



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC PETITION NO. 6 OF 2019

GEORGE HOPF.....PETITIONER

VERSUS

THE DIRECTOR OF SURVEY.....1ST RESPONDENT

THE CABINET SECRETARY

MINISTRY OF LANDS AND

PHYSICAL PLANNING.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. The petitioner filed the petition dated **26/6/2019** on the same date. He seeks the following orders:

(a) A declaration that any excision of the petitioner's registered 31.7 acres on parcel LR No. 2073/23 without due process and compensation is illegal.

(b) A conservatory order restraining the respondents or their agents from threatening or illegally excising any part of the petitioner's 31.7 acres of parcel LR. No. 2073.23.

(c) Costs of this petition.

The Petitioner's Case

2. The petitioner's case is that he is one of the registered joint owners of a family property parcel no **2073/23** measuring **31.7** acres. The land was vested to these owners vide an assent dated **10/3/2000** registered on **5/6/2000**. They obtained a registered survey map and with the services of a surveyor verified that the suit land's boundaries on the ground tallies with the map and that there was no encroachment on any road or other plot. However the respondents have threatened the petitioner and his family with excision of a part of the suit land to provide for a road without following the due process. The petitioner was served with a letter by the County Surveyor notifying him that there would be a road demarcation exercise involving plots other than the suit land. At several meetings also the County Surveyor has summoned the petitioner's family to attend regarding the excision despite the fact that they have pointed out that their land is not among the plots involved. A written demand dated **13/11/2017** through their advocate never yielded any response from the County Surveyor. However the demarcation process never took place. In **May, 2019** the County Surveyor again served them with summons to attend

the exercise to excise a **40** feet wide road. A second written demand failed to secure any response from the County Surveyor. The petitioner states that from previous correspondence it is clear that the County Surveyor intends to excise a **40** feet wide road expanding an already existing road which currently measures **6** feet wide and which borders the petitioner's land and his neighbour's. The petitioner is therefore apprehensive that there is a plan to hive off the suit land which, in the absence of a notification of an error of survey and terms of indemnity under **Part VIII** of the **Land Registration Act**, is tantamount to compulsorily acquiring a portion of the suit property without due process or compliance with the law. He states that **Article 40** of the **Constitution** guarantees protection of the right to own property.

The Respondents' Reply to the Petition and Cross-Petition

3. The respondents filed a response to petition and a cross-petition on **11/12/2019**. The reply to petition and cross-petition are supported by a sworn affidavit of **Emmanuel Mutange** the **County Surveyor, Trans-Nzoia County**. In the response they state that the suit property is a subdivision of **LR 2073/14** which in **1952** measured approximately **59.5** acres but whose three acres were reserved for a road reserve; that during subdivision, the allowance for the road was ignored and the aggregate acreage of the two subdivisions remained **59.5** instead of **56.5** acres; that behind the suit land and the other subdivision, there lies parcels that depend on the ignored road reserve for access to the tarmac road; that failure to consider the road reserve has caused endless confusion and disputes; that the respondents have received complaints from the blocked landowners for decades but attempts to resolve the dispute have been futile because of endless litigation and unreasonableness on the part of the owners of the aforementioned subdivisions; that the petitioner's constitutional rights have not been violated in any way; that compulsory acquisition does not apply to land that is already in the category of public land; that the summons to the petitioner have been part of the attempt to resolve the road reserve issue and that the road should be **12 metres** and not **6 metres**. The respondents argue that consequently any transactions or surveys that purported to create titles in private names over the road reserve were fraudulent and illegal and null and void *ab initio*.

4. In the cross-petition the respondents aver that **Article 2** of the **Constitution** binds all persons and organs at both levels of government and any action in contravention of the Constitution is invalid.

5. The respondents' cross-petition against the petitioner is for a permanent injunction against petitioner restraining him, his agents, employees, servants or family from occupying the suit parcel of land as far as it extends to the road reserve and an order of rectification of the register/title to reflect the said road reserve as per the original map dated **3/4/1952**.

