



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 520 OF 2017

JIMI WANJIGI.....1ST PETITIONER

IRENE NZISA WANJIGI.....2ND PETITIONER

VERSUS

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. **Jimi Wanjigi** and **Irene Nzisa Wanjigi**, the Petitioners, are Kenyan citizens. The 1st Petitioner is a business man with business interests both in Kenya and abroad while the 2nd Petitioner is his wife.

2. The Petitioners filed this petition against the **Inspector General of Police**, an office established under Article 245 of the Constitution, the **Director of Public Prosecutions** an office established under Article 157 of the Constitution responsible for instituting and conducting public prosecutions in the country, **Director of Criminal Investigations** established under the National Police Service Act (NPS Act), and the **Attorney General**, an office established under Article 156 of the Constitution, the Principal legal advisor to the national government and legal representative to the national government in civil cases it is party to, the 1st, 2nd, 3rd and 4th Respondents respectively.

3. The Petitioners aver that on the 16th of October, 2017, the 1st, 2nd and 3rd Respondents and or their agents raided and broke into their residential premises in Muthaiga estate, Nairobi County, without a search warrant and for three days while using more than one hundred (100) armed police officers laid siege and barricaded the Petitioners' residence restricting entry and exit into their home to them and their guests, including denying access to their advocates.

4. The petitioners state that during the raid, the police illegally searched and wantonly destroyed their property, broke down doors, destroyed CCTV installations and generally terrorized them and their family members; that during the illegal search, the officers confiscated, among other items, the 1st Petitioner's licensed firearms and ammunition as well as those of his associate B N Mwaura and his father, Hon. Maina Wanjigi.

5. According to the Petitioners, the confiscated firearms included; one pistol make Smith and Wesson serial number SW99; one Glock pistol serial number UAB 630; one assault rifle make Mini Archer serial number 2013/MIII attached with a laser serial number W3043907; one Glock 19 pistol serial number UAB 646; one assault rifle make M4CQ serial number CN 005433/13; one Glock 19 pistol serial number URG 798 and one Glock 19 pistol serial number UAB 632

6. The Petitioners state that despite conservatory orders issued on 17th October, 2017, the police officers willfully disobeyed and disregarded the said orders and continued to trespass on their premises and only withdrew on 18th October, 2017 at 0800 leaving behind a trail of destruction, pain and suffering inflicted on the Petitioners and their family members.

7. The petitioners aver that the respondents violated their rights and fundamental freedoms guaranteed under the Constitution and contravened various Articles of the Constitution including Articles 2, 3, 10, 22, 24, 26, 27, 28, 29, 32, 33, 38, 39, 48 and 238.

8. The petitioners therefore filed the Petition amended on 6th December 2017 seeking the following reliefs:-

a) A declaration be and is hereby issued that the 1st, 2nd and 3rd Respondents have breached and continue to be in breach of the Petitioners' fundamental rights under Articles 10(1), 10(2), 26(3), 27(1), (2), (4) & (5), 28, 29, 31(a) & (b), 32(1), 33(1), 36(1), 38(1), 39, 45(1), 47(1) & (2), 48, 49,50 and 51 of the Constitution of Kenya, 2010.

b) A declaration be and is hereby issued that the 1st, 2nd and 3rd Respondents' conduct and actions which are complained of in the Petitions, jointly and/or severally, singularly and/or cumulatively against the Petitioners are oppressive, unfair, unreasonable, irrational, illegal and an abuse of power and the criminal justice system and process.

c) A declaration be and is hereby issued that the 1st, 2nd and 3rd Respondents' breach of the Petitioners' fundamental rights singularly and cumulatively has caused loss and damage to the Petitioners.

d) A declaration be and is hereby issued that the Petitioners are entitled to pecuniary compensation for such loss and damage as they have suffered on account of the Respondents' violation of their fundamental rights.

e) General damages for the violation/contravention of the Petitioners' rights and fundamental freedoms.

f) General damages for the malicious, wanton and reckless destruction of the Petitioners' property

g) A further declaration be and is hereby issued that the petitioners are entitled to exemplary and aggravated damages in view of the 1st, 2nd and 3rd Respondents' conduct and actions and breach of the petitioners' fundamental rights and freedoms

h) An award of exemplary and aggravated damages to be quantified by the court.

