



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

CONSTITUTION PETITION NO. 6 OF 2013

IN THE MATTER OF PROTECTION OF RIGHTS TO PROPERTY UNDER ARTICLES NO. 40 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19, 20, 22, 23, 40 AND 159 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER LAND PARCEL NO. ABOTHUGUCHI/GITHONGO/3410 AND 3413

Being the subdivisions of parcel NO. ABOTHUGUCHI/GITHONGO/398

BETWEEN

M'MIRITI M'MUGAA..... PETITIONER

VERSUS

DISTRICT LAND REGISTRAR MERU CENTRAL 1ST RESPONDENT

THE DISTRICT LAND SURVEYOR..... 2ND RESPONDENT

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

ADMORE INNERMANS LTD 1ST INTERESTED PARTY

JOSEPH MUROKI M'IMPWI..... 2ND INTERESTED PARTY

JUDGMENT

1. On 29th May, 2013 the petitioner, M'Miriti M'Muga lodged in court a constitutional petition supported by his affidavit, whereby he seeks the following prayers;

a) A declaration to issue to the effect that the respondents intention and threats to affect, interfere or otherwise excise the petitioner's parcels of land NO. L. R ABOTHUGUCHI/GITHONGO/3410 and 3413 to create a road of access to the interested parties' parcels of land or any other contravenes the petitioner's fundamental rights as to protection of property as per article 40 of the Kenyan Constitution.

b) An order restraining the Respondents their agents or servants from excising part of the petitioner's parcels of land NO. ABOTHUGUCHI/GITHONGO/ 3410 and 3413 in contravention of Article 40 of the Constitution.

c) Costs and interests.

2. The petitioner's case is that he was the lawful owner of land NO. ABOTHUGUCHI/GITHONGO/398, which he subdivided into land NO. ABOTHUGUCHI/GITHONGO/3410, 3411, 3412, 3413, 3414, 3415 and 3416 which are all registered in his name. The road of access he had initially been provided with fell on and affected the family's graveyard due to his surveyor's mistake which was re-adjusted with the

approval of the respondent's officials. The re-adjusted road was effected not only on the ground but also on the relevant maps.

3. Petitioner was served with a notice dated **15th May 2013** from the 1st and 2nd respondents directing him to attend on the ground on 30th May 2013 to facilitate the excision of his parcels NO. L. R. ABOTHUGUCHI/GITHONGO/3410 in order to create a road of access to parcels NO. L. R. ABOTHUGUCHI/GITHONGO/ 3797, 3402, 3797 and 1817 which were subdivided by the original owner without a road of access and which parcels are independent without any connection with his.

4. The petitioner contends that he is threatened by the respondents who have been influenced by the interested parties to create a road of access through his parcels of land without any lawful justification or compensation. He avers that the respondents intend to contravene and infringe on his constitutional rights as to protection of the law against deprivation of private property which are fundamental rights. The interested parties ought to have demanded a road of access from the vendors before acquiring them and not to use illegal means to encroach on the petitioner's land.

5. This petition was opposed vide the respondents' grounds of opposition filed on 3.7.2013 and through a replying affidavit of H.S.W. Musumiah sworn on 8th October 2013. The Respondents aver that since the petitioner had initially created the road of access, the suit portion was surrendered to the government. Thereafter, the application for relocation was erroneously made to the respondents after which the petitioner arranged to draw a mutation for the relocation through the services of a private surveyor instead of doing it through the district surveyor's office. His wishes are not implementable as the subsisting road of access was serving other plots and further the same has never been reflected in the registry index map. The Respondents further claim that Petitioner has no locus to file this suit, that any injury which is likely to be suffered can be compensated by an award of damages and that Petitioner is guilty of non-disclosure of material facts.

6. The 2nd interested party also opposed the petition through his replying affidavit sworn on 5th May 2018. He denies that he influenced the 1st and 2nd respondents with money so that they can create the road access to parcels NO. LR ABOTHUGUCHI/GITHONGO/3796, 3402, 3797 and 1817 as alleged. He avers that the 1st and 2nd respondents were but only exercising their powers as provided under **Section 23 of the Survey Act, Chapter 299 Laws of Kenya**. Furthermore, it is his right to make application for communal rights of way as provided for under **Section 145 of the Land Act, 2012** and **Section 18 (3) of the Land Registration Act, 2012**. If the petitioner is granted the orders sought for in the petition he stands to be denied access to his land parcel NO. ABOTHUGUCHI/GITHONGO/3797.

