REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

PETITION NO. 6 OF 2017

ZEDEKIAH EVANS NYAMONGO ACHIRA.....PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

SETTLEMENT FUND TRUSTEE.....2ND RESPONDENT

BOARD OF MANAGEMENT

SAIWA SECONDARY SCHOOL.....3RD RESPONDENT

SAMMY KURGAT.....4TH RESPONDENT

ATTORNEY GENERAL.....5TH RESPONDENT

JUDGMENT

INTRODUCTION

1. The petitioner filed this petition on **20/9/2017.** He sought orders of declaration as follows *verbatim*:-

> **1. A declaration that the acts of respondents, that is forcefully carving and taking over the petitioner's 2.471 acres of land, amounts to infringement of the petitioner's right to own property and the acts are intended to illegally and unprocedurally deprive off the petitioner 2.5 acres of land from land parcel Nos. Trans-Nzoia/Kipsoen/289, 158 and 157.**
>
> **2. A declaration that land parcel No. Trans-Nzoia/Kipsoen/288 was an afterthought and a creation by the 2nd respondent on paper without available space on ground and superimposed on the petitioner's parcel Nos. 289, 158 and 157 hence the intended carving is unconstitutional and unlawful.**
>
> **3. On order of permanent injunction restraining the respondents from taking possession, transferring, carving, alienating constructing or dealing with part of the petitioner's parcel Nos. 289, 158 and 157 and further from inciting member of Saiwa village community against the petitioner.**
>
> **4. General damages for subjecting the petitioner into insecurity and trauma.**
>
> **5. The petitioner be compensated for the loss of 2.5 acres at the prevailing market price.**
>
> **6. Any other relief that he court may deem just and fit to grant in the circumstances.**

The Petitioner's Case

2. In a nutshell the petitioner has approached the court for a remedy against the respondents for their alleged intention to deprive the petitioner of **2.5** acres of land out land that had been allocated to him earlier by the 2nd respondent. It is alleged that the respondents intend to have the **2.5** acres registered in the name of the 3rd defendant, a public institution.

3. The petition is supported by the affidavit of the petitioner dated **20/9/2017** which reiterates the grounds in the petition and to which is attached a number of exhibits, and also by his supplementary affidavit dated **19/12/2017.**

4. The grounds upon which the petition is premised are as follows: that the petitioner allegedly purchased and became the registered owner of land parcels **Nos. Trans-Nzoia/Kipsoen/289, 158** and **157** all measuring **17.3 Ha** an equivalent of **42.748 acres** and was issued with **3** title deeds; that the applicant has been in possession and occupation of the above parcels of land since **1993** without any interruption and has developed the suit land; that the respondents now claim that land parcel No. **Trans-Nzoia/Kipsoen/288** measuring **1 ha** (**2.5 acres**) is situated within parcels of land **Nos. 289, 158** and **157** and they intend to carve it out of those portions; that the respondents will by doing so occasion the petitioner loss of **2.5 acres** land without any justification; that after the local Chief intimated to him that **2.5** acres of the suit land was government land, the petitioner confirmed through the services of a surveyor that a fourth plot exists, being parcel no **288,** which overlaps part of the suit land, and that the same has been registered in favour of the 2nd respondent. He asserts that **parcel no 288** is an afterthought, and was discreetly superimposed on the map without any space to accommodate it on the ground since the other three plots which it interferes with had already been allocated to the petitioner. He further asserts that though the dispute concerned title to the land it was dealt with by the respondents as a boundary dispute between him and the 3rd respondent school which is not even registered as owner of **plot 288.** The petitioner avers that the intended excision is not legal or procedural; that the 3rd and 4th respondents incited members of the public who invaded the petitioner's parcel of land without any colour of right cut down trees and destroyed property thereon, hence exposing him to insecurity; that attempts to amicably resolve the dispute have failed; that the respondents intend to unconstitutionally deprive the petitioner of his land measuring **2.5 acres** only due to public demand; that he has been informed by the national Land Commission County Coordinator that **parcel no 288** is on the process of being transferred to the school and, even before the dispute has been resolved, that the school has commenced construction of permanent structure on the land; that the parcel has never been reserved for a public utility; that it is the petitioner's conviction that **parcel No 288** was meant to be situated somewhere else where there is a permanent improvement erected; that there is only one permanent improvement on his land; and that if the land must be taken then **article 40(3)(b)** should be followed; that the petitioner's rights under **article 40(2) (a)** of the constitution have been violated hence this petition.

