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Court:	Court of Appeal at Kisii
Case Action:	Ruling
Judge:	Samson Odhiambo Okong'o
Citation:	Laboson Arap Balach v Land Registrar, Trans-Mara Sub-County & 6 [2015] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Land and Environment
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County:	Kisii
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Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CONSTITUTIONAL PETITION NO. 41 OF 2014**

IN THE MATTER OF ARTICLES 10, 19, 20, 22, 23(1), 40, 47 AND 165 OF THE CONSTITUTION, 2010

AND

IN THE MATTER OF CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE RULES, 2013

AND

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTIAL RIGHTS AND FREEDOMS UNDER ARTICLES 10, 19, 20, 22, 23(1), 40 AND 47 OF THE CONSTITUTION, 2010

BETWEEN

LABOSON ARAP BALACH ..... PETITIONER

VERSUS

THE LAND REGISTRAR, TRANS-MARA SUB-COUNTY .....1<sup>ST</sup>  
RESPONDENT

THE SURVEYOR, TRANSMARA SUB-COUNTY.....2<sup>ND</sup> RESPONDENT

THE DIRECTOR OF SURVEY .....3<sup>RD</sup> RESPONDENT

THE CHIEF LAND REGISTRAR .....4<sup>TH</sup> RESPONDENT

THE ATTORNEY GENERAL .....5<sup>TH</sup>RESPONDENT

JEREMIAH SAOLI OLE MAGESH ..... 6<sup>TH</sup> RESPONDENT

KUNINI OLE KIPAAS .....7<sup>TH</sup> RESPONDENT

**RULING**

**1. Background;**

The area known as Kimintet“D” that was within Esoit Location in the former Trans-Mara District was declared an Adjudication Section in or about the year 1990. During the demarcation and recording of interest in land within the Section, land parcel No. 447 was demarcated and recorded in the name of the 7<sup>th</sup> respondent as the owner. The petitioner lodged an objection under section 26 of the Land Adjudication Act, Cap. 284 Laws of Kenya to the recording of the 7<sup>th</sup> respondent as the owner of the said parcel of land. The petitioner’s objection was heard and allowed by the District Land Adjudication Officer on 7<sup>th</sup> January 2000. In his objection, the petitioner had contended that the 7<sup>th</sup> respondent had sold to

him a portion of the land parcel No. 447 (“hereinafter referred to as **“the original Plot No. 447”**”) whose boundary was clearly marked on the ground. The petitioner had contended further that notwithstanding his interest in the said portion of the original Plot No. 447, the 6<sup>th</sup> respondent had laid a claim to the entire parcel of land that was comprised in the said plot on the ground that the same had been sold to him by the 7<sup>th</sup> respondent. The District Land Adjudication Officer allowed the petitioner’s objection and ordered that the original Plot No. 447 be divided along the boundary that existed on the ground between the portion of the said parcel of land that was occupied by the petitioner and the other portion that was occupied by the 7<sup>th</sup> respondent. The said officer directed further that, the portion of the said parcel of land that was occupied by the petitioner be given a new number and recorded in his name as the owner.

2. The 7<sup>th</sup> respondent was aggrieved by the said decision and preferred an appeal against the same to the Minister under section 29 of the Land Adjudication Act, Cap 284 Laws of Kenya (“the Act”). The 7<sup>th</sup> respondent’s appeal was heard and dismissed by the Minister on 10<sup>th</sup> June 2004 while the 7<sup>th</sup> respondent’s appeal to the Minister was pending. The original Plot No. 447 was divided into two (2) portions in accordance with the decision that had been made by the District Land Adjudication Officer in the objection that I have referred to above. One of the portions of the said parcel of land retained the original parcel No. 447 and was recorded in the names of the 6<sup>th</sup> and 7<sup>th</sup> respondents as owners while the other portion was given a new parcel number namely, land parcel No. 1144 and recorded in the name of the petitioner as the owner. The two (2) parcels of land were subsequently registered on 7<sup>th</sup> January 2004 as Transmara/Kimintet “D”/447 (hereinafter referred to as **“Plot No. 447”**) and Transmara/Kimintet “D”/1144 (hereinafter referred to as **“Plot No. 1144”**) under the Registered Land Act, Cap.300 Laws of Kenya (now repealed) in the names of the 6<sup>th</sup> and 7<sup>th</sup> respondents and the petitioner respectively.