6. For clarity the respondents seek the following specific orders in their cross-petition:-

(i) The petition be dismissed with costs.

(ii) Judgement be entered against petitioners in terms of the cross-petition as follows:-

(a) A declaration that suit property LR No. 2073/23 was originally part of LR No. 2073/14 measuring a total of 59/5 acres with 3 acres being for road reserve.

(b) A declaration that the subdivision of LR. No. 2073/14 into LR No. 2073/23 and 2073/24 without considering the road reserve is illegal, unlawful and fraudulent.

(c) A declaration that road reserves as per the map/plan of LR No. 2073/11-22 dated 3/4/1952 are public land and should remain as such.

(d) An order of permanent injunction restraining the petitioners, their servants, agents and or any other person acting under them from ever laying claim to, interfering with or in any other manner dealing with the road reserves.

(iii) Costs of the cross-petition and interest thereon at court rates.

7. The respondents' supporting affidavit reiterates the facts stated in the response to the petition and the cross-petition. Attached thereto are some supporting documents including maps and a replying affidavit in **Kitale ELC Misc. JR No 2 of 2016**.

8. In a reply to the cross petition; the petitioner admits that the suit land was a product of subdivision of **LR 2073/14**; that his father was registered the owner of the entire **31.7 acres in 1965**; that the alleged road reserve was merely proposed; that in previous proceedings the deponent of the respondents' replying affidavit surveyor *Emmanuel Mutange* stated that he could not authoritatively establish the extent of the road; that the 1st respondent therefore confirms that the *proposed* road reserve was only proposed but was never actually surveyed; that under **Section 31** of the **Survey Act**, any survey error can be corrected within **12 months** of the date of submission of a survey plan to the **Director Of Survey**; that in the present case that window for correction was closed; that the land is now private land and that no illegality has been proved in the acquisition of the suit land.

9. The Petitioner filed his written submissions on **19/6/2020**. I have perused the court record and I have found no submissions filed on behalf of the respondents/cross-petitioners. I have considered the petition the cross-petition and the respective responses thereto as well as the submissions filed.

Determination

10. The issues which arise for determination in this suit are as follows:

(a) Whether the petition and cross-petition meet the threshold for a constitutional petition as set out in the Anarita Karimi Njeru Case.

(b) Have the petitioner and cross-petitioner properly invoked the jurisdiction of this court while approaching this court for a remedy?

(c) Whether the intended excision of a road from the petitioner's land violates or threatens to infringe on the petitioner's family's Constitutional rights to own property under article 40(1) of the constitution.

(d) What orders should issue on the petition and cross-petition?

11. The issues are discussed as hereunder:-

(a) Whether the petition and cross-petition meet the threshold for a constitutional petition as set out in the Anarita Karimi Case

12. The **Anarita Karimi Njeru -vs- Attorney General, (1979) KLR 154** Court of Appeal decision issued a yardstick by which petitions are gauged to establish if they meet the required threshold required of such genre of weighty matters.

13. In **Anarita Karimi Njeru -vs- Attorney General, (1979) KLR 154** the Court Of Appeal stated as follows:

“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

14. Has the petitioner complied with the above rule?

15. He has cited numerous articles of the constitution in the title to his petition. Of these he has chosen to address only a few in the body of the petition. These are **articles 22** (on locus to file the petition claiming

that rights have been or are about to be violated,) **24** (on limitation of rights) and **40** (on protection of the right to own property and freedom from expropriation without compensation).