The 2nd to 5th Respondents' Response

5. The respondents filed replying affidavits, one sworn by the 3rd respondent's Secretary of the Board of Management Saiwa Secondary School, and another one sworn by the County Land Adjudication and Settlement Officer in reply to the petition dated **20/9/2017**. Their response is that the petition is defective for not being supported by an affidavit; that the registers for all the mentioned parcels **157, 158, 288** and **289** were opened on the same date, **4/8/1986** in the name of the 2nd respondent; that parcel no **288** is still registered in the name of the SFT; that they do not dispute that the other three parcels were transferred by the original allottee to the petitioner in **1994**; that all the mentioned parcels are distinct from each other and they do exist on the ground; that the County Land Registrar and the County Land Surveyor have adjudicated over the issue of the boundary separating **plot 288** from the other plots; that the Trans Nzoia County Land Adjudication Officer confirmed that **plot 288** is a public utility; that the matter was thereafter referred as an appeal to the County Land Registrar and it was then referred to the District Commissioner as an arbitration issue and it was concluded on **8/2/2016;** that therefore under the relevant sections of the **Land Registration Act 2012** the boundary issue between the properties of the petitioner and **plot 288** has been finally concluded and this court has no jurisdiction over it; that the local community approved plans to apply for allocation of plot no **288** in order to develop a secondary school on the land; that the deponent therefore applied to the County Land Management Board for allocation of the land to the school and the local administration supported the application; that the suit land was then confirmed to be a public utility and consequently the Trans Nzoia County Land Management Board considered and approved the application and recommended issuance of title; that the school being a public institution is entitled to allocation of the land; that the school has already developed the land with permanent classrooms which are operational; that the petitioner has no registrable interest in the suit land and that the petition has not attained the threshold of a constitutional petition set out in the case of **Anarita Karimi Njeru** as there is no constitutional issue raised herein.

6. The 1st respondent filed a sworn replying affidavit of one **Brian Ikol** dated **22/11/2017** in response to the petition. The 1st respondent's response as contained therein is that the suit land was reserved as a permanent improvement reserved for community use as a spray race and store; that there is no dispute that parcels **157, 158** and **289** are registered in the petitioner's name; that in **2015** the local community recommended that the land be utilized by Saiwa secondary school; that the school board applied for the allocation of the land and the 1st respondent endorsed the application and boundaries thereto were confirmed; that the title is currently being processed in favour of the school; that the County Land Registrar reported that each of the parcels mentioned had lesser acreage on the ground than stated on the land register; that the petitioner was informed of the need to make rectifications to the register and that the orders sought would be contrary to the letter and spirit of **Article 40** of the Constitution in that land illegally acquired should not be protected.

The Petitioner's Supplementary Affidavit

7. A supplementary affidavit was sworn by the petitioner in response to the replying affidavit of the 2nd to 5th respondents. In that affidavit he pointed out that his petition is supported by an affidavit; that it is not disputed that he has been resident on the suit land for **22** years; that entry by the 3rd respondent was forcibly secured; that the **2.5** acres can not be within the margin of error; that the permanent improvement having been built on parcel number **157** parcel no **288** could not be have been reserved owing to that Permanent Improvement; that a *"permanent improvement"* and a *"public utility"* are not one and the same thing.

The Petitioner's Further Supporting Affidavit

8. The petitioner also filed a further supporting affidavit dated **2/10/2018**. In that affidavit he states that the area list prepared by the 2nd respondent's agents showed that all his three parcels totaled to **42.7** acres; that his titles reflect the acreage in the area list, that is, **42.7 acres**; that under the **Survey Act** an error could not have exceeded **1 ha**; that the land is discharged from any encumbrances in favour of the 2nd respondent. He details the process that was followed to obtain the titles to the three parcels, stating that the County Surveyor had in **2015** confirmed that going by the Registry Index map, the total acreage of plots numbers **157 158 288** and **289** was supposed to be **18.3** ha but on the ground it was **17.3** ha; that he is not in occupation of more than the **17.3** acres reflected in the records; that the consideration he paid to the 2nd respondent entitled him to all the **17.3** acres and not any less, and that in the alternative he should be compensated in the sum of **Kshs. 7,500,000/=** for the land and **Kshs. 8,500,000/=** for the improvements thereon.