3. All seems to have been well between the parties until sometimes in the year 2012 when the petitioner brought proceedings before this court against the 6<sup>th</sup> and 7<sup>th</sup> respondents herein by way of Originating Summons dated 23<sup>rd</sup> February 2012 in **Kisii HCCC No. 69 of 2012 (O.S) Loboson Arap Balachi –vs- Jeremiah Saoli Ole Megesh & Kunini Ole Kipaas** (“hereinafter referred to as **“the Originating Summons”**”). In the Originating Summons, the petitioner sought an order that he had acquired title to a portion measuring 37acres of Plot No. 447 by adverse possession and that the 1<sup>st</sup> respondent herein be compelled to register the said parcel of land in his name. The petitioner contended that he had occupied the said portion of land openly, peacefully and continuously for a period of over 12 years. Together with the Originating Summons, the petitioner brought an application for a temporary injunction to restrain the 6<sup>th</sup> and 7<sup>th</sup> respondents herein from alienating, transferring, interfering with and/or evicting the petitioner from the said portion of Plot No. 447 measuring 37acres pending the hearing and determination of the Originating Summons. In a ruling that was delivered on 26<sup>th</sup> April 2013, this court expressed doubt on the merit of the petitioner’s adverse possession claim against the 6<sup>th</sup> and 7<sup>th</sup> respondents and whether the petitioner would suffer irreparable injury that could not be compensated in damages if the injunction was not granted. The court disallowed the injunction application but ordered that the status quo as relates to the title, use and occupation of the said disputed portion of Plot No. 447 measuring 37acres be maintained pending the hearing and determination of the Originating Summons. In view of some of the findings that the court had made in the said ruling, the petitioner withdrew the Originating Summons on 15<sup>th</sup> April 2014 and instituted these proceedings immediately thereafter.

#### 4. **The Petition before the court:**

The petitioner brought the present petition on 28<sup>th</sup> November 2014 seeking the following reliefs:-

i. That this honourable court be pleased to declare that the 1<sup>st</sup> to 5<sup>th</sup> respondents conduct and/or acts of omission, neglect and/or refusal to implement and/or visit the suit land, ascertain the error and correct the same as provided by the provisions of section 21 (1), (2), (3), (4) and (5) read together with section 142 (1) (c) of the Registered Lands Act, Cap 300 (now repealed) and/or the provisions of section 79 (1) (c) of the Land Registration Act, 2012, to accord with the decision of the land adjudication officer dated the 7<sup>th</sup> day of January 2000 and the minister dated the 10<sup>th</sup> day of June 2004, respectively, is unconstitutional and constitute a violation of the petitioner's fundamental rights to property as enshrined under Article 40 of the Constitution of Kenya, 2010 and the right to fair administrative action as set out under article 47 of the Constitution of Kenya, 2010.

ii. A declaration that the 6<sup>th</sup> and 7<sup>th</sup> respondent's stake, claim and/or rights in respect of the disputed portion of land, the subject of determination of land adjudication officer and the minister dated the 7<sup>th</sup> day of January 2000 and 10<sup>th</sup> day of June 2004, respectively, were extinguished and conferred to the petitioner and thus, the 6<sup>th</sup> and 7<sup>th</sup> respondents acts of interference with the petitioner's use, occupation and/or possession over disputed portion of suit property, otherwise known as LR No. Transmara/Kimintet D/447, is illegal and unconstitutional.

iii. An order of permanent injunction restraining the 6<sup>th</sup> and 7<sup>th</sup> respondents, dependants, agents, servants and/or employees, interfering, trespassing into, encroaching into a portion of the disputed land otherwise known as LR No. Transmara/Kimintet D/447.

iv. An order compelling the 1<sup>st</sup> to 5<sup>th</sup> respondents to implement in full, the determination and/or award of the land adjudication officer and reiterated vide the award in the appeal to the minister dated 7<sup>th</sup> day of January 2000 and 10<sup>th</sup> day of June 2004, respectively.

v. That the land registrar and the surveyor be and are hereby directed to forthwith visit parcels of lands number Transmara/Kimintet D/447 and 1144, and ascertain and fix the boundary in accordance with the determination of the land adjudication officer and the minister.

vi. That the 1<sup>st</sup> to 5<sup>th</sup> respondents be directed to forthwith reconcile and/or regularize their records so as to reflect and accord with the award and/or determination of the adjudication officer and/or the minister.

vii. Any further and/or such orders that the honourable court may deem fit and just to grant in the circumstance.

