



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CONSTITUTIONAL PETITION NO. 1 OF 2015

CHITA NGOLO CHITA.....PETITIONER

VERSUS

1. DISTRICT LAND REGISTRAR-KILIFI

2. DISTRICT SURVEYOR-KILIFI

3. DISTRICT ADJUDICATION OFFICER-KILIFI.....RESPONDENTS

AND

INDRAVADAN ASHIBHAI PATEL.....INTERESTED PARTY

BILLY M. MUITA.....THIRD INTERESTED PARTY

JUDGMENT

Background

1. This Petition was initially filed at the High Court at Mombasa on 5th September 2011 as ***Mombasa High Court Petition No. 53 of 2011***. By his petition lodged as aforesaid in person, and later amended on 20th November 2015, Chita Ngolo Chita (hereafter the Petitioner) prays for: -

a) A declaration that the Respondents actions of withholding and/or denying the Petitioner access to the original adjudication record, the Registry Index Map (as in 1984) and or other lands registry records relating to all that area known as Buni/Kisimani Adjudication Section is unlawful and in contravention of the Petitioner's rights under the Constitution;

b) An order compelling) the Respondents to follow the law and immediately table before this Honourable Court the procedures it followed to alter the original boundaries in relation to Plots Nos. 218, 219, 209, 208, 207 and 210 when creating Plot No. 1181 in reference to the original registration records and adjudication of 1984; and

c) A mandatory order do issue compelling the Respondents to rectify and fix boundaries of Buni/Kisimani 218 measuring approximately 4.01 Ha (9.90871 Acres) as per Title issued on 1st October 2009.

d) Any other order for the protection and further preservation of the Applicants fundamental rights under the Constitution as this Court may deem just and convenient to grant.

2. The facts leading to the Petition are that the Petitioner is the owner and occupies all that land bordering Plot Nos. 209, 207, 208 and 219 (which is also referred to as Plot No. 28). The Petitioner accuses the Respondents of creating Plot No. 1181(from the Original Plot No. 207 and 208) in the name of one Indravadan Ashibhai Patel (the Interested Party) sometime in 1984. The Interested Party has made numerous attempts to acquire the Petitioners adjacent Plot No. 218 but after failing to get the same resorted to the use of the Provincial Administration to hive off the land.

3. The Petitioner avers that sometimes in August 2011, he lost his elder brother and when he tried to bury him at the family graveyard which falls in the middle of the newly created Plot No. 1181, he was stopped by the Provincial Administration and was forced to bury his brother elsewhere. Soon thereafter the Petitioner was served with suit papers emanating from ***Kaloleni SRM's Civil Suit No. 271 of 2011*** wherein

he was named as a Defendant.

4. It is the Petitioner's case that to enable him to effectively respond to the suit, he visited the lands office at Kilifi to acquire the original land adjudication record but the Respondents herein declined to issue him with any documents. As a result, the Petitioner avers that he is now "handcuffed" and unable to respond effectively to the suit filed against him.

5. The Petitioner contends that by their said actions, the Respondents have violated his rights to access public information, to protection from deprivation of property and that the Respondents have treated him in a malicious, partial and discriminatory manner.

6. The District Land Registrar, the District Surveyor, and the District Land Adjudication Officer Kilifi (the 1st, 2nd and 3rd Respondents) are however opposed to the Petition. In Grounds of Opposition dated 18th August 2016 as filed herein on their behalf on 18th August 2016 by the Honourable the Attorney General, the Respondents oppose the same on the grounds inter alia, that:

1. The Petition does not contain the necessary particulars or describe the suit property sufficiently to enable the Respondents to respond to the same and it ought to be struck out for being fatally and incurably defective.

2. The Respondents deny that there is any discrepancy between the Registry Index Map and the actual boundaries on the ground as alleged.

3. The Respondents deny that the petitioner was denied access to the Original Adjudication Record in respect of the suitland or that he was discriminated as alleged or at all.

4. The Respondents deny that any Constitutional provisions, in particular Article 40 thereof was contravened or violated by the Respondents.