i) An order directing the 1st, 2nd and/or 3rd Respondents to forthwith restore and/or return to the 1st Petitioner all firearms, ammunition and items taken from the Petitioners' private residence and in particular the following:

i. One pistol make Smith and Wesson serial number SW99;

ii. One Glock pistol serial number UAB 630;

iii. One assault rifle make Mini Archer serial number 2013/MIII attached with a laser serial number W3043907;

iv. One Glock 19 pistol serial number UAB 646;

v. One assault rifle make M4CQ serial number CN 005433/13;

vi. One Glock 19 pistol serial number URG 798;

vii. One Glock 19 pistol serial number UAB 632

j) Any other relief or such other orders as this Honourable Court shall deem fit and just to grant the Petitioners.

k) Cost of this Petition be awarded to the Petitioners.

1st, 3rd and 4th Respondents' Response

9. The 1st, 3rd and 4th Respondents filed grounds of opposition in response to the Amended petition. They contend that the search conducted on the Petitioners' premises on 17th October, 2017 was lawful and authorized through a search warrant issued in **Misc. Application No. 3352 of 2017**; that section 120(2) of the Criminal Procedure Code (the Code) provides that if access into the building or other place cannot be so obtained, the police officer or other person executing the search warrant may proceed in the manner prescribed by section 22 or 23; that section 22(2) of the Code allows a police officer to enter the place and conduct a search therein, and, in order to enter into the premises, he may break open any outer or inner door or window of the house or place.

10. The respondents contend that prayer ix of the amended petition which seeks return of the firearms, ammunition and items taken from the petitioners' residence is subject to other court proceedings including **Judicial Review Application No. 46 of 2018 Rv Firearms Licensing Board & Others Ex-parte Jimi Wanjigi**; that the 1st and 3rd Respondents' actions of 17th October, 2017 were within the ambit of Article 243(4) of the Constitution as read with Sections 24 and 35 of the NPS Act; that the petitioners' constitutional rights alleged to have been violated are not absolute but are qualified both under the Constitution and statutory framework and that the petition is incompetent, misconceived, misplaced and an abuse of the process as the Petitioners' rights and fundamental freedoms have not been violated in any manner.

2nd Respondent's Response

11. The 2nd Respondent filed a Replying Affidavit by **CI. Joseph Gichuki** sworn on 18th October, 2017 in response to the amended Petition. He deposes that on or 15th October, 2017 Police officers received information that there were illegal firearms kept at a house in Malindi; that on 16th October, 2017 based on that information, the house in question was searched and five firearms, ninety four (94) live rounds of ammunitions, three (3) spent cartridges and one turtle shell recovered; that in the course of the search, they interrogated the occupants of the house who informed them that the house and the firearms belonged to the 1st Petitioner and that documents belonging to Kwacha Group of Companies were also recovered from the house.

12. It is his further deposition that on the basis of that information, they proceeded to the Petitioners' residence in Muthaiga with a view to interviewing the 1st Petitioner on the ownership of the Malindi house and the firearms recovered therein but they were denied access arousing more suspicion. He states that on 17th October, 2017, they filed **Misc. Application No. 3352 of 2017** before the Chief Magistrates Court at Milimani for a search warrant which was allowed.

13. **CI Gichuki** further states that on the same day, they proceeded to the Petitioners' premises, identified themselves as police officers to the security guards manning the gate who opened the gate for them but the occupants of the main house including the 2nd Petitioner, declined to open for them. He deposes that as a result, they used reasonable force to gain access and found the 2nd Petitioner, the 1st Petitioner's father, Hon. Maina Wanjigi as well as the 1st Petitioner's brother. He states that the search warrant was served on the 2nd Petitioner in the presence of their advocate, Mr. Willis Otieno.

14. According to **CI Gichuki**, they proceeded to search the house and recovered five (5) pistols, two (2) assault rifles and six hundred and forty six (646) rounds of ammunition of different calibers; that an inventory was prepared and signed by the police officers as well as the Petitioners' counsel. He deposes that police have a statutory duty to investigate crime; that investigations include conducting searches and that the decision whether or not to prefer criminal charges can only be made by the Director of Public Prosecution (DPP) based on the facts and evidence at the conclusion of the investigations

15. He therefore deposes that the police not only have the mandate but also the power and the obligation to investigate any crime or suspicion of commission of a crime and upon conclusion of such investigations, to forward the inquiry file to the DPP for his decision whether to prosecute or not. He contends that it would be improper for the court to prevent, prohibit or stop any legally constituted agency from discharging its legal mandate under the Constitution.