5. In the petition, the petitioner has averred that he is the registered proprietor of Plot No. 1144 while the 6<sup>th</sup> and 7<sup>th</sup> respondents are registered as proprietors of Plot No. 447. The petitioner has averred that during the land adjudication at Kimintet Adjudication Section, a portion of land measuring 37 acres which is now comprised in and forms part of Plot No. 447 was awarded to the petitioner following objection proceedings that ensued after the entire parcel of land that was comprised in the original Plot No. 447 was demarcated and recorded in the name of the 6<sup>th</sup> and 7<sup>th</sup> respondents as the owners. The petitioner has contended that, although the said portion of land measuring 37 acres (hereinafter referred to as "**the disputed portion of Plot No. 447**") was awarded to him as aforesaid, the same was nevertheless

included in Plot No. 447 that was registered in the names of the 6<sup>th</sup> and 7<sup>th</sup> respondents instead of the same being made part of Plot No. 1144 that was registered in his (petitioner) name. The petitioner has contended that the disputed portion of Plot No. 447 was made part of Plot No.447 in error as it was supposed to form part of Plot No. 1144 and not Plot No. 447. The petitioner has contended that this error has been brought to the attention of the 1<sup>st</sup> to 5<sup>th</sup> respondents who have a legal duty to correct the same but they have failed to act with the result that the disputed portion of Plot No. 447 has remained as part of Plot No. 447 instead of being part of Plot No. 1144 where it belongs. The petitioner has averred that as a result of the 1<sup>st</sup> to 5<sup>th</sup> respondent's failure to carry out their lawful duties as aforesaid, the petitioner's right to property has been violated.

6. The petitioner has also contended that he has been denied fair administrative action contrary to the provisions of Article 47 of the Constitution of Kenya. The petitioner has contended that he had all along thought that the disputed portion of Plot No. 447 was part of plot No. 1144 until he carried out a survey that revealed that the same falls within Plot No. 447. The petitioner has contended that the decision of the land adjudication officer and the Minister concerning the ownership of the original Plot No. 447 was not properly implemented in that the sub-division that was carried out on the original Plot No. 447 was erroneous to the extent that the portion of the said parcel of land that was recorded in the name of the petitioner as the owner was reduced by 37 acres that was included in the portion of the said parcel of land that was recorded in the names of the 6<sup>th</sup> and 7<sup>th</sup> respondents.

7. Together with the petition, the petitioner filed an application by way of Notice of Motion dated 14<sup>th</sup> November, 2014 under rules 4, 8, 10, 19, 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. It is this application which is the subject of this ruling. In the application, the petitioner has sought a conservatory order to prohibit the respondents from evicting him or interfering with his occupation of the disputed portion of Plot No.447 measuring 37 acres pending the hearing and determination of the petition and, in the alternative, a conservatory order of status quo in respect of the use, title, occupation and/or possession of the disputed portion of Plot No.447 measuring 37 acres pending the hearing and determination of the petition. The application was supported by the affidavit of the petitioner sworn on 21<sup>st</sup> November, 2014 in which he reiterated the contents of the petition and the affidavit filed in support thereof that I have highlighted herein above at length.

8. The petition and the application for conservatory order were opposed by the 6<sup>th</sup> and 7<sup>th</sup> respondents. The 6<sup>th</sup> and 7<sup>th</sup> respondents filed grounds of opposition, notice of preliminary objection and a replying affidavit sworn by the 7<sup>th</sup> defendant all dated 13<sup>th</sup> December, 2014 in opposition to the petition and the said application. In their statement of grounds of opposition, the 6<sup>th</sup> and 7<sup>th</sup> respondents contended that since the disputed portion of Plot No. 447 is registered in the name of the 6<sup>th</sup> and 7<sup>th</sup> respondents, the petitioner has no constitutional right or interest in the same which the 6<sup>th</sup> and 7<sup>th</sup> respondents can be said to have violated to justify an action under Articles 20 and 40 of the Constitution of Kenya, 2010. The 6<sup>th</sup> and 7<sup>th</sup> respondents contended further that the petition herein is a mockery and an abuse of the process of the court in that in the petition, the petitioner has taken a completely contrasting position to that which he took in Kisii HCCC No. 69 of 2012 (O.S)(Originating Summons). The 6<sup>th</sup> and 7<sup>th</sup> respondents contended further that this petition is an attempt by the petitioner to challenge the decisions that were made during the land adjudication process and to that extent, the petition is barred and/or prohibited by the provisions of sections 25, 26 and 29 of the Land Adjudication Act, Cap 284, Laws of Kenya and the Limitation of Actions Act, Cap 22 Laws of Kenya. The 6<sup>th</sup> and 7<sup>th</sup> respondents contended further that the petition, together with the application based thereon are *res judicata*. In their notice of preliminary objection, the 6<sup>th</sup> and 7<sup>th</sup> respondents reiterated the contents of their statement of grounds of opposition and urged the court to strike out the petition together with the application for conservatory orders.

