



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

PETITION NO 547 OF 2014

JACQUELINE WANGU KARIUKI.....1ST PETITIONER

FRANCIS KARIUKI WANGU.....2ND PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

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

EMBAKASI RANCHING COMPANY LTD.....3RD RESPONDENT

DAVID GATERO THAIRU4TH RESPONDENT

JUDGMENT

Introduction

1. The petitioners have filed this matter to challenge their prosecution in Criminal Case No. 5176 of 2014 - Republic vs Francis Karuki Kimaru, or in any other criminal proceedings relating to plot numbers **V 8177, V 8178 and V 8179** Embakasi Ranching Company Limited situated at Embakasi. The two petitioners who are father and daughter, have allegedly been charged with the offence of forcible detainer contrary to section 91 of the Penal Code.
2. In the petition dated 5th November 2014, the petitioners seek the following orders:
 - a) *A declaration that the respondents have contravened the 2nd petitioner's rights under Articles 27, 29, 31, 47, 48, 49 and 157(6) of the Constitution.*
 - b) *An order that the Criminal Case No 5176 of 2014, Republic vs Francis Kariuki Kimaru be stayed permanently and/ or quashed.*
 - c) *An order of prohibiting the prosecution of the 1st and 2nd petitioner's in Criminal Case No 5176 of 2014, Republic v Francis Karuki Kimaru or in any other criminal proceedings relating to Plot No V 8177 V 8178 and V 8179 Embakasi Ranching Company Limited situated at Embakasi on the offence of Forcible Detainer.*

- d) An order that section 91 of the Penal Code is unconstitutional in view of Article 40 of the constitution.*
 - e) An order of Damage for compensation under Article 23(3) (e) of the constitution.*
 - f) That the costs of this petition be provided for.*
 - g) Any other orders that this Honorable Court may deem fit to grant.*
3. The petition is supported by an affidavit sworn by the 1st petitioner on 5th November 2014. The 2nd petitioner also filed a further affidavit in support of the petitioners' case sworn on 20th February 2015.
 4. The 1st and 2nd respondents oppose the petition and have filed an affidavit in reply sworn by PC Anthony Mumanyi on 18th November 2014. The petitioners and 1st and 2nd respondent also filed submissions in support of their respective cases, but no replies or submissions were filed by the 3rd and 4th respondents and neither did they participate in any way in the proceedings. The matter was canvassed before me on 11th May 2015.

The Petitioners' Case

5. The facts giving rise to the present petition revolve around the ownership of plot numbers V 8177, V 8178 and V 8179 in the Embakasi Ranching Company Limited situated in Embakasi within Nairobi area. The 1st petitioner alleges that she is the lawful owner of the said plots, and that she took possession thereof on or about 2008 and had been in occupying without interruption for three (3) years.
6. On or around April 2011, the 3rd respondent allegedly started to call the 1st petitioner indicating that it was repossessing plot number V 8178 without any justification whatsoever. She alleges that a third party had been trying to illegally construct on the said plot number V 8178 and had put construction materials on the site.
7. According to the 1st petitioner, she filed **Milimani Chief Magistrate Court Civil Case No. 2659 of 2011 Jacqueline Wangu Kariuki vs Embakasi Ranching Company Ltd and Others** seeking orders to stop the 3rd respondent, its employees, servants or agents from, inter alia, constructing and erecting any permanent buildings or advertising for sale or in any other manner whatsoever interfering with plot numbers No V 8177 V 8178 and V 8179. She states that she was granted a temporary injunction restraining the 3rd respondent as prayed on 15th December 2011. The matter has yet to be heard and determined.
8. The petitioner states that she has constructed a permanent building on the premises in dispute, and her parents live on the said property. The mother title to the property of which the disputed property forms a part is still in the name of the 3rd respondent.
9. The petitioners complain that the 2nd petitioner is now being charged with the offence of forcible detainer contrary to section 91 of the Penal Code in **Makadara Criminal Case No 5176 of 2014 Republic vs Francis Kariuki Kimaru**. The particulars of the charge are that:

“On 31st day of October 2014, at Ruai Location in Njiru Sub-County within Nairobi County, being in possession of Plot No V 6199 situated within Embakasi Ranching Co. Limited without colour of right held in possession of the said land in a manner likely to cause a breach of peace or reasonable apprehension of a breach of peace against MR DAVID GATERO THAIRU who was entitled by law to the possession of the said land.”

