



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL PETITION NO. 29 OF 2014

1. **PETER AGUNDA**
2. **SELINA ATIENO AMOTH**
3. **SIMON PETER OCHIENG**
4. **CAROLYNE AKOTH OKOYO APPLICANTS**

VERSUS

1. **MOHAMED HASSAN ISMAIL**
2. **ABDI RAHIM MOHAMED HASSAN**
3. **COUNTY GOVERNMENT OF MOMBASA**
4. **THE MINISTRY FOR LANDS**
5. **THE HON. ATTORNEY GENERAL RESPONDENTS**

RULING

This is a ruling on a Preliminary Objection dated 7th October 2014, given in a notice therefor by Counsel for the 2nd Respondent, the particulars whereof were as follows:

- a. *The suit offends the mandatory provisions of Order 37 rule 7 of the Civil Procedure Rules 2010 and Section 38 of the Limitation of Actions Act Cap 22 laws of Kenya.*
- b. *The suit/Petition is contra-statute.*
- c. *There is no suit in existence hence the Constitutional Petition and Notice of Motion dated 22nd May 2014 are incurably defective, incompetent, bad in law and otherwise an abuse of the Court process.*
- d. *The Petition **should** therefore be struck out.”*

By their undated petition filed on 22nd May 2014, the Petitioners sued the registered proprietor of the suit property, the County Government of Mombasa, the National Government’s Ministry of Land and the Attorney General as the principal Legal advisor to the Government of Kenya seeking recognition of his right to be registered as the proprietor of the suit property. The details of their claim are set out in paragraphs 1-7 of facts of the Petition, as follows:

“THE FACTS

1. *The Petitioner is a resident of Mtongwe within the county council of Mombasa where he has openly, peacefully and uninterruptedly lived since the 1970's and had constructed semi-permanent houses.*
2. *That the 3rd respondent has been issuing us with demolish notices for making constructions on the said land without approval. However we are unable to get approved plans due to the big amounts of land rates that were pending by the landlord.*

3. *On several occasions the 3rd respondent has without any court order/s prior notice or consultation threatened to violently and brutally demolished the houses of the Petitioners and render them and their families homeless and destitute and even marked the said houses for demolition.*
4. *The officers of the 3rd respondents have threatened not to accord the Petitioners and their families an opportunity to be heard, to salvage any of their property, building, materials and household goods including clothes, beddings, furniture and utensils before the demolitions.*
5. *The officers of the 3rd respondents have threatened not accord the petitioner and his family any alternative accommodation and/or any form of shelter after the demolitions which is contrary to the natural justice.*
6. *The petitioners and their families will be rendered homeless and be living in the open exposed to the elements of nature and all forms of risks to their health and security.*
7. *The children of the petitioners will be adversely affected in the employment of their right to free and compulsory basic education which have forced their parents not move from the Mtongwe location in search of alternative shelter and accommodation.”*

On the basis of these factual pleading, the petitioner asserted breach of their rights to housing and prohibition from forced eviction under International Covenant on Economic Social and Cultural rights and the African Charter on Human and People’s Rights and constitutional rights under Constitution of Kenya 2010 on human dignity and security of the person, respectively, under Arts. 28 and 29; to information held by the State under Art. 35; to accessible and adequate housing under Art. 43; and from torture and cruel, inhuman or degrading treatment under Art. 25; and prayed for orders as follows:

- a. *That this Honourable Court do make such orders issue such writs and give such directions as it deems appropriate to prohibit the Respondents from interfering with the peaceful stay of the residents of the said suit property.*
- b. *A declaration that the forcible, violent and brutal eviction through demolition of homes of the Petitioners and their families without according them alternative shelter and/or accommodation and leaving the children to live in the open exposed to the elements and vagaries of nature is a violation of the fundamental rights of children to basic nutrition, shelter and health care and protection from abuse, neglect and all forms of violence and inhuman treatment and to basic education guaranteed by Article 53 (1) (b), (c), (f) and (2) read together with Article 21 (3) of the Constitution of Kenya, and Article 28 of the CRC read with Article 2 (6) of the Constitution of Kenya, 2010.*
- c. *A declaration that the petitioners have acquired property right over the **Plot No. 33/II/MS Mtongwe area** and/or therefore are entitled to be issued with documents of title deed by the 4th respondent for the suit land in occupation by them and an order to that effect.*
- d. *Any other or further orders and/or directions that this Honourable court may deem fit and just to be granted.*
- e. *Costs of this petition.”(sic)*

Simultaneously with the petition, the Petitioners filed a Notice of Motion dated 22nd May 2014 seeking interim relief, principally, to restrain their eviction from the suit property pending the hearing of the petition.

