



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KAKAMEGA

PETITION NO. 51 OF 2014

1. MWANAHAWA ANYONA CHIYAYI

2. AMINA CHITAYI

3. ABDALA MUKOYA

4. GERALD MOGOYA

5. GEORGINA ATIENO

1. SIMON OKINDA.....PETITIONERS

VERSUS

1. SWALEH AURA

2. MUSA NDALIRO MUCHELULE

3. DIRECTOR OF PUBLIC PROSECUTION

4. SNR P. MAGISTRATE MUMIAS LAW COURTS....RESPONDENTS

JUDGMENT

INTRODUCTION

1. The Petitioners herein filed a Petition dated 17/06/2014 on the very day seeking four substitutive orders. Contemporaneously with the said Petition the Petitioners filed a Notice of Motion dated 17/06/2014 seeking to stay the hearing of Mumias Criminal Case No. 341 of 2014 and Mumias Criminal Case No. 360 of 2014 pending the hearing and determination of the Petition.

2. On 24/09/2014, the Petitioners filed an Amended Petition dated 23/09/2014 seeking seven substantive orders. The same was supported by Affidavits of the First and Second Petitioners. For clarity purposes, the Amended Petition sought for the following orders: -

1. A declaration of the right of the petitioner to accessible and adequate housing, to quiet enjoyment of the property she has lived on since 1984.

2. Declaration that the purported eviction without notice and in flagrant violation of the 1st petitioner's fundamental right is invalid and unlawful.

3. A declaration that Mumias Criminal case number 341 of 2014 as consolidated with criminal case No. 360 of 2014 is an abuse of the court process and a violation of the petitioner's fundamental freedoms and rights.

4. An order dismissing criminal case number 341 of 2014 as consolidated with criminal case No. 360 of 2014.

5. An order stopping the 3rd respondents from prosecuting criminal cases number 341 and 360 of 2014.

6. An order stopping the 4th respondent from hearing criminal cases number 341 and 360 of 2014.

7. An order for the state to compensate the petitioners, for wrongful arrest, prosecution of charges, eviction and violation of their rights to enjoy their cultural rites.

8. Such other order(s) that this honourable court shall deem just to grant.

3. In response to the Petition thereof, the 1st and 2nd Respondents filed their respective Affidavits whereas the 3rd and 4th Respondents did not file either Affidavits or Grounds of Opposition but were duly represented during the hearing of the Petition.

BACKGROUND

4. This Petition has a long history hence the need for a brief revisit so as to fully understand and appreciate the context and extent of the Petition before Court.

History has it that one JOHN AMUKUBU owned a parcel of land known as S.WANGA/LUREKO/1690 which he sub-divided into two parcels being S.WANGA/LUREKO/2711 and 2712 measuring 5 acres and 7.5 acres respectively. The parcel number S.WANGA/LUREKO/2712 was later on sold to the 2nd Respondent herein and the other one sold to one MARTIN SAKWA.

5. Thereafter, the 1st Petitioner herein together with one JOEL NAMBANDE CHITAYI found their way onto the parcel of land known as S.WANGA/LUREKO/2712 then owned by the 2nd Respondent herein and occupied about 4 ½ acres thereof. Their acts prompted a dispute between them which could not be resolved even by the invitation of a Surveyor.

6. The 1st Petitioner and the said Joel Nambande Chitayi then lodged disputes against the 2nd Respondent herein in Mumias Land Disputes Tribunal. They were Tribunal Cases No. 35 of 2004 and 6 of 2005. These cases upon being heard were eventually dismissed.

7. As a result thereof, the 2nd Respondent was then cleared and henceforth issued with a title deed to the parcel of land known as S/WANGA/LUREKO/2712 (hereinafter referred to as "**the disputed land**") sometimes on 30/10/2005. In order to acquire possession of the disputed land, the 2nd Respondent herein instituted a suit in the Lower Court at Butere in SRMCC No. 136 of 2005. Upon hearing, the Court found that the 1st Petitioner herein and the said Joel Nambande Chitayi had acquired the disputed land by adverse possession hence could not be evicted therefrom.

8. That finding prompted the 2nd Respondent herein to file an appeal before this Court. That was the **Civil Appeal No. 130 of 2007**. The appeal was first heard by Lenaola, J and in a judgment delivered on 16/11/2010, the appeal was allowed and the 1st Petitioner and the said Joel were ordered to be evicted

from the disputed land.

9. By a ruling delivered on 17/05/2012, the said judgment of Lenaola, J was set-aside and the appeal ordered to be heard afresh since it had so been heard *ex parte* in the first instance. The appeal was then heard by Chitembwe, J and in a judgment delivered on 30/09/2013 the appeal was allowed and eviction ordered accordingly.