5. The Respondents deny that the Petitioners are entitled to any of the orders sought in the Petition.

7. Similarly, Indravadan Ashabhai Patel (the Interested Party) is equally opposed to the Petition. In a Replying Affidavit filed herein on his behalf on 8th August 2012 sworn by a donee of his power of attorney Isaac Momanyi Mamboleo, the Interested Party avers that he is the absolute proprietor of all that parcel of land known as Buni/Kisimani/1181.

8. The Interested Party further avers that he has been wrongfully enjoined in this Petition as his parcel of land does not share a common boundary with the Petitioner's parcel of land-Buni/Kisimani/218. The Interested Party asserts that he was compelled to file the suit in the **Kaloleni SRM's Court** after the Petitioner trespassed upon his parcel of land on 16th August 2011 and started digging a grave thereon with the intention of burying his dead relative thereon.

9. The Interested Party further asserts that the District Surveyor had already visited the disputed property on 24th June 2010 in the presence of the Petitioner and had ascertained the boundaries thereof and the Petitioner is being economical with the truth in claiming a violation of his rights herein.

10. By an Order issued by the Honourable Justice Anne Omollo in Mombasa on 16th February 2015, the Petition was transferred to Malindi for hearing and disposal. Subsequently and by the consent of parties, directions were taken on 7th February 2019 that the Petition proceeds by way of viva voce evidence.

The Petitioner's Case

11. In support of his case, the Petitioner called a total of four witnesses at the trial.

12. PW1-Chita Ngolo Chita is the Petitioner and a resident of Shauri Moyo village in Rabai. He testified that he is the registered owner of the parcel of land known as Buni/Kisimani/218. He further told the Court that land adjudication was done in their area in 1984 although they were not issued with titles until the 1st day of October 2009 when he obtained his own.

13. PW1 testified that after sometime, the Interested Party went to their area claiming to have bought land. Thereafter he started putting structures on the land using PW1's land as an access. A shortwhile later, PW1 received a letter dated 26th June 2012 asking the District Surveyor (the 2nd Respondent) to give a Report on the land. Subsequently the boundary beacons were removed and placed inside PW1's land.

14. After receiving the Survey Report, PW1 went to the Lands Office and asked for the documents but he was not given. He testified that his land used to be 4.01 Ha and urged the Court to give it back to him.

15. On cross-examination, PW1 conceded that he had not produced documents to demonstrate that he had sought any help from any Government agency. He told the Court he did not agree with the Report of the Provincial Surveyor dated 7th August 2013.

16. PW1 further told the Court that his parcel is adjacent to Plot Nos. 207, 209 and 219. Plot Nos 207 and 208 were amalgamated into Plot No. 1181. He conceded that the survey was done in his presence and following an application that was agreed on by the consent of the parties in Court. He further conceded that even though the Report showed his land was 4.01 Ha, it did not take into account the portion he had been cultivating before. He further denied accusing the Respondents of refusing to give him the map of the area and told the Court that

his surveyor had used the map.

17. PW2- Ronald Chita is also a resident of Shauri Moyo and an elder brother to the Petitioner. It was his testimony that the Interested Party had taken his younger brother's land and that he had since fenced it with a wall. He urged the Court to have the boundary of his brother's land reverted to where it was before.

18. On cross-examination however, PW2 testified that he did not know how much of the Petitioner's land had been taken away by the Interested Party. He told the Court he was the proprietor of Plot No. 219 and denied taking away a portion of the Petitioner's land.

19. PW3- Edward Marenye Kiguru is a Licenced Land Surveyor based at Mombasa. He told the Court that he was instructed by the Petitioner's Advocates in June 2016 to survey the disputed property. He carried out the survey and filed a Report dated 5th July 2016.

20. On cross-examination, PW3 told the Court that according to his Report, Plot No. 218 measures only 1.81 Ha thereby leaving a discrepancy of 2.20 Ha. The land is therefore smaller on the ground compared to what appears on the title.

21. Questioned on the details of the Report however, PW3 conceded that he had not gone to the ground himself and that instead, his associate one Dennis Malembeka had prepared the Report. Probed further, PW3 conceded further that the said Malembeka is not a Licenced Surveyor. PW3 further conceded that when the survey was done, they had not given any notice to the Interested Party as required under the Survey Act.