Responses

The second respondent filed a replying affidavit in substance denying the petitioner’s claim that they had purchased the suit premises from the deceased 1st Respondent and charging the petitioners with material non-disclosure of relevant previous proceedings against the petitioners as follows:

“REPLYING AFFIDAVIT

1. *That the first respondent is the father to the 2nd respondent and passed away in the year*

- 1977 in Nairobi attached is a copy of his death certificate marked MHA-1.
2. That my later father bought the land from “ ” during the colonial protectorate in the year 1945 and the attached is a copy of the said agreement marked MHA-2.
 3. That the petitioner was charged in a municipal court in the year 2009 vide criminal case No. 1149/09 in which was fined 10,000/= in default serve six months imprisonment but was suspended on condition that he demolish any structure which he erected on my plot without my consent attached is a copy of judgment and order made by Hon. R. Ondieki RM marked as MHA-3.
 4. That petitioner appealed against the said decision vide CRA No. 202/2010 which appeal marked as abandoned by Hon. Justice M. Muya in the year 2013. Marked AMH 3b.
 5. That petitioner then filed another case in Mombasa High Court Civil Misc. case No. 234/2012 which application was dismissed as the abuse of the process of the court by Hon. Lady Justice Mary Kasango attached is the proceeding of the decision and marked as MHA-4.
 6. That the owner of the land is not in dispute as shown by the search certificate which was exhibited by the petitioners themselves and attached is their copy in which they forged the signature of the deceased who died 37 years ago marked as MHA-5.
 7. The petitioners are not telling the truth to this court, there is nowhere in the application and the petition where the Petitioner disclosed the cases which were in court and were ordered by the court to demolish the structure by himself or he will be jailed the order is attached as AMH-6
 8. That all the time the rate of the said land is paid by the 2nd respondent and on 18th October 2012 a receipt of Kshs. 32,500/- was paid and the receipt is attached as AMH-7.”

The 3rd respondent filed Grounds of Opposition dated 16th June 2014 as follows:

“THE 3RD RESPONDENT'S GROUNDS OF OPPOSITION

1. The Notice of Motion filed in Court has not demonstrated any legal wrong/breach to have been perpetrated by the 3rd respondent.
2. The 3rd respondent further states that the Petitioners are self-confessed trespassers who cannot avail themselves the drastic orders sought herein wherefore the Petition as it states is for striking out.
3. The application as taken out does not satisfy the mandatory provisions of Order 40 of the Civil Procedure Rules and lacks any firm ground to stand on.
4. The Petitioner's Notice of Motion as filed is serious misconceived, is frivolous, bad in Law and nothing other than an utter abuse of the process of the court.
5. No reason and/or grounds have been set forth to warrant the court to exercise its discretion in favour of the Petitioners whereof the application must be dismissed.
6. The application as a whole is a gross abuse of the process of this Honourable Court and must fail in its entirety.
7. The application as filed is misconceived fatally defective, bad in law and the same is for striking out.
8. That the grounds and issues raised in the Petitioner's application for a temporary Injunction are pre-mature and predicted on wrong premise and cannot be delved into at this juncture.
9. That the Petitioners herein have acted in bad faith and out of gross malafides and further have misled the court by seeking the orders as set out in the Notice of Motion dated 22nd May 2014 on the basis of the affidavits and the Exhibits in support thereof.”

Submissions on the Preliminary Objection

In urging the preliminary Objection, Counsel for the 2nd Respondent relied on the Court of Appeal decisions in *Ngethe v. Gitau & Anor.* [1999] 1 EA 225, *Kenyanga v. Ombwori* [2001] KLR 103 and *Njuguna Ndatho v. Masai Itumo & 2 Ors.* [2002] eKLR for the proposition that a claim in adverse possession could only competently be brought by way of the originating summons procedure of Order 37 of the Civil Procedure Rules (formerly Order 36). It was further submitted,

in reliance on **Cyril Haroo & Anor. Uchumi Services Ltd. & 3 Ors.** [2014] eKLR per Angote, J., that a suit filed contrary to provisions of statute is a nullity which cannot be saved by the substantial justice principle of Art. 159 of the Constitution, and the court was urged to find the petition and application there-under is misconceived, incompetent and fatally defective and, consequently, to strike them out.