9. In the replying affidavit, the 7<sup>th</sup> respondent deposed that; he was at all material times the owner of the original Plot No. 447. Following the demarcation and recording of the said parcel of land in his name as the owner thereof during land adjudication at Kimintet "D" Adjudication Section, the petitioner whom he had given a portion of the said parcel of land to cultivate lodged an objection. The petitioner's objection was allowed and he was awarded a portion of the original Plot No. 447 which he had claimed. The 7<sup>th</sup> respondent deposed further that, he was not satisfied with the decision of the objection court and preferred an appeal against the same to the Minister pursuant to the provisions of section 29 of the Land Adjudication Act, Cap 284 Laws of Kenya which appeal was dismissed. Following the dismissal of the said appeal, the decision of the objection court was executed. The original Plot No. 447 was sub-divided into two (2) portions, one, for the petitioner and the other for him. The portion of the said parcel of land that was awarded to the petitioner by the objection court was given a new parcel number namely, Plot No.1144 and was accordingly recorded in the name of the petitioner. The portion of the said parcel of land that remained in his name retained the original parcel No. 447 and the same was recorded in his name jointly with the 7<sup>th</sup> respondent as owners.

10. The 7<sup>th</sup> respondent deposed further that, Land parcel number 447 was subsequently registered in his name jointly with the 6<sup>th</sup> respondent as LR No. Trans-Mara/Kimintet D/447 ("Plot No. 447") while parcel number 1144 was registered in the name of the petitioner as LR No. Trans-Mara/Kimintet D/1144 ("Plot No. 1144"). The 7<sup>th</sup> respondent deposed that Plot No. 1144 is comprised of the parcel of land that was occupied by the petitioner and which was awarded to him by the objection court whose decision was confirmed on appeal to the Minister. The 7<sup>th</sup> respondent deposed that after the said parcel of land was registered in the name of the petitioner, the petitioner was issued with a title deed in respect thereof and remained in occupation thereof without any complaint for more than 7 years until sometimes on 7<sup>th</sup> March 2011 when the petitioner wrote to the District Land Registrar complaining that the 6<sup>th</sup> respondent had laid a claim to a large portion of his land. The 7<sup>th</sup> respondent denied that the petitioner has been in occupation of the disputed portion of Plot No. 447 which measures 37 acres. The 7<sup>th</sup> respondent denied also that the said portion of Plot No. 447 was supposed to form part of Plot No. 1144. The 7<sup>th</sup> respondent contended that the petitioner having been issued with a title deed for Plot No. 1144 that was awarded to him by the objection court, his claim that the decision of the said court was not implemented by the 1<sup>st</sup> to 4<sup>th</sup> respondents is baseless. The 7<sup>th</sup> respondent contended further that the petitioner having conceded in the earlier case (Originating Summons) that the disputed portion of Plot No. 447 is owned by the 6<sup>th</sup> and 7<sup>th</sup> respondents, he is estopped from claiming in these proceedings that the said parcel of land falls within Plot No. 1144. The 7<sup>th</sup> respondent contended that the petitioner's claim herein is legally untenable and should be dismissed by the court.

