



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL PETITION NO. 27 OF 2013**

**IN THE MATTER OF: ARTICLE 2(6), 19, 20, 21, 22(2)(a), (3)(d), 23(1), (3) & 25,**

**28, 40, 165(3)(a)(b)(d)(i)(ii) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**UNDER ARTICLES 26(1), (3), 27(1), (2), 28, 29©, (D) OF THE CONSTITUTION**

**AND RULE 11© & 12 PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOM**

**OF PRACTICE AND PROCEDURE RULES AND ALL OTHER RELEVANT**

**ENABLING POWER & PROVISIONS OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF: ARTICLE 25 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS**

**BETWEEN**

**1. KARISA CHARO DUNDA**

**2. MZEE HAMISI MWALUGO**

**3. KABIBI KARISA.....PETITIONERS**

**VERSUS**

**1. FRANCIS WANJOHI WANG'ANG'A**

**2. PATRICK NJENGA NJAU**

**3. THE MINISTRY OF INTERNAL SECURITY**

**4. THE MINISTRY OF LANDS HOUSING & URBAN DEV.**

**JUDGMENT**

**THE PETITION**

1. In their Petition dated and filed on 26<sup>th</sup> April, 2013 the Petitioners claim that their ancestors have since time immemorial openly, peacefully and uninterruptedly, and that they, the Petitioners themselves have similarly since the 1940's lived on the parcels of land known as Sub-Divisions Number 2621, 2622, 2623 and 2624, being sub-divisions of the parcel of land formally known as MAINLAND NORTH, SECTION III, registered in the Land Registry, Mombasa.

2. The Petitioners claim that unknown to them, the First Respondent acquired the said parcel of land and sold the sub-divisions to the Second Respondent. The Petitioners claim that on 26<sup>th</sup> April, 2013, the First Respondent with the aid of the Local Provincial Administration visited them and issued threats to violently and brutally evict the Petitioners and also destroy their homesteads, and thus render them and their families homeless and destitute. The Petitioners further claim that the Ministry of the Interior, (the Third Respondent) had declined to give them and their families an opportunity to be heard, to salvage their property, buildings, materials and household goods, including clothes, beddings, furniture and utensils before the demolitions, and that they have not been accorded alternative accommodation by the Fourth Respondent.

3. The Petitioners also claim that this is a violation of their rights to housing as guaranteed to them under Article 11 of the International Covenant on Economic Social and Cultural Rights (ICESCR), which is part of Kenyan law by virtue of Article 2(6) of the Constitution of Kenya 2010, (the Constitution), which provides that international conventions of which Kenya is a party are part and source of Kenya law. The Petitioners also rely on Article 18 of the African Charter on Human and Peoples Rights (ACHPR) to which Kenya is a party, and which too, guarantees the right to physical and mental health of the individual as well as family.

4. The Petitioners also rely upon the provisions of Articles 26 (the right to life), 28 and 29 (the right to human dignity and security of the person, which includes), the right to information (Article 35) freedom from torture and, inhuman or degrading treatment (Article 25).

5. The Petitioners claim that the First and Second Respondents are obliged to transfer portions of the suit properties to the Petitioners and registered at the owners expense as opposed to disrupting their lives with threatened eviction and taking away of their plots.

6. In the circumstances the Petitioners seek the following orders:-

(a) a declaration that the action by the Commissioner of Lands giving the First and Second Respondents titles deeds over all the parcel of land known as sub-divisions Numbers 2621, 2622, 2623 and 2624 all of Mainland North Section 111 (the suit property) and the Land Registrar issuing title deeds to the First and Second Respondents respectively at a time when the Petitioners were in physical occupation and use of the suit property thereby rendering the Petitioners liable to forcible eviction was contrary to Articles 2(5), 25, 26, 43(1) (b), 47(1) of the Constitution which guarantees adequate housing, dignity, respect, protection and the right to fair administrative action;

(b) an order of prohibition to prohibit the Respondents from interfering with the peaceful stay of the Petitioners, and residents of the suit property until such time as the National Land Commission shall have addressed itself to the validity and propriety of the allocation of the suit property to a business entity over and above landless Kenya citizens;

(c) a declaration that the forcible, violent and brutal eviction through demolition of homes of Petitioners and their families without according them alternative shelter and/or accommodation leaving them to live in the open exposed to the elements and vagaries of nature is a violation of

their fundamental rights to life guaranteed under Article 25, 26(1) and 28 of the Constitution and Article 11 of ICESCR physical and mental health of the family under Articles 16 and 18 of the ACHPR read with Article 2(6) of the Constitution;

(d) a declaration that the forcible, violent and mental eviction through demolition of homes of the Petitioners and their families without according them alternative shelter and/or accommodation and leaving children to live in the open exposed to the elements and vagaries of nature is a violation of the fundamental rights of the children to basic nutrition, shelter and healthcare and protection from abuse, neglect and all forms of violence and inhuman treatment and the 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;

