



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION 13 OF 2012

GABRIEL OCHONG ORIWO

PHILISTER ACHAPA OBUOR.....PLAINTIFFS

VERSUS

AUGUSTINO OMWANDA &

DISTRICT LAND SURVEYOR.....DEFENDANTS

R U L I N G

1. This is a ruling on a Notice of Motion dated 5/11/2012 filed contemporaneously with a petition of even date on 6/11/2012. The motion was brought under rule 20 and 21 of the Constitution of Kenya (supervisory jurisdiction and protection of fundamental rights and freedoms of the Individual) High Court practice and Procedure Rules, 2006, and articles 20, 22 and 23 of the Constitution of Kenya, 2010 and Sections 7 and 19 of the 6th Schedule thereof.

2. In all, five (5) prayers are sought but prayers 1 and 2 are spent and therefore not for consideration at this stage. This ruling is therefore focused on prayers 3,4,and 5, which are as follows:

Prayer 3: That a conservatory order of prohibition be granted to prohibit the 1st Respondent – **AUGUSTINO OMWANDA** – from using part of petitioners land that he has encroached into.

Prayer 4: A mandatory injunction do issue by way of conserving the petitioners right to property and directing the 1st Respondent to remove the poles planted by him pending the hearing and determination of the petition herein.

Prayer 5: That the costs of this application be borne by the Respondents.

3. The parties embroiled in the application are **GABRIEL OCHONG ORIWO** and **PHILISTER ACHAPA OBUOR** as applicants while **AUGUSTINO OMWANDA** and **THE DISTRICT LANDS SURVEYOR, UGENYA** are respondents. The properties involved are **NORTH UGENYA/SEGA/12** **NORTH UGENYA/SEGA/216** and **NORTH UGENYA/SEGA/1217**.

4. The application is premised on the grounds that the respondents have significantly encroached and placed beacons on the petitioner's land illegally taking up close to 2 Ha of 1st petitioner's land and reaching 1.5 metres into 2nd petitioner's land. The 1st Respondent is also said to have fenced off land which legally belong to the Petitioners.

5. The supporting affidavit gives some background and history to the application. It is stated that sometimes in August 2012, 4 people from the office of **THE DISTRICT LANDS SURVEYOR, UGENYA** (2nd Respondent) went to 1st Petitioner's (**GABRIEL OCHONG ORIWO**'s) area at Ugambe on invitation of 1st Respondent – **AUGUSTINO OMWANDA**. They were accompanied by two policemen and the mission was to survey land parcel No. **NORTH UGENYA/SEGA/12** belonging to 1st Respondent which borders parcels Nos. **NORTH UGENYA/SEGA/1216** belonging to 1st petitioner and Parcel NO. **NORTH UGENYA/SEGA/1217** belonging to 1st petitioner's deceased brother.

6. At the end of the exercise, the 1st Petitioner had acquired portions in land parcels Nos. **NORTH UGENYA/SEGA/1216** and **NORTH UGENYA/SEGA/1217**. The 1st Respondent is then said to have started carrying out activities on the encroached portions thereby effectively stopping the petitioners from using the portions. That gave rise to the suit and the present application is meant to forestall and even reverse the Respondents actions. The Petitioners, it was deponed, are likely to suffer irreparable loss if this is not done.

7. The 1st Respondent replied vide a replying affidavit filed on 7/12/2012. The replying affidavit is undated. The deponent – **AUGUSTINO OMWANDA** – stated, inter alia, that he owns land parcel No. **NORTH UGENYA/SEGA/12** together with **WILLIAM OPONDO OMALA**, the late **HENRY MUTULA** and **DISMAS OTHWILLA**. The petitioners own parcels numbers: **NORTH UGENYA/SEGA/1216** and **NORTH UGENYA/SEGA/1217**, which border his land.

8. Adjudication took place long ago. Over time, the 1st Respondent's land was encroached into. There are people too who bought properties in the neighbourhood recently and they don't know their boundaries well. There was need therefore to establish boundaries and help was sought from the area survey office.