11. When the petitioner's application came up for hearing on 19<sup>th</sup> February 2015, the advocates for the parties agreed to argue the same by way of written submissions. The petitioner filed his written submissions on 7<sup>th</sup> April 2015 while the 6<sup>th</sup> and 7<sup>th</sup> respondents did so on 4<sup>th</sup> May 2015. I have considered the application together with the submissions made by the petitioner's advocates in support thereof. I have also considered the 6<sup>th</sup> and 7<sup>th</sup> respondent's notice of preliminary objection, statement of grounds of opposition and replying affidavit that were filed in opposition to the application together with their advocates' written submissions. What is before me is an application for conservatory orders. The 6<sup>th</sup> and 7<sup>th</sup> respondents have opposed the application through grounds of opposition and replying affidavit. They have also raised a preliminary objection through which they have sought not only the dismissal of the application but also the striking out of the petition. I have noted that most of the grounds set out in the 6<sup>th</sup> and 7<sup>th</sup> respondents' notice of preliminary objection, statement of grounds of opposition and replying affidavit are similar. In the circumstances, it would not serve any useful purpose in my view to consider the preliminary objection in isolation. I think that it would be more appropriate if all the grounds put forward by the 6<sup>th</sup> and 7<sup>th</sup> respondents against the application and petition herein are considered together.

12. In the case of **George Odero –vs- Lake Victoria Environment Management Programme & 3 Others, Kisii HCCC No. 10 of 2015 (unreported)**, this court stated that an applicant for a conservatory order under rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 must demonstrate that:-

- a. he has a prima facie case against the respondent;
- b. unless the conservatory order is granted he is likely to suffer prejudice or injury as a result of violation of his constitutional rights or the constitution;
- c. it would be in the public interest to grant the order.

In the Supreme Court case of **Gatirau Peter Munya –vs- Dickson Mwenda Kithinji and 2 Others, Supreme Court of Kenya, Petition No. 2 of 2014 (unreported)**, the court stated that:-

**““Conservatory orders” bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies as well as to uphold the adjudicatory authority of the court in the public interest. Conservatory orders therefore are not unlike interlocutory injunction linked to such private party issues as “the prospects of irreparable harm” occurring during pendency of a case, or “high probability of success” in the applicants case for orders of stay. Conservatory orders, consequently should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes.”**

13. The facts giving rise to this petition are straight forward and to a large extent not contested. During the land adjudication at Kimintet “D” Adjudication Section, the original Plot No. 447 was demarcated and recorded in the name of the 7<sup>th</sup> respondent as the owner thereof. The petitioner herein who was occupying a portion of the said parcel of land at the material time objected to the recording of the entire parcel in the name of the 7<sup>th</sup> respondent as the owner. The petitioner’s objection was allowed by the Land Adjudication Officer (hereinafter referred to only as “the objection court” where the context so admits). The objection court ordered that the original Plot No. 447 be divided between the petitioner and the 7<sup>th</sup> respondent along the boundary that existed between the portion of that parcel of land that was occupied by the 7<sup>th</sup> respondent and the other portion that was occupied by the petitioner.

14. The said order by the objection court was duly executed. Plot No. 447 was sub-divided into two (2) portions. The 7<sup>th</sup> respondent remained with the portion thereof that retained parcel No. 447 while the petitioner had the portion that was given a new parcel number, namely Plot No. 1144. The 7<sup>th</sup> respondent appealed to the Minister against the decision of the objection court but his appeal was dismissed. The adjudication register for Kimintet “D” Adjudication section was ultimately finalized and presented to the Chief Land Registrar for registration of the interests that were set out therein pursuant to the provisions of section 28 of the Land Adjudication Act, Cap.284 Laws of Kenya and section 11 of the Registered Land Act, Cap. 300, Laws of Kenya (now repealed). Plot No. 447 that arose from the sub-division of the original Plot No. 447 was registered in the names of the 6<sup>th</sup> and 7<sup>th</sup> respondents as LR No.

Trans-Mara/Kimintet "D"/447 ("Plot No. 447") while the other portion of the said parcel of land namely, Plot No. 1144 was registered in the name of the petitioner as LR No. Trans-Mara/Kimintet "D"/1144 ("Plot No. 1144"). Plot No. 447 measures 37.73 hectares (93.260acres) while Plot No. 1144 measures 11.23 hectares (27.758 acres). The two parcels of land were registered in the names of the 6<sup>th</sup> and 7<sup>th</sup> respondents and, the petitioner respectively, on first registration on 7<sup>th</sup> January 2004.

