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Court:	High Court at Nakuru
Case Action:	Judgment
Judge:	John M Mutungi
Citation:	Harishabhai Nemchad Zakharia v County Government of Nakuru & another [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nakuru
Docket Number:	-
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Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

PETITION NO.37 OF 2017

IN THE MATTER OF ARTICLES 22,23,50,64 AND 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTIONS OF RIGHTS UNDER ARTICLE 10,27,28, 40 AND 47 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE ADMINISTRATIVE ACTION ACT, ACT NO.4 OF 2015

HARISHABHAI NEMCHAD ZAKHARIA.....PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF NAKURU.....1ST RESPONDENT

THE PRINCIPAL SECRETARY, STATE DEPARTMENT

OF HOUSING AND URBAN DEVELOPMENT.....2ND RESPONDENT

J U D G M E N T

1. The petitioner in his petition dated 18th September 2017 filed in court on 25th September 2017 avers that he is the registered proprietor of land parcel **Nakuru Municipality Block 23/776** having purchased the same on or about August 2015 (herein after referred to as “the suit property”).

2. The petitioner averred that upon taking possession of the suit property he realized the Respondent had encroached into the suit property and constructed thereon a public non-motorized transport footpath measuring approximately 2.4M in width and 60.65 M long. The petitioner averred that despite the respondents acknowledging the existence of the footpath the respondent had declined, failed and/or refused to relocate the footpath rendering the petitioner unable to usefully develop his parcel of land.

3. The petitioner claims that the respondents action violates his constitution right to property and states his constitutional rights under Articles 27, 28, 29 and 40 have been violated. He avers that the respondent in maintaining the footpath over his property has violated Articles 10 and 47 of the constitution and seeks the following reliefs from the court: -

*(a) A declaration that the petitioner is the lawful proprietor of all hat parcel of land known as **Nakuru Municipality Block 23/776**.*

(b) A declaration that the petitioner’s rights guaranteed and protected under Articles 10, 27, 28, 40 and 47 of the Constitution have been violated by the respondents.

*(c) A mandatory injunction compelling the Respondents to divert or redict or re-route the public non-motorized transport footpath approximately 2.4m wide and 60.65m long away from all the parcel of land known as **Nakuru Municipality Block 23/776** within 14 days and in default the petitioner be at liberty to close and remove the footpath from his land and the attendant costs be*

borne by the respondents.

(d) A permanent injunction restraining the respondents either by themselves, agents or otherwise howsoever from trespassing upon or repossessing and, or damaging or wasting or interfering with the petitioner's quiet and peaceful enjoyment of all the parcel of land known as Nakuru Municipality Block 23/776 or any part thereof in any manner whatsoever prejudicial to the interest of the petitioner.

(e) An order that the Respondents pays the petitioner general damages with interest for violating his rights.

(f) Costs of this petition with interest until payment on full.

(g) Such other further additional incidental and/or alternative reliefs or remedies as the honorable court shall deem just and expedient to grant in the circumstances.

4. The petition was supported on the supporting affidavit sworn by Harishabhai Nemchand Zakharia, the petitioner herein sworn on 18th September 2017. The petitioner averred that he was the registered proprietor of the suit property and that he was issued with a certificate of Lease on 14th December 2015 as per the copy of title and certificate of official search annexed to the affidavit. The petitioner further averred that the County Government of Nakuru had encroached onto his land and had constructed thereon a public non-motorized transport foot path measuring 2.4M wide and 60.65M long and despite the petitioner demanding that the footpath be relocated from his land the respondent declined and/or refused to do so. The petitioner contends that owing to encroachment by the respondent he has been unable to access financing from his bankers and has therefore been unable to develop his property.

5. On 19th February 2018 the petitioner amended the petition and introduced the principal secretary, state Department of Housing and Urban Development as the 2nd respondent. The joinder of the 2nd Respondent was on the basis that the 2nd respondent had entered into contract for the construction of a non-motorized transport footpath over a part of the petitioner's land without any notice to the petitioner.

