



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

**AT MOMBASA**

**CONSTITUTIONAL & JUDICIAL REVIEW DIVISION**

**PETITION NO. 68 OF 2015**

**OSMAN ABDI JAMA**

**OMARI ADAN OSMAN.....PETITIONERS**

**VERSUS**

**COUNTY POLICE COMMANDER,**

**KWALE COUNTY & OTHERS.....RESPONDENTS**

**J U D G E M E N T**

1. Before the court for determination is the petition dated 18.12.2016 filed in court on the same day and premised on the allegations that the petitioners rights and fundamental freedoms under Articles 25(a), 27(1) 2, 4 & 5, 28, 29(a) (c) (d) & (f) 39(3) and 40(1) have been violated and infringed by the Respondents.
2. The foundation of the petition is to be found at paragraphs 6 & 10 of the petition. The conclusion at paragraph 12 & 14 is that after the eviction, the Somali community had been barred from going back to the villages where most of their livestock are and that the exercise is an ambush as it was being conducted without Notice.
3. For those reasons the petitioners seek a declaration that by the Respondents evicting them their constitutional rights under the enumerated articles had been violated, a permanent injunction to restrain eviction, damages for killed and lost camels and costs of the proceedings.
4. The petitioner filed the petition together with an application for conservatory orders which was heard and granted *ex parte* in the interim on the 18/12/2016. By an application dated 9/2/2016 the interested party (7<sup>th</sup> Respondent) sought to be joined and was joined to the proceedings on the 10/2/2016 after which the court gave direction for the Respondents to file respective replies to the petition including the liberty to file submissions.
5. The petition was supported by the affidavit of the 1<sup>st</sup> petitioner which exhibited among other documents several documents headed "Agreement for license" variously dated between May 2014 and September 2015 and invariably made to lapse not later than 31/10/2016. It is the right comprised in or allegedly created under such licenses that the petitioners contend have been violated or threatened with

violation by the Respondents.

6. For the alleged violation the Petitioners have moved the court for a declaration that the eviction of the petitioners from the village is a breach and violation of their constitutional rights under Articles 25, 27, 28, 29, 39 & 40, an order of permanent injunction and damages for animals killed or gone missing as a result of the exercise of eviction, as would be assessed by the court.

7. That the petition was opposed by the Attorney General who appeared for the 1<sup>st</sup> – 5<sup>th</sup> Respondents. The Attorney General filed a replying affidavit sworn by one Mr Olaka Kutsowa, The County Commissioner Kwale. In the replying affidavit, the deponent depones and identifies his responsibilities to include maintaining law and order, conflict resolution, public administration and coordination of Government, (National Government) policies at the county level. That in the cause of his duties there has never been any attempt at evicting the petitioners and their animals from Siloani village. However, it was within his knowledge that there is potential for conflict between the herders and the residents of the village who are primarily farmers and that the existence of the herders in the area was a result of security operation which flushed out illegal herders and their livestock from Tsavo West & East National parks as well as from individual and communal ranches in the neighbouring Taita Taveta County. The deponent went on to swear that as a result of complaints from the villagers concerning trespass, destruction of crops and threat to personal safety and the resultant tension between the villagers and the herders, several barazas were held to forestall any conflict during which barazas, it was revealed that some persons masquerading as representatives of the community had allegedly allowed the herders into the village for purposes of grazing their animals at a fee or consideration but without the blessing of the communities and that the animals had destroyed crops and that at one such barazas, it was resolved by consensus that at the expiry of the licenses in October 2015, the licenses would not be renewed and as a result herders moved out their animals voluntarily.

8. The deponent then impugned the licenses by which the petitioner moved into the area as being against public policy and that the involvement of provincial administration was in execution of the mandate of the administrators to contain public conflict and not motivated by political considerations as the animals there moved in without compliance with the laid down procedures sanctioning animal movement.