Petitioner's submissions

16. Miss Soweto, learned counsel for the Petitioners, submits highlighting their written submissions dated 7th November 2018, that the fundamental question at the heart of the amended petition is whether the invasion, raid and search on the Petitioners' home was lawful and legal. She submits that the Constitution prohibits unreasonable searches and seizures; that the core of this protection underlies the Petitioners' right to privacy guaranteed under Article 31 of the Constitution and that once the Respondents are found to have acted outside the lawful scope and breached the parameters under Article 31 of the Constitution, then the violation of other incidental or concomitant rights complained of automatically ensue.

17. It is counsel's submission that the right to privacy is a fundamental right and freedom that is protected under the Bill of Rights. Counsel relies on the United States Supreme Court decision in **McDonald v US** 355 US 451 on the nature and importance of the right to privacy. In that case the Court held that the right to privacy is one of the unique values of civilization and that (per **Justice Douglas**, the right is deemed too precious to be entrusted to the discretion of those whose job is the detection of crime and the arrest of criminals. Counsel argues that this position is affirmed by Article 10(2) of the Constitution which contains the national values and principles of governance, including the rule of law, human dignity, equity, equality, human rights, good governance, integrity, transparency and accountability.

18. Counsel once again relies on **Hunter et al –v Southam Inc** (1984) 2 SCR 154 where the Supreme Court of Canada, analyzing the breadth of the right to privacy in the Canadian Charter of Rights and Freedoms and held that it is intended to constrain governmental action inconsistent with those rights and freedoms. She submits that that holding can be equated to the Bill of Rights under our Constitution

19. Ms Soweto furthers submits that since the Constitution and the Bill of Rights guarantee and protect the enjoyment of the rights as opposed to authorizing governmental action, where infringement is shown, the burden is on the Respondents to show that their actions were within the law, within limits of reasons that respect the enjoyment of fundamental rights and freedoms protected under the Constitution. She relies on **R v Somerset County Council, ex parte Fewings and Others** (1995) 1 All ER 513, where Laws LJ captured the essence of the duty and obligation owed by public authorities and **Samura Engineering Limited & 10 Others v Kenya Revenue Authority** [2012] e KLR, for the submission that since searches infringe on the right to privacy, they must be conducted in terms of legislation, which must comply with the provisions of Article 24. Counsel also relied on **B. Rossler's** book, **The Value of Privacy** to support her case. Counsel further relies on Article 49 of the Constitution, sections 26 and 118 of the Code and sections 57 and 58 of the NPS Act.

20. On whether the entry and search upon the Petitioners' residence was lawful, counsel submits that the propriety of the raid was premised upon the propriety of the search conducted at a residence in Malindi and without evidence from the said search to connect the Petitioners, the police had no basis for seeking or obtaining a search warrant in Nairobi CMC Misc. Criminal Application No. 3352 of 2017 and therefore, the legality and propriety of the Malindi search must also be examined.

21. According to counsel, the Malindi search was a pretext and or trumped up basis to illegally gain access to the Petitioners' premises. She relies on **McDonald vs US** (*supra*) for the submission that where officers are not responding to an emergency there must be compelling reasons to justify the absence of search warrant.

22. Miss Soweto argues therefore, that the police raided the Petitioners' home on 16th October, 2017 without a search warrant and that any search warrant obtained thereafter was an afterthought after the Petitioners' advocates demanded to see one. Counsel submits that by the

time the warrant if any was obtained, the police had already forced their way into the Petitioners' home and destroyed CCTV installations and that any search conducted without a warrant is deemed unreasonable. She relies on the holding by **Dickson J** in *Hunter et al* (*supra*), that it was upon the party seeking to justify a warrantless search to rebut the presumption of unreasonableness.

