



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**PETITION NO. 26 OF 2016**

**IN THE MATTER OF ARTICLES 22, 23 (3) AND 40 AND 258 OF THE CONSTITUTION 2010**

**AND**

**IN THE MATTER OF VIOLATIONS AND/OR INFRINGEMENT PROTECTION OF PROPERTY RIGHTS OF THE PETITIONER**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012**

**AND**

**IN THE MATTER OF LR NO. KISII MUNICIPALITY/BLOCK I/613**

**AND**

**IN THE MATTER OF SECTION 19 (SIXTH SCHEDULE) OF THE CONSTITUTION 2010**

**BETWEEN**

**ZEDEKIA ONDARI KENYORO .....PETITIONER**

**VERSUS**

**KITUTU CHACHE SOUTH CONSTITUENCY**

**DEVELOPMENT FUND BOARD .....1<sup>ST</sup> RESPONDENT**

**KENYA ROADS BOARD ..... 2<sup>ND</sup> RESPONDENT**

**KENYA URBAN ROADS AUTHORITY (KURA) ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**J U D G M E N T**

1. The petitioner vide an amended petition dated 24<sup>th</sup> May 2017 seeks the following orders/reliefs:-

(a) A declaration be issued to the effect that the petitioner is entitled to interests conferred by registration and rights of owner of property under the Constitution.

(b) A declaration that the respondents have no rights, mandate and/or authority to forcefully and/or enter upon and build administration police units and road of access on the petitioners land parcel No. Kisii Township/Block I/613 that lawfully belongs to the petitioner.

(c) A declaration that the respondents have breached and/or infringed and violated the fundamental freedom to protection of

**right to property.**

**(d) An order of permanent injunction restraining the respondents either by themselves, agents, servants and/or anyone claiming under the said respondents from entering upon, trespassing onto taking possession, building on or in any other way interfering with the proprietor's rights over the suit land.**

**(e) Damages**

**(f) Costs of the petition.**

The petition is brought against Kitutu Chache South Constituency Development Fund Board (1<sup>st</sup> respondent) and the Kenya Roads Board (2<sup>nd</sup> respondent). The Attorney General (3<sup>rd</sup> Respondent) is enjoined to the petition as the Chief Legal Advisor to the Government.

2. The petitioner in support of the petition avers that he is the registered proprietor of land parcel **LR No. Kisii Municipality/Block I/613** (hereinafter referred to as "**the suit land**") having been allocated the suit land in 1986 and registered as owner on 11<sup>th</sup> July 1995. He claims that by virtue of being registered owner he was vested with ownership rights and that his title was absolute and indefeasible. The petitioner however avers that notwithstanding that he is the lawful owner of the suit property the 1<sup>st</sup> respondent has unlawfully sanctioned and/or commissioned activities on the petitioner's land which have restricted and interfered with the petitioner's rights over the suit land. The petitioner avers that the respondents have set out to construct or cause to be constructed a chief's camp and administration police housing units on the suit land as well as a road of access passing through the land in flagrant disregard of the petitioner's rights to the property.

3. The petitioner contends that the respondents' actions are in breach of his fundamental rights contrary to Article 19(3) (c) which preclude the limitation of such rights unless the limitation is as permitted under the Constitution. It is the petitioner's assertion that the respondents' actions constitute a deprivation of his property rights without complying with the Constitution. The petitioner contends that the respondents' act of depriving him of his property without following due process is in contravention of Article 40(3) of the Constitution which bars any person from being deprived of his property by the state unless there has been full compensation to such person. Article 40(3) of the Constitution provides thus:-

**40(3) The state shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-**

**(a) Results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with chapter five; or**

**(b) Is for a public purpose or interest and is carried out in accordance with this constitution and any Act of Parliament that-**

**(i) Requires prompt payment in full, of just compensation to the person; and**

**(ii) Allows any person who has an interest in, or right over that property a right of access to a court of law.**

4. The petitioner's petition is supported on the supporting affidavit sworn by Zedekiah Ondari Kenyoru on 3<sup>rd</sup> August 2016 and the annexures attached thereto. The 2<sup>nd</sup> respondent upon service of the petition filed an answer to the petition on 31<sup>st</sup> January 2017. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents did not file any response to the petition.

