



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
PETITION NO. 42 OF 2014

IN THE MATTER OF: ARTICLE 10, 22, 28, 47, 50, 159 AND 165(3) OF THE CONSTITUTION OF KENYA AND THE MUTUNGA RULES

AND

IN THE MATTER OF: CONTRAVENTION OF PETITIONERS' FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 22, ARTILE 28 AND ARTICLE 47 OF THE CONSTITUTION REGARDING RIGHT TO THE ADMINISTRATIVE ACTION, FREEDOM FROM INHUMAN TREATMENT AND THE RIGHT FROM BEING DISCRIMINATED AGAINST RELATING TO THE PETITIONER

AND

IN THE MATTER OF: KENYA AIRPORTS AUTHORITY RIGHT TO EVICT THE PETITIONERS FROM A PORTION OF LAND ADJACENT TO MOI INTERNATIONAL AIRPORT, MOMBASA

AND

IN THE MATTER OF: WHETHER SUCH INTENDED EVICTION OF THE PETITIONERS WHILE MANY OTHER PARTIES IN THE SAME STATUS ARE NOT AFFECTED BY SUCH INTENDED EVICTION VIOLATES THE PRINCIPLES SET OUT IN ARTICLES 10, 29 AND 47 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

1. ELIEZAR KAMAU THIONG'O
2. MOHAMED S. MOHAMED
3. ADAM YUSUF ALI.....PETITIONERS

AND

1. KENYA AIRPORTS AUTHORITY
2. MOMBASA COUNTY GOVERNMENT.....RESPONDENTS

AND

1. DOSHI IRONMONGERS LIMITED
2. MULTIPLE HAULIERS (E.A.) LIMITED
3. JESUS INVITATION CENTRE.....INTERESTED PARTIES

JUDGMENT

1. In their Petition dated and filed on 9th July, 2014, Eliezar Kamau Thiongo, Mohamed S. Mohamed and Adam Yusuf Ali (Petitioners), the Petitioners sought the following orders –

(1) A declaration that the Petitioners are entitled to be given reasonable time to vacate from the unsurveyed ground that they occupy along the landing lights of the Moi International Airport, Mombasa which land is adjacent to Moi International Airport, Mombasa;

(2) An order that the Second Respondent do provide the Petitioners with alternative land in the same geographical area as the Petitioners currently occupy for the Petitioners to carry out their trade of garage proprietors;

(3) An order that the court do appoint a reputable surveyor to file in the court a survey report setting out all the persons who occupy any part of the ground along the landing lights of the Moi International Airport Mombasa, which under international aviation safety standards should be left open and for a further order that all such persons be ordered to vacate the said grounds when the Petitioners vacate the grounds they are currently in occupation;

(4) Costs of this Petition be provided for.

2. The Petition was supported by the Affidavit of Eliezar Kamau Thiongo sworn on 9th July, 2014, in support of the Notice of Motion of even date for conservatory orders, the grounds on the face of the Petition, and the Petitioners' counsel's written submissions dated and filed on 1st October, 2014, and the Petitioners' further written submissions dated 4th October, and filed on 6th October, 2014, against the Second Interested Party's Preliminary Objection dated 29th July, 2014, challenging *inter alia* the Petitioners' locus to prosecute the Petition, and the Notice of Motion for conservatory orders.

OPPOSITION TO THE PETITION

3. The Petition and Notice of Motion for conservatory orders was opposed by both Respondents and the Interested Parties. For the First Respondent was filed on 30th September, 2014 a Replying Affidavit of Yatich Kangugo, the Airport Manager, Moi International Airport Mombasa sworn on 29th September, 2014. There were also the written submissions of the First Respondent's counsel dated 3rd February, 2015 and filed on 5th February, 2015; and the further submissions of said counsel dated 10th October, 2015 and filed on 12th October, 2015.

4. In opposition to the Petition and the Notice of Motion on behalf of the Second Respondent was the Replying Affidavit of Mohamed Mummin Ridhwan, the Senior Legal Clerk of the Second Respondent sworn and filed on 30th July, 2014. In addition thereto, there were also filed on behalf of the Second Respondent, written submissions (Final Submissions) dated and filed on 30th October, 2015.

5. The Petition and the Notice of Motion were also opposed by the Second Interested Party (Multiple Hauliers (E.A.) Limited), through the Replying Affidavit of Clive Critchlow sworn on 21st July, 2014,

and filed on 23rd July, 2014, the Notice of Preliminary Objection dated 27th July and strangely stamped as filed on 25th July, 2015, stating inter alia that the **ex facie**, the Application (Notice of Motion) was incompetent. The Second Interested Party's counsel also filed on 3rd September, 2015 submissions dated 1st September, 2015.

