



Tsisaga v County Government of Kakamega (Environment & Land Case 34 of 2018) [2023] KEELC 150 (KLR) (25 January 2023) (Judgment)

Neutral citation: [2023] KEELC 150 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 34 OF 2018**

**DO OHUNGO, J
JANUARY 25, 2023**

BETWEEN

SOLOMON ONZERE TSISAGA PLAINTIFF

AND

COUNTY GOVERNMENT OF KAKAMEGA DEFENDANT

JUDGMENT

1. The plaintiff/applicant commenced proceedings in this matter through originating summons (OS) dated March 27, 2018 wherein he averred that his rights under article 40 of the Constitution had been violated by the defendant/respondent. He sought determination of the following questions:
 1. Whether the court can declare that applicant's fundamental rights under article 40 of the Constitution of Kenya have been contravened and grossly violated by the respondent whose contractors, employees, and or agents carried out public works on his property land parcel number Kakamega/Lugari/297.
 2. Whether the court can declare that the applicant has suffered special damages amounting to Kshs 419,570 and order that the applicant be paid the said Kshs 419,570 plus interest from date of filing this application till full payment.
 3. Whether the court can access (sic) general damages suffered by the applicant and order the respondent to pay the applicant such general damages which are adjudged as being due and owing.
 4. Whether the court can issue any such further orders, writs, directions, order for costs and interest as shall be deemed just and appropriate.
2. The OS was supported by an affidavit sworn by the applicant. He deposed that he is the registered proprietor of that parcel of land known as Kakamega/ Lugari/297 (suit property) which he uses for his



agricultural activities and that during the year 2016 he had planted trees and subsistence crops on the land and that having heard that the respondent was planning to do a road which was meant to affect his trees and crops, he instructed his then lawyers M/s Nyikuli, Shifwoka & Co Advocates to write to the respondent to seek either to stop the respondent from proceeding with the planned activities or for the respondent to follow the right procedure. He further deposed that the respondent did not heed to the notice and went ahead to carry activities on the suit property which culminated in destroying the applicant's trees and crops. That the trees destroyed were valued at Kshs 370,000 and while the crops damaged were valued at Kshs 49,570 which amount was calculated at the cost of expected harvest of 12 bags, plus ploughing, preparation, weeding, planting, and harvesting expenses. He went on to depose that despite demanding compensation from the respondent, the respondent refused.

3. In response, the respondent filed grounds of opposition dated April 2, 2019 stating that the OS is bad in law, incompetent, misconceived, fundamentally defective and does not disclose any reasonable cause of action and is a mere abuse of court process. That the OS does not raise constitutional issues, that the prayers sought therein contravene mandatory provisions of the *Civil Procedure Rules 2010* and the *Constitution* and lastly that this court lacks jurisdiction.
4. At the hearing, the applicant testified as PW1. He adopted his aforesaid affidavit as his evidence in chief and produced copies of register for the suit property and letters from Nyikuli, Shifwoka & Co Advocates dated January 30, 2016 and December 13, 2016 as exhibits.
5. He further stated that the respondent violated his rights under article 40 of the *Constitution*. He denied planting any trees on a public road and added that he did not take any photographs of the damage since he was not on the land when the damage was done. He also stated that his people were however on the land and that he knew it was the respondent who destroyed his property because the respondent's vehicles were there. That the amount he is claiming is based on reports from the forest officer and the agricultural officer. He agreed that a crop damage assessment could not be made as the crops had already dried up by the time the officer went to the ground and further that by the time the forest officer visited the farm, the trees which had been destroyed were still on the ground.
6. Milton Muchuma Mulindo testified as PW2. He testified that he is employed by the defendant/respondent in the Department of Agriculture at Lugari Sub-County and that in 2016, the applicant went to his office and complained that his crops had been damaged. That on October 10, 2016, he went with the applicant to the suit property and on arrival he found a road measuring 225 metres by 5 metres. That the applicant complained that his maize crop had been damaged. PW2 added that he compiled a report dated October 31, 2016 (PExb 5), that there was no maize crop when he visited the suit property and that he noted in his report that there were no crops damaged to warrant an assessment.
7. Nelson Misigoli testified as PW3. He stated that he resides in Lugari and that he is the Sub-County Forest Officer. That following the plaintiff's claim that his trees were damaged, he went to the suit property and did an assessment on June 16, 2016 wherein he assessed the value of damaged trees at Kshs 54,264. He produced his report (PExb 6). During cross examination PW3 testified that he did not know the date when the damage occurred and that he did his report following a letter from the applicant and that he was not aware if the applicant had done his own assessment prior to going to PW3. PW3 further testified that he did not find any machines from the County Government when he visited the scene.
8. The applicant's case was then closed. Counsel for the respondent thereafter stated that he did not have any witness to call as the ones he would have called had already testified. The respondent's case was then closed without calling any witness and parties filed written submissions.