16. The petitioner's case is premised on an apprehension of a threat of an illegal excision of the suit land for purposes of creation of a road. He seeks an order that any excision of the petitioner's registered **31.7** acres on parcel **LR No. 2073/23** without due process and compensation is illegal. It is evident from the petition that his case is that under **section 26** of the **Land Registration Act** his family has absolute proprietorship of the suit land and that the boundaries of the suit land tally with those on the map without encroaching on any road reserve; he maintains that is no provision of a road on the map such that carving out of a road from the suit land without compensation while no fraud has been proved would in his view infringe on the family's rights to own property. (The importance and the double edged nature of this statement will be seen later in this judgment while addressing the second issue as listed hereinabove). His assertion is that if the family's right to own property is intended to be limited through that intended excision, then the process of compulsory acquisition of a portion of the suit land for a public purpose set out under **Part VIII** of the **Land Act** which operationalizes **Article 40(3) (b)** of the **Constitution**, ought to be followed. He maintains that the 2nd respondent or the County Executive Committee Member in charge of Land ought to submit a request to the National Land Commission in order for the latter to acquire land on its behalf. The National Land Commission would thereafter deal with the salient matters of acquisition by among others publishing a notice to acquire land, to appoint a date to hear an inquiry involving land owners and discuss compensation with them. He alleges that the respondents have disregarded all the legal provisions pertinent to and the features of an acquisition process yet they have continued to threaten the petitioner's family with excision of their land for the road purposes. The petitioner maintains that all along during the pendency of the dispute the suit land was not included among the affected parcels listed in the letters of summons served upon him by the County Surveyor Trans Nzoia and that any reduction of the parcel was a violation of the family's right to property.

17. He states that the County Surveyor's letters have made it clear that he intends to excise a 40 feet road to expand an already existing road not on but bordering the suit land, yet he has failed to respond to communication by the family lawyer demanding an explanation for service of the notice while the suit land was not included in letter of summons. He maintains that currently there is a **6 feet** road between the suit land and his neighbour's land and that if the expansion is to be done, it would affect him or his neighbour or both without due process. He sets out verbatim at **paragraph 24** of the petition the provisions of **article 40(2)** and **(3)** of the **Constitution**.

18. In the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** the Court of Appeal observed as follows:

“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. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

19. Though the petitioner has made very brief references to the **Constitution** and statutes in the body of the petition, in this court's view, the petition conveys with a reasonable degree of precision the complaint of the petitioner, the provisions said to be infringed and the manner in which they are alleged to be infringed or under threat of infringement.

(b) Have the petitioner and cross-petitioner properly invoked the jurisdiction of this court while approaching this court for a remedy?

20. It has been stated in past decisions that where there is an alternative remedy that remedy should be pursued by an aggrieved person for not all matters qualify to constitutional status otherwise the importance of constitutional petitions in our jurisprudence would be eroded. (See the cases of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR**, **Harrikissoon Vs. Attorney-General Of Trinidad And Tobago [1980] A.C. 202** and **Alphonse Mwangemi Munga & 10 Others V African Safari Club Limited [2008] eKLR**.)

21. The court in the **Speaker of the National Assembly** case (supra) stated as follows:

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

22. The petitioner’s case involves an examination of many documents including maps and it may require the oral testimony of witnesses in order to arrive at an appropriate determination. The allegation that there was a reservation of a road by the previous surveys calls for evidence to back it, and this makes the petitioner’s case one in which the facts are hotly contested.

23. The circumstances of the provision of the alleged road reserve and how it was allegedly overlooked in subsequent surveys calls for more than a determination as to whether the landowner’s rights have been violated. Besides, the entire petition appears to raise the issue of whether, going by the antecedents, the portion intended to be excised from the suit land legally belongs to the petitioner’s family or is public land. While the factual matrix remains that fluid, this court would be reluctant to exercise its constitutional jurisdiction and pronounce itself as to whether the petitioner’s constitutional rights have been or are likely to be infringed.

