



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC PETITION CASE NO. 3 OF 2019

HILLARY SAMBAYA AKUMONYO.....PETITIONER

VERSUS

ISAAC SIITARI MUSA

BIDII WOMEN GROUP

THE CHAIRMAN OF KAKAMEGA NORTH

DISTRICT LAND DISPUTES TRIBUNAL

THE ATTORNEY GENERAL

THE PRINCIPAL MAGISTRATE BUTALI LAW COURTS.....RESPONDENTS

JUDGEMENT

This is the petition of Hillary Sambaya Akumonyo who states that, at all material times before filing of this petition, the petitioner has been and is the actual owner of a portion of land measuring 0.07 Ha comprised in L.R. No. South Kabras/Shamberere/3646 having purchased the same from the 1st respondent. The petitioner purchased a portion of land measuring 0.07 Ha then comprised in L.R. No. South Kabras/Shamberere/2977 in the month of October, 2009 then registered in the name of the 1st respondent. The petitioner took immediate possession of the purchased portion and started developing the same and further embarked on processing of title for the purchased portion to his name. The respondents became aware of the petitioner's occupation and possession of a portion of land measuring 0.07 Ha now comprised in L.R. No. South Kabras/Shamberere/3646 then comprised in L.R. No. South Kabras/Shamberere/2977 in October, 2009 and the petitioner has continued to stay thereon in peace and extensively developed the same with the full knowledge of the respondents and with no complaint whatsoever from the said respondents. That as at 19th July, 2017, the said portion comprised in L.R. No. South Kabras/Shamberere/3646 was valued at Ksh. 450,000/= (Four hundred and Fifty Thousand) only while the developments thereon were valued at Ksh. 8,200,000/= (Eight Million Two Hundred thousand) only all totaling to Ksh. 8,650,000/= (Eight Million, Six hundred and fifty thousand) only. That in the month of November, 2009, the 2nd respondent launched a claim at the Kakamega North District Land Disputes Tribunal against the 1st respondent claiming for a portion of land then comprised in L.R. South Kabras/Shamberere/2977 and now known as L.R. South Kabras/Shamberere/3646 claiming to have purchased the same from the 1st respondent. That at the time of filing the claim with the Disputes Tribunal, the 2nd respondent was aware of the fact that the petitioner had purchased and was in actual possession of the subject land, had developed the same and was still in active development of the same. That despite the foregoing, the respondents deliberately and in total violation of the petitioner's right to natural justice refused to enjoin, involve or mention the petitioner in the proceedings at the Disputes Tribunal. That the petitioner's attempt to have the land registered in his name failed since the same had been restricted by the 2nd respondent and no dealings could be carried on it. That the petitioner was later shocked to learn that L.R. South Kabras/Shamberere/2977 had been sub divided into two portions being L.R. No. South Kabras/Shamberere/3645 and L.R. No. South Kabras/Shamberere/3646 and the petitioner's portion was now comprised in L.R. South Kabras/Shamberere/3646. That the petitioner was more shocked to learn that his portion had now been transferred to and registered in the name of the 2nd respondent. That the petitioner after carrying out due diligence was surprised to learn that there was a case at the Land Disputes Tribunal being Kakamega North District Land Disputes Tribunal case. That the petitioner further learnt that the tribunal particularly ordered that the portion under which the petitioner occupies being the commercial area from the tarmac be hived off and be registered in the name of the 2nd respondent. That the petitioner also learnt that the award of the Land Disputes Tribunal was adopted as an order of the court vide Butali SRMCC Misc. Award Number 4 of 2010, which then necessitated the transfer of the petitioner's portion to the 2nd respondent. The petitioner therefore humbly prays that this honourable court declares as follows:-

- (a) That Articles 22 (1), 23 (1) and 258 (1) of the Constitution of Kenya 2010 empowers the petitioner to bring this petition and vests this honourable court with jurisdiction to take cognizance of this matter.

(b) That the petitioner's fundamental rights and freedoms as envisaged under Articles 40 (1) 40 (2) b, 47 (1), 48 and 50 (1) of the Constitution of Kenya, 2010 have been infringed and violated by the respondents herein.