23. Counsel further submits that although section 118 of the Code requires proof on oath before a Magistrate to justify the issuance of a search warrant, all that was placed before the Magistrate was mere suspicion which did not meet the threshold of proof required to justify an infringement upon a constitutional right. Counsel relies on Articles 2, 10(2), 19(2) (3), 20 and 21 of the Constitution for this submission.

24. On whether the force used and damage caused to the Petitioners' property was excessive, counsel argues that the objective or purpose of the police, which was to interview the 1st petitioner paled in comparison to what they did and how they went about achieving that objective; that the Petitioners' evidence regarding the number of police officers deployed as well as the damage caused by the officers has not been controverted, a clear admission that they were overzealous and used excessive, unreasonable and unjustified force.

25. According to counsel, the onus shifted to the Respondents to justify their actions. Counsel contends that by their conduct, the Respondents violated, infringed upon and or contravened the Petitioners' rights and fundamental freedoms to life, equality and freedom from discrimination, human dignity, security, freedom of conscience and political rights, family and fair administrative action.

26. Counsel argues that the Respondents have not contested, disputed or denied the validity of licenses for all the firearms found in the Petitioners' house and therefore, there was no justification to continue keeping them.

1st, 3rd and 4th Respondents' Submissions

27. Mr. Githinji learned counsel for the 1st, 3rd and 4th Respondents submits highlighting their written submissions dated 9th November 2018, that Article 243 of the Constitution establishes the National Police Service and their duties are enumerated in the NPS Act; that sections 24 and 35 of the Act provide for the functions of the National Police and the Directorate of Criminal Investigations respectively and that the mandate of the NPS is to collect and collate intelligence, detect and prevent crime, undertake investigations with a view of maintaining law and order and the same is supported by Section 118 of the Code.

28. Counsel contends that there was reasonable justification and suspicion for the 1st and 3rd Respondents to search the Petitioners' premises; that there was nexus between the house in Malindi which belongs to Kwacha Group of Companies owned by the 1st Petitioner's father and the Petitioners' residence; that the Petitioners have not annexed the firearm certificates for Hon. Maina Wanjigi and Boniface Nginyo Mwaura firearms. He further contends that the Petitioners have not explained why those firearms were in their residence and that even assuming that the firearms belonged to the said people, the 1st Petitioner would still be in illegal possession of firearms belonging to other persons contrary to Section 4 of the Firearms Act.

29. Mr. Githinji submits that the force used was justifiable as the Petitioners declined to grant entry to the 1st and 3rd Respondents' officers to conduct the search since the door they had to break into was a bullet proof mahogany door.

2nd Respondent's submissions

30. Mr. Ashimosi, learned counsel for the 2nd Respondent, submits in opposition to the Petition that the police received information that there were some firearms in Malindi and on searching the premises, they recovered firearms and ammunitions which were said to belong to the 1st Petitioner; that based on that information, they filed an application for search warrants which was granted and that in the said application, the Police specified the house to be searched and reasons for the search. It is counsel's submission that the search warrants have never been challenged and that matter is not before this court.

31. Learned counsel further submits that from the search, it was admitted by the Petitioners that firearms were recovered from their residence. He therefore urges the court not to consider that request to order release of the firearms since the issue is pending in **JR No. 46 of 2018** before the Judicial Review Division. He also submits that the role of the 2nd Respondent is to the extent that a raid was carried out and out of that raid, firearms were recovered and prosecution mounted against the 1st Petitioner.

Analysis and Determination

32. I have considered the amended Petition, the responses; submissions and the authorities relied on. The issue that arises for determination is whether the police violated the Petitioners' rights in entering their residence on 16th October 2017 conducted a search thereon and destroying CCTV cameras and other property. Secondary to this is the question whether the weapons confiscated as a result of the said search should be returned.

33. The facts of the Petition are not in dispute. On 16th October 2017, police officers went into the petitioners' residence in Muthaiga forced their way into the compound and purported to conduct a search in the premises. They did not gain entry into the premises. But according to the Petitioners, they destroyed property including CCTV installations. The following day, they succeeded in entering the house after breaking windows and the doors.

34. In the meantime, on the same day, 17th October 2017, this Court on being moved under urgency, granted conservatory, including an order preventing the respondents and or their agents from further trespassing, breaking into and or interfering with the petitioners' residence. The orders were to last until 19th October 2017 when the court would give further directions on the matter.