15. The petitioner was issued with a title deed for Plot No. 1144 on 29<sup>th</sup> July 2004. On 7<sup>th</sup> March, 2011, the petitioner wrote to the 1<sup>st</sup> respondent claiming that the division of the original Plot No. 447 was carried out erroneously in that he got a smaller portion of the said parcel of land than he was entitled to while the 6<sup>th</sup> and 7<sup>th</sup> respondents got more than what they were supposed to get pursuant to the decision of the objection court. The petitioner requested the 1<sup>st</sup> respondent to send officers from his office to the site of the two parcels of land to correct the said error. The petitioner's letter aforesaid was followed by another letter from his advocates on record dated 22<sup>nd</sup> April 2011 that was also addressed to the 1<sup>st</sup> respondent in which letter the said advocates also called upon the 1<sup>st</sup> respondent to take steps to ensure that the boundaries of Plot No. 447 and Plot No. 1144 are fixed in accordance with the said decision of the objection court. No action seems to have been taken by the 1<sup>st</sup> respondent following the said letters of demand.

16. What followed was a civil suit namely, Kisii HCCC No. 69 of 2012 (OS) (the Originating Summons) that was filed by the petitioner against the 6<sup>th</sup> and 7<sup>th</sup> respondents in which suit, the petitioner claimed a portion measuring 37acres of Plot No. 447 by adverse possession. The petitioner claimed that he had occupied the said portion of Plot No. 447 for a period of over 12 years and as such he was entitled to be registered as the owner thereof since the 6<sup>th</sup> and 7<sup>th</sup> respondent's title over the same had been extinguished by operation of law. Together with the Originating Summons, the petitioner brought an application for a temporary injunction to restrain the 6<sup>th</sup> and 7<sup>th</sup> respondents from alienating, transferring, interfering with and/or evicting him from the said portion of Plot No. 447 measuring 37 acres pending the hearing and determination of the Originating Summons. The petitioner's application for injunction was heard and a ruling thereon made on 26<sup>th</sup> April 2013. The application was disallowed. However, the court ordered that the status quo relating to the title, use, occupation and/or possession of the disputed portion of Plot No. 447 measuring 37acres as at the date of that ruling be maintained pending the hearing and determination of the Originating Summons.

17. Following the said ruling, the petitioner on his advocates' advice formed the view that the Originating Summons did not have good prospects of success. The petitioner withdrew the said Originating Summons on 15<sup>th</sup> October 2014 and instituted these proceedings on 28<sup>th</sup> July 2014 claiming that his constitutional rights have been violated and/or threatened by the respondents. The petition and the application presently before me have been brought under Articles 10, 19, 20, 22, 23, 40 and 47 of the Constitution of Kenya, 2010. The petitioner has contended that he is entitled to be registered as the owner of the disputed portion of Plot No. 447 measuring 37 acres pursuant to the decision of the objection court and the Minister aforesaid. The petitioner has contended that the 1<sup>st</sup> to 5<sup>th</sup> respondents have failed to implement the said decision of the objection court with the result that the 6<sup>th</sup> and 7<sup>th</sup> respondents have now laid a claim to the said portion of Plot No.447 and are in the process of dispossessing the petitioner of the same. The petitioner has contended that the 1<sup>st</sup> to 5<sup>th</sup> respondents' failure to implement the said decision has violated his right to fair administrative action guaranteed under Article 47 of the constitution. The petitioner has contended further that the 6<sup>th</sup> and 7<sup>th</sup> respondents have made attempts to dispossess him of the disputed portion of Plot No. 447 thereby threatening his right to own property guaranteed under Article 40 of the Constitution.

18. As I have stated earlier in this ruling, the onus was upon the petitioner to establish a prima facie case of violation or threatened violation of his constitutional rights by the respondents. The decision of

the objection court that the original Plot No. 447 be shared between the petitioner and the 7<sup>th</sup> respondent was made during the land adjudication under the provisions of the Land Adjudication Act, Cap 284, Laws of Kenya. The said decision was supposed to be implemented by the Land Adjudication Officer, Kimintet "D" Adjudication Section and the officers who were appointed under section 4 of the Land Adjudication Act, Cap 284 to assist him with the land adjudication in the said Section. The task of dividing the land was as submitted by the 6<sup>th</sup> and 7<sup>th</sup> respondents expressly given to the demarcation officer by the objection court. The said court stated that: "**ORDER. The demarcation officer to plot along the established boundary**". I am in agreement with the submission by the 6<sup>th</sup> and 7<sup>th</sup> respondents that the decision of the objection court was duly implemented by those who were responsible for its implementation. It is consequent to that implementation that the petitioner acquired Plot No. 1144 and the 6<sup>th</sup> and 7<sup>th</sup> respondents, Plot No. 447. I am therefore not persuaded by the petitioner's contention that the 1<sup>st</sup> to 5<sup>th</sup> respondents' have violated his constitutional rights by refusing or failing to implement the said decision.

