



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CONSTITUTIONAL PETITION NO. 8 OF 2016**

**IN THE MATTER OF ARTICLES 19, 20, 21, 23,25, 27, 28, 29, 39, 40, 47, 49, & 50 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLES 19, 25, 28, 29, 39, 40, 47 & 50 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE INTENDED CRIMINAL PROSECUTION OF MURIUKI KAMAU**

MURIUKI KAMAU.....PETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3<sup>RD</sup> RESPONDENT

THE DIRECTOR CRIMINAL INVESTIGATION DEPARTMENT.....4<sup>TH</sup> RESPONDENT

AND

SICILY WAMBUI NDWIGA.....INTERESTED PARTY

**RULING**

1. Before me is a Notice of Motion dated 6<sup>th</sup> October, 2016 where Muriuki Kamau the petitioner and applicant (for ease of reference he shall hereinafter be referred to as applicant) has invoked **Articles 22**, and **23** of the **Constitution** and **Rules 20** and **21** of the Constitution of Kenya (supervisory of jurisdiction and protection of fundamental Rights and Freedoms of individuals) in seeking the following reliefs:-

*(i) That this application be certified urgent and the same be heard exparte in the first instance for purposes of prayers 2, 3, 4 and 5 of the application.*

*(ii) A conservatory order do issue restraining the Kenya Police from arresting and detaining in*

*custody the petitioner in respect of investigations and/or charges on the alleged offence of Trespass pending hearing of this application inter partes on such date as may be ordered by the court or until further orders of the court.*

*(iii) A conservatory order do issue restraining the Respondents from arraigning, charging and/or prosecuting the applicant for the alleged offence of Trespass pending hearing of this application inter partes on such date as may be ordered by the court.*

*(iv) A conservatory order do issue restraining Kenya Police from raiding, intimidating, harassing and/or threatening the petitioner's personal liberty under the guise of effecting arrest pending the hearing of this application inter partes.*

*(v) A conservatory order do issue staying the criminal case before the Principal Magistrate's Court at Wanguru against the Petitioner in respect of the alleged offence of Trespass pending hearing and determination of the petition inter partes.*

*(vi) A conservatory order do issue restraining the Kenya Police from arresting and detaining in custody the Petitioner in respect of investigations and/or charges on the alleged offence of Trespass pending hearing and determination of the petition filed herein.*

*(vii) A conservatory order do issue restraining the Respondents from arraigning, charging and/or prosecuting the Applicant for the alleged offence of Trespass pending hearing and determination of the petition filed herein.*

*(viii) A conservatory order do issue staying the criminal case before the Principal Magistrate's Court at Wanguru against the Petitioner in respect of the alleged offence of Trespass pending hearing and determination of the petition herein.*

*(ix) A conservatory order do issue restraining the respondent from raiding intimidating, harassing and/or threatening the Petitioner's personal liberty under the guise of affecting arrest pending hearing and determination of the petition filed herein.*

*(x) Such other order as this Hon. Court may deem fit.*

*(ix) Costs of this application.*

2. At the hearing of this application, the Applicant informed this Court that he was only pursuing prayers (vii), (viii) and (ix) above on the following grounds namely:-

*(a) That the Applicant and his siblings are in occupation of the suit land that was initially Kirinyaga/Marurumo/703 but now subdivided into Kirinyaga/Marurumo/857, 858, 859, 860 and 861.*

*(b) That the suit land has not been surveyed.*

*(c) That the applicant and his entire family have been living continuously on the disputed parcels since 1971 and have extensively developed it.*

*(d) That there has been a long standing dispute regarding ownership which has now been taken to Kerugoya ELC court vide civil case No. 114 of 2016 (OS) where the applicant is seeking to be declared a true owner of the suit land.*

*(e) That on the 4<sup>th</sup> October, 2016 the applicant was arrested and taken to Wanguru Police Station by Police officers because of a complaint lodged by Sicily Wambui Ndwiga the interested party herein.*