35. The petitioners argue that despite these orders, the respondents' agents went on to damage their house, entered into and confiscated firearms from the premises in violation of the petitioners' rights and breach of the court orders.

36. In response, the respondents contend that they had reasons to enter the petitioners' premises; that they recovered firearms from the premises and that they had a search warrant to conduct the search. They argue that the rationale for visiting the premises was informed by the fact that a search in a residence in Malindi had led to recovery of firearms and occupants of the said house informed the police that the firearms belonged to the 1st petitioner and, therefore, that is why they wanted to interrogate him.

37. The Constitution guarantees the right to privacy. Article 31 provides that every person has the right to privacy which includes the right not to have their person, home or property searched and their possessions seized. This is Constitutional guarantee to this right.

38. The petitioners have argued that their constitutional rights including the right to privacy were violated by the respondents when they entered and searched their premises without a search warrant. The respondents on their part have contended that their actions were lawful and that in any case, the Petitioner's right to privacy is not absolute and is limited under Article 24(1) of the Constitution.

39. Article 243 of the Constitution establishes the National Police Service and the NPS Act gives full effect to this Article. At the same time, Article 244 provides for the objects and functions of the NPS which are also emphasized under section 24 of the NPS Act. The Kenya Police Service has mandate to investigate crime, prevent corruption and promote and practice transparency and accountability. Article 244(c) in particular requires the NPS to comply with constitutional standards of human rights and fundamental freedoms in the discharge of its mandate. This is important because human rights and fundamental freedoms and the rule of law are founding values in our Constitution.

40. The petitioners have deposed that the respondents' officers and or agents entered their premises on 16th October 2017 without a search warrant and searched their premises. They resisted this action and their advocate demanded a search warrant but the police had none. Nonetheless the police went on with the search and dismantled CCTV installations and destroyed their property. This fact has not been denied by the Respondents. This gives credence to Petitioners' claim that the 1st Respondents' officers entered their house on 16th October 2017 and conducted an illegal search therein in violation of their right to privacy.

41. It would appear, and plainly so, that the police went to the petitioners' premises in readiness to raid and conduct searches given the sheer number of officers the petitioners say stormed their compound, how they arrived there and set to conduct the search. In that regard, the police did not act in accordance with the highest constitutional standards of human rights and professionalism demanded of them by the Constitution.

42. Section 26 of the Criminal Procedure Code (the Code), provides that; **" (1) A police officer, or other person authorized in writing in that behalf by the Commissioner of Police, may stop, search and detain – (c) any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained".**

43. Section 29 of the Code also gives instances when the police may arrest. In the same vein, section 118 of the Code provides that;

"Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law."

44. The above provisions must however be read in the context of Article 31 of the Constitution on the right to privacy as read with other Articles, including Article 244(c) on the observance of the highest standards of human right by the police so that the police should never act at whims when their actions threaten to violate human rights and fundamental freedoms.

45. In that regard, I agree with the court's holding in *Vitu Limited v The Chief Magistrate Nairobi & two Others*, (H.C. Misc. Criminal Application No. 475 of 2004) that:

"Since Police duties are not judicial functions, then in the performance of [their] duties, it is anticipated that warrants or [summonses] may be required and for this reason Parliament in its wisdom enacted section 118 of the Criminal Procedure Code (Cap. 75) and section 19 of the Police Act (cap. 84)....I am therefore constrained to agree with Counsel for the petitioners that the respondents' justification of their actions is, in the circumstances, unsustainable. Their acts in carrying out the raid on the petitioners' premises had no lawful justification."

46. In the present Petition, the Respondents contend that they had a search warrant which enabled them to conduct a search in the Petitioners' premises. They have attached a copy of the application made at the Chief Magistrate's Court, Milimani through **Misc. Criminal Appl. No 3352 of 2017, DCI Nairobi County v Jimmy Wanjigi**. That application is dated 17th October 2017 and was filed in court on the same day. The order was also issued on the same day. The application and the orders, if anything, confirm that the initial entry and search in the Petitioners' premises on 16th October 2017 was not sanctioned by a lawful search warrant issued by a court of competent jurisdiction. That initial raid and any search conducted on 16th October 2017 was arbitrary and patently unlawful thus violated the petitioners' right to privacy guaranteed under Article 31 of the Constitution.