10. A decree of the Court was extracted and issued on 10/10/2013 with penal clauses. On 22/10/2013 an Eviction Order was issued directing the OCS of Mumias Police Station to carry out the evictions.

11. On learning that the execution of the orders of the Court was scheduled for the 21/11/2013, the 1st Petitioner herein and the said Joel Nambande Chitayi rushed to Court and filed a Notice of Motion dated 20/11/2013 where they obtained a stay of execution of the decree. The application sought to review and/or set-aside the judgment delivered on 30/09/2013 on *inter alia* grounds that the decree attempted to be executed had been extracted irregularly and that it was wrong to effect the evictions prior to carrying out a survey as ordered by the Court. That application was eventually heard alongside an earlier application which the parties had filed seeking to arrest the judgment of the Court and by a consolidated ruling delivered on 20/03/2014 both applications were dismissed with costs.

12. Since the execution of the decree scheduled for the 21/11/2013 had been stayed by the above proceedings, another date was set for the exercise. That was to be on 02/04/2014.

13. To that end, the District Surveyor Kakamega formally wrote to the Area Chief of Lureko Location vide a letter dated 24/03/2014 informing him of the visit to implement a Court Order and the Area Chief was requested to arrange for security.

14. The decree of the Court was eventually executed on the 02/04/2014 after the Surveyors complied with the order of the Court in fixing the boundary between the disputed land and the adjoining land No. S.WANGA/LUREKO/172. The OCS Mumias Police Station, as ordered by this Court, oversaw the execution of the order and left upon full implementation of the decree aforesaid.

15. Upon return to the Station, the Police received information that the property of the 2nd Respondent herein had been destroyed and a house burnt down and that the 1st Respondent herein had been attacked and robbed by people whom the victims had positively identified.

The Police thereafter commenced investigations and ended up charging the Petitioners herein in Mumias Criminal cases No. 341 of 2014 and 360 of 2014 (which cases were later on consolidated).

16. It is the said criminal cases that gave birth to the Petition herein.

PETITIONERS' CASE:

17. On the background of the matter, the Petitioners contend that the eviction order was irregularly issued as no draft decree was sent to their Counsel prior to issuance as required in law and as such their rights as protected under Article 47 of the Constitution of Kenya 2010 (hereinafter referred to as '**the Constitution**') were infringed.

18. It is the Petitioners' further case that the eviction was done in the absence of the Area Chief or any elder and without any notice to the 1st Petitioner and that they way the order had been tailored, having provided for both surveying and eviction at the same time, contravened to rules of natural justice. It is further alleged that the eviction, as supervised by the OCS Mumias Police Station, was carried out so chaotically, unruly and carried mass hysteria to the 1st Petitioner who raised alarm to the members of public to come to her rescue and protect her property. The villagers aforesaid, on a revenge mission, went to the 2nd Respondent's home and destroyed property since to them the eviction was unlawful for want of notice and that no village elder was present.

19. The Petitioners further contend that it was during the execution of the eviction order that the alleged offences in the criminal cases were committed and that the same are only but trumped up charges designed to lock away the Petitioners and enable the 2nd Respondent to move into the 1st Petitioner's land inhibited. It is the petitioner's further case that the criminal cases amount to an abuse of the Court process since they are used to settle an otherwise long civil dispute between the 1st Petitioner and the 2nd Respondent.

20. It is further contended that the Petitioners have suffered injury amounting to denial, violation, infringement and threats to the fundamental rights and freedoms to own property and shelter, to inherit dignity and the right to have that dignity respected and protected, denial to their right to accessible and adequate housing and to reasonable standards of sanitation and to denial of quiet enjoyment of their cultural rights especially in respect to burial and tending to the graves.

21. It is on this basis that the Petitioners seek the orders in the Amended Petition.

1ST AND 2ND RESPONDENTS' CASE

22. The 1st and 2nd Respondents hold a different view from that of the Petitioners. They maintain that the Amended Petition should be dismissed with costs since it is amply demonstrated that the offences were committed long after the eviction had taken place and the perpetrators positively identified accordingly.

23. In their Replying Affidavits sworn on 14/09/2014 and 10/09/2014 respectively they presented a detailed history of the matter in Court and how the Police carried out their investigations further to availing photographs of the properties alleged destroyed by among others the Petitioners herein. To them, the criminal cases arose out of proper investigations by the Police in considering the material and evidence availed and the Petitioners have failed to demonstrate how they stand to be occasioned harm or how any of their rights have been violated.