*(f) That the complaint lodged was that the applicant had trespassed and had been trespassing continuously on the suit land that belongs to the interested party.*

*(g) That the applicant informed the OCS Wanguru about the land standing dispute and the pendency of the dispute in the ELC court but the same fell on deaf ears as he was arraigned in court on 7<sup>th</sup> October, 2016.*

*(h) That the detention of the applicant and the actions by the Police to harass the petitioner for a civil dispute before a competent court at the instigation of the interested part is an abuse of office and legal process.*

*(i) That despite exculpatory and collaborative evidence of the applicant, the respondents and the interested party have decided to proceed with the criminal charges.*

*(j) That the acts of the Kenya Police at the behest of the interested party are in violation of the fundamental rights and freedoms of the applicant guaranteed by the constitution of Kenya.*

*(k) That the investigations by the Kenya police and the intended prosecution are in gross abuse of justice process, tainted with interior motive and are meant to intimidate, frustrate and/or deny the petitioner his right to access to justice guaranteed by Article 48 of the Constitution of Kenya and cause the applicant to vacate the suit land which will greatly undermine the civil case pending before the ELC court.*

*(l) That unless this hon. Court urgently hears the application filed herewith and intervenes, the petitioners will suffer irreparable injury and his fundamental rights to protection of the law, access to justice and fair hearing will be violated.*

*(m) That there is a real danger that the Police will charge the applicant with the offence of trespass unless conservatory order is issued by this court.*

*(n) That there is also a real threat that the Police may continuously break into and continuously harass the petitioner in violation of the applicant's fundamental rights, and unless the hon. Court urgently intervenes, the applicant will suffer irreparable injury and his fundamental right to protection of the law, privacy and liberty will be violated.*

*(o) That the intended arraignment and prosecution of the applicant before the Principal Magistrate's Court at Wanguru is premised on ulterior motives, malicious intentions and an abuse of process to serve parochial partisan and illegal interests of the interested parties.*

*(p) That it will be in the interest of justice to grant the reliefs sought.*

3. The Applicant has sworn an affidavit which was sworn on 6<sup>th</sup> October, 2016 which largely supports the above grounds but in addition, the Applicant feels that the Respondents are using coercive machinery of the state to pursue an improper purpose and that the same should be stopped to protect the integrity of the judicial system.

4. **Mr. Maina** learned counsel for the Applicant further contended that the Applicant is entitled to protection and equal benefit of the law as enshrined under **Article 27** of the **Constitution of Kenya 2010**. He further submitted that the Police acted unjustly and arbitrarily by arraigning the Applicant in Court and that by so doing, they took away the Applicant's right to present his case before the Environment and Land Court. In his view the interested party should have resorted to civil remedies like injunction instead of resorting to a criminal process which will expose the Applicant to the inconvenience of defending himself in a criminal court as well as prosecuting his case. In his view so long as the proprietary interest of the suit land is yet to be determined owing to ownership dispute, the criminal trial should be halted as Trespass cannot lie.

5. The Respondents have opposed this application through a replying affidavit of E. P. O. Omayo, learned counsel from the Director of Public Prosecutions sworn on 17<sup>th</sup> October, 2016 and the replying affidavit by P. C. Peter Njathi, the investigating officer attached to the 4<sup>th</sup> Respondent sworn on the same day. The interested party Sicily Wambui Ndwiga, has also filed a replying affidavit sworn on 17<sup>th</sup> October, 2016 in opposition to this application.

6. Mr. Omayo on his part and representing the position of the 1<sup>st</sup> Respondent contended that the criminal case should be left to proceed in view of the complaints lodged by the interested party to the Police concerning the actions by the Applicant. The Respondents have submitted that the interested party's complaint is legitimate as she has a genuine title to the suit land as opposed to the Applicant who has no document to back up his claims. It was contended that the Applicant's suit does not entitle him to forcibly take away the interested party's rights in that land.

7. The investigating officer in the criminal case has deponed that contrary to contention by the Applicant, the suit land is properly surveyed and there are beacons on the parcel. He has further deponed that the actions of the Applicant on the suit land were unjustified and criminal which explains why they took the action to charge him in a court of law. In his view the Applicant committed a crime and should face the law.

