



**REPUBLIC OF KENYA**

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

**PETITION NO. 7 OF 2016**

**ARTICLE 1,2, 3, 10, 19, 20, 21 (1) & (3), 27(2) 28, 40(1) 40(3), 47 (1) 47(2), 48, 50(1), 60(1B)64, 73, 159,160, 165,174(A),259 AND 260 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: RULES 23 AND 24 OF THE CONSTITUTION OF KENYA(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES. 2013**

**AND**

**IN THE MATTER OF : SECTION 107,108, 111, 112, 113, 114, 115, 126, 128.146,147, 148, 150 OF THE LAND ACT 2012**

**AND IN THE MATTER OF SECTION 24(a), 25, 26, 101 OF THE LAND REGISTRATION ACT2012**

**AND**

**IN THE MATTER OF SECTION 13 OF THE LAND AND ENVIRONMENT ACT AND IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 27(1), 27(2), 28, 40(2), 40(3) 43(1) (a) (b) (c), 47 (1), 47(1), 48, 50(1) OF THE CONSTITUTION OF KENYA 2010.**

**EDWARD KARANJA CHOGO.....1<sup>ST</sup> PETITIONER**

**JANTRICKS KEDOGO KARANJA.....2<sup>ND</sup> PETITIONER**

**MICHAEL RATOLI NJONJE.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**THE COUNTY GOVERNMENT OF KAKAMEGA.....RESPONDENT**

**JUDGEMENT**

The Petitioners brought a Constitutional petition before this Honourable Court for alleged contravention of fundamental rights and freedoms under Article 27(1), 28, 40(1), 40(2), 40(3), 47(2), 48, 50(1) of the Constitutions of Kenya, 2010 vide a Notice of Motion Dated 11<sup>th</sup> May, 2016. An application where the petitioner was seeking conservatory orders to be issued against the respondent from entering upon the petitioner's private land No. Butso/so/Shikoti/18098 and Butso/so/Shikoti/13652 and continuing with the construction of a public road thereon or conducting any activity on the land parcels. An application which the Respondents gave a reply to vide grounds of opposition dated 25<sup>th</sup> May, 2016. Among the grounds was the fact that the respondent had no pecuniary interest and/or interest in acquiring land for its purposes but to create an access road where the applicant as well as the public can enjoy their rights and therefore granting the orders will be against the interest of the public good. Public interest supersedes the private claims of an individual in the words of Nyamu J in Kenya Guards & Allied Workers Union-vs-Security Guards Services and 38 Others and Another (IP) H.C. Misc. 1159 of 2003. Further in the case of Kenya Bus Service Ltd & 2 others v Attorney General & Another, Misc Civil Suit No 413 of 2005 the court held that the enjoyment of fundamental rights and freedoms contemplates respect for the rule of law, including the protection of the rights of others, and for the public interest.

The respondent submitted that they filed a memo of appearance and grounds of opposition Dated 25<sup>th</sup> May, 2016 in response to the petition. They are therefore entitled to reply to this Petition. They were unable to file a replying Affidavit because the facts were uncertain and the petitioner could not establish the extent of the damage and if so to what extent. This is why the parties called for a survey to be done and indeed it was carried out and a copy of the same was attached to this submissions.

They submit that they have a right to oppose the petition as they filed their grounds of opposition. The proceedings herein are sui generis under the Mutunga rules and they are not governed by the Civil Procedure Rules which require someone to file a holding defence even when they are not sure of the facts in fact it would be absurd for the respondents to file a replying affidavit just for the sake of it before all the facts are established. The Rule 16 is not put in mandatory terms the words used are "may hear and determine in the respondents absence," This gives the court discretion in cases such as this where a survey is required to be done before full facts are established, then the court proceeds to consider all circumstances and facts on record. In this case we are urging the court to look at the two survey reports and make its findings on merits.