6. The 1st respondent filed a response to the petition through an affidavit sworn on 11th January 2018 by James Mutai Kariuki a surveyor of the 1st respondent. The 1st respondent contended the petition did not satisfy the threshold of what qualifies as a constitutional petition and averred that the petition was an abuse of the court process. The 1st Respondent averred that the petitioner's property lies on a road reserve explaining that as per the survey plan Folio No. 189 approved on 21st October, 1987 annexed to the affidavit sworn in response, the road measured 60.96 metres but the same had been reduced to 20 metres following encroachment by the petitioner and others. The 1st respondent further stated the construction of the non- motorized foot path was the initiative of the National Government through the Ministry of Lands, Housing & Urban Development in collaboration with the World Bank who were funding the project. The 1st respondent explained that the 2nd Respondent entered into a contract for the construction of the foot path with Seo & Sons Ltd on 31st July 2014 and the construction went on upto 4th November 2016 when it was completed as per the certificate of completion issued on 22nd November 2016 exhibited as "JMK3". The Respondent averred that during the whole period of construction the petitioner never raised any issue of ownership of the property. The 1st respondent asserted that the non-motorized footpath was constructed after consultation with relevant stakeholders and that the same was done in designated areas that were identified to be road reserve along Oginga Odinga road where the suit property lies. The 1st respondent averred that by the time the petitioner acquired the property the footpath had already been constructed and/or was under construction and thus the petitioner ought to have been aware or should have become aware that the property was on a road reserve.

7. The 1st Respondent averred the public foot path was constructed in public interest for the safety of the public and to ease public transport for the benefit of the public. The 1st Respondent contended the petition was devoid of any merit and ought to be dismissed with costs.

8. The 2nd Respondent filed a response to the petition on 6th May 2021. The 2nd Respondent denied the petitioner's averments in the petition and further contended the court lacked jurisdiction to entertain the petition and sought the same to be struck out. The 2nd respondent averred that the petition was incompetent as it raised issues that called to be ventilated by way adducing viva voce evidence which was not suitable in matters pleaded as constitutional petitions;

9. With the agreement and consent of the parties the court on 9th June, 2021 directed that the petition be adjudicated on the basis of the affidavit evidence and submissions and invited the parties to file their submissions. The petitioner filed his submissions on 13th

August 2021, the 1st respondent on 15th September 2021 and the 2nd Respondent on 27th September 2021. I have reviewed the pleadings and the submissions filed by the parties and the following are the issues that arise for determination: -

(i) Whether the petition satisfies the threshold of what constitutes a constitutional petition"

(ii) Whether the court has jurisdiction to sustain the petition"

(iii) Whether the petitioner is entitled to the reliefs sought in the petition"

10. Not every suit commenced as a constitutional petition qualifies as such. A constitutional petition to qualify as such must satisfy some basic threshold. The principle of what constitutes a Constitutional petition was established in the case of *Anarita Karimi Njeru - vs- The Republic (1979) eKLR* and was restated in the case of *Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR*. The principle established was to the effect that a Constitutional petition should set out with a degree of precision the petitioner's complaint, the provisions of the constitution infringed and the manner in which they are alleged to be infringed. In the *Mumo Matemu* case (supra) the court of appeal in its judgment at paragraph 44 inter alia stated:-

"(44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the "epitome of precise, comprehensive or elegant drafting without remedy by the 1st respondent".

11. The court further at paragraph 87 (3) in the judgment stated as follows: -

"It is our finding that, the petition before the High court was not pleaded with precision as required in constitutional petitions. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of the Constitution of Kenya and the Ethics and Anti- Corruption Commission Act, 2011. Accordingly, the petition did not meet the standard enunciated In the Anarita Karimi Njeru case"

12. In the present petition the petitioner claims that the Respondents have encroached onto his property and have constructed a footpath over a portion of the same and have upon demand refused to divert and/or relocate the footpath from the petitioner's property. The 1st defendant in its response to the petition averred that the footpath was constructed on a road reserve after appropriate stakeholders consultation and after the site was identified to be a road reserve and hence public land. This in effect raises the issue whether or not the public footpath is constructed on public land and/or on land belonging to the petitioner. The 1st Respondent has annexed to its replying affidavit a survey plan "**JMK 1 (a) & (b)**" which it argues indicates the road reserve was illegally encroached upon reducing the road from 60.96 metres wide to a mere 20 metres wide. The effect of this pleading is that the title held by the petitioner is under challenge. Once the title of a registered proprietor is the subject of challenge it becomes incumbent on the part of the registered proprietor to demonstrate and establish the root of the title he/she holds. Section 26 (1) of the Land Registration Act, 2012 gives the instances where a registered proprietor's title may be challenged.