8. The interested party, Sicily Wambui Ndwiga, in her replying affidavit, cited **Section 193A** of the **Criminal Procedure Code** which provides that a pendency of a civil case cannot be a bar or ground to stay or delay criminal proceedings. She has further deponed that she is the lawful registered owner of the suit land, **Kirinyaga/Marurumo/860** and exhibited the copy of the title as exhibit "SWN1". She has further deponed that the Applicant had formed a habit of trespassing on her land and interfering with her possession and that she had booked various reports at the Police Station. In her view she has a constitutional right to own and utilize her property under **Article 40 (1)** and **64 (A)** of the **Constitution**. She has further cited **Article 50 (1)** of the **Constitution** which she contends gives her a right to have her complaint decided in a fair and public hearing before a court of law and that granting the reliefs sought in this application would in her view curtail her protected rights under **Article 40 (1)** and **64 (a)** of the **Constitution**. She has further contended that the Police are mandated under the Constitution to conduct criminal investigations and have the liberty to prefer charges if the results of the investigations reveal that a crime has been committed. In her view the mandate of the 3<sup>rd</sup> Respondent to prosecute criminal cases is enshrined in the Constitution and the rights of all the parties are safeguarded and protected under the Constitution. She faulted the Applicant of trying to use this application to stall the criminal process and perpetuate acts of trespass particularly at this time when the short rains are about to start and hence the planting season.

9. I have considered this application and the grounds upon which it has been brought including the submissions made by counsel for the Applicant. I have also considered the rival submissions by the Director of Public Prosecutions, the investigating officer and the interested party.

10. The application before me has invoked the provisions of **Article 22** and **23 (1), (3) (b) (c) and (f)** of the **Constitution of Kenya 2010**. Article 22 of the **Constitution** gives every person a right to institute legal proceedings in court if any of his fundamental right or freedoms under the Bill of Rights has been denied, violated/or infringed or is threatened. Under **Article 23**, the Constitution gives power and authority to courts to uphold and enforce the Bill of Rights and the enforcement can be in the form of issuing an injunction or conservatory order to guard or protect against any infringement or violation of the stated rights. The rules under the Constitution of Kenya (supervisory jurisdiction and protection of fundamental rights and freedoms/practice and procedure rules) provides the procedural legal framework under which a party can approach or move the court. The relevant rule in this application is **rule 23** of the said **Constitution of Kenya/Protection of Rights and Fundamental Freedom Practice and Procedure Rules 2013** and not the cited **rules 20** and **21** which deals with the main petition.

11. The Applicant in his main petition has cited that his rights under **Article 27 (1)** of the **Constitution** has been violated by the decision of the Respondents to prefer criminal charges on the allegations of

trespass to land. According to the Applicant he has not trespassed on the suit land because according to him he has been in actual occupation of the same. This fact is contested by the interested party and the Respondents. The interested party on her part has exhibited a copy of title deed and deposed that she has been in occupation of the land since 1998 when she acquired the land for value. The Respondents through the investigating officer has supported the interested party stating that the results of their investigation revealed that the Applicant had trespassed and thereby committed a crime. I have noted that the Applicant has filed a civil suit in the Environment and Land Court through an originating summons (114/16 – at Kerugoya Environment and Land Court) claiming adverse possession on the suit land. The Environment and Land Court in my view is well placed and constitutionally mandated to determine the issue of ownership and other related issues like occupation and possession. It is not proper for such issues to be ventilated in this court because the court that is seized with the jurisdiction is the Environment and Land Court.