9. The Siaya District land surveyor then visited the site after notifying all persons with parcels of land in the neighbourhood. The aim was to undertake boundary confirmation. But the petitioners and their family members became violent thus rendering the exercise impossible.

10. The surveyor left the site but advised that a dispute be registered with the area District land Registrar. This was done and the Registrar, after notifying all owners of adjoining parcels of land, arranged for a site meeting to establish the boundaries. On the due date however, the petitioners claimed they were not served.

11. Another date was taken. Again all concerned parties were notified. This time round, the exercise was carried out.

The local administration was represented. Parties were invited to make representations. Boundaries were marked, beacons placed, and dissatisfied parties advised to lodge appeals. The 1st Respondent pleaded lack of knowledge of any appeal lodged by the petitioners.

12. Then the petitioners came to **COURT** vide this suit. They obtained Ex parte orders and used that as a pretext to destroy the boundaries.

13. According to the 1st Respondent, the facts of this matter do not raise constitutional issues. The petitioners have not established violation of their rights. The matter is a boundary dispute and the petitioners have not shown that the relevant procedure was contravened, overlooked, overstepped, misapplied, misused, abused or disregarded. The Registrar is said to have acted within his powers in adjudicating the boundary dispute. He also followed due diligence by notifying all the parties.

14. And according to the 1st Respondent, the petitioners are wrong in suing the District Surveyor. It is the Registrar, he deponed, who should have been enjoined but was conveniently left out. The District Surveyor, it was stated, is not a legal entity known in law. Further stated was that this is a matter to be dealt with under the existing and applicable statutes dealing with land. There are no Constitutional issues arising.

15. The 1st Respondent's replying affidavit elicited a riposte from the petitioners by way of supplementary affidavit. The affidavit is dated 31/1/2013. According to the petitioners, there was no boundary dispute, the boundaries having been fixed long ago. And it appears that the exercise done recently to establish boundaries was done in their absence. After the exercise however, the petitioners went to Land Registrar's office to lodge an appeal. It is reiterated that the petitioners constitutional rights were violated. It is therefore proper to bring the suit the way it is.

16. No oral arguments were presented. Submissions were availed in lieu. The petitioner's submissions were filed on 2/5/2013. The 1st Respondent's submissions were filed on 19/2/2013.

17. The petitioner's submissions captured the issues thus:-

(i) Whether the court has jurisdiction to hear the matter.

(ii) Whether there is a case of violation of fundamental rights.

(iii) Whether the petitioner's are entitled to the remedies of prohibition and injunction in view of the alleged trampling of their property rights by the respondents.

18. The submissions then predicate the petitioner's rights to come to Court under article 23(1) of the Constitution and allege violation of their property rights under article 40 of the constitution. The Court – High court in this sense – is said to be clothed with the power to entertain the suit under article 23(1) of the Constitution while the petitioners bid to enforce their rights is premised on article 22(1) of the Constitution. A reinforcement of the court's power to entertain these proceedings is cited under article 165(3) of the Constitution. The entitlement of the petitioner's to due process is said to come under article 47 of the Constitution. The thrust of the petitioner's arguments is that the High Court has the requisite jurisdiction to hear their claim.

19. It is worthy pointing out that a manifest contention between the parties was whether it is the High Court, constituted as a human rights court, or the Environment and Land Court, which should hear the matter. The petitioners opine that the High Court should do so but the respondents position is that this is a matter for Environment and Land Court. But this is now moot as both sides have submitted to the jurisdiction of Environment and Land Court.

20. Further averments in the petitioner's submissions point to violation of petitioners property rights in the manner the respondents went about establishing and confirming the boundaries. The exercise was said to be done in disregard of both statutory and procedural requirements. The petitioners are said not to have been given a hearing. No notice too was given to them.

21. The submissions conclude by urging that the petition be allowed.

22. The 1st respondent reiterated that statutory and procedural requirements were adhered to and the petitioners were faulted for not lodging an appeal as procedure enjoined them, if dissatisfied, to do. This suit is said to have stalled the boundary determination process because of the Exparte orders issued.