Further it is alleged that the Petitioners have not demonstrated that the Police and/or the Respondents acted in bad-faith or maliciously in respect to the charges in Court and in the manner in which they carried their mandate under the Constitution. To this end, the Petition remain an abuse of the Court process and it is in the interest of justice that the Court permits the full hearing of the criminal cases since the charges preferred against the Petitioners are as a direct result of their actions and/or omissions. It is alleged that indeed several witnesses are awaiting the hearing. The attention of this Court was drawn to paragraph 16 of the Affidavit of the 1st Petitioner sworn on 17/06/2014.

24. The 1st and 2nd Respondents further deny that the offences were committed during the execution of the Court orders and assert that all local administrative officers, the Police and the Surveyor were all aware and present during the execution of the order and played their various roles.

The Respondents further argue that the Petitioners have all along been aware of the three findings of the Court where they participated actively and therefore cannot feign ignorance of the law. To them, the due process of the law was followed and the officers at the scene were not armed with crude weapons as alleged since as Police officers they know how to be properly armed. The allegation of youths who were armed was equally rebutted.

25. It is the Respondents' case that criminal proceedings can still proceed alongside the civil proceedings as provided under Section 193A of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya. They further allege that the Petition is contrary to public policy and amounts to an appeal through the backdoor given that the 1st Petitioner failed to lodge one and as such they are in Court with unclean hands and ought not to be allowed to perpetrate their impunity on alleged contravention of rights like in this instant case.

THE PETITIONERS' SUBMISSIONS

26. The Petitioners filed written submissions and tendered highlights thereto. While reiterating the contents of their Affidavits on record they re-emphasized the argument that the Police never carried out any investigations and if any were conducted they were so shoddily conducted and failed the test of a proper investigation capable of sustaining the charges before the criminal Court. They relied on Article 244 of the Constitution, Section 24(c) of the National Police Service Act No. 11A of 2011 and the cases of **Muneer Haroun Ismail --vs- R (2014) eKLR, Ripples International as her Guardian and next of Friend & 11 others –vs- Commissioner of Police/Inspector General of the National Police Service & 3 others (2013) eKLR** and **Commissioner of Police & the Director of Criminal Investigation Department & Another vs. Kenya Commercial Bank & 4 others (2013)eKLR**.

27. The Petitioners further submit that the 2nd Respondent and the OCS violated the 1st Petitioner's right to housing in the manner in which they conducted the evictions by failing to give due notice, failing to engage with the Applicant and give her due time to look for a alternative housing. The decision of **Satrose Ayuma & 11 others -vs- Registered Trustees of the Kenya Railways Staff Retirement Scheme & 3 others (2013)eKLR** was referred to with emphasis that the Respondents' actions offended the Petitioner's rights under Article 47(2) hence the eviction was wrongful and remains unlawful. On the submissions that the eviction was conducted by unknown persons who refused to identify themselves, the Petitioner relied on the case of **Joseph Maweu Matheka –vs- Murikite Ltd & Another (2012) eKLR**.

28. The Petitioners rested their submissions with a calling that on the foregone non-observance of the law, the Petition ought to be allowed as prayed.

THE 1ST & 2ND RESPONDENTS SUBMISSIONS:

29. While revisiting the contents of their Affidavits, the 1st and 2nd Respondents identified 4 issues for determination being whether: -

a. Criminal acts were committed against the 1st and 2nd Respondents;

b. The Criminal proceedings against the petitioners were instituted for the purpose of defeating the civil cases;

c. The Criminal proceedings against the petitioners should be stayed on the basis of issues raised to the petition; and

d. The criminal proceedings are likely to prejudice the petitioners.

30. The Respondents availed all the above issues in their favour. On the issue of whether the criminal proceedings should be stayed the respondents relied on the decisions of **Hussein Khalid & 16 Others - vs- AG & 2 Others, Nrb HC Petition No. 324 of 2013 (unreported)** and **Paul Ng'ang'a Nyaga & 2 Others -vs- AG & 3 Others, HC Petition No. 518 of 2012 (unreported)**.

31. On the issue on whether the criminal proceedings are likely to prejudice the Petitioners, the Respondents referred to the decisions of **Elory Kraneveld –vs- AG & 2 others, Nrb HCC Petition No. 153 of 2012** (unreported) and that of **Francis Mbugua Kinyanjui –vs- The Commissioner of Police & 3 others, Nrb HC Petition No. 79 of 2012 (unreported)**.