(c) That the Kakamega North District Land Disputes Tribunal acted ultra vires and in contravention of Section 3 of the Land Disputes Tribunal Act 1990 now repealed by ordering that L.R. No. South Kabras/Shamberere/2977 be subdivided and another title of 0.5 acres be created and transferred to the 2nd respondent.

Reasons whereof the petitioner seeks for the following orders:-

- (i) A declaration that the petitioner's fundamental rights and freedoms as enshrined under Articles 40 (1), 40 (2) b, 47 (1), 48 and 50 (1) of the Constitution of Kenya 2010 have been contravened and infringed upon the respondents.
- (ii) A declaration that the Kakamega North District Land Disputes Tribunal acted ultra vires and in contravention of the provisions of Section 3 of the Land Disputes Tribunal Act 1990 now repealed.
- (iii) An order of certiorari to remove into this honourable court and quash the award of the Kakamega North District Land Disputes Tribunal awarding the 2nd respondent 0.5 acres of land from L.R. No. South Kabras/Shamberere/2977 demarcated from the commercial area at the tarmac road.
- (iv) An order of certiorari to remove into this honourable court and quash the award of Kakamega North District Land Disputes Tribunal authorizing the Executive officer Butali Court to sign all the transfer forms.
- (v) An order of certiorari to remove into this honourable court and quash the adoption order given on the 15th October, 2010 vide Butali SRMCC Miscellaneous Award No. 4 of 2010.
- (vi) An order cancelling titles L.R. South Kabras/Shamberere/3645 and L.R. No. South Kabras/Shamberere/3646 and have the same revert to L.R. No. South Kabras/Shamberere/2977.
- (vii) An order compelling the 1st respondent to transfer a portion of land occupied by the petitioner measuring 0.07 Ha to the petitioner.
- (viii) In the alternative, an order for compensation of the petitioner for a sum of Ksh. 8,650,000/= (Eight million, six hundred and fifty thousand) only being the value of the subject land with the developments thereon by the respondents.
- (ix) An order that the respondents do bear the costs of this petition.

The 2nd respondent stated that, the petitioner started doing his development on land parcel number South Kabras/Shamberere/3646 before obtaining title deed for the portion of land that he bought. That the petitioner bought his portion of land after they had bought their portion of land from the registered owner. That the registered owner has sold their portion which was touching the tarmac road and demarcated the same for their own use. That the petitioner started his development on their portion of land despite having knowledge that they had already bought the portion. That the petitioner wanted to grab their portion of land because of his financial position but they managed to get title deed for their portion before he got the title deed for his portion. That the petitioner started his development on their portion of land despite having knowledge that they had already bought the portion. That the petitioner should remove his structures from their portion of land and move it to his portion of land. That the petitioner had colluded with the registered owner to deny them title for their portion. That they pursued their rights through the Kakamega North District Land Disputes Tribunal which gave an award in their favour. That the award of the Kakamega North Land Disputes Tribunal was adopted as an order of the court vide Butali SRMCC Misc. Award November, 4 of 2010. That the Executive Officer Butali Law Court executed transfer documents in their favour and they obtained title for land parcel number South Kabras/Shamberere/3646. That land parcel number South Kabras/Shamberere/3646 is subdivision of land parcel number South Kabras/Shamberere/2977. That when land parcel number South Kabras/Shamberere/2977 was subdivided it created land parcel numbers South Kabras/Shamberere/3645 and 3646. That no constitutional rights of the petitioner have been violated because he is the author of his own losses after trespassing into our land and started developments without our consent and or any legal rights.

The 4th and 5th respondents submitted that the proceedings of the tribunal sought to be quashed took place sometimes in the month of November, 2009 a month after the alleged purchase by the petitioner. It is evident that the proceeding were concluded on 11th December, 2009 when the tribunal visited the suit land. The decision of the tribunal was adopted as court's judgment on the 15th April, 2011 and on 4th April, 2013 almost two years later execution orders were issued by the court. While this was happening the petitioner who allegedly was in possession and had developed the land was not aware. There is no evidence to show that the 1st respondent who sold this portion both to the petitioner and the 2nd respondent ever appealed or otherwise contested the finding of the tribunal. This petition has been filed after the petitioner and by extension or collusion the 1st respondent realized that the stipulated time to either appeal against the decision or seek to quash the decision vide judicial review proceeding has elapsed.