9. The applicant filed his submissions on March 11, 2022 stating that his suit is a petition brought under articles 24, 40 and 43 of the Constitution following the respondent's violation of his constitutional rights on the suit property by trespassing thereon and damaging his trees and maize and further committing waste by putting up a road of access which did not previously exist. He further submitted that the respondent's action frustrated his efforts of having his crops mature hence the compensation sought at Kshs 370,000.
10. In reply to the respondent's grounds of opposition, the applicant submitted that the grounds largely raise procedural technicalities which do not go to the substance on the suit and added that the OS is neither bad in law nor fundamentally defective. The applicant relied on article 159 (2) (d) of the Constitution and rules 3, 4 and 9 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and argued that he properly moved the court since the Constitution opens the door for any procedure to be used to file a petition. On the issue of general damages, the applicant submitted that despite warning the respondent, it still trespassed on the suit property. The applicant therefore proposed general damages of Kshs 1,000,000, special damages of Kshs 54,264 and damages for future anticipated loss of Kshs 370,000.
11. The respondent filed its submissions on June 23, 2022 and reiterated its grounds of opposition. It further argued that the applicant did not particularize the special damages that he is seeking and that since the applicant's is a claim for recovery of money it can only be instituted through a plaint as opposed an OS. Further, that issues of violation of constitutional rights can only be raised through a constitutional petition. Relying inter alia on the cases of Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] eKLR and Godfery Paul Okutoyi v Habil Olaka & Central Bank of Kenya (Nairobi HC Constitutional and Human Rights Division Petition No 457 of 2015), the respondent urged the court to dismiss the OS with costs.
12. I have carefully considered the parties' pleadings, evidence, and submissions. The issues that emerge for determination are whether the court has been properly moved through OS and whether the reliefs sought should issue.
13. The respondent's position is that issues of violation of constitutional rights can only be raised through a constitutional petition and not OS as the applicant has sought. There is however a ready answer at rule 10 (3) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Whereas rule 10 (1) provides that a claim seeking redress for contravention of rights or fundamental freedoms shall be brought by way of a petition, rule 10 (3) allows the court to accept a claim commenced through an oral application, a letter or any other informal documentation which discloses denial, violation, infringement, or threat to a right or fundamental freedom. Read with article 159 (2) (d) of the Constitution which requires the courts to administer justice without undue regard to procedural technicalities, the net effect is that seeking redress for contravention of rights or fundamental freedoms through OS is not fatal. That said, litigants are reminded that the proper procedure is to file a petition. I find that the court has been properly moved in this matter.
14. At the foundation of this case is the applicant's claim that he is the registered proprietor of the parcel of land known as Kakamega/ Lugari/297 (the suit property). He conceded that he did not produce any title deed to support his claim of ownership. Instead, he produced a copy of the register, a perusal of which reveals that it does not bear any date of certification by the land registrar. Further, the last entry in the register which is dated June 28, 1983 purports that the applicant became the registered proprietor on the said date and was issued with title.
15. The OS herein was filed on March 28, 2018, some 35 years after the alleged date of registration. Anything may have happened in the intervening period. Whereas the respondent did not file any



affidavit in response to the OS, the burden of proving ownership and demonstrating that nothing has changed remained throughout with the applicant. All he needed to do was to produce a recent certificate of search and to call the land registrar to vouch for his ownership. He failed to do so. A party founding his case on title to registered land must succeed on the strength of his case and not on the weakness or indeed absence of defence. See *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR*. In the absence of proof of ownership of the suit property, the applicant has not laid any adequate basis for compensation for alleged damage to trees and crops on the suit property. The reliefs sought cannot issue in the circumstances.

16. In the result, I find no merit in the plaintiff/applicant's case and I therefore dismiss it with no order on costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF JANUARY, 2023.

D O OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the plaintiff/applicant

No appearance for the defendant/respondent

Court Assistant: E Juma