(e) a declaration that the forcible, violent and brutal eviction through demolition of homes of the Petitioners and other elderly persons without according them alternative shelter and/or accommodation rendering them to live in the open exposed to the elements and vagaries of nature is a violation of the fundamental rights of the elderly persons to the pursuit of personal development, to live in dignity, respect and freedom from abuse and to receive reasonable care and assistance from the State as guaranteed by Article 57(b), (c) and (d) as read with Article 21(3) of the Constitution;

(f) a declaration that the Petitioners have acquired proprietary rights over the stated sub-division Numbers 2621, 2622, 2623 and 2624 of Mainland North Section III, and are therefore entitled to be issued with documents of title the Respondents for the plots in occupation by them and an order to that effect;

(g) any other or further orders and/or directions that the court may deem fit and just to grant.”

7. The Petition was however opposed by the Second Respondent who in a Replying Affidavit sworn on 17<sup>th</sup> September, 2013 and filed on 18<sup>th</sup> September, 2013, and depones *inter alia* that the Petition is scandalous, frivolous and vexatious and is an abuse of the process of court; that the Petitioner is a vexatious litigant who deserves no audience in any court for contempt of court, and has come to court with unclean hands, that the Petitioners are squatters who want to illegally and/or unjustly enrich themselves with land belonging to a private person, and that the same constitution which they have invoked, unequivocally, equally and correspondingly, protects individual owners of land as well as under Article 21, and Article 40 of the Constitution of Kenya 2010, and in totality the Petition has no merit, and that the Petitioners have not been truthful to the court.

8. On his part, the First Respondent opposed the Petition and deponed that he is the registered owner of Sub-division Numbers 2621, 2622 and 2623 all of Section III Mainland North situate along Mtwapa Creek, in Kilifi District. This deponent avers that while he was away from Kenya between the years 2002-2009, the Petitioners encroached upon his property and erected therein semi-permanent structures, that upon his return to Kenya, he tried to unsuccessfully to negotiate with the Petitioners to vacate his land. The Petitioners refused completely to vacate the land, even after obtaining eviction orders in Kilifi SRM CC No. 76 of 2011. Even after dismissal of their appeal in Malindi High Court ELC Appeal No. 40 of 2012, the Petitioners still persisted in squatting upon the First Respondent’s land.

9. This Respondent avers that he has been very accommodating to the Petitioners, that the Petition has no merit, that the Petitioners have not been truthful to the court, and that the court should be reluctant to exercise its discretion in favour of the Petitioners, that the Petitioners’ conduct has been mischievous and in bad faith.

10. The Attorney-General on behalf of the Third, Fourth and Fifth Respondents filed on 14<sup>th</sup> March, 2014 grounds of opposition dated 29<sup>th</sup> January, 2014, and avers –

(1) that the orders sought by the Petitioners are against the rules of justice and fairness and are untenable, a nullity and void *ab initio* as the Petitioners are well aware and it is within their

knowledge that the suit land is private land and have tried and lost their claim to the suit property;

(2) that no rules or constitutional rights have been demonstrated to have been breached by the Respondents, but rather the Petitioners are in breach of existing court orders to vacate the suit premises;

(c) the allegations and claims in the Petition cannot in any manner whatsoever be adequately addressed or evidence exhausted in the Petition as the issues require strict proof for the claims to be considered;

(d) that the claim is strictly improper against the Third, Fourth and Fifth Respondents as no action or omission on their part has been demonstrated to have breached any rights of the Petitioners and they ought to be omitted from the proceedings, ...

11. In addition to the Petition, the Replying Affidavits by the Second and Third Respondents, and Grounds of Opposition by the Third, Fourth and Fifth Respondents the Petitioners' counsel as well as counsel of the Third Respondents filed written submissions dated 30<sup>th</sup> April, 2013, and 19<sup>th</sup> August, 2015, and dated 24<sup>th</sup> April, 2015 entitled [facts forming the background of this Constitutional Petition].

12. I have read the Petition, the grounds thereof, and written submissions by counsel for the Petitioners. In like manner I have read the Replying Affidavits of the First and Second Respondent as well as the Grounds of Opposition by the counsel for the Third, Fourth and Fifth Respondents. I do not propose to rehearse these averments, grounds of opposition, and the submissions of counsel.

13. I am concerned that the Petition herein was the subject of proceedings in Malindi ELC Case No. 40 of 2012 in which the Petitioners Application to file an appeal out of time was dismissed. That appeal was filed purportedly to challenge the decision of the court in Kilifi SRMCC 709 of 2011 (Francis Nganga Wanjohi vs. Charo Karisa), a case for trespass in which the Petitioner was ordered to vacate the suit land of the First and Second Respondents herein. The Petitioner refused to do so, even after the application to file an appeal out of time was dismissed.