13. The petitioner's claim of ownership of the suit property is premised on the certificate of lease dated 14th December 2015, that he holds over the suit land. How was this land allocated" Was the land carved out of a road reserve" These are questions that become pertinent if the root of the title has to be established. In the case of *Munyu Maina -vs- Hiram Gathia Maina (2013) eKLR* the court of appeal stated as follows:-

"We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted in the register"

14. I dare say that where a purchaser is buying a leasehold property whose origin is traceable to an allotment from the government, it is imperative for the purchaser to ensure proper and appropriate due diligence is carried out to satisfy oneself that due process was followed in the alienation of the public land. The alienation ought to have been in compliance with section **3, 7, 9** and **12** of the now

repealed Government Lands Act (Cap 280 Laws of Kenya) if it had been done before the Land Act, 2012 came into force and/or in compliance with section 14 of the Land Act, 2012 if the allocation was after the Act came into force. From the copy of the certificate of Lease exhibited by the petitioner, the register for land parcel Nakuru Municipality Block 23/776 is shown to have been opened on 19th February 1997 denoting that the allocation must have been made under the provisions of the Government Lands Act (Cap 280 Laws of Kenya). The documents that would support the creation of the title would have been a letter of allotment attaching a Part Development Plan (PDP), acceptance of the allotment and payment of any allotment charges, survey Plan (F/R) and a survey Map (RIM), and a lease issued and duly signed by the Commissioner of Lands and the eventual registration of the Lease that results in the issue of the certificate of Lease.

15. It is understandable that the petitioner was a purchaser of the suit property but due diligence would have entailed carrying out a background check to establish the root of the title. As the 1st Respondent has pleaded the footpath was constructed on what was a road reserve and/or public land, there was necessity to dispel such claim and in my view I do not consider that could be done within the present petition as pleaded.

16. In the case of *Adan Abdirahani Hassan & 2 others -vs- Registrar of Titles & 2 others (2013) eKLR Angote J* stated as follows:-

“Any alienation of land reserved for public purpose and issuance of a title for the same whether under the Registration of Titles Act, Cap 281 or the Registered Land Act, Cap 300 is null and void abinitio, such a title does not exist in the first place because the land belonged to the public and was not available for alienation”.

17. In the case of *Godfrey Paul Okutoyi & others -vs- Habil Olaka & Another (2018) eKLR Chacha, J* stated as follows:-

“A party should only file a constitutional petition for redress of a breach of the Constitution or denial or violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.

18. In the present petition I do not see that there was any violation and/or infringement of any constitutional provisions under the Bill of Rights to justify the petitioner to invoke the constitutional jurisdiction of this court. The petitioner had an alternative avenue for redress through the Civil Court. In the case of *Bernard Murage -vs- fine Serve Africa Ltd & others (2015) eKLR* the court stated:-

“Not each and every violation of the Law must be raised before the High Court as a Constitutional issue. Where there exists alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.

19. I have observed elsewhere in this judgment that the petitioner claims there has been encroachment onto his land by the Respondents. The 1st Respondent refutes the claim and claims the pathway is on a road reserve. This without doubt raises the issue of ownership of the disputed portion where the footpath has been constructed. Such issue is better suited for adjudication before the ordinary civil court and not as a constitutional petition. In the premises I hold and find that the petition does not satisfy the threshold of what qualifies as a constitutional petition and hence the court lacks the jurisdiction to sustain the same as such. I accordingly order the petition struck out.

20. Each party to bear their own cost of the suit.

Judgment dated signed and delivered virtually at Nakuru this 2nd day of December 2021.

J M MUTUNGI

JUDGE



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