2000)eKLR* .

21. More fundamentally, the petitioner complained that the decision of the defunct tribunal contravened his right to the suit land as enshrined under Article 40 (1) of the Constitution(supra). However, protection of right to property is not unlimited under **Articles 25 and 40(6) (supra)**.

22. The petitioner also complained that the respondents trespassed into the suit land. On that score, I take into account the term “trespass” as defined in *Clerk and Lindsell on Torts,17th Edition at paragraph 17-01 and Halsbury’s Laws of England,18th Edition*.

23. In the case of *Zachariah Onsongo Momanyi-vs- Evans Omurwa Onchagwa (2014)eKLR*, Samson Okongo, J held that the term “trespass” means any unjustified intrusion of the person upon the land in possession of another. Accordingly, I approve the said reasoning for it is sound and relevant to this petition.

24. It was the contention of the petitioner that the defunct Tribunal exceeded its mandate by awarding damages in terms of Ksh 35,000/= for trespass in favour of the 1st respondent. I am aware of the principles that guide the court in the assessment of general damages for trespass as well settled in several authorities including the Court of Appeal case of *Eric Adome and another-vs- Pauline Kasumba Osebe and another (2014) eKLR* .

25. The 1st defendant asserted that by documents marked as “DOO1” and “DOO2” annexed to the replying affidavit alongside the documents marked as “DOO1”and “DOO2” annexed to the supplementary affidavit, the instant petition is res judicata. Admittedly, I am alive to the doctrine of res judicata as anchored on section 7 of the Civil Procedure Act Chapter 21 Laws of Kenya.

26. Quite plainly, the definition of the doctrine “res judicata” is well settled; see **the Black’s Law Dictionary, 10th Edition at page 1504** where the doctrine is defined as:

“An issue that has been definitively settled by judicial decision”

27. The 1st respondent further referred to KISII ELCC No 103 of 2006 (OS) and asserted that the petition is also subjudice. **The Black’s Law Dictionary (Ibid)** also defines the term “subjudice” thus:

“Before the court or judge for determination.”

28. **Section 6 of the Civil Procedure Act (supra)** makes provision for stay of suit. This court is not unconscious of the threshold under the stated legal provision. On that strength, I loathe to state more on the apparent pending suit before the aforesaid court.

29. In view of the character of the petition, the steadfast answer thereto hinged on documents annexed to both the replying affidavit and the supplementary affidavit as well as the obtaining circumstances herein, it is hardly conclusive that the petitioner’s constitutional rights have been infringed. It is thus the finding of this court that the present petition is devoid of merit.

30. To that end, are the reliefs sought in the petition available to the petitioner? Nay, the petition is bound to fail.

31. A fortiori, the instant petition dated 19th March 2013 is hereby dismissed with costs to the respondents.

Delivered, Signed and Dated at Migori through email pursuant to,inter alia, Articles 7 (3) (b),159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the prevailing Corona Virus pandemic, this 20th day of May, 2020.

G.M. A. ONGONDO

JUDGE