



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**PETITION NO.5 OF 2015**

**IN THE MATTER OF : ARTICLES 20, 22, 23, 24, 47, 50 & 55 OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN**

**RUKIA ATHMAN**

**MWARUNDA .....PETITIONER**

**AND**

**THE INSPECTOR GENERAL OF POLICE..... 1ST RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION..... 2ND RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATION DEPARTMENT.....3RD RESPONDENT**

**THE OFFICER COMMANDING MTWAPA POLICE STATION.....4TH RESPONDENT**

**THE HON. THE ATTORNEY GENERAL .....5TH RESPONDENT**

**JAMES GACHAU KIRATHE.....6TH RESPONDENT**

**RULING**

The Notice of Motion dated 28/4/2015 seeks the following two prayers:

1) .....

2) That pending interpartes hearing of this application and petition, a conservatory orders do issue restraining the respondents or any person acting under their authority from arresting, detaining, charging and/or prosecuting the petitioner with any purported offences of trespass on the properties with alleged title numbers 5318, 5319, 5320, 5321, 5322, 5323, 5327, 5333, 5350, 5353, 5352,5356, 5357, 5358, 5361, 5362, 5363, 5364, 5365, 5366, 5367, 5368, 5369, 5370, 5371, 5372, 5373, 5374 and 5375 section III Mainland North allegedly belonging to James Gachau Kirathe.

3) That pending hearing of this application and petition, a conservatory orders do issue restraining the respondents or any person acting under their authority from proceeding with the prosecution and continuation of the criminal proceedings commenced against the petition at the Shanzu Law Courts in Criminal Case No. 174 of 2015, Republic -vs- Rukia Athman Mwarunda.

The application is supported by the affidavit of the applicant sworn on 28/4/2015. The respondent filed a replying affidavit sworn by Corporal Good Mufoya on 27/5/2015.

Mr. Obaga, counsel for the applicant relied on his written submissions. Counsel further maintains that the powers of the Director of Public Prosecution to prosecute are not absolute. They are subject to the bill of Rights under the Constitution. The Court has powers to interrogate the evidence before one is charged and should not allow a person to undergo a criminal trial yet the evidence does not show any criminal offence.

It is submitted for the applicant that the evidence in the criminal case facing the applicant cannot sustain a charge of trespass under section 3 (1) as read with section 3 (2) of the Trespass Act. The complainant in his witness statement alleges that he is 50 years old yet the title deeds proving his ownership of the land in dispute is alleged to have been issued on 24<sup>th</sup> January 1927. The complainant on one hand alleges to be the original allottee while on the other hand claims to have purchased the land in 2009. Counsel for the applicant maintains that the court has powers to arrest the situation and stop the applicant's prosecution before the trial court.

Mr. Nyongesa, prosecution counsel, opposed the application. Counsel maintains that whether the complainant's titles are fake or not cannot be the basis for stopping the prosecution. The trial court will deal with the issue. Those who issued the title deeds can testify. The powers of the DPP to prosecute cannot be capriciously curtailed. No malice has been established on the part of the DPP.

In her supporting affidavit, the applicant avers that she has been living on the suit land since time immemorial. The 6<sup>th</sup> respondent went to the land and started demolishing houses while putting up a perimeter wall. It is also averred that she was charged in court with the offence of trespass on 20<sup>th</sup> February 2015 and was released on bond. The applicant maintains that the 6<sup>th</sup> respondent's titles are not genuine.

I have read the entire petition, the supporting affidavit together with all the annexures, the witness statement of James Gachau Kirathe and the replying affidavit. Although the applicant alleges that she has lived in the suit land since time immemorial, there is no evidence to support that allegation. At the very least, I would have expected the applicant to exhibit photographs of her home as well as the houses demolished by the 6<sup>th</sup> respondent or some crops planted on the land. The applicant alleges that she has been forced to go into hiding due to persistent threats. She is already charged in court and has nothing to fear. The police can prefer more charges if they deem it fit. There is no evidence of long term occupation of the land by the applicant.

According to the complainant, he bought the land in 2009 and sub-divided it into several sub-plots. The applicant and others invaded the land on 13<sup>th</sup> February, 2015 and started clearing bush and subdividing his land. Once any Kenyan makes such a complaint, the police are bound by the law to carry out investigations. The applicant cannot rely on the alleged default in the complainant's titles to claim ownership of the land. The applicant is at liberty to file a civil suit and claim ownership of the land as well as challenge the complainant's titles. In the meantime, the complainant's claim to ownership of the land cannot be simply overlooked or dismissed. The issues raised by the applicant as to the period from when the complainant's ownership started running are valid but those issues do not confer any title on the applicant.

I do find that there is no abuse of the prosecutorial powers by the respondents. The Constitution safeguards Kenya's property and there is no violation of the applicant's rights. I do find that the application dated 28/4/2015 lacks merit and is hereby dismissed with no order as to costs. The interim

orders are hereby vacated.

**Dated, signed and delivered at Malindi this 3<sup>rd</sup> day of September, 2015.**

**SAID J. CHITEMBWE**

**JUDGE**