



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CONSTITUTIONAL PETITION NO 4 OF 2017

IN THE MATTER OF ARTICLES 22 AND 23

OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 35, 40, 47 OF

THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLES 2(1), 2(4), 10 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS), PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

JANE WANJIKU MUREITHI.....PETITIONER

AND

COUNTY LAND REGISTRAR, NYERI1ST RESPONDENT

DIRECTOR OF LAND ADJUDICATION AND

SETTLEMENT2ND RESPONDENT

THE DIRECTOR OF SURVEY3RD RESPONDENT

THE NATIONAL LAND COMMISSION4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

JUDGMENT

1. The petitioner brought the suit herein claiming that her constitutional rights guaranteed under **Articles 35(1), 40(1)(2), 47(1)**, of the Constitution were violated by the 1st respondent in a purported exercise of fixing the boundary between the parcels of land known as LR Nos. Nyeri/Ngarengiro/436, 421, 424 and 425. In particular the petitioner contends that:-

- (i) She was not given sufficient information concerning the dispute hereto to enable her prepare her defence;

(ii) That her advocate's request that the Registry Index Map (RIM) created in 1983 be used in the boundary fixing exercise was ignored by the respondents;

(iii) That the 1st respondent determined the dispute using RIM maps created after 1983 hence prejudging her;

(iv) That in his decision concerning the dispute, the 1st respondent created a 9 metre wide road on her parcel of land on the basis that her parcel of land, which was found to be larger on the ground than indicated in the RIM, had encroached on the access road;

(v) That the decision by the 1st respondent to impose an access road on her land, when none existed was irrational and unreasonable as it was not backed by any verifiable consideration.

2. The petitioner further contends that the decision of the 1st respondent was in breach of rules of natural justice as the summons were not personally served on her, she was not informed of the nature of the dispute thereby being denied an opportunity to prepare for hearing or formulate an adequate defence to claims being laid on the suit property; her request for use of the 1983 maps was deliberately ignored and that the decision was biased as it was not premised on the right RIM.

3. For the foregoing reasons, the petitioner seeks the following reliefs:-

(i) A declaration that the 1st respondent has no statutory authority and/or power to create an access road on his land;

(ii) A declaration that the 1st respondent has no statutory authority and or power or discretion to determine the size, width or length of an access road particularly on her land;

(iii) A declaration that the 1st respondent abused his office and acted illegally and unconstitutionally by creating a 9 metre wide access road and alienating part of her land;

(iv) A declaration that the 1st respondent acted in contravention of Article 40 by depriving her of a portion of her land and by creating an access road on her property;

(v) A declaration that the creation of a 9 metre access road by the 1st respondent on her parcel of land was done in breach of the rules of natural justice, procedural fairness and national values and principles of governance;

(vi) A declaration that the criteria used by the 1st respondent to create an access road on her parcel of land is not recognized by law, is inconsistent with the constitution and therefore void.

(vii) A declaration that the 2nd and 3rd respondents acted in contravention of article 35 by failing to provide her with the scheme plans and maps for her property as they existed in 1983;

(viii) An order of prohibition to prohibit the 1st respondent from implementing, enforcing or otherwise howsoever effecting the ruling issued on 16th March, 2017 together with all prior and subsequent proceedings premised and or emanating therefrom and orders creating an access road on and through her land through his report dated 27th March, 2017;

(ix) An order of certorari to bring into this court and to quash the impugned decision of the 1st respondent;

(x) An order of mandamus to compel the 2nd and 3rd respondent to produce scheme plans, registry index map and mutation forms for her parcel of land as existed in 1983;

(xi) An order of mandamus to compel the 4th respondent to undertake proper procedure in the process of compulsory acquisition of part of her property for creating an access road.

(xii) Exemplary damages.

(xiii) Costs of and incidental to the petition; and

(xiv) Any other order that the court may deem fit and just to grant.