32. The Respondents further referred this Court to the decisions of **R -vs- Director of Public Prosecution & 3 Others, Nrb HC Judicial Revision No. 348 of 2012, George Joshua Okungu –vs- The Chief Magistrate's Court & Another (unreported), Nrb HC Petition No. 227 of 250 of 2009 and R Vs D.P.P (unreported), Nrb Hc Judicial Review No. 39 of 2013(unreported)** and prayed for the dismissal of the Petition with costs.

THE 3RD RESPONDENT'S SUBMISSIONS:

33. Mr. Oroni, Learned State Counsel, appeared for the 3rd Respondent and submitted that the Police participated in the enforcement of an Order as specifically ordered by the Court. Further, it was submitted that under the Office of Director of Public Prosecutions Act No. 3 of 2013, the 3rd Respondent is duty bound to prosecute offences in a Court of law just like the Petitioners' cases herein and wondered why the Director of Public Prosecution had been brought into the proceedings in the first place.

THE 4TH RESPONDENT'S SUBMISSIONS:

34. Mr. Onyiso, Learned State Counsel submitted that the 4th Respondent remained a nominal party in these proceedings and was only awaiting the outcome of the Petition to determine the way forward.

ANALYSIS AND DETERMINATIONS:

35. I have had a clear and in-depth appreciation of the issues in this Petition. In a nutshell, this Court is called upon to determine the following twin issues: -

a. Whether in the execution of the Court order by way of eviction the 1st Petitioner's constitutional rights under Articles 43(1) (b) and 47 of the Constitution of Kenya were infringed and if so whether the said eviction was rendered invalid and unlawful.

b. Whether the pendency of the criminal proceedings infringe the constitutional rights of the Petitioners and amount to an abuse of the Court process and ought to be terminated.

I will deal with each issue independently.

On whether the execution of the Court Order was unconstitutional:

36. I have endeavored to clearly set the background of this matter so that it will be easy to follow how the events unfolded. That there has been a civil dispute and litigation in Court over many years in respect to the disputed land is not in doubt. It is also not in doubt that the said litigation culminated in this Court's Civil Appeal No. 130 of 2007. It is further a fact that in the course of the litigation in the said appeal this Court made several orders and indeed delivered its judgment on 30/09/2013 where the appeal by the 2nd Respondent herein was allowed and eviction ordered.

It is further on record that the dispute between the 1st Petitioner and the 2nd Respondent has been on a boundary between the disputed land and the 1st Petitioner's land known as S.WANGA/LUREKO/172 of which this Court ordered a survey to be undertaken to ascertain the actual boundary prior to any eviction.

37. I have carefully perused the record and I am satisfied that the 1st Petitioner has all along been aware of the Court proceedings and to the judgment delivered on 30/09/2013. The 1st Petitioner has also been aware of the pending execution of the decree by way of eviction and that is why on the 20/11/2013 just one day to the intended execution of the decree proceeded to Court and filed an application for review of the judgment and obtained a stay order. The 1st Petitioner also filed an application to arrest the judgment. These two applications were heard together and eventually dismissed. I am further satisfied that the record is not favoured with any evidence that the 1st Petitioner appealed against the judgment of 30/09/2013 or the ruling dismissing the said applications. The submissions by the 1st Petitioner's Counsel that there is an appeal pending before the Court of Appeal remains unsupported and amount to bare allegations and this Court has no option but to treat that submission as an afterthought. The 1st Petitioner would have simply availed any documentary evidence in proof of the serious allegation and to highlight to the Court whether the Court of Appeal issued any stay orders or otherwise the prevailing position thereat.

38. The record is also clear on how the eviction was conducted. The OCS Mumias Police Station did not act on his own frolic. He was specifically ordered by this Court to do so. This was by the eviction Order

directed to him and dated 23/03/2011 and another one dated 22/10/2013. The said Orders clearly referred to the judgment of the Court delivered on 30/09/2013. I have also seen the correspondences between the District Surveyor Kakamega and the Chief of Lureko Location which were copied to the District Officer Mumias and the Assistant Chief of Lureko Sub-Location on the implementation of the Court decree by undertaking the survey work. This is part of Exhibit "MNN-2". There is also a correspondence by the Assistant Chief of Lureko Sub-Location (Haji Muliga Saidi) dated 08/11/2013 addressed to a Village Elder one Joel Chitayi to avail himself on the land for purpose of the implementation of the Court decree. The above goes a long way to confirm the various steps taken by the parties in the Civil Appeal No. 130 of 2007 in effecting the decree and equally dispels the allegation that the 1st Petitioner was unaware of the pending eviction.