They submit that, a field survey was carried out on the said land parcels and a report was made following the visit Dated 15<sup>th</sup> December, 2017 for BUTSOTSO/SHIKOTI/18098 among other affected land. The report concluded that, there is need for boundary disputes to be resolved by the office of the Land Registrar. There is need for a re-survey of the affected parcels, mutation forms to be prepared to cancel the first one which introduced anomalies on the map, submitted for registration and subsequently adopted for map amendment. In view of the above report there are uncertainties as to the facts of the said land parcels in question. The respondent adopts the field report of the surveyor dated 15th December, 2017 fully and submits that the applicant is before this honourable court not with clean hands.

It is their submission that the petitioner's claim raises no constitutional issue and that the issues being raised are civil in nature and pertain to the boundaries between the petitioner's property and the road reserve. They invite the court to observe that the road in question allocated by the land owners to the affected parcels was less than the required standard which is 6m. The land parcels in question are in dispute as to the boundaries matters which cannot be remedied by way of a Constitutional Petition. The land disputes ought to be dealt with vide a suit and not vide a constitutional petition. A case in point is in the case of David Ramogi & 4 Others vs C.S Ministry of Energy & Petroleum and 7 Others [2017] eKLR where the court held that the a constitution petition is meant to deal with clear constitutional matters. It is to be applied in clear cases where facts can be ascertained, where there is need for further facts then the petitioner ought to revert to a civil claim.

Their further submissions are that the petition is simply a private law civil claim couched as a constitutional claim in order to avoid the rigours of the provisions of section 16 of the Government Proceedings Act, and that the petitioner ought to file a civil claim in which witnesses, including expert witnesses, will be called and the site in dispute visited by the Court. It is their submission that the Constitution of Kenya 2010 under Article 162 creates particular institutions or statutes tasked to deal with specific grievances, Article 162 of the constitution of Kenya 2010 provides that:-

- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
  - (a) employment and labour relations; and
  - (b) the environment and the use and occupation of, and title to, land.
- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

Therefore these channels ought to be first explored and exhausted before the intervention of the court is sought. The Petitioners in this matter ought to have instituted a private law civil claim vide a suit before this court in order to get the remedies being sought for and not vide a constitutional petition as the matter in question is merely constitutes an act of trespass and or interference with the petitioners right to peaceful use and enjoyment of land in which witnesses including expert witnesses will be called to give evidence with regards to the same. The petitioners merely couched a constitutional claim in order to avoid the rigours of the provisions of section 16 of the Government Proceedings Act. The constitutionality or otherwise of the petitioners complaints falls within the jurisdiction of the Environment and Land Court which in my view has jurisdiction to determine the issues raised as clearly stipulated in the provisions of the law. The same was set out in the case of David Ramogi & 4 Others vs The Cabinet Secretary, Ministry of Energy & Petroleum and 7 Others (2017) eKLR.

The respondent is not in dispute that he indeed carried out a road works on the said land parcel. The parties were ready to pay any damages that would be found to have been caused on the petitioners land, this called for the report from a surveyor to ascertain whether the construction affected any adjoining land but it was found by the report that it was not possible to ascertain the same. In the case of Rodgers Muema Nzioka v AG, the learned Judge where in terming such applications as trivializing of the Constitutional jurisdiction remarked thus;

“This court has held that constitutional jurisdiction should not be trivialized and should be confined to purely constitutional matters. Where the ordinary law provides for relief that relief must be pursued. In this case there are provisions for relief by way of compensation under the Mining Act and this is what the Petitioner is entitled to pursue as a remedy.”

The learned Judge then went on to state that where a party deliberately avoided to pursue the statutory remedies for compensation or any other remedy and instead purported to invoke the Constitution, then such a move constituted abuse of the court process and also trivialized the Constitutional jurisdiction. Lastly, the orders being sought by the petitioner are unavailable in the circumstances of the case and that to allow the application would amount to converting a constitutional petition to a civil suit for compensation.

This court has carefully considered the petition and the submissions therein. The petitioners submitted that the respondent has failed to file any response to the petition and hence it is unchallenged. The respondent submits that they have a right to oppose the petition as they filed their grounds of opposition. Article 159(2) d of the Constitution of Kenya provides that, justice shall be administered without undue regard to technicalities. I find the respondent has a right to challenge the said petition in order for this court to meet the ends of justice.