19. The petitioner has also contended in the alternative, I believe, that if the decision of the objection court was implemented, the said implementation was carried out erroneously. In this regard, the petitioner has contended that the 1<sup>st</sup> to 5<sup>th</sup> respondents which have the statutory power to correct the errors that were committed during the implementation of the said decision have failed to do so thereby violating his constitutional rights. I am in agreement with the petitioner that the 1<sup>st</sup> respondent has power under section 142(1)(c) of the Registered Land Act, Cap.300, Laws of Kenya (now repealed) and section 79(1)( c ) of the Land Registration Act, 2012 to correct errors in the register which relates to dimensions or area of land. I must say that whether the alleged errors which have been pointed out by the petitioner concern dimensions or area of Plot No.1144 can only be determined at the trial. For now, I have not been persuaded by the petitioner that, that is the case.

20. According to the report by Geoinfo Land Surveyors and Consultants dated 12<sup>th</sup> April, 2011 which is annexed to the petitioner's affidavit in support of the present application, Plot No.1144 measures 11.23 ha. on the ground. This is the same measurement that has been given in the register and in the Registry Index Map for this parcel of land. I cannot see therefore how it can be said that the measurement of Plot No. 1144 as it is indicated in the register is erroneous so as to call for correction by the Land Registrar under the aforesaid provisions of the Registered Land Act and Land Registration Act. The 37 acres of land that is being claimed by the petitioner falls entirely on Plot No. 447. If my understanding of the petitioner's complaint is correct; his claim is that a portion of land that was awarded to him by the objection court was recorded in the name of the 7<sup>th</sup> respondent as the owner wrongfully during the land adjudication exercise. His claim in my view is over land and has nothing to do with the boundaries or measurements of Plot No. 1144 and Plot No. 447. This is well captured in his submission as follows: "**.....and the Petitioner contends that the disputed portion forms part of the land that was awarded to him.**"

21. The dispute between the petitioner and the 6<sup>th</sup> and 7<sup>th</sup> respondents over the original Plot No. 447 was determined through the dispute resolution mechanism set out under the Land Adjudication Act, Cap 284, Laws of Kenya. Under that Act, whoever is aggrieved with the decision of the objection court or the manner in which it has been implemented has a right of appeal to the Minister. In this case, the objection court had ordered that the original Plot No. 447 be shared between the petitioner and the 7<sup>th</sup> respondent along the then existing boundary.

22. Following this order, the sub-division of the said parcel of land was done and the petitioner ended up with Plot No. 1144. I am of the view that, if the petitioner was not satisfied with the manner in which the said sub-division was carried out, his recourse was to appeal to the Minister. The petitioner never lodged an appeal. I am of the view that after the adjudication register was finalized and Plot No.1144

and Plot No. 447 that were recorded in the names of the petitioner and the 6<sup>th</sup> and 7<sup>th</sup> respondents respectively as owners were registered in their names under the Registered Land Act, Cap 300 Laws of Kenya (now repealed) on first registration, the parties' rights over their respective parcels of land became absolute and no further claims to land arising from the adjudication process could be entertained. The 1<sup>st</sup> to 5<sup>th</sup> respondents have no power in my view to cause a portion measuring 37 acres to be exercised from Plot No.447 and added to Plot No.1144 in the name of correcting errors in the registers of the two parcels of land relating to their dimensions or areas. The 1<sup>st</sup> to 5<sup>th</sup> respondents cannot therefore be said to have violated the petitioner's constitutional rights to a fair administrative action by failing to undertake an exercise over which they have no power.

23. The petitioner has also contended that the 6<sup>th</sup> to 7<sup>th</sup> respondents have threatened to violate his right to property by dispossessing him of the disputed portion of Plot No. 447. There is no dispute that the disputed parcel of land falls within Plot No. 447 which is registered in the names of the 6<sup>th</sup> and 7<sup>th</sup> respondents. The 6<sup>th</sup> and 7<sup>th</sup> respondents have a right therefore by virtue of the provisions of section 24, 25 and 26 of the Land Registration Act, 2012 to possess and use the disputed property. The petitioner has not established a prima facie right over the disputed property. I am not persuaded therefore that the 6<sup>th</sup> and 7<sup>th</sup> respondents have threatened to violate the petitioner's right to own property guaranteed under Article 40 of the Constitution.