39. The Investigation Diary by the Police which is also annexed as part of Exhibit "MNN 2" (OB. No. 42) in the 2nd Respondent's Replying Affidavit indicated that the Government Surveyor accompanied the Police and carried out the survey works by ascertaining and putting the boundaries prior to carrying out of the eviction. It is also not denied that the 1st Petitioner and the other party in the said appeal were present during the said exercise.

40. The said diary also confirms that the Police prior to the execution of the Court order and after the survey works had been undertaken and ascertained that there was an encroachment, gave the owners to those houses which had trespassed onto the disputed land, including the 1st Petitioner an opportunity and time to remove their items from the said houses. The affected parties diligently did exactly that.

41. The Court order was duly executed and the parties left the disputed land.

42. It is also imperative to note and I reiterate that the eviction was undertaken after the ascertainment and fixing of the boundary between the two parcels of land where encroachment was confirmed. Since the 2nd Respondent herein owns the disputed land and the 1st Petitioner is on the adjoining parcel S.WANGA/LUREKO/172, it cannot be said that the execution of the Court decree rendered the 1st Petitioner homeless or destitute. The 1st Petitioner has all along been in occupation of the said S.WANGA/LUREKO/172 since she just encroached onto the disputed land. She can continue her stay on the said land.

43. Further the allegation tendered by the 1st Petitioner on how the decree was extracted without her involvement was wholly dealt with under the two applications whose consolidated ruling was delivered on 20/03/2014 and the Court did not find any merit on the same. As stated earlier, the 1st Petitioner never appealed against that ruling. That issue is therefore *res judicata* before this Court.

The allegations that a decision was delivered in the 1st Petitioner's absence and that it was not right for the survey and eviction to be undertaken at the same time among all such attendant issues are matters which would normally be challenged either on appeal to the Court of Appeal or by filing of appropriate application(s) in the Civil Appeal No. 130 of 2007 but cannot form the basis of the present Petition. I say this because these are issues which require an in-depth examination by way of evidence and that is conveniently achieved in the ordinary suits otherwise this Court is at a loss when confronted with two opposing factual assertions. Had the 1st Petitioner taken up the said avenues timeously she would have had her issues looked into accordingly. She chose otherwise.

44. When a party has been directed by a Court of law to do or abstain from doing an act that party has no legal option than to comply. The legality or otherwise of the Order remains altogether another issue. That was the position to the Police when they were served with the Order of this Court. The 1st Petitioner knew all along that there was a decree against her on eviction. She chose not to interrogate that status. The matter had been pending in courts since 2004. Article 159 of the Constitution calls for expeditious dispensation of justice. This duty is upon all parties in a suit and this Court ought to resist the temptation of having itself instead being used as an avenue of defeating the very Constitution it is called upon to uphold.

45. It is therefore not amply demonstrated how the manner in which the execution of the Court order by way of eviction of the 1st Petitioner ended up infringing her rights as guaranteed under Articles 43(1) (b) and 47 of the Constitution. This is a case where a lawful legal process took its course, Orders were accordingly issued and the parties directed duly complied by executing the same. It is the 1st Petitioner who for reasons best known to herself failed to exercise her rights in the course of the litigation. Court orders were issued, they were executed and in the process of all that there was no any legal impediment. There is also no evidence that the eviction was carried out by the Police in the company of youths wielding crude weapons neither does the allegation that the Surveyor refused to identify himself hold. The Police do operate under the law and it would be the last to engage in acts likely to cause breach of peace. On the other hand it is demonstrated that the execution of the Court order was undertaken in the presence of the necessary local administrators, the Police and all the parties in the said appeal.

This Court is therefore not persuaded that in the course of the execution of the Court order the 1st Petitioner's rights as alleged were infringed or at all.

46. This Court has perused the authorities tendered by the 1st Petitioner in support of her above position. They are **Satrose Ayuma & 11 Others (supra)** and **Joseph Maweu (supra)**. In distinguishing the above cases, it ought to be noted that in both of them the matters therein did not have the advantage of Court litigation. Notices were just issued and followed with execution without any Court orders and in the absence of any administrative officials. The Courts rightly frowned on such acts which amounted to lawlessness. That position however is not similar to the one in this case. As earlier said, all acts in this case followed lawful Court orders.

On whether the pendency of the Mumias Criminal Cases No. 341 of 2014 and 260 of 2014 infringe the Petitioners constitutional rights and amount to an abuse of the Court process:

47. The 1st Petitioner in her Supporting Affidavit sworn on 17/06/2014 hand the following to say, in part: -

“10. That I started shouting and wailing. This attracted my neighbours who came and chased away the 2nd respondent together with his team when they failed to produce a court order. They also failed to identify themselves as government surveyors.