10. The petitioners state that the said David Gatero Thairu was claiming ownership of plot No V. 6199 which he claims is part of Plot No V 8177 V 8178 and V 8179. It is their contention that the dispute relating to the ownership of the three plots in dispute is civil in nature.
11. The petitioners therefore allege a violation of their constitutional rights by the 3rd and 4th respondents who are using the criminal process to coerce them to settle a civil dispute.
12. They further claim that the 3rd respondent, who is in custody of all documents relating to the plots in dispute and is the issuing authority, is yet to record a statement with the police, but that the 1st respondent seeks to prosecute them without having recorded statements from the 3rd respondent who is the custodian of all relevant records, maps, receipts and other ownership documents.
13. The petitioners state further that the Criminal Court, which deferred their plea taking on 3rd November 2014 to 10th November 2014 to enable the parties produce their ownership documents in court, has no jurisdiction to decide the question of ownership of the disputed plots of land. They are apprehensive therefore that their right to property under Article 40 would be violated should they be compelled to settle a civil matter through a criminal process.
14. The petitioners accuse the investigating officer of having only investigated the 4th respondent's complaint and failing to establish the physical location of plot numbers V 8177, V 8178 and V 8179 against the physical location of plot number V 6199 which the 4th respondent was claiming.
15. In presenting the petitioners' case, Mr. Thuku submitted that the petitioners were seeking orders that Criminal Case No 5776 of 2014 at Makadara be quashed, and that the 1st respondent be prohibited from prosecuting the petitioners on the offence of forcible detainer. They were also, according to Mr. Thuku, asking the Court to declare section 91 of the Penal Code unconstitutional.
16. Mr. Thuku contended that section 91 presupposes that the illegal act is the possession of land against a person entitled by law to occupy that land; that it presupposes that in case of a dispute over property, a party should not invoke that section and institute criminal proceedings which will not address the question of ownership.
17. Mr. Thuku contended that Article 40 gives every citizen the right to own property of any description, which includes registered and unregistered land. It was his contention that in the present case, the land in dispute is unsurveyed and unregistered; that what the parties have are share certificates which are not recognized under the Land Act, and the main title to the property is with the 3rd respondent. He submitted that both the petitioners and the 4th respondent have share certificates bearing different plot numbers, and the Criminal Court could not determine to whom the land belongs.
18. The petitioners asked the Court to be guided by the decision in **Abraham Longangat & Another vs R, High Court Criminal Appeal No 91 of 2012** for the proposition that where land belongs to a group ranch, as is the case with Embakasi Ranching Company Limited, a member cannot claim to own a particular parcel of land unless ownership has been established through a civil matter; and further, that with respect to a criminal complaint, the group ranch, not the individual allottee, should have been the complainant.
19. Mr. Thuku submitted further that section 91 of the Penal Code, if it was to be applied, should not be applied to unsurveyed land and ranches whose owners do not possess individual titles as that would cause anarchy. It was his submission that section 91 violates Article 40(1)(a) of the Constitution.
20. The petitioners urged the Court to find that their continued prosecution would amount to abuse of the Court process and to grant the prayers sought in the petition.