SUBMISSIONS

9. The petitioner filed his submissions on **27/2/2020.** The 2nd - 5th respondents filed their submissions in response to the petition dated **20/9/2017** on **27/4/2020.**

DETERMINATION

Issues for Determination

10. I have noted that the issue as to whether the petition raises a constitutional issue has been raised. Since that issue is closely tied to the history of the land and the court's finding as to whether the petitioner has any registrable interest in the land, it will not be dealt with as a preliminary issue but it will be subsumed under the first issue to be dealt with herein below.

11. The issues that arise in this petition are as follows:

a. Whether the respondents forcibly and unconstitutionally superimposed parcel no 288 on the petitioner's land and thereby carved out 2.5 acres from the petitioner's land.

b. Whether the petitioner is entitled to an injunction.

c. Whether the petitioner is entitled to general damages for insecurity and trauma or compensation.

d. What orders should issue?

12. The issues are discussed as hereunder.

a. Whether the respondents forcibly and unconstitutionally superimposed parcel no 288 on the petitioner's land and thereby carved out 2.5 acres from the petitioner's land.

13. The petitioner's claim is that parcel no **288,** which is the suit land**,** was superimposed on parcel **157** thus making him lose **2.5** acres of land.

14. It is evident from the record that parcels numbers **157, 158, 288** and **289** exist in the records produced by both parties.

15. The petitioner has displayed a list of the plots in the scheme, thus admitting that the suit land existed in the records. The certified copy of register shows that suit land and the petitioner's parcels were all created on the same date that is **4/4/1986**. The register shows that the suit land measures **1 ha**.

16. The exhibit marked "**OE3(c)"** is a report of the proceedings regarding the disputed land in a meeting held on site on **6/1/2016**. It shows that the Settlement Officer one *F.O. Obiria* identified the land as a public utility land parcel whose exact use had not yet been identified; he further indicated that title had not been issued. He also stated that the boundary was clearly identified on the map. He also gave an outline of how the public utilities are set aside, saying that ordinarily the plan of the whole scheme is first prepared and then public utilities are set aside. The petitioner is recorded in that exhibit as stating that he was shown the land by the seller and that the whole parcel was fenced, and he was led to believe that the whole fenced portion was one parcel; that he approached the Settlement Officer to confirm the boundaries; however, even then, he never saw the map, he only came to discover later that that his belief that the fenced land was one plot was erroneous. In the same exhibit one *David Kipchoge* for the 1st respondent confirmed that he conducted a search and found that the suit land was registered in the name of the Settlement Fund Trustees the 2nd respondent. The surveyor commissioned by the petitioner confirmed that the suit plot existed and that the shortfall in acreage of the three parcels owned by the plaintiff amounted to the acreage of the suit land. In his findings the Land Registrar found that the person who sold the plaintiff his land showed him the four portions mentioned in this petition but ended up transferring only **3** portions to the petitioner and hence defrauded him. In conclusion the Land Registrar recommended that the boundary of the suit land be maintained.

17. From the above information and the copies of records from the land registry regarding the suit land exhibited in the petition it is crystal clear that the suit land existed even before the petitioner was required to surrender it for the purposes of the school. He has no agreement showing that he purchased it for valuable consideration from the person who sold him all the other three plots that are not in dispute.

18. That the four parcels were fenced off as one portion by the previous owner and that the petitioner was misled into believing that the same had been sold to him does not alter the fact that the seller had no right to the suit land. He could not therefore pass to the petitioner title that he did not have. The sale never made the petitioner the owner of the land comprised of in parcel No. **288**.

19. The petitioner has made a curious allegation that the suit land was superimposed by the respondents upon his land. However, as the record clearly shows that the suit land was created at the same time as his land, the claim of wrongful superimposition of parcel No. **288** on the petitioner's land is therefore untrue.

20. Each of the parcels mentioned in this petition has a discrepancy in respect of ground and registered acreage. However the petitioner prefers to refer to the cumulative difference in the ground and registered acreages of all the parcels, which amounts to **2.5** acres. This serves him well, for it enables him to urge the court to adopt the view that under the **Survey Act Cap 299,** an error of that magnitude should not exist. I have examined the provisions of that Act and the rules cited by the petitioner's counsel in his submissions. These are rules **56, 57** and **60**.