16. That the villagers who responded to my distress call reacted and similarly visited Muchelule's home to exact revenge. In their mind, they had no reasons to believe that the action was lawful as no notice had been given, no village elder was in attendance and the OCS and team had fled the scene once the eviction went out of hand”. (emphasis added).

48. In the Amended Petition dated 23/09/2014, the Petitioners state as follows: -

“13. That it was during the execution of the eviction order that the alleged offences in the criminal cases were committed.”

49. The Respondents however have a contrary position to that of the Petitioners. They hold that the execution of the Court order was fully undertaken and thereafter the Officers left and it is thereafter that the Petitioners among others who are still at large mobilized themselves to exact revenge. The Respondents position is buttressed by the Police under their OB. No. 42 of 02/04/2014 at 1620Hrs where the Investigation Diary records as follows: -

“BACK FROM EVICTION; C.I. Boniface Mutie, IP Mulai... now book from Lureko where we had gone to effect a Court Order of Civil Suit No. 130/07 where the order has been effected and the Government Surveyor put on the boundaries and the temporary houses which were on the parcel of land No. S.WANGA/LUREKO/2712 demolished after the owners removed the important items. After all was done we proceeded back to the station. On arrival near Mumias Town we received information that the villagers had invaded the home of Musa Ndaliro

Muchelule and burnt the temporary main house where we advised him to come and report.”

Signed by C.JBonface

Mutie (OCS)

(emphasis added).

50. The 1st Respondent SWALEH AURA had the following to say in his Replying Affidavit sworn on 14/07/2014 and filed in Court on 16/07/2014 at paragraphs 11, 12 and 13 thereof: -

“ 11. I personally witnessed the Petitioners committing the offences where they attacked and assaulted me and torched my father’s. The said people are well known to me ‘The Petitioners herein’. They are my neighbours.

12. The Petitioners assaulted me before they proceeded to put the house on fire. They also robbed me of Kenya Shillings Nineteen Thousand only (Kshs. 19,000/-) and they should not be allowed to take justice for granted.

13. I was brutally injured by the actions and/or commissions of the Petitioners and I would like to face them in a court of law to protect my rights”

51. From the foregone, it may be true that the alleged acts of revenge by the villagers took place after the Police left the disputed land. I however do not in anyway make a finding on that issue since it is one calling for evidence. However a revenge was taken up and effected upon the 1st and 2nd Respondents. There is evidence of loss and destruction of property. The Respondents accordingly lodged complaints with the Police. The question therefore which begs an answer is who undertook the revenge. That also remains a factual issue and is to be determined upon scrutiny of evidence.

The Police commenced investigations and recorded statements from various witnesses. The scene was visited. Thereafter some suspects were apprehended and accordingly had charges preferred in Court thereby culminating with the two criminal cases. I have seen the statements, the Police Investigation Diary and the Occurrence Book together with the photographs. I have also seen the charges preferred against the Petitioners.

52. It cannot be denied that the acts which constituted the revenge attack were criminal in nature and specifically prohibited in law. The attack was not based on an Order of the Court to amount to a ‘revenge’ so to say since the eviction was undertaken on the strength of a Court order. Had the parties really wanted a ‘lawful revenge’ they would have instead restrained themselves from taking the law into their hands. They would have simply gone back to Court and lodged their complaints. That is what is expected of a civilized society like Kenya which is constitutionally-anchored on the rule of law. Without saying much, those acts must be probed and appropriate action taken on the perpetrators for they are plainly criminal in nature. To me it matters not at what point in time the alleged acts were committed.

53. Who is therefore charged with that responsibility?

The National Police Service (the Police) and the Director of Public Prosecutions (the DPP) are part of the criminal justice system in Kenya vested with specific legal mandates. Article 243 of the Constitution of Kenya provides that: -

“243. (1) There is established the National Police Service.

(2) The National Police Service consists of-

(a) The Kenya Police Service; and

(b) The Administration Police Service.

(3) The National Police service is a national service and shall function throughout Kenya.

(4) Parliament shall enact legislation to give full effect to this Article.”

54. **The National Police Service Act** No. 11A of 2011 (the Police Act) was born from the said Article 243(4) of the Constitution. It was assented to on the 27/08/2011 and commenced on 30/08/2011.

Section 24 of the Police Act stipulates that the functions of the Kenya Police Service shall be the: -

a. provision of assistance to the public when in need;

b. maintenance of law and order;

c. preservation of peace;

d. preservation of life and property;

e. investigation of crimes;

f. collection of criminal intelligence;

g. prevention and detection of crime;

h. apprehension of offenders;

i. enforcement of all laws and regulations with which it is charged, and

j. performance of any other duties that may be prescribed by the Inspector –General under this Act or any other written law from time to time.”