Article 40 of the Constitution of Kenya provides that every person has the right to acquire and own property and Article 40 (2) observes that no one should be arbitrarily deprived of property or in any way restricted from the enjoying their own property. The Petitioners have right to own their land and they should not be deprived or even restricted from enjoying their right. The Respondent should not deprive the Petitioners from enjoying their land by acquiring their land parcels without following the due process which would be illegal. In the case of Everlyn College of Design vs Director of Children's Department & AG Constitution Petition No. 228 of 2013, Constitution Petition No. 228 of 2013, the Learned Judge P.S. Majanja stated in his judgment that;

*“I would once again emphasise that a finding of “unlawful acquisition” referred to in article 40(6) of the constitution must be through a legally established process and not by forcefully occupation of the property by the state institutions or by preventing a person from enjoying the incidents of ownership of property”.*

Article 47 of the Constitution states that every person has a right to fair administrative action that is expeditious, effective, lawful, reasonable and procedurally fair. The Respondent ought to under Section 112 of the Land Act conduct a hearing and make full inquiry into and determine who are the persons interested in the land. In the Judicial Review Miscellaneous Application no. 36 of 2016, Republic vs National Police Service Commission, the learned judge C. V Odunsa stated that;

*“ Procedural fairness is therefore now a constitutional requirement in administrative action and the requirement goes further than the traditional meaning of duty to afford one an opportunity of being heard. It is now dear that even in cases where there is no express requirement that a person be heard before a decision is made, the tribunal or authority entrusted with the mandate of making the decision must act fairly”.*

Be that as it may, the petitioners allege violation of fundamental rights and freedoms and is therefore under a duty to plead their case with particularity, in the case of Anarita Karimi Njeru vs. The Republic (1976-1980) eKLR 1272 where the Court established the principle that a person seeking redress from the High Court on a matter which involves reference to the Constitution should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed. From the documents on record, a field survey was carried out on the said land parcels in question by the Kakamega County Surveyors; Ezekiel Nandwa and Stephen Wasike alongside Edward Chogo Karanja. A report was made following the visit dated 15<sup>th</sup> December, 2017 for BUTSOTSO/SHIKOTI/18098 among other affected land parcels and the following observations were made;

1. The positions for parcels adjoining the river, that is, parcel no. 18902 and 18903 do not conform with the map.
2. Roads of access earlier allocated by the owner to the affected parcels were less than the required standard i.e 6m.
3. The surveyor who undertook subdivision survey exercise never went back to demarcate extend of their access roads against what he submitted for registration and map amendment.
4. The place seems to have a boundary dispute which beckons intervention of a Land Registrar to resolve.
5. Extend of damage to Land Parcel No. 18098 cancels out with what ought to be taken by the road, if the mutation form presented by the owner and the official map from the Survey of Kenya is anything to go by.
6. Extend of damage to other parcels cannot be determined accurately due to ground and map anomalies (non conformity of the map with the ground.)

The report goes further and concludes that, there is need for boundary disputes to be resolved by the office of the Land Registrar. There is need for a re-survey of the affected parcels, mutation forms to be prepared to cancel the first one which introduced anomalies on the map, submitted for registration and subsequently adopted for map amendment. It is impossible for this court to establish in a constitutional petition the provision said to be infringed and the manner in which they are alleged to be infringed. In view of the said report there are uncertainties as to the facts of the said land parcels in question. There was no conformity between the land parcel on the map and the land parcel on the ground. The report dated 15<sup>th</sup> December, 2017 among the observations are the fact that the extent of the damage cannot be determined accurately due to non-conformity between the ground and the map. A constitution petition is meant to deal with clear constitutional matters. It is to be applied in clear cases where facts can be ascertained, it is my view that, where there is need for further facts then the petitioner ought to revert to a civil claim. The petitioners are advised to follow the recommendations of the report in order to determine the boundaries and the actual positions of their parcels of land. I find this petition is unmerited and I dismiss it with no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2018.**

**N.A. MATHEKA**

**JUDGE**