4. In reply and opposition to the petition, the 1st, 2nd, 3rd and 5th respondents have *inter alia* deponed that on 14th December, 2016 the 1st respondent received a complaint from the registered owners of land parcels number Nyeri/Ngaringiro/424 and 425; that the complaint was to the effect that there was a boundary dispute between their parcel of land and the adjacent parcels of land to wit Nyeri/Ngaringiro 421 and Nyeri/Ngaringiro 436; that the complaint was lodged to the office of the 1st respondent pursuant to the provisions of **Section 19(1)** of the Land Registration Act (LRA), 2012; that the 1st respondent issued a notice to the owners of the parcels mentioned hereinabove requiring them to appear for resolution of the boundary dispute on 16th March, 2017. On 16th March, 2017, the 1st respondent visited the site.

5. It is further deponed that the petitioner who had been served with notice and summons to attend the boundary fixing exercise was represented by her husband, advocate and the property

caretaker hence she was given an opportunity to be heard through her said representatives.

6. Upon hearing all the concerned parties and with guidance from the surveyors present, the 1st respondent delivered his ruling. The import of the ruling is said to have been reinstatement of the access road as shown on the Registry Index Map (RIM) which after taking measurements on the ground showed that the petitioner had encroached on the access road without any lawful justification.

7. Contrary to the petitioner's contention that the 1st respondent acted *ultra vires* his powers under Land registration Act (LRA), it is contended that the 1st respondent acted within his statutory powers and mandate under **Sections 18 and 19** of the LRA.

8. While acknowledging that the petitioner has a right to her property, it is contended that the petitioner's right should not be exercised in a manner that infringes on other people's rights.

9. Terming the petition herein premature, misconceived, incompetent, bad in law and an abuse of the court process, the respondents contend that the petitioner should have exhausted all relevant statutory avenues available before filing the present suit.

10. The petitioner is faulted for having failed to comply with the provisions of **Section 13A(1)** of the Government Proceedings Act, Cap 40 Laws of Kenya before filing the present suit and having failed to disclose or demonstrate how her constitutional rights were contravened by the 1st, 2nd, 3rd and 5th respondents.

11. For the foregoing reasons, the 1st, 2nd, 3rd and 5th respondents urge the court to dismiss the petition with costs to them.

12. When the matter came up for hearing, counsel for the petitioner informed the court that in 1983, the petitioner was allocated land by Settlement Fund Trustee (SFT) and was given time to view the land, fence and take possession. 34 years later, the petitioner was summoned to appear on the ground for what she was informed was a boundary dispute. The petitioner was also informed that an access road was to pass through her property. She informed her advocate who informed the Land Registrar to rely on the RIM in existence in 1983 as she had occupied the land for 34 years and the issue of access road had never arisen.

13. The court heard that the Land Registrar ignored the request and delivered his ruling through which he created a 9 metre access road on the petitioner's land on the ground that the size of the petitioner's land was larger than the neighbouring parcels on the ground. The court further heard that the petitioner requested the 2nd and 3rd respondents for maps as existed in 1983 but the two failed to respond to her request.

14. The failure by the respondents to respond to the petitioner's request prompted the petitioner to file the petition herein to assert her constitutional rights.

15. The petitioner urged the court to establish whether there was fair administrative action as the law provides that the decision should be reasonable, lawful and procedurally fair according to the law of natural justice which demands that a party must be made aware of any administrative action taken against them. They must be given notice to prepare a defence.

16. The notice issued to the petitioner, dated 21st February 2017, stated that it is a notice to determine a boundary dispute. There was no notice about the issue of an access road. Thus they were denied the opportunity to prepare for a defence.

17. It is submitted that the action by the respondents was not reasonable because the ruling was based on the petitioner's size of land in comparison to that of her neighbours and the chief Land Registrar's discretion.

18. While acknowledging that the Land Registrar had the mandate to determine and fix boundaries with precision, the petitioner's counsel submitted that the Land Registrar should have done it using the 1983 map used when the petitioner was allocated her land.

19. On whether the decision was lawful, the petitioner submitted that by creating an access road the Land Registrar acted *ultra vires* his mandate which is to fix boundaries. According to the petitioner, the role of creating access roads lies with the district road boards, KRRRA and not the Land Registrar.

20. Pointing out that the petitioner wrote to the 3rd respondent requesting for maps as they existed in 1983 (JWW3), the petitioner's counsel submitted that under **Section 9(1)** of the Access to Information Act, the state was obligated to respond to the petitioner's request within 21 days.

21. It is the petitioner's case that the respondents right could only be right if his request for the maps was acted upon and the maps provided.