In response, the Petitioner opposed the preliminary objection asserting that the petition was not a claim in adverse possession and urged that the prayers of the Petition attested to the position that they claimed the land as purchasers from the deceased 1st respondent and also sought protection from forced eviction. It was submitted that:

“It will be noted from the [Petition] prayers that:

- a. *There is no prayer made by the petitioners stating that they have acquired the said property by way of adverse possession.*
- b. *Prayer (c) specifically prays for property RIGHT for the suit land in which the petitioners occupy and not the whole suit property as they do not occupy the part of the land they did not purchase for the 1st Respondent who is deceased.*

Further Your Honour, Your petitioners seek protection of their fundamental human rights under the laws stated on the petition and the view of the 2nd respondent that the petitioners need to approach court by way of originating summons based on adverse possession is completely misconceived and misplaced insinuation.

The petitioners completely oppose the view by the 2nd respondent that the petitioners’ cause of action is based on adverse possession; in instituting this suit the petitioners came under Notice of Motion dated 22nd May 2014 seeking an injunction to stop the 3rd respondent from demolishing houses on the said plot as the petitioners were rightfully allowed to construct on the said plot under Order 40 of the Civil Procedure.

The fact that the Petitioners have been on the land for more than 12 years is not the basis of the petition but an additional fact to the obvious truth that the petitioners bought the said property from the 1st respondent and under the Bill of Rights all citizens are allowed to own property in any part of the country under article 40 of the Constitution.

In conclusion, Your Honour, the Prayers and facts before the court are in relation to the constant contravention of the petitioners’ and their families rights to fundamental right to housing and prohibition from forced eviction as contained in Article 11 of the International covenant of economic Social & and Cultural Rights and article 2 (6) of the Constitution of Kenya and the Bill of Rights.”

The 3rd, 4th and 5th Respondents did not file any submissions despite opportunity granted by adjournment of the matter for that purpose. The 3rd Respondent had, however, as shown above, in its Grounds of Opposition objected to the Petitioner’s Notice of Motion dated 22nd May 2014 on the ground principally that the petitioners were self-confessed trespassers who were not entitled to the order sought and that the petition ought to be struck out.

Determination

1. The factual basis of the petitioners’ case is set out in the affidavit of the 1st Petitioner sworn on 22nd May 2014, as follows:
2. *“That I and all other petitioners are residents of Mtongwe within Mombasa within Mombasa County and have always lived on the suit property since 1970s.*

3. *That I and other petitioners have been in possession and or occupation and use of the stated above plots since when each acquired the said plots and or inherited.*
4. *That the said plots and homes are our only homes and the only home our children and grandchildren have ever known.*
5. *That I am familiar with the facts of this case and matters related to this case.*
6. *That at all material times to the suit herein we have been and are still living in all that piece of land known as IIMS/33 Mtongwe area within Mombasa.*
7. *That we have been and are in physical occupation and possession of all that piece land situated in the suit property.*
8. *That have occupied the suit land for more than 30 years and no one has ever come up to claim ownership of the same.*
9. *That any claim whatsoever, if any has been brought after the lapse of the limitation period.*
10. *That we live on the suit land with my family and have brought up our families knowing this suit land as their only home because they were born in this land.*
11. *That we have lived on the suit property, and developed it openly and without hindrance or interruption for more than 50 years.*
12. *That the suit property in issue belongs to one Mohamed Hassan Ismail as the owner. Annexed and marked 'PJA 1' is a copy of Certificate of Official search and copy of title deed.*
13. *That we do not have another home to move to and our families shall be rendered destitute, landless and or homeless.*
14. *That I am advised by our advocates on record, which I verily believe to be true that the land now belongs to us since we each ought from legitimate buyers, the owner has been absent and that we have stayed in the said land for over 12 years as per the Limitations of actions act (cap 22.)...."*

The petitioner's suit for "declaration that the petitioners have acquired property right over the **Plot No. 33/II/MS Mtongwe area** and/or therefore are entitled to be issued with documents of title deed by the 4th respondents for the suit land in occupation by them and an order to that effect" appears to lie in the following factual statements in the said affidavit of the 1st Petitioner:

"11. That we have lived on the suit property, and developed it openly and without hindrance or interruption for more than 50 years.

12. That the suit property in issue belongs to one Mohamed Hassan Ismail as the owner. Annexed and marked 'PJA 1' is a copy of Certificate of Official search and copy of title deed."