24. Constitutional petitions, being largely governed by affidavit evidence in which there is no room for examination of documents and cross examination by the other party are not the appropriate forum for the determination of disputed facts. In a petition for redress of a violation or a threat of violation of a citizen’s constitutional rights, a court is called upon to determine if in the light of certain established, uncontroverted facts, the petitioner’s rights have been so infringed or are under threat of infringement. In this petition the fact of legality of acquisition of all the petitioner’s land including the reservation of 3 acres, requires to be first established before a pronouncement on Constitutional rights can be made. In his submissions, counsel for the petitioner has already stated that in the absence of proof of fraud on the petitioner’s part the intended excision of land for a road would infringe on the petitioner’s right to own property. And what is the manner, this court must ask itself, of proving that there was or was not any fraud on the part of the petitioner? It can not be by way of a petition such as this one. There must be an ordinary suit *vide* which all the evidence of witnesses and the documents from each side must be tested by way of cross-examination till the full truth comes out. It is therefore not possible to determine in this petition whether the excision of the **40 feet** the respondents intend to does or does not require the commencement of a compulsory acquisition process as alleged by the petitioner.

25. In **Kitale ELC Petition No. 5 Of 2018** this court examined various decisions including **Petro Oil Kenya Limited v Kenya Urban Roads Authority [2018] eKLR** and **Sanghani Investments Ltd -vs- Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 E.A 354** regarding whether a constitutional petition, in which oral evidence is rarely called, is or is not an ideal forum for investigating and determining contentious issues of fact. In the **Petro Oil Kenya Limited** it was held that it was not; Though the court in the **Sanghani Investments Ltd** case was dealing with Judicial review, it was observed in its decision that declarations (and one is sought in this case):

“...could require *viva voce* evidence to be adduced for determination of the case on the merits before declaring who the owner of the land is.”

26. Having regard to the foregoing it is the conclusion of this court that the jurisdiction of this court has not been properly invoked. The petitioner could have commenced an ordinary suit by way of plaint to seek redress in this court. That would have paved the way for the presentation of evidence, the testing of the documentary and oral evidence available in the ordinary manner expected in a suit. For that reason, this petition has no merit. The observations of this court while discussing this issue must also apply to the cross-petition and in this court's view it too does not have merits for the same reasons given in respect of the petition.

(c) Whether the intended excision of a road from the petitioner's land violates or threatens to infringe on the petitioner's family's constitutional rights to own property under article 40(1) of the constitution.

27. Due to the observations of the court while addressing the other issues above this court finds that the petitioner has not established that intended excision of a road from the petitioner's land violates or threatens to infringe on the petitioner's family's constitutional rights to own property under **Article 40(2)** of the **Constitution**. In this court's view, he is not able to demonstrate such violation or threat of violation while a dispute still exists as to whether the **40** feet portion intended to be excised is, by virtue of the allegations made by the respondents regarding an earlier reservation, public land or not.

28. A finding of violation of right to own property can not be made where it is still disputed by parties as to whether land said to be private is truly private, for **Article 40 (1) (6)** of the Constitution provides that the rights to protection of the right to acquire and own property and freedom from expropriation without compensation do not extend to property found to have been unlawfully acquired. The same findings herein regarding the petition apply to the cross-petition for the declarations sought therein must also be subjected to an evidentiary test. This court has already observed that that dispute should be first dealt with in an ordinary suit before any petition for violation or threat of violation of right can lie. In that suit the court would make a finding as to whether the allegedly reserved area was illegally acquired and included in the petitioner's land in order to be able to pronounce itself regarding any possible violation of rights under the Constitution.

(d) What orders should issue on the petition and cross-petition?

29. Consequently I find that the petition dated **26th June 2019** has no merit and the same is hereby dismissed. The cross-petition is also dismissed. As it appears probable *for now* that the matters that have instigated the institution of this petition and the cross-petition emanated from omissions during past surveys on the part of public officers each party shall bear its own costs of the petition and the cross-petition.

It is so ordered.

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

MWANGI NJOROGE

JUDGE, ELC, KITALE.