



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU

CONSTITUTION PETITION NO. 10 OF 2013

CATHERINE KANYIBA

M'MWAMBIA & 4 OTHERS.....PETITIONERS

VERSUS

THE DISTRICT LAND REGISTRAR & 2 OTHERS...RESPONDENTS

JULIUS ARITHI.....INTERESTED PARTY

RULING

BACKGROUND

The Petitioner has filed this Petition stating that his fundamental rights under Article 19, 20, 22, 23, 40 and 159 of the Constitution have been violated and/or infringed in respect of the following parcels of land AMWATHI/MAUA 11947, 1164, 11952, 11950, 12747, 11949 being subdivision of parcel No. AMWATHI MAUA 3341. He stated that his father who is the lawful proprietor of L.R. No. AMWATHI MAUA/3341 decided to sub-divide the same into six portions being Amwathi Maua/11947, 1164, 11952, 11950, 12747 and 11949 which are all registered in the names of his children who are new owners. At paragraph 4 of the Petition, the Petitioner stated as follows:

“4. The Petitioner’s father and other neighboring land owners had provided a road of access to his parcels of land initially which fell on and affected families and which passed through parcel number 1160 Amwathi Maua was sanctioned and approved by the officials of the Respondents and affected not only on the ground but also on the maps.”

The petitioner avers that there is a conspiracy to open a new access road for the last three years but the Local Administration has been unable to resolve the matter. The Petitioner further avers that sometime early 2013 he was shocked to receive a notice issued by the 1st and 2nd Respondents summoning him to attend the ground on 30th April, 2013 to have parcels L.R NO. AMWATHI MAUA/11947, 1164, 11952, 11950, 2747 and 11949 excused to provide a road of access. By that notice, the petitioners felt that the Respondents intend to infringe and contravene on their constitutional rights to protection of the law against deprivation of private property which are fundamental rights. The Petitioner also maintained that the interested party brought Land Parcel No. AMWATHI MAUA/1160 from one Gladys Kareko Musa and had the adjacent access road dosed and given a new number forcing the petitioner who neither used to access road to seek alternative road to Maua town through Kegoi which is not available as all land owners are against trespass on their land. The Petitioners seeks the following:

- 1) Declaration do issue to the effect that the Respondents intentions and threats to affect interfere

or otherwise excise the Petitioner's parcel of Land L.R NO. AMWATHI/MAUA/ 11947, 1164, 11952, 11950, 12747 and 11949 to create a road of access to the interested party parcels of land or any other contravenes the Petitioner's fundamental rights as to protection of property as per Article 40 of the Kenya Constitution.

b) An order restraining the respondent their agents or servants from excising part of the petitioners parcels of Land L.R. No. AMWATHI MAUA/11947, 1164, 11952, 11950, 12747 and 11949 in contravention of the Article 40 of the Constitution.

c) An order ordering the Respondents and interested party to re open the original access road on Parcel Numbers AMWATHI MAUA/ 1160.

d) Costs and Interest.

The said Petition is supported by the affidavit of Catherin Kanyiba M'Mwambia who is one of the petitioners herein. In further supporting of the averments contained in the petition, the first petitioner annexed three documents marked CKM I, II and III. The first document are two Maps sheets showing parcels of land.

The scanned document marked CKM II is a cop of a demand letter dated 5th June, 2013. The third document is another letter from the area chief of Maua location dated 25th April, 2013 summoning the Petitioner to attend a meeting on 30/4/2013 filed together with the petition was a notice of motion brought.

Under Article 22, 23 and 159 of the Constitution seeking interim orders. That application was filed under Certificate of Urgency. The application is supported by grounds shown on the face of that application and an affidavit sworn by Catherine Kanyiba M'Mwambia.

When the application was placed before the duty Judge Hon. Justice P.N. Njoroge (as he then was) he certified the same urgent to be heard in the first instance in the absence of the Respondents.

The leaned judge also granted an order of injunction restraining the Respondents their agents or assigns from excising, alienating, interfering or otherwise dealing with the petitioner/applicants parcels of Land L.R.No. Amwathi Maua/11947, 1164, 11952, 11950, 12747 and 11949 pending the hearing and determination of that application inter parties on 7/8/2013 (past).

The interested party through the firm of Mutwiri Arimi & Co. Advocates filed grounds of opposition. The Respondents also filed their grounds of opposition through V.M. Mogaka, litigation counsel. The interested also filed a replying affidavit sworn on 27th August, 2013.

When the application came up for hearing the parties agreed by consent to dispose of the same by way of written submissions.