The cause of action disclosed by the pleadings in the petition and the facts deponed by the 1st Petitioner in the supporting affidavit, as set out above, is, despite protestation by counsel for the petitioner, clearly as claim in adverse possession. It is accepted by the Petitioners that "***the suit property in issue belongs to one Mohamed Hassan Ismail as the owner***" (the 1st respondent) hence his being sued as a respondent and it is averred that the petitioners have been in open occupation for periods of over 12 years, as required for adverse possession under the Limitations of Actions Act, albeit pursuant to alleged purchase from 'legitimate buyers' of the land whose identities and particulars of the purchase and any sale agreements thereof are not disclosed. In the circumstances, possession by the petitioners, if proved, must be adverse to the right of the registered proprietor and therefore the occupiers' claim lies in adverse possession.

Who are the 'legitimate buyers' in context of the ***nemo dat*** principle that one cannot pass a better title than he himself has. It is a requirement of section 3 of the Law of Contract Act that a contract of sale of land must be in writing. As no particulars or evidence of alleged purchase of the suit land from the alleged 'legitimate buyers' were adduced, it must follow that at best the petitioners' possession of the suit land can only be claimed as adverse possession.

As the petitioners accept the 1st defendant is the owner of the suit property and they have not shown that they acquired by sale any interest in the land from the registered owner or his personal representative, their claim based on possession of the suit land can only lie in adverse possession of the suit property.

The court takes the view that the petitioners have desperately sought to embellish their case by giving it constitutional moment and gravity by relying on provisions on rights under the constitution and international instruments. The Constitution and the international instrument cited by the petitioners also protects the right to property of the registered proprietor, which in the circumstances of this case, according to the pleadings, lies with the 1st Respondent who the petitioners acknowledge as the owner (and the 2nd respondent by transmission). The petitioners' claim to right to protection from forced eviction cannot be set up against the *bona fide* duly registered proprietor's of the suit property whose enjoyment of his right to property they impede.

Moreover, there appears to be contradictory positions taken in the petition and the submissions: while the petition under prayer (c) seeks that the petitioners be registered as owners of the entire suit property while the submissions claim an interest only in areas which they claim to have purchased from the deceased 1st respondent and not the whole land. Even the areas purchased are not particularized by location or size or by any documentation of sale. Again, in the supporting affidavit it is alleged that they purchased the land from 'legitimate buyers' not from the deceased 1st respondent as stated in the Submissions.

Significantly, the Petitioners are guilty of non-disclosure of material facts of the criminal proceedings before the municipal court wherein an order for demolition of structures on the suit property was granted. The petitioners' claim in this petition is made after orders of eviction have been given by the criminal magistrate's court with abortive appeal to the High Court and a similarly unsuccessful civil case before the Court, which was dismissed by the Court as an abuse of the court process in view of the pendency of the criminal appeal to the High Court. The petitioners cannot be permitted to litigate across the divisions of the High Court - from the Criminal, to Civil and then to the Constitutional Divisions of the Court on the same matter. The Constitutional Court as a division of the High Court does not supervise the other divisions of the Court, and these proceedings are accordingly wholly inappropriate.

It is settled law since *The Speaker of the National Assembly v Karume* (2008) 1 KLR (EP) 425 that where the constitution or statute sets out a procedure or mechanism for dealing a particular grievance or dispute, that procedure should be strictly followed. There being an order of a court for the demolition of the petitioners' houses by the Municipal Court, the avenue for redressing a grievance arising from that order is by appeal to the High Court.

To repeat before the Constitutional Court a suit for orders similar to those sought in previous proceedings in the High Court on criminal appeal and civil action is an abuse of the process of the Court. The Petitioners must, as they may be advised by their counsel, seek the reinstatement of the criminal appeal against the magistrate court's order; or seek to demonstrate a right to the suit property by adverse possession in accordance with the Originating Summons procedure prescribed therefor under Order 37 of the Civil Procedure Rules; or both.

Accordingly, for the reasons set out above, the Petitioners' Petition and the Notice of Motion there-under both dated the 22nd May 2014 are struck out with costs to the Respondents.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 17TH DAY OF APRIL 2015.

M. MUYA

JUDGE

In the presence of: -

Mr. Njenga holding brief Ms. Kedeki for the Applicants

No appearance for the Respondents

Mr. Musundi - Court Assistant.