23. According to the 1st Respondent, the boundary fixing exercise was legal and procedural. The matter does not raise any Constitutional issues and it is the Environment and Land Court, not the High Court, that should handle the matter.

24. The legality of the exercise consists in the fact that all procedure was followed. All the parties including the petitioners were given the requisite notices and all were allowed to make representation to the Land Registrar. The exercise itself was done openly.

25. And the petitioner's right after the exercise was that of appeal. They could not ignore that route and file a fresh suit. The decided case of **DORCAS INDOMBI WASIKE VS BENSON WAMALWA KHISA & ANOTHER (2010) eKLR** was said to buttress this position.

26. The petitioners are also faulted for not specifically pointing out the relevance of the various constitutional provisions they seek to rely on and their allegation that the 2nd Respondent lacks moral probity, has betrayed public trust, has failed to ensure objectivity and impartiality in decision making, has practised favouritism, discrimination, improper motives and engaged in corrupt practices is said to be without basis.

27. The court is asked to dismiss the petition, the reasons for that being that the boundary fixing exercise was done procedurally and lawfully while the petitioners, if dissatisfied, should have gone on appeal instead of filing a fresh suit. It was also said that the matter is not a constitutional one as the relevant statutes have adequately catered for it.

28. I have considered the material laid before me. I have some misgivings about the way both sides presented their submissions. The presentation, articulation and thrust of the applicant's submissions is largely petition – focused, with the application only appearing as a peripheral subtext. Indeed the submissions end with a prayer that the petition, not the application, be allowed.

29. The orders sought in the application are interim or interlocutory. I expected the submissions to spell out the necessary legal considerations required to grant them and then highlight the consequences that would befall the applicants if the orders are not granted. Instead, the jumbled manner in which the submissions are presented inevitably lead to the prayers in the petition itself. Those prayers are of final nature and the legal imperatives necessary to grant them are different from those for prayers in the application. The submissions are therefore off target.

30. The Respondents submissions are not much better. They start well by stating clearly the prayers in the application. Then after highlighting the background, some ambivalence becomes apparent. The application then seems to be left mid-stream and the petition takes prominence. Ultimately, the final prayer is that of dismissal of the petition, not the application.

31. It is clear that in a scenario like this, the court has to handle the issues raised by both sides very carefully.

And this is because most of the issues are at the core of the petition itself. For instance, jurisdiction and violation of human rights are issues raised by the applicant's side. The two issues are also raised by the respondents side but in a somewhat different way. The respondents side questions the appropriateness of the forum and then proceeds to question whether constitutional issues are raised. The issue of forum raises jurisdictional concerns while reference to constitutional issue points to alleged violation of human rights.

32. If I delve into these issues now, I run the risk of prematurely and inadvertently giving a pointer as to the way the petition will go. And the issues as raised are addressed to the petition, not the application. Yet this ruling does not concern the petition.

33. Looking at the petition as filed, the answer to petition and cross-petition filed by 1st Respondent, it is clear that these are issues I will have to address at length at the final determination of the suit. I don't consider it appropriate to flirt with them now. It is enough for me that the submissions presented and the application are completely mis-aligned.

34. When things are like this, the respondent does not loose. It is the applicant who does not win. Both sides goofed. But while the respondent's side gains from the applicants gaffe, the applicants gain nothing from the respondents.

35. The end result is that the prosecution of the application by the applicant was wanting. It fell short of reaching the necessary thresh hold for positive results. The upshot there is that the application is hereby dismissed with costs.

A.K. KANIARU – JUDGE

7/10/2014

7/10/2014

A.K. Kaniaru – Judge

George Dianga – Court clerk

No party present

Yogo for Ojuro for Applicant

Nyamweya (absent) for 1st Respondent

Interpretation – English/Kiswahili

COURT: Ruling read and delivered in open COURT.

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

7/10/2014