22. Because a decision was made without relevant documents, it is asserted that the petitioner's constitutional rights were violated by the respondents.

23. Counsel for the respondents, Mr. Nderitu, relied on the replying affidavit sworn on 4th October 2017 and filed on 5th October, 2017.

24. Terming the subject matter of this suit a boundary dispute, Mr. Nderitu informed the court that the complaint which is the genesis of this

suit was brought to the attention of the Land Registrar through a letter dated 15th December, 2016 by the owner of land parcel number 421; that the owner of plot number 421 was complaining that she could not access her land.

25. The court heard that the Land Registrar gave a 30 days notice to all the parties vide a letter dated 21st February 2017, which was served through the area chief.

26. Thereafter, the Land Registrar visited the ground and took measurements to establish the boundaries.

27. Based on the report of the Land Registrar which shows that the petitioner's husband, advocate and caretaker gave their statements and that four surveyors were present, Mr. Nderitu maintained that the petitioner was given an opportunity to be heard in accordance with **Section 87(1)** of the Land Registration Act, 2012.

28. Based on the report which does not indicate that the petitioner's representatives requested for the RIM of 1983 before the Land Registrar visited the ground or during the visit, he stated that in arriving at the impugned decision, the Land Registrar and surveyors relied on the RIM annexed and the ground measurements.

29. The respondent's counsel pointed out that the petitioner wrote to the director of survey on 10th April 2017, way after the land registrar had visited the land (The Land Registrar visited the land on 16th March, 2017) and that whilst the RIM relied on indicated that there was an access road, the road was missing on the ground.

30. The Land Registrar is said to have merely reinstated the access road in accordance with the map.

31. According to the counsel for the respondent, the access road was not a creation of the Land Registrar or the surveyors.

32. The Land Registrar is said to have acted in accordance of his mandate under **Sections 18 and 19** of the LRA hence there was no violation of the petitioner's constitutional rights.

33. In a rejoinder, counsel for the petitioner stated that the problem is not about notice but nature of dispute. **Section 19** of LRA requires the Land Registrar to determine the dispute using all facts of land records which included the 1983 map.

Analysis and determination

34. From the pleading filed in this matter and the affidavit evidence in support thereof, the following facts are either common ground or uncontroverted:-

(i) That by a letter dated 15th December, 2016 the 1st respondent received a complaint from the owner of land parcel number Nyeri/Ngaringiro/424 and 425. The complaint was that the complainant could not access his parcels of land because the road of access had been closed at the junction of the parcels known as Nyeri/Ngaringiro/421 and 436.

(ii) The complainant requested the 1st respondent to take the necessary action as lack of access to his land was hindering him from developing his land. See the letter which is annexed to the affidavit sworn by the 1st respondent and marked **JMM-1**.

(iii) Upon receipt of the complaint, the 1st respondent issued a notice on the affected parties that he will visit the parcels of land in question with a view of fixing the disputed boundary between their parcels of land and those of the complainant. See the notice annexed to the affidavit of the 1st respondent marked **JMM-2**;

(iv) That on the appointed date, (16th March, 2017) the 1st respondent, accompanied by four surveyors and area assistant chief visited the site for the intended exercise;

(v) That the petitioner was represented by her husband, advocate and the caretaker of the petitioner's parcel of land;

(vi) That the 1st respondent gave all the parties an opportunity to state their case before proceeding to determine the boundary between the parcels using the Registry Index Map for the area;

(vii) That the petitioner did not object to the exercise. In fact, her advocate suggested that they rely on the surveyors present and the facts on land records.

(viii) That based on land records, it was established that there was an access road but the same was missing on the ground.

(ix) That upon taking measurements, it was determined that the petitioner's parcel of land was the one that had encroached on the access road. For that reason the access road was created through it.

(x) That whilst the petitioner, through her representatives did not object to the exercise, after the 1st respondent gave her decision on the dispute, the petitioner who appears to

have been dissatisfied with the decision wrote to the director of survey asking to be furnished with the map for her property as existed in 1983 when she purchased the land.

(xi) Apparently, the director of survey did not heed to the petitioner's request within the time indicated in the petitioner's letter under reference, dated 10th April and at all.