Whether the subsequent search was illegal

47. The respondents conducted a subsequent search in the Petitioners' premises on 17th October 2017. They state that they had a search warrant when they conducted this search. The Petitioners contend that the whole exercise was done without a search warrant and in violation of court orders. From the Respondents' annexures, the search warrant was obtained on 17th October a day after the initial raid. On the same day, 17th October 2017, this Court issued conservatory orders, including an order preventing further trespass onto the petitioners' premises.

48. It is not clear from both the Petitioners' pleadings as well as those of the Respondents, which of the two orders was issued first. What is however clear from the Petitioners averments is that the police forced their way into the house on 17th October 2017 at 0900. It is not again clear whether by that time the search warrant had been issued or not. The respondents argue that they had the search warrant which was shown to the Petitioners and their counsel while the petitioners hold a contrary view.

49. Unfortunately, this petition proceeded by way of written submissions without the benefit of cross examination making it difficult for the court to determine which side is telling the truth. Given that the warrants were issued on 17th October 2017 and the Petitioners are emphatic that the police officers broke into the house the same day at 0900, I will however give the Respondents the benefit of doubt that when they entered the premises on 17th October 2017, they had already obtained the search warrant given that it was issued on the same day and there is no direct evidence that the warrants were issued after that time. The Petitioners have not suggested that by that time this court had issued the conservatory orders to make that subsequent search illegal. On that basis, I hold that the search conducted on 17th October 2017 was lawful there having been a search warrant.

50. The Petitioners have also contended that the Respondents willfully disobeyed the conservatory orders when they continued to lay siege on their premises even after the conservatory orders were issued and served. I must express the view that the Petitioners have not proved this claim. No evidence has been placed before court to support this contention in form of affidavit of service to show when the orders were served and who was served to enable the court sufficiently interrogate that issue.

51. As observed by the Court of Appeal in *Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others* [2018] e KLR;

“When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who designs to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.”

52. In that respect, any claim of willful and intentional disobedience of court orders must be satisfactorily proved. That is because it is an allegation about contempt of court. In exercising its contempt jurisdiction, the court is primarily concerned with enquiring whether the contemnor is guilty of intentional and willful violation of the order of the court. Every party is expected to obey the orders of the court in its spirit and substance and every person is required to respect and obey those orders with due dignity for the institution. (See *Mahinderjit Singh Bitta v Union of India & Others* 1 A NO. 10 of 2010 (13th October, 2011))

53. Although the petitioners have deposed that the respondents' officers continued to with the siege over their premises even after the orders had been served, they have not proved this allegation as they should have. This court will not act on general depositions without evidence of service of the court orders alleged to have been breached.

Whether the Firearms confiscated should be released

54. The Petitioners have urged that the firearms confiscated from their residence be returned because they were legally owned by the 1st Petitioner. To support their claim, they have attached firearms certificates for those firearms issued by the Firearms Licensing Board, the department responsible for licensing private firearm holders. The Respondents counter that the firearms should not be returned to the 1st petitioner.

55. I have carefully perused the respondents' response to the Petitioners' averments on this issue. They have not denied that the copies of firearms certificates the Petitioners have attached were indeed issued by the Firearms Licensing Board. They have not suggested at all that the firearms are illegally held or even made allegations that the 1st petitioner had misused those firearms to make them the subject of an investigation. It therefore made no sense for the Respondents' officers to confiscate licensed firearms from the Petitioner' premises. The Respondents have not shown justification for doing so. Their action to that extent was unreasonable, capricious and unlawful.

56. The respondents' main concern as can be deciphered from their response is that the firearms are dangerous. That would not make sense either given that the firearms certificates were issued by the same people who now contend that the same firearms they licensed are dangerous.

57. I have perused copies of the certificates and note that they describe each of the firearms including their serial Numbers. At the time of licensing the firearms, the licensing authority knew the type of firearms it was licensing and in the absence of any plausible explanation, the 1st 2nd and 3rd Respondents' argument cannot be countenanced in a democratic state governed by the rule of law which requires public officers to act within the law and not at whims or capriciously. The Respondents would have reason to act the way they did if they showed that the 1st Petitioner was illegally holding firearms or had used them contrary to law but not otherwise.