SUBMISSIONS BY PETITIONERS

The petitioners deliberated their averments contained in the petition and submitted that the Respondents in collusion with the interested party to change the area map sheet, prepared new mutations, the sole intention being to close a previously surveyed and mapped out public access road to Maua town and in its place curve out a new road through the applicants parcels of land.

They argue that their intentions were manifested on 30th April, 2013 when the area chief invited the are residents more specifically the applicants to attend the ground for purposes of curving out a new access road. They further argue that attempts by the applicants to access the new map sheet which would be used in this case have been resisted by the respondents. The applicant also submit that the interested party has closed the only access road to Maua town after colluding with the 1st and 2nd respondents to have the

access road given a number as private property.

SUBMISSION BY THE INTERESTED PARTY

The interested party had filed grounds of opposition to the application on 5/8/2013 in which they contend that they have been wrongly sued as he has no interest on the petitioner's titles. The interested party also assigned that the petitioner's application is not supported by law and facts and that the issues of being raised are presumptive in nature and does not meet the Constitutional threshold. He states that the matters raise are of a civil nature relating to the registered land act (Cap 300 now replaced) the land act and the land registration act. He submitted that the correct forum is the ELC and the Constitutional and Judicial Review Jurisdiction of the superior court should only be involved in very special circumstances.

SUBMISSIONS BY THE RESPONDENT

The respondents have failed to file their submissions despite having been given sufficient time to do so.

ANALYSIS AND DETERMINATION

The petitioners in this notice of motion are seeking orders of injunction under Article 22, 23 and 159 of the Constitution of Kenya. Injunctions is an equitable relief which are provided for under the ambit of the Civil Procedure Act Cap. 21 Laws of Kenya. There are certain thresholds to be met before orders of injunction can be granted. Those parameters cannot be determined in a constitutional petition. Constitutional petition and Judicial Review application are special procedures can only be involved in special circumstances. Upon a cursory look at the affidavit in support of this application the petitioners/applicants complain escalate to some threat by the respondents to excise alienate interfere with their parcels of Land No. Amwathi/Maua 11947, 3341, 1164, 11952, 11950, 12747 and 11949. They allude to some mutations prepared and approved and registered which were intended to change the road access to their parcels of land no. evidence has been sworn to support those allegations.

The origin of those mutations have not been disclosed and how the respondent are associated with the same.

The Respondents are public officers created under the land registration act 2012. Those offices are occupied by civil servants appointed in accordance with the public service act. The applicants have not demonstrated what the occupants by those officers have committed in relation to the complaint herein.

The Attorney General has been enjoined as a respondent. The applicants have not shown what they have failed to do as the chief legal advisor of the state.

The failure to provide those requirements may explain why the law does not anticipate the institution of such prayers by way of a petition.

The petitioners have attached a copy of a letter dated 25th April, 2013 allegedly from the chief, Maua location addressed to the petitioners herein. The letter was a harmless invitation of the parties to the site for verification of a road around that parcels of land.

The letter did not talk of excising, alienating interfering or otherwise dealing with their parcels of land in a way prejudicial to their interests.

In my view, the petitioners overreacted to a letter where the chief was seeking information regarding an access road.

The petitioners have explained in their supporting affidavit that the interested party has taken over the old access road as his private property. If indeed the Interested party took over the original access road then the invitation by the chief of Maua location could not have come at a better time. They should have seized

the opportunity and present the correct map. The order sought by the applicants to compel the Respondent to produce map sheet numbers Amwathi Maua 4/3/4/7 and the original sketch Amwathi/Maua 4/3 in aspect of parcel number 3341 Amwathi is in my view a tall order to issue.

Under Section 15 of the Land Registration Act, 2012, the office or authority responsible for the survey of land shall be the chief land surveyor.

The respondents are not custodians of the maps being sought by the applicants. The court also has no powers to compel as party to produce documents as that is in the power view Judicial Review court under section 53 CPR.

In the upshot I find and hold that there are no constitutional issues raised in this applications for the Court's determination.

Consequently, the application dated 12/7/2013 lack merit and the same is hereby dismissed with costs.

SIGNED AT GARISSA ELC COURT BY JUDGE E. C. CHERONO (MR)

DATED AND DELIVERED AT MERU ELC COURT THIS 7TH DAY OF DECEMBER, 2017 IN THE PRESENCE OF:-

Janet – Court Assistant

H. Gitonga H/B for Nyamokei for Petitioners present

K. Muriuki H/B for Attorney General present.

HON. L. N. MBUGUA

ELC JUDGE