The 1st and 2nd Respondents' Case

21. Ms. Spira for the 1st and 2nd respondents relied on the affidavit sworn by PC Mumanyi and submissions filed on behalf of the respondents dated 9th April 2015.
22. In his affidavit sworn on 18th November 2014, PC Mumanyi avers that he is a police officer attached to the Directorate of Criminal Investigations at Ruai. He had been assigned the duty to investigate the present matter.
23. He deposes that he received a complaint from the 4th respondent and commenced investigations on or about 20th October 2014. The 4th respondent complained to him that an unknown developer had encroached on the parcel of land that he had acquired from the 3rd respondent, and produced a share certificate and a letter in respect of plot number V6199.
24. Cpl. Mumanyi further avers that his investigations established that the 2nd petitioner had developed a dwelling house on the plot No V 6199 and fenced it, thus hindering access by the 4th respondent. He states that the 2nd respondent has failed or refused to record a statement on the issue.
25. The case for the 1st and 2nd respondents is that the 2nd petitioner has been charged with an offence known to the law, but no charges have been preferred against the 1st petitioner. The 2nd petitioner has also not pleaded to the charge against him as it has been deferred several times.
26. Cpl. Mumanyi further contends that he has established that Milimani Chief Magistrate's Civil Case No 2659 of 2011 is not with regard to plot no V6199, the subject of the 4th respondents complaint; that the 4th respondent is not a party to the civil proceedings, and the subject matter of the civil case is distinct from Makadara Criminal Case No 5176 of 2014 against the 2nd petitioner.
27. In her submissions on behalf of the 1st and 2nd respondent, Ms. Spira submitted that under Article 24(1) of the Constitution a right or fundamental freedom may be limited to the extent permissible in a free and democratic society. She contended that upon investigation by police officers, they police confirmed from the 3rd respondent that the complainant was the owner of plot no V6 6199 which is the subject matter of the criminal case. The police summoned the 2nd petitioner to record a statement but he failed or refused to do so, and he was charged with an offence known to law, which is provided for under section 91 of the Penal Code, and the charges against him are therefore constitutional.
28. Ms. Spira reiterated that it is the 2nd petitioner, not the 1st petitioner, who is being charged with the offence, but that the 1st petitioner was making a claim of ownership of parcels of land which are not the subject of the criminal case.
29. Ms Spira submitted that upon review of the evidence, the DPP, as he is mandated to do under the Constitution, directed the police to proceed with the case; and that he did not depend on extraneous considerations but on the evidence on record.
30. With respect to the claim by the petitioners that there is a pending civil case against the 3rd respondent company, the 1st and 2nd respondents submit that the 4th respondent, who is the complainant in the criminal case, is not a party to the civil suit and the issues in the civil case are distinct from those in the criminal case.
31. Ms. Spira denied that the respondents had violated the petitioners' rights, arguing that the decision to charge the petitioner was made within the ambit of the law.

32. In his reply to the submissions by the DPP, Mr. Thuku submitted that with respect to the plot numbers of the parcels in dispute, it is only the 3rd respondent who can confirm the exact number of the disputed plot and who owns it.

Determination

33. The dispute giving rise to the petition revolves around a plot of land which forms part of the land whose mother title, according to the petitioners, is held by the 3rd respondent. The petitioners refer to the plot in dispute as **V 8178** which, along with plot numbers **V 8177** and **V 8179**, they claim belong to the 1st petitioner who purchased it, on or about 2008 from the 3rd respondent. The 3rd and 4th respondents did not deign to honour the Court with their presence to elucidate the question of ownership of the plot. However, according to the 1st and 2nd respondents, the plots in dispute is known as **V 6199**, and from their investigations, it belongs to the 4th respondent.

34. As a result, they have charged the 2nd petitioner with the offence of forcible detainer contrary to section 91 of the Penal Code. Their case is that this is an offence known to law, and so the petitioners cannot complain about violation of their rights.

35. Section 91 of the Penal Code provides as follows:

“91. Any person who, being in actual possession of land without colour of right, holds possession of it, in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, against a person entitled by law to the possession of the land is guilty of the misdemeanour termed forcible detainer.” (Emphasis added)

36. The provisions of section 91 require a person to be in possession of land and to hold onto it ***“without colour of right”*** against a person ***“... entitled by law to the possession of the land”*** in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace.

37. The question is whether, in the present case, the 4th respondent can be said to have been entitled by law to the possession of the land, and the petitioners to have committed the offence of forcible detainer contrary to section 91.

38. This is a question that ordinarily should not fall within the province of this Court to address itself to. It raises questions of fact, and evidence, which are within the province of the trial court. However, the petitioners have raised the question of the proper exercise of constitutional powers by the 1st and 2nd respondents who, on the complaint of the 4th respondent, have charged the petitioners with the offence of forcible detainer.

39. The issue of the ingredients of the offence of forcible detainer have been considered in various cases, notably where parties have been charged and convicted of the offence, and have appealed against the conviction and sentence.

40. In Kitale **High Court Criminal Appeal No. 91 of 2012 Abraham Lonyangat and John Lonyangat vs Republic**, Karanja J considered an appeal with respect to conviction under the said section. He observed that the prosecution, in charging the appellants with the offence, had treated the land in dispute as belonging to the complainant, even though there was no individual title in his favour to prove and affirm his alleged ownership of the land. The entire portion of land in that case was registered in the name of a group ranch to which both the appellant and the complainants belonged, which was the lawful proprietor of the land. Neither the appellants nor the complainant in the case could claim ownership of the land as individual titles had not been issued. And neither could accuse the other of interfering with the other's lawful possession of the land. The Court, in allowing the appeal, observed as follows:

“The solution to their dispute regarding the land lies at most with the registered owners i.e.

the Kongelai Group Ranch or at the very least with the Civil Courts and not certainly the criminal courts. The charge against the appellant was therefore misconceived and defective such that no quantity of evidence from the prosecution could cure it.”