24. The upshot of the foregoing is that the petitioner has failed to demonstrate that he has a prima facie case or as the Supreme Court had put it in the case cited above, a meritorious case against the respondents. Having held that the petitioner has not established a prima facie case, it is not necessary for me to consider whether the petitioner would suffer prejudice or injury arising from the alleged violation of his constitutional rights if the conservatory orders sought are not granted. In any event, since the petitioner has failed to demonstrate that his constitutional rights have been violated or are threatened, I am of the view that it is unlikely that he will suffer any prejudice if the orders sought are not granted. None of parties addressed me on the issue of public interest. I think this is due to the fact that the dispute between the parties herein revolves to a large extent around conflicting private rights.

25. Due to the foregoing, it is my finding that the petitioner has failed to meet the conditions for granting a conservatory order. The 6<sup>th</sup> and 7<sup>th</sup> respondents had urged me to find that this court has no jurisdiction to entertain the petition herein and that the issues raised in the petition are *res judicata*. I was also asked to find that the petition is an abuse of the process of the court and to proceed to strike it out at this stage.

26. The petitioner has brought these proceedings claiming that his constitutional right to fair administrative action has been violated by the 1<sup>st</sup> to 5<sup>th</sup> respondents. He has also claimed that the 6<sup>th</sup> and 7<sup>th</sup> respondents have threatened to violate his constitutional right to property. I am not in agreement with the 6<sup>th</sup> and 7<sup>th</sup> respondents' submission that this court lacks jurisdiction to entertain the petition herein. Section 13 of the Environment and Land Court Act, 2011 gives this court power to entertain this petition and to grant the reliefs sought. I am also not in agreement with the 6<sup>th</sup> and 7<sup>th</sup> respondents that the issues raised in the petition are *res judicata*.

27. There is no evidence before me that there was a previous constitutional petition involving the petitioner and the 6<sup>th</sup> and 7<sup>th</sup> respondents in which the issues raised in the present petition regarding the violation of the petitioner's constitutional rights were raised and conclusively determined. The issues that were raised in Kisii HCCC No. 69 of 2012 (O.S) (Originating Summons) did not concern violation of constitutional rights and in any event, that suit was not heard and determined on merit. On the contention that this petition is an abuse of the process of the court, again, I am unable to agree. Although, the petitioner has not persuaded me that he has a prima facie case against the respondents, this alone does

not make his petition an abuse of the process of the court.

28. In the book, **Pleadings: Principles and Practice by Sir Jack Jacob and Iain S. Goldrein**, the authors have stated that ; “**An action is an abuse of the process of the court where it is “pretenceless” or “absolutely groundless” and the court has the power to stop it summarily and prevent the time of the public and the court from being wasted**”. I am not convinced that the petition herein is either pretenceless or absolutely groundless. There is no evidence that the petition has been brought in bad faith. Due to the foregoing, I am not inclined to strike out the petition at this stage. The petitioner has a constitutional right under Article 20 of the Constitution of Kenya to institute these proceedings. Article 50(1) of the Constitution on the other hand, guarantees him a right to have the dispute heard and determined by this court. In light of those constitutional provisions, this court would strike out a constitutional petition summarily without a hearing sparingly and only in very clear cases where it is apparent that the petition is completely groundless or is an abuse of the process of the court.

29. In conclusion, I would disallow the petitioner’s prayer for a conservatory order. There is also no reason why I should grant an order for the maintenance of status quo that has been sought by the petitioner in the alternative. The petitioner’s application dated 14<sup>th</sup> November 2014 is accordingly dismissed with costs to the 6<sup>th</sup> and 7<sup>th</sup> respondents. In the interest of justice and for the purposes of maintaining law and order, I wish to add for the avoidance of doubt that, the orders made herein shall not entitle the 6<sup>th</sup> and 7<sup>th</sup> respondents to evict the petitioner from the disputed parcel of land if at all he is in occupation thereof without following the due process of law.

**Delivered, Signed and Dated at Kisii this 19<sup>th</sup> day of June 2015.**

**S. OKONG’O**

**JUDGE**

**In the presence of:**

N/A for the petitioner

N/A for the 1<sup>st</sup> to 5<sup>th</sup> respondents

N/A for the 6<sup>th</sup> and 7<sup>th</sup> respondents

Millicent Maore Court Assistant

**S. OKONG’O**

**JUDGE**



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