



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT KISII**

**PETITION NO. 26 OF 2016**

**IN THE MATTER OF ARTICLES 22, 23 (3) AND 25840 OF THE CONSTITUTION 2010**

**AND**

**IN THE MATTER OF VIOLATIONS AND/OR INFRINGEMENT**

**PROTECTION TO 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**

**ZEDEKIAH ONDARI KENYORU.....PETITIONER**

**VERSUS**

**KITUTU CHACHE SOUTH**

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

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

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The petitioner, Zedekiah Ondari Kenyoru on 8<sup>th</sup> August 2016 filed the present petition where he sought the following prayers:-

- a. **A declaration be issued to the effect that the petitioner is entitled to interests confirmed 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 lawfully belonging 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.**

2. The petition was assessed court fees of Kshs. 30,125/= for filing. The petitioner being dissatisfied with the court fees assessment on 10<sup>th</sup> August, 2016 did a protest in writing to the Deputy Registrar against the court fees levied and set out the following grounds:-

- i. **That the fees assessed and levied is in excess of the lawful fees as stipulated under the provisions of Section 1 (12) part IX of the Judicature Act.**
- ii. **That there is no provision under section 1 (12) as set out in legal notice No. 294 of 1995 to levy court fees per prayer contained in the Constitutional Petition.**
- iii. **The fees assessed and levied is in excess of kshs. 24,000/=**

The Deputy Registrar upon perusal of the protest on 16<sup>th</sup> August 2016 responded to the petitioner's protest vide a letter dated 16<sup>th</sup> August 2016 where she advised the fee assessed was not in excess as per the High Court Registry Operation Manual. The Deputy Registrar made reference to pages 18 and 19 of the Registry Manual where various court fees for diverse court services are set out.

3. The petitioner was not satisfied with the Deputy Registrar's determination and on 18<sup>th</sup> August 2016 made a reference for the matter to be placed before the judge for a determination. The petitioner founded the reference on the following grounds:-

- a. **That the fees assessed and levied are in excess of the lawful fees stipulated under the schedule to part IX Section 1 (12) of the Judicature Act (Cap 8 Laws of Kenya).**
- b. **That there is no provision under the duly gazette court fees (Legal Notice No. 294 of 1995) to levy court fees on constitutional reference (Petition) on the basis of prayers in the petition, but for the filing of the petition fixed at kshs. 6,000/= only.**
- c. **The fees assessed and levied is in excess of kshs. 24,000/=.**
- d. **That the high court registry operation manual used by the registry is not the duly gazette court fees prescribed by the Chief Justice and duly gazette.**
- e. **That the provision of assessing and levying court fees based on the High Court Registry Operation Manual, table, item No. 9 is erroneous and therefore null and void.**

4. On reference of the matter to me in chambers on 19<sup>th</sup> September 2016 I made directions for the matter to be mentioned before me on 4<sup>th</sup> October 2016 when Mr. Bosire Advocate for the petitioner made oral submissions respecting the petitioner's objection/protest to the assessed court fees on the petition. The High Court (Practice and Procedure) Rules made pursuant to Section 10 of the Judicature Act (Cap 8 Laws of Kenya) Part IX on court fees Rule 2 provides for an aggrieved party to protest the assessment of any court fees which he deems unjustified. Rule 2 (3) provides thus:-

**(3) If the person by whom the fee was paid is not satisfied with the decision of the registry upon his protest he may require in writing that the registry refer the matter to a judge or resident magistrate (as the case may be in chambers for determination and the order to be made in writing on that reference shall be final.**

The petitioner's protest is predicated on paragraph 12 of Section 1 of the Schedule to part IX which provides in part as follows:

**12. On the filing of an application for judicial review for an Order of Mandamus, Prohibition, Certiorari or any application for constitutional reference ..... shs.6,000/=.**

5. It is the petitioner's argument that part IX Section 1 paragraph 12 above does not provide for charging of fees on a petition per prayer but rather provides the fees for filing of the petition at kshs. 6,000/= and no more. The petitioner further argued the Deputy Registrar/Court registry erred in basing the court assessment on the registry operation manual which has no legal backing and was therefore not an appropriate document to be used to assess court fees. The petitioner's contention was that the court fees could only be assessed as stipulated under the schedule to Part IX Section 1 (12) of the Judicature Act which only provided fees for the filing of the petition.