14. In my humble view what the applicant ought to have done was to file an appeal to the Court of Appeal against dismissal of his application to file an appeal out of time and not gather additional people and make them Petitioners in his Petition, and thus avoid compliance with orders of the court in Kilifi SRMCC No. 709 of 2011. The action of the Petitioners herein is pure abuse of court process and the courts must guard against abuse of its process. On that ground alone the Petition herein stands dismissed with costs to the First and Second Respondents.

15. If I am wrong in above holding, I will refer to the decision Lenaola J in **SATROS AYUMA & 11 OTHERS VS. REGISTERED TRUSTEES OF THE KENYA RAILWAYS STAFF RETIREMENTS SCHEME & 3 OTHERS**.

16. When the horse was the dominant mode of transportation in Europe, the expression was that a beneficiary of a horse did not look [at] **“a Gift Horse in the mouth”** to ascertain whether it had all the teeth as a sign of good health.

17. In that case the learned Judge stated, and I quote:-

**“55. Looking at the provisions of Article 1(1), 19(3) and 20(1), I am certain that the Bill of Rights can be enforced as against a private citizen, a public or government entity such as the First and Second Respondents. I say so deliberately and with fairness because previous decisions of this court on the subject have been completely misunderstood and misread by more persons than some misguided journalist masquerading as a scholar of Constitutional Interpretation,.....The Bill of Rights is not therefore necessarily limited to a state organ by the First and Second Respondents and in saying so, I am alive to the provisions of Article 2 of the Constitution which provides that this “Constitution is the supreme law of the Republic**

**and binds all persons and all state organs at both levels of the Government.”**

**Article 19 (3) provides that – the rights and fundamental Freedom in the Bill of Rights**

- (a) belong to each individual and are not granted by the State;**
- (b) ....**
- (c) are subject to the limitations contemplated in this Constitution.”**

18. Article 24(1) provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, .....into account all relevant factors, including –

- (a)
- (b)
- (c)
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedoms of others;

19. As the learned Judge observed in paragraphs 54 of his Judgment –

**“...it is now an accepted cardinal principle of constitutional interpretation that the entire constitution must be read as an integral whole, and no one particular provision destroys the other but each sustain the other. This is what has come to be known as the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of a written constitution TINYEFUNZA VS. ATTORNEY-GENERAL OF UGANDA [...].”**

20. In my view the effect of the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy where each provisions of the Constitution sustains the other, is that the court is called upon to balance the rights of the individual, qua individual, and the rights of the individual qua the state and the public body or organ, at the national or county level.

21. In an highly individualistic society like Kenya, is any Kenyan likely to give his horse or coat to the other because the other demands it? Is a Kenyan likely to turn the other cheek to be slapped as well? I think the true Kenyan spirit is that his rights stop where the rights of the other Kenyan stop. That I think is the true meaning of the Constitution in Article 24(1) (d), the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.

22. In the instant case, the First and Second Respondents are the registered owners of the parcels of land known as Mainland North/Section III/2621, 2622 and 2623 (in respect of the First Respondent), and 2624 (in respect of the Second Respondent). Until there is conclusive inquiry that the First and Second Respondents acquired the said parcels unlawfully through the Third, Fourth and Fifth Respondents, it would be unconstitutional to deny them the right to property guaranteed to them by Article 40 of the Constitution.

23. The scenario would be different if the suit land were public land. The various conventions relied upon the Petitioners would come into play. There would be need to interrogate the role of the State under Article 43 of the Constitution with regard to housing, and the plight of persons like the Petitioners. To maintain a position that trespass could be legitimized and sanitized through constitutional petitions for enforcement of the rights to housing, care of children and the elderly, and in effect legitimize the invasion

of private lands perceived to be empty, would lead to resistance by rival claimants and lead to absolute break down of law and order and cause chaos.

24. This is not to deny the Petitioners claim for descent housing, for water, shelter, for food, for education, for medical care for whatever that comes in the name and hands of the State. It cannot be at the hands and expense of the individuals, the First and Second Respondents, nor the Third, Fourth and Fifth Respondents.

25. Being of the above persuasion, I find and hold that the Respondents have not violated any proven right of the Petitioners and indeed the Petition herein is a camouflage to defeat a lawful order of the court to vacate the First and Second Respondents' parcels of land upon which the Petitioners trespassed.

26. For those reasons the Petition dated and filed on 26<sup>th</sup> April, 2013 is hereby dismissed with costs.

**Dated, Signed and Delivered in Mombasa this 29<sup>th</sup> day of July, 2015.**

**M. J. ANYARA EMUKULE**

**JUDGE**

In the presence of:

Mr. Wacheya holding brief Akee for Respondent

No Appearance for Petitioner

Mr. Kaunda Court Assistant