5. The 2<sup>nd</sup> respondent in its answer to the petition averred that it was a stranger to the allegations contained in the petition and stated that it was wrongly enjoined in the petition contending that its mandate does not include constructing roads and therefore has not engaged in any activity of road construction. Further the 2<sup>nd</sup> respondent averred that it is not involved in acquisition of land for such purposes as road construction and was therefore incapable of infringing the right of the petitioner. The 2<sup>nd</sup> respondent denied that it had in any manner infringed and/or caused the petitioner's constitutional rights to be infringed. The 2<sup>nd</sup> respondent urged the court to strike out the petitioner's petition against it.

6. The petition was canvassed by way of written submissions. The petitioner filed his written submissions on 6<sup>th</sup> March 2018 while the 2<sup>nd</sup> respondent filed its submissions on 7<sup>th</sup> March 2018. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents did not file any submissions. The petitioner reiterated the contents of the petition and the affidavit in support thereof in the filed written submissions.

7. The petitioner anchored his submissions on Articles 19, 40 and 47 of the Constitution. In invoking Article 19 of the Constitution, I understand the petitioner to contend that he is entitled to the full enjoyment of his fundamental rights guaranteed under the Bill of Rights without any infringement and/or limitation. Article 19(3) of the Constitution is clear that the rights and fundamental freedoms are inalienable and are not given by the state. Article 19(3) of the Constitution provides:-

**19(3) The rights of fundamental freedoms in the Bill of Rights-**

**(a) Belong to each individual and are not granted by the state;**

**(b) Do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with this Chapter; and**

**(c) Are subject only to the limitations contemplated in this Constitution.**

8. The petitioner contends that the acts by the respondents in regard to his property amounts to deprivation and/or appropriation of his property without adhering to the provisions of the Constitution notably Article 40(3) of the Constitution which prescribes how a person's property may be acquired by the state. If the property is acquired for any purpose that is permitted under the Constitution, full and just compensation for the property has to be made. The petitioner further contends that if any action was taken that was likely to adversely affect his interests as the registered owner of the suit property he ought to have been afforded an opportunity to be heard before such action was taken. Article 47 of the constitution requires that any administrative action taken must be lawful, reasonable and procedurally fair which the petitioner avers the respondents did not do before they appropriated the petitioner's property.

Article 47 of the Constitution provides as follows:-

**47(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

**(3) .....**

9. The petitioner asserts that he was given no notice of the administrative action as envisaged under Article 47 of the Constitution yet he was to be adversely affected by the actions taken. Further he submits the procedure provided for under Article 40(3) of the Constitution was not adhered to before his property was appropriated and hence contends his constitutional rights were flouted and breached. In support of his submissions, he relies on the case of **Ephantus Kimotho Kimani & 5 Others -vs- Attorney General & Another [2013] eKLR** where Lenaola, J. (as he then was) held that:-

**“...Article 47 of the Constitution 2010 expects that any administrative action taken must be “lawful, reasonable and procedurally fair”....Article 47(2) specifically demands that where a fundamental right may be adversely affected when an administrative action is taken, “written reasons for the action must be given.” No such reasons were given in the present case.”**

10. The 2<sup>nd</sup> respondent in its submissions merely reiterated that it was wrongly enjoined to the proceedings insisting that its mandate does not include the construction of roads and that it did not commission the construction of any road or any of the alleged illegal activities on the suit land. The petitioner has not attributed any specific act of the alleged breach on the 2<sup>nd</sup> respondent and in the face of the response and denial by the 2<sup>nd</sup> respondent, it is not possible to find the 2<sup>nd</sup> respondent culpable and I accordingly hold and find that the petitioner has not proved and/or established that the 2<sup>nd</sup> respondent was party to and/or involved in any acts that would be construed as breach of the petitioner's fundamental rights to property.