7. The case against the 1st Interested party was withdrawn on 7.5.2018 by the Petitioner.

8. This petition was canvassed by way of written submissions vide directions given on 7.5.2018. Only Petitioner complied with these directions. The petitioner in his submissions contended that **Article 40 of the Constitution** provides for protection of the citizenry and their private property which is a fundamental right. He therefore seeks the court's protection to prevent abuse of his constitutional right to protection of his property.

9. The issue for determination is whether there was any justification in the **letter of 15.5.2013** written to the petitioner by the Land Registrar. The contents of the said letter are as follows;

“ RE: ROAD OF ACCESS

ABOTHUGUCHI/GITHONGO/3797, 3402,3797,1817.

This is to inform you that the District Surveyor and the under signed will visit the above parcels of land on 30.5.2013 for the purposes of establishing the road of access under section 18(3) of the Land registration Act 2012 between them at 10.00am. By a copy of this letter, the area chief is requested to avail himself and provide security.

H.S.W.MUSUMIAH

DISTICT LAND REGISTRAR, MERU CENTRAL”

10. Apparently, the petitioner after being granted a road access on his land had sought for its relocation. The Land registrar had written a letter dated 5.9.2011 to the district surveyor stating as follows;

“RELOCATION OF ROAD OF ACCESS

ABOTHUGUCHI/GITHONGO/340 ON MAP SHEET NO.12.

I have received a request from M'MIRITI M'MUGA, the registered owner of the above parcel of land to relocate the road of access that is passing and disjoining his parcel of land on RIM sheet No.12. I have no objection. Please prepare regularization mutation and effect the change.

H.S.W.MUSUMIAH,

District Land Registrar, Meru Central.” 18 days later on 13.9.2011, another Land registrar, this time one **B.K.KAMWARO** still from Meru central wrote a letter similar to the one above.

11. According to the Petitioner, the relevant mutation and survey was carried out, approved and effected as per annexure MM4. This gave

rise to a new area map which petitioner has annexed as MM5.

12. The question is, was the road of access a private one or a public one?. Had the previous road of access been reflected in the RIM or not. The mutation forms (MM4) bears the stamp of the District surveyor, Meru Central. MM5 appears to be an extract of the map sheet No.12 and it certainly captures the positioning of the new road.

13. In paragraph 9 of the affidavit of **H.S.W.MUSUMIAH**, he avers that **the wishes of the petitioner are not implementable as the subsisting road of access was serving other plots and further, the same have never been reflected in the Registry Index Map (RIM)**. If these averments were true, then it can only mean that MM5, the sheet map extract is a fake document. Why then didn't the deponent (**MUSUMIAH**) avail to this court the true area map. The logical conclusion to make is that the changes with regard to the new road of access had already been reflected in the area map.

14. I have also noted that **MUSUMIAH** has contended that the application by the Petitioner to have the access road relocated was done erroneously (see paragraph 8 of his affidavit). **MUSUMIAH** is however the same person who had written **the letter of 5.9.2011** approving the application and proposing the changes to be reflected in the RIM. The question is, when did **MUSUMIAH** and the other Respondents realize that the application to relocate the road was made in error. Since May 2011 (when the application was made) up to June 2013 when this petition was filed, there was no indication from the respondents that they discovered that the relocation of the road was done erroneously. It is therefore late in the day for the Respondents to claim that there was an error. It is not lost to this court that the Respondents have even failed to file any submissions which in essence means that they have nothing to say regarding the prayers sought herein.

15. Pursuant to the provisions of article 22 of the constitution, **“every person has the right to institute court proceedings claiming that a right or a fundamental freedom in the bill of rights has been denied, violated, infringed or is threatened.”**

16. I am inclined to find that **the letter of 15.5.2013** can be construed as a threat to petitioner's rights in respect of his property. I therefore find that this petition is merited.

17. **Final orders;**

1) **A declaration is hereby issued to the effect that the Respondents intention and threats to affect, interfere or otherwise excise the petitioner's parcels of land NO. L. R ABOTHUGUCHI/GITHONGO/3410 and 3413 to create road of access to the interested parties' parcels of land or any other contravenes the petitioner's fundamental rights as to protection of property as per article 40 of the Kenyan Constitution.**

2) **An order is hereby issued restraining the Respondents, their agents or servants from excising part of the petitioner's parcels of land NO. ABOTHUGUCHI/GITHONGO/ 3410 and 3413 in contravention of Article 40 of the Constitution.**

3) **The Respondents are the authors of the dispute herein and are therefore condemned to pay costs of the suit to the Petitioner.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 7TH JANUARY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Muthamia for petitioner

HON. LUCY. N. MBUGUA

ELC JUDGE