Section 49 of the Police Act further provides as under: -

“49(1) Subject to Article 244 of the Constitution and the Bill of Rights, a police officer may execute such powers and shall perform such duties and functions as are by law imposed or conferred or on assigned to a police officer;

(2) Where any duty, power or discretion is imposed or conferred by this Act or any other law on a police officer of any specified rank or holding any qualified office, the police officer, shall, in the performance of such duty or the exercise of such power or discretion, and subject to the lawful orders and direction of police officer to whom the police officer is directly subordinate, and any senior police officer, if the occasion arises where it is expedient to do so, perform any such duty a exercise to do so, perform any such duty or exercise of such power or discretion.

(3)

(6) Every police officer shall be competent to serve or execute any summons, warrant or other process whether directed to him or to any other officer.

55. Article 157 of the Constitution creates the Office of the Director of Public Prosecutions with the mandate to exercise state powers of prosecution. Pursuant to Article 157(12) Parliament is empowered to enact legislation conferring the powers of prosecution on other authorities other than the DPP, but of course subordinates to the DPP. That led to the enactment of the Office of the Director of Public Prosecutions Act, No. 3 of 2013.

56. As creatures of the Constitution, these entities among all other bodies, organs and institutions likewise created by the Constitution, are to be subject to the Constitution. This Court is therefore empowered to interfere with and interrogate the acts of such constitutional bodies if there is sufficient evidence that they have acted in contravention of or are likely to infringe the Constitution.

Although the Police have powers to conduct investigations under the Police Act and the DPP has discretion in deciding whether to prosecute or not to prosecute an alleged offender, those powers and that discretion should be exercised legally and reasonably. Article 157(11) of the Constitution states that in exercising his powers to DPP: -

“Shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

On this aspect, I wish to borrow from the persuasive decision of the Privy Council in **Mohit vs The Director of Public Prosecutions of Mauritius (Mauritius) (2006) UKPC 20 (25 April, 2006)** as so captioned by the Supreme Court of Fiji in **Matalulu vs DPP (2003) 4 LRC 712** where the Court outlined the instances where the prosecutorial powers can be reviewed by the Court thus: -

“The decisions of the DPP challenged in this case were made under powers conferred by the 1990 constitution... Springing directly from a written Constitution they are not to be treated as a matter of formulation of ancient prerogative authority. They must be exercised within constitutional limits... It may be accepted, however, that a purported exercise of power would be reviewable if it were made: -

1. In excess of the DPP’s constitutional or statutory grant of power - such an attempt to institute proceedings in a Court established by disciplinary law (see S. 96 (4) (a)).

2. When, contrary to the provisions of the constitution, the DPP could be shown to have acted under the discretion or control of another person or authority and to have failed to exercise his or her or independent discretion – if the DPP were to act upon a political instruction the decision could be amenable to review.

3. In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.

4. In abuse of the powers of the court in which it was instituted although the proper forum for review of the action would ordinarily be the court involved.

5. Where the DPP has fettered his or her discretion by a rigid policy e.g. one that precludes prosecution of a specific class of offences.

There may be other considerations not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the discretion, to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice.”

57. In our case, it is alleged that the criminal charges preferred against the Petitioners infringe on their rights and amounts to an abuse of the Court process. If that is established to be true, this Court will not hesitate to intervene for the sake of the Constitution.

Be that as it may, the Petitioners are presumed innocent until proved guilty. This is not some kind of a policy but a constitutionally-guaranteed right under Article 50(2)(a).

Again, constitutionally, the Petitioners are entitled to an expedient trial process. Their rights are further protected under the whole of Article 50 which I hereunder reproduce for certainty: -

“50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(i) to remain silent, and not to testify during the proceedings;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence;

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—

(i) an offence in Kenya; or

(ii) a crime under international law;

(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

- (3) If this Article requires information to be given to a person, the information shall be given in language that the person understands.**
- (4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.**
- (5) An accused person—**
- (a) charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and**
 - (b) has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.**
- (6) A person who is convicted of a criminal offence may petition the High Court for a new trial if—**
- (a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and**
 - (b) new and compelling evidence has become available.**
- (7) In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.**
- (8) This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.**
- (9) Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.**

58. The Petitioners are contending that there were no investigations which were undertaken at all and if any the same were so shoddy and failed the test of a proper investigation and that the failure to conduct proper investigations amounts to a violation of the their rights. They contend further that investigations are supposed to be genuine and brought on a sound legal and evidential basis without any ulterior motive.