22. PW4- Khamisi Mzuya Chai is a teacher and the Petitioner's neighbor in Rabai. He told the Court they used to live in Plot 207 but his father sold the land. Prior to the sale there was no dispute on the boundary although he came to hear there was a dispute thereafter. He told the Court the Petitioner was being defrauded of his land and urged the Court to administer justice.

The Respondents Case

23. On their part, the three Respondents collectively called one witness in support of their case.

24. DW1-Athman Chiro Mboka is a Surveyor based at the District Survey Office, Kilifi. He told the Court he was familiar with the matter in dispute and was aware of the creation of Plot No. 1181 as their office had participated in its creation.

25. DW1 told the Court Plot No. 1181 was created from the original Plot No. 207 measuring 2.48 Ha and Plot No. 208 measuring 1.48 Ha. Plot 1181 thus measured 3.96 Ha.

26. On cross-examination, DW1 told the Court their office never received any formal complaint in regard to the discrepancy on the sizes of the plots. According to him, it was Plot No. 218 which had encroached on other plots. He further told the Court their office is only the custodian of Maps and that the RIM was kept instead at the District Survey Office. He denied that their office had declined to avail the RIM to the Petitioner.

27. DW1 further testified that where a parcel of land had a dispute with a neighbouring one, the concerned officers would visit the ground and resolve it. What is on the ground is what would be put on record. He was however unaware if the relevant offices had visited the ground in this case.

The Interested Party's Case

28. The Interested Party testified through the donee of his power of attorney Isaack Momanyi Mamboleo as the sole witness. The witness told the Court that the Interested Party bought the two pieces of land from one Betty Wavinya Mulumba. The two were later amalgamated into Plot No. 1181.

29. The Interested Party told the Court that sometime on 16th August 2011, he was called by a Caretaker and was told there were some people who were digging a grave on his parcel of land. The Petitioner was one of them. The Interested Party then reported the matter at Kaloleni Police Station and sought an order of injunction at ***Kaloleni SRMCC No. 271 of 2011*** against the Petitioner. The orders were issued although the case was later stayed pending the conclusion of this matter.

30. The Interested Party testified that after the Petitioner filed this matter, the parties agreed by consent for a Surveyor to visit the land. The Survey Report later filed in this Court shows the Interested Party's land does not in any way border the Petitioner's land. There is a Plot No. 209 between the Petitioner's land and that of the Interested Party.

31. On cross-examination, the Interested Party conceded that he had tried to buy the adjacent Plot No. 219 from a relative of the Petitioner but the Petitioner objected to the sale.

Analysis and Determination

32. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses and the evidence adduced at the trial. I have similarly considered the submissions and authorities placed before me by the Learned Advocates acting for the parties herein.

33. In his Amended Petition dated 20th November 2015, the Petitioner prays for a declaration that the Respondents actions of withholding and/or denying him access to the original adjudication record, the Registry Index Map (as in 1984) and or other land registry records relating

to the area known as Buni/Kisimani Adjudication Section is unlawful and in contravention of his rights under the Constitution. In that respect, he urges this Court to compel the Respondents to follow the law and immediately table before this Court the procedure it followed to alter the original boundaries in relation to a number of Plots within the area when the respondents created Plot No. 1181 which is presently registered in the name of the Interested Party.

34. Ultimately, the Petitioner urges this Court to issue a mandatory order compelling the Respondents to rectify and fix boundaries of his own Plot No. Buni/Kisimani/218 and to issue any further orders to protect his fundamental rights under the Constitution.

35. The circumstances leading to this Petition according to the Petitioner are that sometimes in August 2011, he lost his elder brother and that when he tried to bury him at the family graveyard which falls right in the middle of the newly created Plot No. 1181 Buni/Kisimani, he was stopped by the Provincial Administration and he was therefore forced to bury his brother elsewhere.