11. In the instant petition it is evident the petitioner is the registered owner of land parcel number **Kisii Municipality/Block I/913**. The petitioner was allocated **Uns. Residential Plot No. 69 Kisii Municipality** vide a letter of allotment dated 3<sup>rd</sup> June 1986 **Ref. No. 31002/xx**. The plot was surveyed and renumbered **Kisii Municipality/ Block I/913** and registered in the name of the petitioner on 7<sup>th</sup> July 1995. The petitioner was issued a certificate of lease on 11<sup>th</sup> July 1995. The copy of letter of allotment and copy of official search dated 16<sup>th</sup> September 2014 marked **“Z0K1”** and **“Z0K2”** respectively are annexed to the affidavit in support of the petition. Section 24(b) of the Land Registration Act No. 3 of 2012 confers on the registered proprietor of a leasehold interest absolute ownership rights. Section 24(b) provides:-

**“the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”**

12. The rights of a registered proprietor under Section 25 of the Land Registration Act 2012 are indefeasible and can only be challenged as provided under the Act under Section 26:-

**(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

The Deputy Director, Physical Planning and Urban Development, Kisii County Government vide a letter dated 18<sup>th</sup> September 2014 to the 1<sup>st</sup> respondent annexed and marked **“Z0K3”** confirmed there was interference and activities on the petitioner's land. In part the letter reads:-

**“Our records indicate that the subject plot is surveyed and beaconed. The plot is registered in the name of the complainant as indicated in the official search certificate. According to the survey plan, there is no road passing through the mentioned plots (612, 613, 614 and 615). Also there are no records in our office to show that the said parcel was re-planned and a road diverted. A visit to the site confirms that the building so constructed is on parcel number 613. This constitutes an encroachment into private property.”**

This letter affirms there was intrusion onto the petitioner's parcel of land precipitating the filing of the present petition.

13. Without any response to the petition by the 1<sup>st</sup> respondent or the 3<sup>rd</sup> respondent who are the parties alleged to have constructed houses and a road through the petitioner's parcel of land, the petitioner's evidence remains unchallenged that they unlawfully and illegally encroached onto his land. If the land was required for any purpose contemplated under Article 40(3) of the Constitution there is no evidence that the procedure and/or process required to be undertaken under the said Article 40(3) was complied with. **Musinga, J.** (as he then was) in the case of **Kuria Greens Limited –vs- Registrar of Titles & Another [2011] eKLR** faced with a somewhat similar situation as the one I now face observed thus:-

**“Whereas unlawful acquisition of public property by citizens must be lawfully resisted, the court will be failing in its constitutional duties if it failed to protect citizens from unlawful acquisitions of their property by the state through unlawful decisions taken by public officers. If the respondents were satisfied that the suit land had been unlawfully alienated and that it was in the interest of the public that the land reverts to the state or to the Kenya Agricultural Research Institute appropriate notice ought to have been given to the petitioner and thereafter the respondents ought to have exercised any of the following options:-**

**(a) Initiate the process of compulsory acquisition of the suit land and thus pay full and prompt compensation to the petitioner; or**

**(b) File a suit in the High Court challenging the petitioner's title and await its determination, one way or the other.**

**Short of that, the respondent's purported action of revoking the petitioner's title is an affront to private proprietary rights which are guaranteed by our Constitution and such an action must be frowned upon by the law.”**

14. I totally approve of the learned Judge's summation of what state agencies ought to do in case they have any issue with any property that is in the hands of a private person. The property howsoever obtained or acquired cannot be appropriated without due process being followed. In the instant petition it is said a road has been constructed right through the petitioner's land and an administration police camp allegedly established on the land. The petitioner remains the registered owner of the suit property and until his title is successfully challenged as provided under the law he remains the absolute owner of the land. If the property is required for public purposes, the necessary machinery under Article 40(3) of the Constitution ought to be set in motion to ensure the petitioner is fully compensated for his property. There is no evidence whatsoever to show that the petitioner unlawfully acquired the suit land and the onus to prove that remains with the person who alleges the property was unlawfully acquired. No such allegation was made in the present petition and no evidence was laid before me to suggest the petitioner had unlawfully acquired the property.

15. Although the petitioner has prayed for various orders I find the prayer for damages unproved. The petitioner did not tender any evidence in support of the damages claim and is also silent in regard to this claim in his submissions. There is no basis upon which an award for damages can be made and I decline to award any damages.

16. In the result, I enter judgment for the petitioner as against the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents in terms of prayers (a), (b), (c) and (d) of the petition. The parties will bear their own costs of the petition.

17. Orders accordingly.

**JUDGMENT DATED, SIGNED and DELIVERED at KISII this 13<sup>TH</sup> DAY of APRIL, 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Ms. Momanyi for the petitioner

N/A for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents

N/A for the 2<sup>nd</sup> respondent

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**