9. On his part the 6<sup>th</sup> Respondent sworn a replying affidavit in which it is denied that the grazing licenses were entered into on behalf of the community but for the sole personal interests of the persons who executed same and that such agreements were of no legal effect in so far as the land being community land the licenses ought to have had the sanction of the County Government of Kwale which was not consulted. The said 6<sup>th</sup> Respondent reiterated that it was the general membership of the public who raised alarm against the petitioners on grounds of destruction of crops, overgrazing and therefore deterioration of vegetation and imminent drought and loss of livestock due to lack of pasture and animal diseases becoming rampant and that there is general tension which necessitate that the petitioners vacate the area for peace to prevail. The affidavit concludes that the deponent only intervened for the good of his constituents in the ward due to the losses occasioned by the petitioner activities which ignored the roles played by both County and National Governments.

10. On behalf of the 7<sup>th</sup> Respondent the County Government of Kwale, one MDOE NZIVO MDOE a ward administrator employed by the County Government, swore an affidavit in which he depones that the people of Chengoni location eke livelihood out of the community land vested in the County Government of Kwale in trust for the Resident who then have a right to farm and graze animals over the land. That since 2014 there was an influx of livestock in the area which initially he presumed belonged to the locals or were destined for slaughter houses but on consultation with the herders he learnt that the same had been evicted from Taita/Taveta County where the same were grazing in Kenya Wildlife Sanctuaries and that their being driven into Kwale County were unplanned as no permits were issued for their movement a fact which was confirmed by the veterinary department. He added that the land was vested in the 7<sup>th</sup> Respondent and that the influx of herders and their animals had led to tension itself leading to flare-ups resulting into personal assaults and that there were no lawful licenses. He ended by asserting the land and the resources in the land were, for the use by the inhabitants and that the 7<sup>th</sup> Respondent on behalf of the

residents was opposed to the petitioner's presence therein with their animals and should therefore be ordered out.

11. There was a second affidavit by one SAMUEL MUGANDI MALEMBI, a resident of Chengoni location, and a retired chief of the same location. His contention in the affidavit is to the effect that the entire location has never been adjudicated hence the land there is community land vested in the county Government of Kwale but the residents of the area use it to grow cereals and keep livestock being cows, goats and sheep. That without concurrence of the residents of the location herders have entered the area caused conflict by invading pasture, crops and watering points and being armed, threaten the residents with death; that the animals for the residents have nowhere to graze and the watering points have been polluted and therefore the animals are therefore inflicted with diseases and keep aborting. In addition the deponent says that the persons disclosed to have granted the licenses are land agents who have neither land nor authority of the community to grant the alleged licenses. He therefore make a plea that the petition be dismissed.

12. When the parties attended court to argue the petition, the petitioner and the AG having filed their respective submissions, the counsel essentially reiterated the facts in the affidavits with the Attorney General adverting to the provisions of The Constitution to challenge any rights by thve petitioners over the land in issue. The Attorney General equally faulted the petition for imprecision and relied on the decision in *Anaritu Karimi Njeru -vs- Attorney General [1979] eKLR 154* for the proposition that a petition must concisely and precisely plead and bring out the grievances.

13. On their part the petitioners contended that they have the constitutional right like the resident of the location. The petitioners point out the entire dispute in the petition to be about scramble for grazing land and points out that the petitioners are there having been granted licenses but it is the Respondents who are trying to push them out in violation of their rights as Kenyans to live anywhere within the Republic and carry out their economic activities. In effect the petitioner contend that they have equal rights with the residents over the land occupation and grazing right.

14. For the 6<sup>th</sup> Respondent, submissions were made to the effect that there was no constitutional justification for the petitioners to invade and interfere with the rights of the villagers; that the activities by the petitioners threatened security and that public interest in tranquility should be put above the personal interests of the petitioners.

15. For the 7<sup>th</sup> Respondent submissions both written and oral were offered to the effect that there is threat to peace and animal health and that by their own affidavits the petitioners have confirmed that they were expected to leave and vacate the area by 31/10/2015.

### **Analysis and determination**

16. From the affidavits filed and submissions offered, the only one question that this court has to pose and answer is whether or not the petitioners have demonstrated a constitutional right or fundamental to be entitled to grazing rights in the location and if such right or fundamental freedom have been violated.