36. The Petitioner told the Court that soon thereafter, he was served with suit papers emanating from **Kaloleni SRM's Civil Suit No. 271 of 2011** wherein the Interested Party herein had sued him seeking orders of injunction to stop the burial and any further trespass by the Petitioner. It is the Petitioner's case that to enable him to effectively respond to the suit, he visited the Lands Registry in Kilifi to acquire the said records but the Respondents declined to issue him with any. As a result, the Petitioner told the Court he was now handicapped and unable to respond effectively to the suit filed against himself.

37. The Petitioner contends that by their said actions, the Respondents have violated his rights to access to public information and to protection from deprivation of property. It is further his case that the Respondents have treated him in a malicious, partial and discriminatory manner and hence the orders sought in this matter.

38. Subsequent to the institution of this Petition in Mombasa and by a consent in writing dated 26th November 2012, recorded by Learned Counsels for the Petitioner, the Respondents and the Interested Party in Court on 7th December 2012, the parties herein agreed as follows: -

- 1. By consent the Provincial Surveyor Coast and the District Registrar Kilifi do ascertain and fix boundaries of Plot No. Buni/Kisimani/218 measuring approximately 4.01 Ha (9.90871 acres) as per the title Deed issued on the 1st October, 2009;**
- 2. By consent there by a stay of proceedings in Kaloleni Law Courts registered as SRMCC No. 271 of 2011 between Indravadan Ashabhai Patel (the Interested Party herein) –vs- Chita Ngolo Chita (the Petitioner herein) and the status quo arising and prevailing therefrom be maintained pending the hearing and determination of this Petition; and**
- 3. By consent the Provincial Surveyor and the District Land Registrar Kilifi do file a Report to the Court within 90-days from the date of filing this consent."**

39. In compliance with the said orders, the Provincial Surveyor visited the parcels of land in dispute on 7th August 2013 and proceeded to prepare a Report dated 19th August 2013 which Report was subsequently filed herein on 23rd August 2013.

40. As it were, the Petitioner's main contention herein was that he was denied access to the original adjudication records, the Registry Index Map as in 1984 and other land registry records relating to the suit property. Other than the Registry Map (RIM) which was specified in his pleadings however; the Petitioner did not specify and it remains unclear to this Court what the Petitioner meant by the "Original adjudication records" and "other land records."

41. From the record of his testimony herein, the Petitioner when questioned by his own Advocates as to the nature of the other documents stated in re-examination that there was nothing else he had asked for other than the Registry Index Map. Even as far as that Map is concerned however, it similarly remained unclear to me how the Respondents could be accused of denying the same to the Petitioner. I say so because the Petitioner did not table any request or letter addressed to the Respondents seeking to be availed the same.

42. On cross-examination by the Respondent Counsel and that of the Interested Party herein, the Petitioner conceded that he did not produce any document to show that he had sought help and that he did not forward any complaint in writing to the Lands Office. That much was indeed confirmed by the Respondents' sole witness Athman Chiro Mboka (DW1). According to DW1, the RIM is a document obtained from the Surveys Office on payment of the requisite fee. DW1, the District Surveyor was however categorical that their office neither received a request nor a complaint in regard to the RIM for the area in dispute from the Petitioner.

43. In the absence of any request for any document, the Petitioner cannot be heard blaming the Respondents or any other person for failing to supply him and or denying him access to documents which he had not requested for in the first place.

44. The Petitioner also accused the Respondents of altering the original boundaries to the disputed area of land and urged this Court to compel the Respondents to rectify and fix the same particularly in respect of the Petitioner's parcel number Buni/Kisimani/218. As I have alluded to hereinabove, the determination of that issue was indeed the first order of business shortly after this Petition was instituted.

45. By a consent recorded before the Honourable Justice Tuiyot at Mombasa on 7th December 2012, the parties herein agreed that the Provincial Surveyor Coast Province and the District Land Registrar Kilifi do ascertain and fix the boundaries of the said Parcel No. Buni/Kisimani/218 and to thereafter file their Report in Court. Accordingly, the Provincial Surveyor A.K Munyasia visited the suitland on 7th August 2013 and thereafter prepared a Report dated 19th August 2013 that was filed herein on 23rd August 2013.

