



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 86 OF 2016

BETWEEN

ABISHAG NYAGA.....1ST PETITIONER

JANE KALEKYE MUSEMBI.....2ND PETITIONER

FRIDA KAPERRE.....3RD PETITIONER

JAMES KABUI.....4TH PETITIONER

CAROLINE ACHIENG.....5TH PETITIONER

JOSPHINE KALEKE WAMBUA.....6TH PETITIONER

JOHN MUINDE.....7TH PETITIONER

BEATRICE WANJIRU.....8TH PETITIONER

SAMWELI KYALO.....9TH PETITIONER

JULIUS NDONGA.....10TH PETITIONER

NEWTON IBELHA.....11TH PETITIONER

FESTUS GAKUO.....12TH PETITIONER

JOHN M. NJOROGE.....13TH PETITIONER

MARK M. JUSTO.....14TH PETITIONER

TITUS MUTUKU.....15TH PETITIONER

JOSEPH MAINA.....16TH PETITIONER

JOSEPH OKARU.....17TH PETITIONER

PAUL MUINDE.....18TH PETITIONER

IRENE NYAWIRA.....19TH PETITIONER

CECILIA WANJIRU.....20TH PETITIONER

(ALL SUING ON BEHALF OF THE 150 MEMBERS OF KISMAYU FARMERS COMPANY)

AND

THE ASSISTANT COUNTY COMMISSIONER, NAIROBI WEST DIVISION.....1ST
RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Introduction

1. The Petitioners are all residents of Kismayu Slums, an informal settlement. They also state that they are members of Kismayu Farmers Company, a community based organization. The Petitioners state that Kismayu Slums is within Land Reference No. 209/10553. The Petitioners, who claim to have filed the instant suit on behalf of other members of Kismayu Farmers Company, seek in the interim conservatory orders to restrain the Respondents their agents and or servants from unilaterally and forcefully evicting the Petitioners and all other residents and dwellers of the informal settlement. In support of the application, an affidavit was sworn by the 1st Petitioner.
2. The application was contested. The 1st Respondent Kullow Mohammed swore a Replying Affidavit on 8th April 2016.

Factual Background

3. The Petitioners claim to have occupied the suit property for more than thirty five years. However in the course of the month of February 2016, the 1st Respondent in the company of unknown individuals and without warning sought to evict the Petitioners from the suit land. The 1st Respondent together with armed officers of the National Police Service (Administration Police Wing) also destroyed the Petitioners' shelters as well as their crops.
4. The Petitioners state that their occupation of the land was on the basis of an allotment letter issued by the then Commissioner of Lands in 1995. A copy of the letter of allotment is annexed to the affidavit in support of the application.
5. The Respondents do not deny having sought to evict the Petitioners and other inhabitants of the informal settlement. The Respondents however state that the subject parcel of land belongs to Masaal General Agencies Ltd and or the Kenya Airports Authority who both sought the Respondents help in securing the subject property.

The Petitioners' case

6. The Petitioners' case is straight forward.
7. The Petitioners contend that the Respondents never issued them with any eviction notice. The Petitioners also contend that they are the legal owners of the suit property and their proprietary rights cannot be interfered with. The Petitioners contend further that the Respondents' actions are contrary to Articles 28, 40, 43 and 47 of the Constitution. More particularly, the Petitioners contend that they are entitled to be treated with dignity and also to have their property secured and protected.

The Respondents' case

8. The Respondents on the other hand contend that they are only ensuring that there is no breach of peace.
9. According to the Respondents, the Petitioners do not own the subject property. To the Respondents, the true owners are entitled to their constitutional rights of access to and use their property to the exclusion of any other third party, including the Petitioners.

The issue

10. The core issue before me currently is whether the Petitioners are entitled to any conservatory orders as sought.

Discussion and Determination

11. In determining the issue, I am not expected to make any conclusive and definitive findings of fact or law. That must be left to the trial court. Suffice to point out that I must take into consideration the purpose of a conservatory order whilst making my determination. I must also take into account the principles for the issuance of a conservatory order.
12. I need not consider at length the law on the issue of conservatory orders. That has been done in various rulings and judgments of our courts. I may adopt the observations of this court in the case of **Jeniffer Shamalla –v- Law Society of Kenya & 12 Others HCCP No. 85 of 2016 [2016]eKLR**. I stated as follows:

“[57] It is to be noted that much more is required of a Petitioner who seeks conservatory orders. The principles for the grant of a conservatory order have been well laid out in a series of cases. They were well summarized by this court in the case of Kenya Small Scale Farmers Forum v Cabinet Secretary Ministry of Education Science and Technology & 5 Others HCCP No 399 of 2015[2015] eKLR. There will be little benefit to be derived in rehashing the same here in detail. The criteria are clear. In short, the Petitioner needs to demonstrate a prima facie with a likelihood of success and not merely a potentially arguable case while also showing that he will suffer prejudice and the petition rendered nugatory if the orders are not granted. There is also need to establish whether granting the orders would enhance constitutional values and objects specific to the rights or freedoms sought to be protected. Finally, the court in exercising its discretion must consider the wider public interest and also invite the doctrine of proportionality where appropriate.”