21. Rule 27 provides as follows:

> **"27.All measurements must be made in accordance with regulations 56, 57 and 60, and the Director may refuse to authenticate any survey which contains errors in excess of those that can be expected from measurements properly carried out in the manner specified."**

22. Rules 56 and **57** provide as follows:

> **56. Method of taking triangulation**
>
> **(1)The minimum requirement for tertiary and minor triangulation shall be two arcs observed on different zeros:**
>
> **Provided that two rounds observed in different zeros may be sufficient for observations to points situated less than two kilometres distant.**
>
> **(2) An arc of angular observations for triangulation shall consist of two rounds observed in opposite directions on the same zero, one round being on face left and the other on face right.**
>
> **(3) For each arc a suitable reference stating shall be selected and both rounds of the arc shall be closed on to it, and the misclosure of each round shall be appropriate to the class of theodolite used.**
>
> **(4) The difference between measurements of any angle on different arcs shall be appropriate to the class of theodolite used.**
>
> **(5) Where electronic distance measuring equipment is used, sufficient observations shall be taken to eliminate any ambiguities, and achieve the accuracy required by regulation 27.**
>
> **57. Fixing of beacons**
>
> **(1) Triangulation, trilateration, or a combination of these techniques for determining the position of beacons shall be carried out in accordance with the procedure laid down in regulations 53 to 56 of these Regulations and the method of computation shall conform with current standard survey practice.**
>
> **(2) Beacons may also be fixed by-**
>
> **(a) intersection, provided at least three suitable rays are observed on to the point to be fixed;**
>
> **(b) re-section, provided at least four points in favourable positions for such fixing are observed;**
>
> **(c) any other method which is capable of fixing a point with no less accuracy than that of the methods of intersection and re-section:**
>
> **Provided that no point fixed by any of the methods specified in subparagraphs (a), (b) and (c) of this paragraph shall be used to form the basis of further triangulation."**

23. Rule 60 provides as follows:

> **60. Lower order traverses**
>
> **(1) (a) All main control traverses in built-up areas shall be observed to third order standard.**
>
> **(b) All such lines shall be double-chained, and field operations shall be appropriate to a standard of accuracy of not less than 1:20,000.**
>
> **(2) (a) All other control traverses shall be observed to fourth order standard.**
>
> **(b) Field operations for such surveys shall be appropriate to a standard of accuracy of 1:10,000, but computational misclosures shall be allowed to the same degree of accuracy as the datum supplied by the Director.**
>
> **(c) A surveyor shall not use a loop traverse closing on his starting point if it is practicable to traverse between two previously fixed stations.**
>
> **(d) When a surveyor is unable to close his work within the limits prescribed by the Director, the Director may at his discretion authorize or instruct the surveyor to accept a lower order of misclosure, otherwise he shall close his new work by a loop traverse, orientation being confirmed in a satisfactory manner.**
>
> **(3) (a) The survey of curvilinear boundaries such as roads, railways, rivers, high-water marks, etc., shall be made by**

subsidiary traverse or by air-survey methods:

Provided that this regulation shall not preclude any more accurate method.

(b) Such surveys of curvilinear boundaries shall be carried out to a standard of accuracy appropriate to the plotting scale of the plan of the survey.

(4) Where traverses are extremely short, a reasonable misclosure shall be allowed irrespective of the minimum requirements under these Regulations."

24. First, it is observable that the petitioner's counsel's submission has not delved in depth into how the margin of error fails to fit into the margin of error conceived of in the four rules that he cites.

25. Secondly, it would appear that the gist of the petitioner's argument is that there could have been no error as the Director of Surveys approved the survey exercise that created his portions notwithstanding the provisions of **rule 27** set out above. However, what the petitioner has concealed is that in lieu of dealing with the separate errors for each plot, he has aggregated the entire range of errors relating to his three plots in order to portray it as one great error of **2.5** acres for the purpose of his argument.

26. An error may wrongfully add or deduct land from a particular parcel. In this court's view, it is not necessary to consider the cumulative shortfall in acreage for all the parcels if the parcels were surveyed and titled separately. Further, the provisions of the rules under the **Survey Act** must be construed to refer to an error affecting one parcel at a time, notwithstanding that the survey exercise concerned several parcels abutting one another or lying in consecutive sequence which are under one proprietor. If it were construed otherwise, one consequence would be that some landowners may be unjustly enriched by having errors in surveying if several of their contiguous parcels were deliberately combined to magnify the error in order to escape scrutiny, as in the instant case.