12. I have looked at the cited violation of the Applicant's right under **Article 27 (1)** of the Constitution. **Article 27 (1)** of the **Constitution** provides as follows:-

***“Every person is equal before the law and has the right to equal protection and equal benefit of the law.”***

The Applicant feels that the decision to charge him with trespass in the criminal court at Wanguru is a violation of this right. The Respondent has however, raised a legitimate and a fundamental point which is her right to property enshrined under **Article 40 (1)** and **64 (a)** of the Constitution of Kenya 2010. Her rights in my view deserve equal protection of the law as well. She is a registered owner of that parcel of land known as **Kirinyaga/Marurumo/860** and this fact is not contested. I agree with the interested party that a certificate of title under the law (Section 26 of Land Registration Act Cap. 300 Laws of Kenya) is a *prima facie* evidence that the registered person is a proprietor of that parcel of land. That right is also protected under **Article 40** as read with **Article 64 (a)** of the **Constitution**.

13. The rights cited by the Applicant are not in my view absolute but are limited under **Article 24 (1)** of the **Constitution** which provides as follows:

***“A right or fundamental freedom in the Bill of Rights shall not be limited except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors.....”***

The above limitations of course and whether or not they apply, here is a subject to be determined in the main petition. At this stage this Court has to be satisfied that there is a threatened violation which unless stopped will render the main petition nugatory or lead to the Applicant suffering irreparable harm due to threatened breach of the cited rights. In this application however, I agree with the Respondents and the interested party that the criminal process against the Applicant does not on the face of it violate any of the Applicant's constitutional right. There is no evidence presented before me that suggests that the Applicant will be subjected to unfair trial at Wanguru Principal Magistrate's Court. As a matter of fact the trial court is under an obligation to ensure that the rights of the Applicant as an accused person embedded under **Article 49** and **50** of the **Constitution of Kenya 2010** are jealously guarded and protected. The Applicant has stated in this application that he is armed with what he has termed as “Exculpatory” evidence to present in court and if that is the case, he has nothing to fear. There is no basis for any real or perceived apprehension that his rights in the criminal court or the Environment and Land Court will be prejudiced in any way. I am further persuaded by the interested parties contention that the pendency of the Environment and Land Court matter in court should not be used as a ground to stay or delay the criminal proceedings facing the Applicant at Wanguru. I find that the contention is legally sound as it is based on the provisions of **Section 193 (a)** of the **Criminal Procedure Code**.

14. It is also important to note that in a country where the rule of law prevails such as this country, the Constitution and the law dictates that citizens and other persons in general are protected and it is the duty

of the courts of law to ensure that people are for example protected against arbitrary arrest, prosecution etc but the same people should also be guarded against persons who may be tempted to try to hide under the guise of constitutional guarantees or the law to commit crimes or trample on other people's rights. It is in that spirit that the Constitution of Kenya 2010 provides for the cited limitations or safeguards under **Article 24** of the **Constitution**.

15. This Court strongly believes that all the issues in regard to the civil dispute between the Applicant and the interested part shall be addressed well because they are pending before a competent court. At the same time, all the issues that relate to any offence that may have been committed as contended by the interested part and the Respondents and contested by the Applicant shall be addressed well by the criminal court at Wanguru because it is competent and well placed to determine them. I am not persuaded at this stage the criminal trial is an abuse of court process or that the process is geared to serve what the Applicant terms "parochial, partisan and illegal interests." There is no evidence or reasons upon which the criminal trial can be termed as such.

In the light of the above, this Court finds no merit in the application dated 6<sup>th</sup> October, 2016. The same is disallowed. The costs shall be in the main petition. It is so ordered.

***Dated and delivered at Kerugoya this 25<sup>th</sup> day of October, 2016.***

**R. K. LIMO**

**JUDGE**

25.10.2016

Before Hon. Justice R. K. Limo J.,

State Counsel Mr. Omayo

Court Assistant Naomi Murage

Applicant present

Interpretation English/Kikuyu

Maina for the Petitioner/applicant present

Omayo for the Respondent

Sicily Wambui Interested Party present.

**COURT:** Ruling signed, dated and delivered in the open court in presence of Maina Kagio Advocate for the petitioner/applicant, Omayo for Respondents and Sicily Wambui the interested party appearing in person.

**R. K. LIMO**

**JUDGE**

25.10.2016