13. In the instant case, it has not been disputed that the Petitioners occupy the suit property. It has also not been disputed that the Respondents participated in the attempts to secure the suit property. Controversy emerges when the Petitioners' alleged ownership of the suit property is denied and challenged by the Respondents. Controversy also emerges when the Respondents advance the reasons behind the forceful eviction.
14. The Petitioners stated and argued that they are the bona fide proprietors of the suit land. The Petitioners hold as proof of ownership an allotment letter issued by the Ministry of Lands and Settlement. The letter was issued on 18th June 1995. The Petitioners also have a copy of the original Deed plan. It was issued in 1996 by the Director of Surveys.
15. The Petitioners' counsel, Mr. John Mugambi, whilst urging the Petitioners' case submitted that the title document is being processed. Counsel, just like the Petitioners in their pleadings, did not however detail the court in any way why it has taken nearly twenty years to have the title document issued.
16. The Respondents on the other hand through the Replying Affidavit of the 1st Respondent have stated that the suit property does not belong to the Petitioners. The Replying Affidavit reveals that both Masaal General Agencies Ltd and The Kenya Airports Authority have laid claim to the suit property.
17. No documentation was however availed by the Respondents to prove any nexus of the suit laid to either the Kenya Airports Authority or Masaal General Agencies Ltd. A letter by the law firm of

- Garane & Associates Advocates representing the interests of Masaal General Agencies Ltd written on 21st October 2015 and directed to the 1st Respondent makes references to Land Reference No. 209/13711. That does not appear to be the same as the suit property which is Land Reference No. 209/10553, at least on paper. On the other hand and with regard to the Kenya Airports Authority, the only nexus is that the property is located near one of the local airports, being Wilson Airport.
18. The Kenya Airports Authority under the Kenya Airports Authority Act (Cap 395) Laws of Kenya is responsible, amongst other duties, for the undertaking and maintenance or management of aerodromes including buildings, installations and equipment intended to be used either wholly or in part for the arrival, departure and surface movement of aircraft in the country.
 19. Evidently and on the basis of the documents currently before the court, the Petitioners stand in better stead when they say that they are the owners of the suit property. The Respondents have no document to prove a third party's interest while the Petitioners' title also appears incomplete. Where, of course, a court is dealing with unregistered land or the registration documents are missing and unavailable, then the root of title must be traced through any other documentary evidence. In the instant case, I am satisfied that there is prima facie evidence that the Petitioners are the owners of the suit property.
 20. Besides, I am also alive to the legal principle enshrined in the latin maxim *pari delecto, potior est conditio possidentis* (where two parties are equally to blame or wrong, the person who is in possession of the suit land will retain possession). Both parties in the instant Petition appear culpable in so far as they are unable to avail proper and conclusive documents of title to the subject property. The Petitioners are however in possession, giving them the edge for now.
 21. Counsel for the Respondent Mr. Njoroge urged that the application ought not be allowed in the public interest as the evictions were being undertaken, if at all, to ensure the security of the Wilson Airport besides the safety of air- passengers who transit through the airport. Mr. Mugambi's response was however that the Petitioners have been on the suit laid for over thirty years and pose no security threat whatsoever.
 22. Having keenly listened to the parties and considered all documentation availed, I am satisfied that the Petitioners have established a prima facie case with a likelihood of success.
 23. The Petitioners are and have been in occupation for a long while now, almost for as long as the Wilson Airport has existed in its modern face. The Petitioners also appear to hold better documents of ownership in the form of a letter of allotment and deed plan which do not seem to have been contested by the Respondents. The Respondents on the other hand have not availed any formal documentation which may lead the court to the root of the suit property's title.
 24. True, the problem of security, of the country's airports and airstrips as well as the of the public at large ought to be taken seriously and should never be compromised: see **Coalition for Reform and Democracy (CORD) & 2 others -v- Republic of Kenya & 10 Others HCCP No. 628 of 2014 [2015]eKLR**. However, in the present circumstances there appears to be a disconnect between the evidence availed by the Respondents and the submissions made by counsel on behalf of the Respondents.
 25. The affidavit evidence point to the fact that the Respondents were intent in assisting a third party in either the Kenya Airports Authority or Masaal General Agencies Ltd to secure its private property. The affidavit evidence is to the effect that the duty to secure a person's private property was being executed. Nothing in the replying affidavit touched on the issue of national security related to aerodromes and airports or airstrips.
 26. In my view, the issue of public interest as urged by the Respondents does not currently appear to be pegged on any factual matrix.
 27. Instead, I consider it that the Petition may not only be rendered nugatory but the Petitioners are also likely to suffer much prejudice in the interim if the evident and apparent evictions are allowed to proceed. The Petitioners will likely be rendered homeless, with no-where to shelter yet no notice had even been given to them prior to the evictions being initiated. That would itself be akin to a violation of the Article 43 (guarantee as to housing) as well as Article 28 (protection of inherent dignity).
 28. Finally, constitutional principles and values which would cherish resettlement of the homeless would favour a grant of the orders sought by the Petitioners. Even if I was to accede to the submission that the dictates of national security around airports demand that the evictions be sanctioned, the evictions do not appear to have been structured or planned. They border on

- recklessness. They were being undertaken without any prior notification to the Petitioners. They were also being undertaken without any plan for resettlement.
29. In conclusion, I am satisfied that the Petitioners have established a prima facie case with a likelihood of success. Their case is that their rights are being violated or may be violated. I agree. The Constitution under Article 23 grants this court the powers to grant an injunction in such circumstances and I must oblige the Petitioners.
30. Consequently, pending the hearing and determination of the Petition the Respondents, their servants, officers and or agents acting under them are restrained by injunction from entering into, fencing, demarcating, evicting or in any way interfering with the Petitioners' occupation and use of the suit property being all that parcel of land known as LR. No. 209/10553 and being the informal settlement more conveniently known as Kismayu Slums.
31. The costs of the application will however abide the Petition
32. Orders accordingly.

Dated, signed and delivered at Nairobi this 29th day April, 2016

J.L.ONGUTO

JUDGE