27. For the foregoing reasons this court is not persuaded to apply the petitioner's interpretation of the provisions of the rules made under the **Survey Act** so as to aggregate errors of three parcels into one, for the effect of such interpretation would be absurd. It would result in ruling out the fact of creation of the suit land contemporaneously with the petitioner's parcels, yet records show they came into existence at the same time. Whatever errors that came in on the part of either the petitioner or the respondents during the survey exercise do not alter that fact of that contemporaneous creation. Therefore, in this court's view, reinstating parcel No **288** on the ground does not amount to carving out of a new parcel from the petitioner's land. It does not also amount to violation of any of the petitioner's right to own property under **Article 40**.

28. Lastly on the issue, this court must take it to be the case that officers of the state are also susceptible to errors, or in extreme cases, deliberate malfeasance. In this case there is no evidence of willful misconduct on the part of the surveyors who did the final survey of the land and possibly gave an incorrect report that the petitioner's three parcels included the suit land. The court notes that possibly the error could have been initiated the petitioner's own wrongful occupation of the suit land prior to titling of his plots. The petitioner has clearly avoided to volunteer information as to who occasioned that survey error which has led to this dispute and this court is left to mere presumptions.

29. The petitioner cites his long occupation of land owned by the SFT. First this does not aid him in so far as he does not expressly claim prescriptive rights which would be the only logical sequel of pleading a claim of long occupation of **24** years. In any event this would have been the wrong forum had that been done. Notwithstanding that, any such express or implied claim does not aid the petition in any manner since as held in the cases of **Samuel Ndungu Gitu -vs- Danson Ndungu & 2 others [2001] eKLR** and **Boniface Oredo vs Wabomba Mukile Civil Appeal No. 170 of 1989 (unreported),** prescriptive rights can not accrue out of long occupation of SFT or government land.

30. Regarding the claim in **para 45** of petition that there were no PIs (permanent improvements) on the land at the time of registration of the 2nd respondent the answer is in the report dated **6th June 2016** written by one *F. O. Obiria*, the Land Adjudication and Settlement Officer, Trans Nzoia. The petitioner volunteered and attached that report as his exhibit, "**ZENA 11(a)."** It reads in part as follows:

"…He (the petitioner) also occupies PI 821 (new no.288) which was used by the original owner as a spray race and currently belongs to the SFT. All along Mr Achira has been using plot no 288 believing that it was part of his farm."

31. Paragraph 42 of the petition also concedes that the land had been *"…indicated as PI, meaning permanent improvement."*

32. The right conclusion is therefore that there was a permanent improvement on plot number **288** as at the time the petitioner came onto the scene. He can not claim not to have been aware of it at the time he was shown the land by the purported seller.

33. As to the petitioner's complaint that the boundary dispute was said to be between the petitioner and 3rd respondent while the latter was not the registered owner of the land, it is clear that the only person who had been allocated use of the land after application for allocation was the 3rd respondent. Its interest in the land must be presumed to have been birthed as soon as its application for the allocation of the lands was approved by the relevant authorities. Its claim over the suit land is therefore not far-fetched.

34. In view of the foregoing, the finding of this court is that the petitioner has not proved his claim that plot no **288** was illegally or unconstitutionally carved out of his land.

b. Whether the Petitioner is entitled to an Injunction.

35. In the light of the self-explanatory facts as set out earlier in this judgment above and which need not be reiterated at this juncture, the

petitioner does not deserve any injunction as the suit land was not registered in his name at any material time.

c. Whether the petitioner is entitled to general damages for insecurity and trauma or compensation.

36. The compensation that the petitioner seeks is presumed to be under the provisions of **article 40**.The petitioner has not established that the suit land was ever registered in his name at any point in time since the parcel was created.

37. From those facts, it is a straightforward observation that there would therefore be no proper basis for holding that the petitioner is entitled to any damages or compensation.

(c) ***What orders should issue?***

38. The upshot of the foregoing is that the petitioner has failed to establish that the respondents violated his rights under the constitution. The respondents merely reclaimed from the petitioner parcel number **Trans-Nzoia/Kipsoen/288**, which was land that he had annexed and occupied which land was registered under the 2nd respondent's name. They also assigned it use as a public school. The petitioner had no right to retain what was not registered in his name while it was needed by the respondents. Consequently, the instant petition is without merit and it is hereby dismissed with costs to the respondents.

Dated, signed and delivered at Kitale via electronic mail on this 30th day of June, 2020.

MWANGI NJOROGE

JUDGE, ELC, KITALE.