46. While the Petitioner disowned the contents of the Report at the trial herein, he did produce it as one of his own documents (petitioner's Exhibit 7). That Report gives details of what was obtaining on the ground when the Provincial Surveyor visited the land. A perusal thereof

reveals that the survey was done in the presence of the owners of the properties. It also shows that the Petitioner's Plot No. 218 measures 4.01 Ha but notes that there is no physical demarcation of the boundary between Plot 218 and Plot 209.

47. During cross-examination at the trial herein, the Petitioner told the Court that even though the Survey Report showed that his parcel was 4.01 Ha as reflected in his title deed, it did not take into account the portion that the Petitioner had been cultivating before the Interested party's Plot No. 1181 was created.

48. As it were, the Petitioner did not demonstrate to this Court the existence of any boundary dispute between himself and the Interested Party herein. From the material placed before me, the said Plot No. 1181 was an amalgamation of two Plots Numbers 207 and 208 which were adjacent to the Petitioner's Parcel. It is apparent that a dispute on the boundaries arose when the Interested Party moved to purchase the said parcels. It is also clear that the dispute was subjected to the relevant offices and that the boundaries were subsequently verified as per the findings of the Provincial Surveyor in the Report dated 19th August 2013 aforesaid.

49. From the Petitioner's Affidavit in support of his Chamber Summons application dated 3rd May 2012 in which he sought for the Provincial Surveyor to ascertain and fix the boundaries, he states as follows at paragraph 8 to 12 thereof: -

8. That my neighbours and the owners of Plot Nos. 207 and 208 sold their stated Plots to an Asian called Indravan Ashabhai Patel (Annexed are copies of the two titles marked as CMC-2").

9. That after Mr. Patel purchased the same, he amalgamated them and came up with one parcel of land known as Buni/Kisimani/1181.

10. That on the 24th June 2010, I received a letter from the Kilifi District Survey Office informing me of a boundary verification/identification of the two (amalgamated Plots known as No. 207 and 208) as a party bordering the same parcels of land. (Annexed is a Copy of the Letter marked as CNC-3".

11. That on the 24th June 2012 when the District Surveyor came, alongside other officials they altered the existing beacons into my Plot including even the graveyard.

12. That being the position, I am also humbled to request the District Land Registrar to ascertain and also fix my boundaries.

50. It is precisely those prayers that led to the findings of the Provincial Surveyor as filed herein on 23rd August 2013. He did not dispute that Report prepared on his own application. Some three years down the line however, the Petitioner produced another Survey Report prepared by one Dennis Malembeka and dated 5th July 2016. That Report was produced at the trial herein by PW3-Edward Marenye Kiguru.

51. That Report was however not helpful to the Petitioner's cause. In the first instance, it shows clearly that there was a Plot No. 209 between the Petitioner's Plot No. 218 and the Interested Party's Plot No. 1181. The Petitioner has not sued the owner of Plot No. 209 who according to his Survey Report is his immediate neighbor. But secondly and more importantly, that Report as was conceded by PW3 herein was not prepared by a Licenced Surveyor as by law required.

52. Upon being questioned on the Report, PW3 conceded that it was indeed prepared by the said Malembeka who is neither licensed nor authorized to undertake survey work. That Report cannot therefore be relied upon by this Court as PW3 himself conceded he neither went to the ground nor prepared the same.

53. In my considered view, it was apparent that the Petitioner had issues with the land adjudication as done in the area in 1984 and hence his request for information on the RIM for that year as well as the adjudication records. Under Section 26 of the Land Adjudication Act, an objection relating to the Adjudication register ought to have been raised within 60 days of the completion thereof. No explanation has been given why this was not done until the year 2011 when this Petition was filed.

54. Thus while the Petitioner purports that his rights under Article 40 of the Constitution have been violated, I am unable to find in what manner the same were breached by either the Respondents or the Interested Party herein. The Petitioner has completely failed to specify with precision in his pleadings and testimony herein how his Constitutional rights were infringed.

55. In the premises, I find and hold that the Amended Petition has not only failed to meet the legal threshold for a Constitutional Petition but also failed to disclose any cause of action against the Respondents and the Interested Party herein.

56. The upshot is that the Petition is dismissed with costs.

Dated, signed and delivered at Malindi this 2nd day of October, 2020.

J.O. OLOLA

JUDGE