(xii) It is noteworthy that while making determination on the dispute, the 1st respondent notified the parties of their right of appeal to the High Court.

(xiii) Instead of appealing, the petitioner filed the petition herein on the aforementioned grounds.

35. From the pleadings and the submissions by counsel for respective parties, this court finds the issues for determination to be:-

- (a) Whether the 1st respondent had power to undertake the impugned action?
- (b) Whether the 1st respondent breached the petitioner's legal/constitutional rights while undertaking the impugned action?
- (c) Whether the petitioner has made a case for being granted the orders sought or any of them.
- (d) What orders should the court make?

36. On whether the 1st respondent had power to undertake the impugned action, having carefully reviewed the evidence adduced in this matter I entertain no doubt that the exercise the 1st respondent was called upon to undertake and which he undertook was a boundary fixing exercise. As was observed in the case of **Nyanchama Kimaiti vs. Samuel Guto Onguto & Another (2014)eKLR** there is a very thin line between determining a boundary dispute and opening up a road of access the existence of which is in dispute. See the said case where it was stated:-

“The plaintiff's case is that the Land Registrar had visited the suit property and Plot No. 909 among others to determine a boundary dispute and as such the Land Registrar had no business opening up a road of access which in any event was non-existent. In my view, there is a very thin line between determining a boundary dispute and opening up a road of access the existence of which is in dispute. The dispute between the plaintiff and the 1st defendant was over a road of access. Whereas the 1st defendant contended that a road of access existed along the boundary of the suit property and Plot No. 910 to Plot No. 909, the plaintiff contended as he has done in this case that no such road existed. In the face of these opposing views, the Land Registrar had to determine the boundaries of these parcels of land and if at all, any access road existed through the suit property and Plot No. 910 to Plot No. 909. According to P.exh. 4, when the Land Registrar visited the site of the suit property and Plot No. 909 together with the District Surveyor, they confirmed that a road existed through the suit property to Plot No. 909 and that it had been closed by the plaintiff. The Land Registrar proceeded and placed beacons to mark the boundaries of the said road on the ground and opened it for use by the public. I am of the view that the exercise that the Land Registrar undertook was within the powers conferred upon the Land Registrar by section 21 of the Registered Land Act, Cap 300, Laws of Kenya (now repealed) and Section 18 of the Land Registration Act, 2012. The exercise complained of was therefore lawfully undertaken due notices having been given to all the parties who would have been affected therewith.

1. Issues No. VI and VII:-

As I have already found hereinabove, there is a surveyed road of access through the suit property which serves Plot No. 909 and the neighbouring parcels of land. The plaintiff has no proprietary right over the land where this road is situated. By opening the said road of access for use by the public and the 1st defendant, neither the Land Registrar nor the 1st defendant can be said to have infringed on the plaintiff's property rights. Since the defendants did not infringe on any of the plaintiff's rights, the plaintiff is not entitled to the reliefs sought in this suit.”

37. In view of the foregoing, I return a positive verdict on the first issue.

38. As to whether the 1st respondent breached the petitioner's legal rights in carrying out the impugned exercise, a review of the evidence adduced in this case shows that the 1st respondent accorded the petitioner, through her appointed representatives an opportunity to present their case before he made the impugned decision. It is only after he made his decision, that the petitioner raised issues of the maps of her land as existed in 1983. Whilst the 3rd respondent had a legal duty to provide the petitioner with the information sought or at least respond to that request, it is my considered view that that information would not have had any bearing on the decision of the 1st respondent as at the time it was sought the decision had already been made.

39. For the foregoing reason, apart from the failure by the 3rd respondent to comply with the obligation imposed on it of providing the information the petitioner sought or at least responding to that request, I find and hold that the 1st respondent did not violate the petitioner's right by fixing the access road.

40. On whether the petitioner has made a case of been granted the orders sought or any of them, having found that the 1st respondent had power to undertake the impugned action and that the 1st respondent did not violate the petitioner's right by fixing the access road, I find the petitioner has not made a case for been granted the orders sought. Consequently, I dismiss the petition with costs to the respondents.

Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 29th day of April, 2019.

L N WAITHAKA

JUDGE

Coram:

Mr. Ndichu h/b for Muraguri for the petitioner

N/A for the respondents

Court assistant - Esther