6. Legal Gazette No. 294 of 1995 under paragraph 37 provides fees on filing applications for prerogative orders by way of judicial review application. Where a party in a judicial review application seeks an order for mandamus, prohibition and/or certiorari a fee of kshs. 6,000/= is charged for each of the respective orders sought. Vide the same Gazette Notice paragraph 37:- **"Any application for any constitutional reference"** is charged at kshs. 6,000/=. Does this mean only a fee of kshs. 6,000/= is chargeable on Constitutional reference or petition notwithstanding that the constitutional reference or petition may be praying for diverse orders? This is the issue for determination in this reference before me.

7. Both Part IX Section 1 (12) of the Judicature Act and Gazette Notice 294 of 1995 does not provide any clarity in regard to filing of constitutional references and/or petitions. The court takes judicial notice that as at 1995 when the Gazette Notice was issued, Constitutional References/Petitions were a rarity in our courts. This situation radically changed following the promulgation of the 2010 Constitution which virtually opened the flood gates for interested parties to bring constitution petitions particularly when the question of having to establish locus standi or interest in any specific matter was done away with and the scope of the Bill of Rights and Fundamental Rights and Freedoms was expanded. Presently the courts are experiencing a deluge of constitutional petitions compared to the period before the promulgation of the 2010 Constitution. Article 22 (1) of the Constitution provides thus:

**"Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."**

8. Under Article 22 (3) of the Constitution, the Chief Justice was required to make rules to provide for the court proceedings relating to Constitutional Petitions/references. The Chief Justice on 28<sup>th</sup> June, 2013 vide Legal Notice No. 117 published **"The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013."** On the issue of court fees the Practice and Procedure Rules under Rule 33 provides as follows:-

**"There shall be paid in respect of all proceedings under these rules the same court fees as are**

**payable in respect of Civil Proceedings in the High Court in so far as the same are applicable.”**

9. A party who is not able to pay the court fees can apply for the waiver of court fees under Rule 34 (1) of the Practice and Procedure Rules, 2013. Under Rule 33 therefore of the Practice and Procedure Rules, 2013 a petition such as the present one ought to be charged court fees as are charged and payable in respect of Civil Proceedings in the High Court. The practice in the High Court is to charge court fees as per the reliefs/orders prayed for in the plaint and/or judicial review application. My view is that as long as a petition is seeking what can be described as separate and distinct orders the court fees ought to be assessed per prayer. This makes sense in that the court in determining the petition is expected to consider and pronounce itself in respect of each of the prayers sought. As is evident from various petitions filed by parties, it has become customary for parties apart from seeking a prayer for a declaration that there has been a violation of a constitution right, the parties are increasingly using petitions to have the courts determine and make declarations as to the parties rights particularly as regards property rights. In the present petition, the petitioner’s prayers extend beyond a declaration that the respondents have breached and/or infringed on his constitutional right to protection of right to property. The petitioner in addition seeks a declaration of ownership rights, injunctive relief and damages. Those are distinctive prayers which would have been assessed fees separately in civil proceedings.

10. The petitioner has challenged the registry for using the recently launched registry operation manual to assess court fees perhaps rightly so. The registry operation manual is really not a legal document that ought to be used to assess court fees as the same cannot be said to have been made by the Chief Justice pursuant to Section 10 of the Judicature Act, Cap 8 Laws of Kenya which permits the Chief Justice to make practice rules including prescribing fees and scales of remuneration. The registry operation manual was a response to the need to codify and standardize registry operations country wide to ease administration and to foster expeditious access to justice. The idea in developing a registry manual was so that the standard of services in all the judiciary registries was standardized so that the same service was replicated in all court registries. While this should be lauded as a noble initiative on the part of the judiciary, it is necessary to the extent that the operation manual impacts on the Practice and Procedure and/or affects in any manner the prescribed fees for any services, for the Chief Justice to consider making any appropriate rules to operationalise the manual and to prescribe fees as necessary.

11. Having reviewed and considered the protest and determination made by the Deputy Registrar respecting the protest and having evaluated the applicable law relating to the assessment of court fees, I am satisfied that the fee assessed for filing of the petition was appropriate. I accordingly disallow the reference.

12. Orders accordingly.

**Ruling dated, signed and delivered at Kisii this 25<sup>th</sup> day of November, 2016.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Ms. Ogonjo for Bosire for the petitioner

N/A for the 1<sup>st</sup> to 3<sup>rd</sup> respondents

Ngare Court Assistant

**J. M. MUTUNGI**

**JUDGE**