41. With respect to the provisions of section 91 of the Penal Code, the Court stated as follows:

“In any event, section 91 of the Penal Code presupposes that the complainant is the lawful owner of the land in dispute which was not the case herein. The appellants could not be said to be guilty of forcible detainer yet the land is not registered in the name of the complainant or lawfully possessed by himself thereby giving him the colour of right thereof to the exclusion of the appellants or any other person.”

42. See also **High Court At Homa Bay Criminal Appeal No. 87 of 2014 (Formerly Kisii HCCR Appeal No. 74 of 2010) Samwel Abuya Mbija vs Republic** with respect to the offence of forcible detainer and what needs to be established.

43. The petitioners have alleged violation of several of their constitutional rights under Articles 27, 29, 31, 47, 48, 49 and 157(6). The petitioners have not established how these violations have occurred, and certainly, there is no right that can be violated under Article 157(6) as it relates to the power of the DPP to terminate prosecutions.

44. However, they make a valid point with regard to the offence they are charged with. Since neither they nor the complainant, the 4th respondent, is the registered owner of the plot in dispute, none can properly maintain a claim for forcible detainer. The land in dispute is still registered in the name of the 3rd respondent, and as a responsible seller, the 3rd respondent should by now have taken the requisite steps to clearly demarcate the land, ensure that each purchaser is clear about the location and extent of his or her property, and arranged for the issuance of titles to each purchaser. In any event, the dispute between the parties is clearly one for the civil courts, not the criminal justice system.

45. Having not found a violation of a constitutional right as alleged, yet having found that in the present case the prosecution against the 2nd petitioner may be unsustainable, what is the Court to do? Should it allow the prosecution to continue when it is evident that the dispute will revolve around title- as the petitioners observed, the trial court had deferred the taking of a plea and requested both the petitioners and the complainant to produce their titles. This is clearly outside the jurisdiction of the trial court, but it demonstrates its own reservations about the case placed before it.

46. This Court has jurisdiction, under Article 23(3), to grant appropriate relief in matters brought under Article 22 of the Constitution. In my view, it would be to allow an abuse of the Court process if the proceedings against the 2nd petitioner, which are premised on the lawful entitlement of the 4th respondent, to proceed. In this case, I would rely on the views of the Court in the case of **Githunguri vs Republic [1985] KLR 91** in which the Court upheld its duty to prevent an abuse of its process. It cited the decision in **Metropolitan Bank Ltd v Pooley (1885) 10 App Cases, 210 at p 220, 221** in which Lord Blackburn said:

“But from early times ... the Court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing – the Court had the right to protect itself against such an abuse.”

47. It also cited the words of Lord Selbourne at p 214 of the same decision that:

“The power seemed to be inherent in the jurisdiction of every Court of Justice to protect itself from the abuse of its own procedure.”

48. The Court in Githunguri also relied on the decision in **Mills v Cooper [1967] 2 All ER 100** at p 104 in which Lord Parker CJ said:

“every Court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the Court.”

49. On the material before me, I am satisfied that it would be to countenance an abuse of the Court process to permit the prosecution of the 2nd petitioner, or the 1st petitioner, should proceedings be against her, commenced to proceed.

50. The petitioners have also claimed that the provisions of section 91 of the Penal Code are unconstitutional in view of Article 40 on the right to property. They have not, however, placed before me anything that would justify a finding that the provisions are unconstitutional.

51. In the circumstances, my final orders are as follows:

i. That an order be and is hereby issued prohibiting the prosecution of the 1st and 2nd petitioners in Criminal Case No 5176 of 2014, Republic vs Francis Kariuki Kimaru or in any other criminal proceedings relating to Plot No V 8177 V 8178 and V 8179 or V 6199 Embakasi Ranching Company Limited situated at Embakasi on the offence of forcible detainer.

ii. That each party bears its own costs of the petition.

Dated, Delivered and Signed at Nairobi this 30th day of July 2015

MUMBI NGUGI

JUDGE

Mr. Thuku instructed by the firm of S. N. Thuku & Associates & Co. Advocates for the petitioner.

Ms. Spira instructed by the office of Director of Public Prosecution for the 1st respondent.