As demonstrated hereinabove, the duty to carry out investigations is bestowed on the Police and the DPP is to prosecute in the event charges are preferred. From the Investigation Diary and the witness statements, I am unable to find that the investigations were shoddily undertaken as that is a finding to be arrived at by the trial Court upon scrutiny of the then adduced evidence. There is some evidence of how the offences were committed and some suspects identified. I am equally at a loss to find how the investigations were either oppressive or vexatious or contrary to public policy, the law or the Constitution at large. I cannot equally see how the prosecution of the alleged offenders is *mala-fides* or how the prosecution of the offences is intended to achieve an ulterior motive or be equally used as a tool to settle personal scores. Looking at the rights under Article 50, I have not seen which one of those guaranteed rights is demonstrably infringed or about to, in the currency of the criminal cases. I am also not seeing how the prosecutorial powers stand abused.

59. Petitioners are always under a duty to demonstrate with particularity how their rights have been or

are threatened with infringement and to further demonstrate the damage suffered or likely to be suffered by the alleged infringement. To this end, I will fully concur with the decision in the case of **Anarita Karimi Njeru vs The Attorney General (1975) KLR 154.**

60. The lower Court is inquiring into allegations of a criminal nature and public interest demands that both parties be treated fairly and equally. It is in public interest that a crime is prosecuted and the wrongdoer convicted and punished or be acquitted accordingly. It is equally demanded that once sufficient evidence to justify the commission of a crime is gathered, then unless there is some serious countervailing reasons to justify the contrary, the prosecution of the offences should ensue. That is public interest and both parties have equal rights which are constitutionally guaranteed.

The above finding is fully associated with the finding of **Lenaola, J in Nairobi Constitutional & Human Rights Division Constitutional Petition No. 518 of 2012 (unreported)** where he referred to several other decisions and eventually presented himself thus: -

“Whereas every person has a right to the protection of the Constitution, it is not in all cases that orders as prayed should be granted. I say so because the Petitioner has conveniently forgotten that the Constitution must be read holistically for its real meaning and impact to be discerned. Our judicial system is not one where a Judge is granted such powers as to investigate criminal complaints. That power lies in Article 157(4) of the Constitution. Further, whether or not the investigations leading to the Petitioner’s arrest disclosed an offence is not for this Court to determine as I am not seized of the evidence to be presented against him. The Petitioner has literally jumped the gun because he has presented his defence of innocence not before the trial Court but this Court. His actions are premature.”

Warsame, J in **Nairobi HC Criminal Miscellaneous Application No. 68 of 2011 Micheal Monari & Another vs The Commissioner of Police & 3 Others (unreported)** had this to say in respect to this aspect: -

“It is not the duty of the court to go into the merits and demerits of any party. It is the function of the court before which the charge shall be placed which shall conduct the intended trial to determine the veracity and merits of any evidence to be tendered- against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the respondents exceeded jurisdiction, breached rules of national justice or considered extraneous matters or were actuated by malice in undertaking the investigation against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment.”

The Court of Appeal in the case of **Meixner & Another vs Attorney General (2005) 2 KLR 189** had this to say: -

“The criminal trial process is regulated by statutes, particularly, the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in Section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge.... It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court”.

This Court wish not to add anything more.

61. The Petitioners have therefore failed to demonstrate that the pendency and the prosecution of the criminal cases infringe on their constitutional rights and amount to abuse of the process of the Court. The Petitioners are therefore jumping the gun and the orders sought cannot be appropriately granted in the particular circumstances of this case.

On whether the criminal proceedings are aimed at depriving the 1st Petitioner her land in the civil dispute:

62. The charges preferred against the Petitioners herein are based on allegations of criminal acts visited upon the 1st and 2nd Respondents' land or persons and they **are not based** on the land which has been subject of the Court's litigation. They are offences created under the Penal Code, Chapter 63 of the Laws of Kenya.

It is a well established point in law that a civil suit in which the matters are substantially in issue in criminal proceedings, both cases can run concurrently. This is expressly provided in Section 193A of the Criminal Procedure Code which states as follows: -

“193A. Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in a pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

This position has been so taken in the case of **Paul Ng'ang'a Nyaga vs DPP & Another, Nairobi High Court Criminal Division, Constitutional reference No. 483 of 2012 (unreported)** which I wish to equally refer to.

CONCLUSION:

63. The upshot is that despite this Court taking violation of constitutionally-guaranteed rights very serious, the Petition remains but without merit and is hereby dismissed with costs.

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 5th DAY OF February 2015.

A.C. MRIMA

JUDGE