This court has considered the application and the submissions therein. It is a finding of fact that the 2nd respondent pursued his rights through the Kakamega North District Land Disputes Tribunal which gave an award in their favour. That the award of the Kakamega North Land Disputes Tribunal was adopted as an order of the court vide Butali SRMCC Misc. Award November, 4 of 2010. That the Executive Officer Butali Law Court executed transfer documents in their favour and they obtained title for land parcel number South Kabras/Shamberere/3646. That land parcel number South Kabras/Shamberere/3646 is subdivision of land parcel number South Kabras/Shamberere/2977. That when land parcel number South Kabras/Shamberere/2977 was subdivided it created land parcel numbers South Kabras/Shamberere/3645 and 3646. This is the order the petitioner intends to quash. In the case of Kenya Bus Company vs. Attorney General & Others Misc Civil Application

No. 413 of 2005 the court held that;

- (i) *An unchallenged court order cannot be the basis of a Constitutional application (to prevent execution)*
- (ii) *Non disclosure of material facts is sufficient to warrant the dismissal of a Constitutional application*
- (iii) *A Constitutional court has inherent powers to prevent abuse of its process*
- (iv) *A Constitutional application brought in violation of fundamental principles of law is incompetent and should be dismissed.*

In the case of Booth vs. Mombasa Water Company Misc Civil Application No. 1052 of 2005 the court held that;

“I wish to reiterate and to reinforce the principles I endeavored to define and establish in my recent ruling in the case of LABHSONS LTD v MANULA HAULIERS LTD HCCC No 204 of 2005 where I held inter alia in the articulation of and enforcement of fundamental rights this court cannot disregard the fundamental principles of law such as res judicata, limitation, laches, and if I may add to the list estoppel, waiver and compromise.”

“Our Constitution does assume that there are also fundamental principles of law in existence although the constitution does itself so to speak occupy the position of the super structure. That superstructure has a foundation and one of the foundations is the existence of fundamental principle of law. It is reckless for applicants to ignore the fundamental principles of law when filing or articulating constitutional applications. Many of the identified fundamental principles of law are based on public policy principles of fairness and justice...”

“Our Constitution is not a cloud that hovers over the beautiful land of Kenya – it is linked to our history, customs, tradition, ideals, values and on political cultural social and economic situations. Its dynamics and relevance is deeply rooted in these values. Cut off from these factors it would become redundant and irrelevant. I refuse to accept that the Constitution is a skeleton of dry bones without life and spirit. The least it is expected to have and which we cannot deny it is the spirit of its Framers. To me we must give it much more:”

The petitioner alleges violation of fundamental rights and freedoms and is therefore his duty to plead his case with particularity, in the case of Anarita Karimi Njeru vs. The Republic (1976-1980) eKLR 1272 where the Court established the principle that a person seeking redress from the High Court on a matter which involves reference to the Constitution 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. From the evidence on record, the respondent acquired title through a court order which was never appealed against. The principle in the **Anarita Karimi Njeru** was clarified in the case of **Trusted Society of Human Rights Alliance vs. Attorney General & 2 others, Petition No. 229 of 2012**.

This principle was re-affirmed by the Court of Appeal in the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance and others, Nairobi Civil Appeal No. 290 of 2012** where it was stated as follows:

"We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point...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 facts of this case it is in my view that the petition lacks any specificity and a remedy existed in other laws. A constitution petition is meant to deal with clear constitutional matters. It is to be applied in clear cases where facts can be ascertained, it is my view that, where there is need for further facts then the petitioner ought to revert to a civil claim. Constitutional jurisdiction should not be trivialised and should be confined to purely constitutional matters. Where the ordinary law provides for relief that relief must be pursued. For those reasons I find this petition is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 29TH DAY OF JULY 2020.

N.A. MATHEKA

JUDGE