17. According to the petition the petitioners hinge their rights on the documents called 'agreement for license'. Those agreements as pointed out above are over unadjudicated parcels of land conceded to belong to the community that live and occupy that location situate within Kwale County and called Chengoni. It is contended that the petitioners have a right to occupy the area and graze their animals there. In the oral submissions, however the Counsel argued that the petitioner have a right to free movement and residence as well as right to own property in any part of Kenya. There is no assertion by the petitioners that they are members of the area community but their claim to the right to occupy the area and graze their animals is pegged on the licenses. This stand points invites the court to pronounce itself on the efficacy of the said license as a simple contractual right or a constitutional right.

18. To this court a license over land is just but a license. It only requires withdrawal by the land owner to end. In the matter before the court that the land is vested in the 7<sup>th</sup> Respondent for the benefit of the

community of Chengoni location. The 7<sup>th</sup> respondent denounces the petitioners presence and denies having consented or granted the license to the petitioners. To that extent it cannot be genuinely argued that there is any valid license in favour of the petitioners. They are at best invitees of the persons described as land agents with no authority to transact on the land but at worst they are trespassers. This petition thus must invariably determined if such at trespassers has rights equitable with those of beneficial owners.

19. Put the other way even if they were indeed licenses as such to the court the rights created by such license would be a simple contractual right that can be conveniently determined by a civil suit for enforcement of any rights thereby vested. To this court our liberal and versatile constitution did not collapse all traditional modes of litigating civil, commercial and contractual rights into constitutional litigation. To say that every infringement must be litigated by a constitutional petition even where there exist adequate and efficient civil remedy is to say the least, belittle the heavy task the court sitting as a constitutional court to interrogate the allegation of infringement of fundamental freedoms and rights. In *Benjo Amalgamated Ltd - vs – Keb [2007] eKLR* the court said:-

**“Where a petitioner has entered into a tenancy, or a lease, a mortgage or charge, bill of sale, pledge or contract, any dispute arising out of those incidents are disputes of private and commercial nature and give rise to claims in private law and are not inconsistent with the petitions right to own property”.**

20. More recently, Emukule J, in *Maggie Mwauki Mteleki -vs- Housing Finance Company of Kenya Ltd [2015] eKLR* said:-

**“....and this is important to litigants and counsel, the constitution cannot be used as a general substitute for litigating ordinary civil disputes....”.**

I find that there was never justification to bring this litigation as a constitutional petition. A simple plaint claiming an injunction and seeking declaration beyond the damages would have sufficed.

21. However more importantly, the licenses relied upon were due to lapse and did lapse in October 2015 if not by effluxion of time, by the notice the petitioners advert to in paragraphs 8-13 of the affidavit in support.

22. I am however, even after finding as above prepared to move a notch higher and interrogate if any rights have been violated under the provisions cited.

23. It is now trite that in enjoying ones constitutional rights and fundamental freedoms one has no license or justification to infringe on the rights and freedoms of others. That is the clear and unambiguous dictate of Article 24(1)d. Put in the context of the matter before me, can it be said that the rights of the petitioners to graze their animals and enjoy the property in the animals far override or should overshadow the rights of the residents of Changoni location to engage in their economic activities in agricultural and livestock rearing? I hesitate not in saying NO.

24. On the specific rights cited, being the right to movement within the Republic and right to own property, I find that both are in the category of right amendable to restraint and limitation if for nothing else but for the enjoyment of equal rights by the residents of Changoni village. For the other rights, being freedom, from torture, and cruel, inhuman or degrading treatment or punishment; freedom from discrimination as well as right to human dignity and security to the person, I find that those provisions have been idly cited and thrown at the court without material to support same.

25. Parties are bound to be succinct in pleading breach or violation of rights or fundamental freedoms. It is not enough to merely cite the provisions of the constitution and leave it at such. The long and shot of the foregoing is that I find no merit in the petition, and I therefore dismiss it. It is one of those rare matters that I hold the opinion that the petitioners had no justification at all to bring it the way they did. For that reason I order that the petitioners shall pay the costs of the Respondents.

26. It is so ordered.

Dated and Delivered at Mombasa this **14th** day of **October 2016**.

**HON P.J.O. OTIENO**

**JUDGE**