58. The Respondents have also argued that two of the firearms belong to the 1st petitioners' father and the 1st Petitioner's associate. It has not

been alleged that the two persons were not in the Petitioners' premises at the time or that the individuals were not licensed gun holders to make it an offence. In fact, the Respondents themselves state in their pleadings that when police officers went to the Petitioners' residence, on 16th October 2017 one of the persons found in the house was the 1st Petitioner's father, Hon. Maina Wanjigi.

59. If that be true that the 1st Petitioner's father, the holder of one of the firearms was in that house, and I have no reason to doubt it coming from the Respondents, that would explain why that particular firearm was in the Petitioners' house. The presence of that firearm in that house could not be attributed to the 1st Petitioner in those circumstances.

60. This court is fully aware of the constitutional and legal mandate of the police to investigate and prevent crime. That does not however mean they should misuse that mandate. They a constitutional and legal obligation to act constitutionally and legally. They have not alleged any criminal conduct on the part of the petitioner in so far as the firearms confiscated are concerned. From the evidence on record, they seem to have been legally owned rendering the Respondents' actions a violation of the 1st Petitioner's right.

61. Once a firearm certificate has been issued the police have no mandate to confiscate the holder's firearm without lawful cause. I find and hold that the Respondents' action of confiscating legally held firearms without reasonable cause was unreasonable and illegal.

Reliefs

62. The Petitioners have urged the court to grant various reliefs including damages both general and compensatory for various violations. They have in particular argued that the Respondents officers damaged their residential house which they should pay for. Other damages sought are for breach of their constitutional rights and fundamental freedoms.

63. In constitutional litigation the court may award damages depending on the level of violations proved by the petitioner. The level of damages is at the discretion of the court. The damages are meant to act as deterrence for future breaches and violations. Save compensatory damages, they are not meant to restore the rights violated since human rights and fundamental freedoms violated cannot be restored.

64. The Petitioners submit that police officers destroyed their residence in the course of the siege and search. As the court has already pointed out, this petition was disposed of by way of written submissions without the benefit of oral testimony and cross examination. Even though the petition was amended on 7th December 2017, the petitioners did not particularise the damage caused to their house, attach evidence of the damage or the possible cost of restoration to enable the court apply its mind to this claim. That being the case, it is impractical for the court to hazard a figure for compensation without supporting evidence. With regard the other claims for damages, in the circumstances of this case and being discretionary, I am not persuaded that they are grantable.

Conclusion

Having considered the amended pleadings, submissions the constitution and the law as well as precedents I am persuaded that the Petitioners have made out a case. They have satisfied the court that police officers violated their rights when they entered their premises on 16th October 2017 and searched them without a search warrant. They have also demonstrated that police officers confiscated the 1st Petitioner's licensed firearms without justification. The court is not however satisfied that the subsequent search on 17th October 2017 was unlawful since there is evidence that there was a search warrant. On damages I am not persuaded that they are grantable.

66. Consequently and for the above reasons, the amended petition partially succeeds and I make the following orders.

a) A declaration be and is hereby issued that the 1st, 2nd and 3rd Respondents breached the Petitioners' fundamental rights including the right to privacy guaranteed under Article 31 of the Constitution.

b) A declaration be and is hereby issued that the 1st, 2nd and 3rd Respondents' actions of confiscating the 1st Petitioner's licensed firearms was oppressive, unfair, unreasonable, irrational, abuse of power and illegal.

c) An order is hereby issued directing the 1st, 2nd and/or 3rd Respondents to forthwith rerun to the 1st Petitioner all firearms, and ammunition taken from the Petitioners' residence and in particular; one pistol make Smith and Wesson serial number SW99; One Glock pistol serial number UAB 630; one assault rifle make Mini Archer serial number 2013/MIII attached with a laser serial number W3043907; one Glock 19 pistol serial number UAB 646; one assault rifle make M4CQ serial number CN 005433/13; one Glock 19 pistol serial number URG 798 and one Glock 19 pistol serial number UAB 632

d) The Respondents do bear cost of the Petition

Dated, Signed and Delivered at Nairobi this 21st Day of June 2019

E C MWITA

JUDGE