6. The First and Third Interested Parties neither entered Appearance nor took any part in these proceedings.

The Petitioners' Case

7. The Petitioners' case is set out in the Supporting Affidavit of the First Petitioner, sworn in support of the Notice of Motion of 9th July, 2014. The Petitioners occupy garage related businesses and having been doing so since 1993, pursuant to and under Temporary Occupation Licences, granted to the First Petitioner by letter dated 25th February, 1993, Elkan Body Builders and General Engineering Works on 14th January, 1993, Mohammed S. Mohammed on 18th July, 1999 and Aikan Yusuf Ali on 2nd June, 2004. All the letters had common conditions **“temporary authority” liable to termination upon “one month’s notice”**, and no construction of permanent structures, and except in the case of Mohammed S. Mohammed, to vacate the area upon three (3) months notice.

8. The Petitioners claim that their rights to fair administrative action (under Article 47 of the Constitution), human dignity (under Article 28), equality and freedom from discrimination (Article 27), Article 10 (observance of the national values and principles of governance), have been violated. On the right not to be discriminated against Mr. Gikandi counsel for the Petitioners referred the court to Agikuyu proverb – **“gutiri wa nda na wa mongongo”** which loosely translated means -

“all in one family are required to undergo equal treatment” for one cannot be expected to be feeding two of his sons with meaty tasty food while his other sons are fed on cassava only.”

9. By this contention counsel was, I guess, referring to the Interested Parties who occupy similar spaces of land within the proximity of the lands occupied by the Petitioners. It is also the basis for the prayer to appoint a surveyor to establish the respective distances for the First Respondent's safety area for aircraft flying in and out of Moi International Airport Mombasa. Counsel relied on the decision of the court in **MITU-BELL WELFARE SOCIETY VS. ATTORNEY-GENEERAL, THE KENYA AIRPORTS AUTHORITY AND THE COMMISSIONER OF LANDS [2013] e KLR**, where the court ordered the Respondents to engage with the Petitioners on the state's policies and programmes on provision of shelter and access to housing for marginalized groups, such as residents of informal and slum settlements and generally with the Petitioners following their eviction from informal and slum settlement called **“Mitumba Village”**.

10. Counsel also cited the case of **WILLIAM MUSEMBI & 10 OTHERS VS. MOI EDUCATION CENTRE COMPANY LIMITED & 2 OTHERS consolidated with MARGARET KANINI KELI & 2 OTHERS VS. MOI EDUCATION CENTRE COMPANY LIMITED & 3 OTHERS [2014] eKLR**, in which the court ordered compensation to each of the Petitioners, ranging from Kshs. 100,000/= to 150,000/=. Counsel however urged the court to follow the decision in **MITU-BELL WELFARE SOCIETY VS. ATTORNEY-GENERAL & 2 OTHERS**.

THE SECOND RESPONDENT'S CASE

11. In the Second Respondent's Final submissions first referred to above, the First Respondent contends that -

(a) the Petitioners have failed to disclose any constitutional violations by the Second Respondent/and/or show any cause of action against the Second Respondent;

(b) the Petitioners have failed to meet the constitutional threshold for a successful constitutional

Petition;

(c) in any event, the Second Respondent is empowered by law to issue and revoke temporary occupation licences such as those issued to the Petitioners;

(d) the Petition and prayers therein are fatally defective and the court is incapable of granting the prayers sought;

12. On those grounds counsel urged the court to dismiss the Petition with costs against the Petitioners.

THE FIRST RESPONDENT'S CASE

13. It was the written submissions of counsel for the First Respondent that the Petition is “... a classic example of what constitutes abuse of the court process, and that when a book is finally written on the wider subject of abuse of the court process for historical purposes, this case deserves a “chapter”.

14. Opposition to the Petition is set out in the Relying Affidavit of YATICH KANGUGO sworn on 29th September, 2014 and filed on 1st October, 2014. Counsel submitted that the Petition is not justiciable, on the ground that he who alleges must prove a general proposition of law, the legal burden of proof lies upon the party who invokes the aid of the law and cited sections 102(1) and 109 and 112 of the Evidence Act, [Cap 80, Laws of Kenya], as well as the case of **JENNIFER NYAMBURA KAMAU VS. HUMPHREY MBAKA NANOSI [2013] eKLR**, and **STEPHEN WASIKE WAKHU & ANOTHER VS. SECURITY EXPRESS LIMITED [2006] eKLR** as well as **TRUST BANK LIMITED VS. AMIN COMPANY LIMITED & ANOTHER [2000] KLR 164**.

15. Counsel urged that the Petition herein is a frivolous and vexatious claim and should be dismissed with costs to First Respondent.

THE SECOND INTERESTED PARTY'S CASE

16. Counsel for the Second Interested Party in its submissions dated 3rd September, 2015, associated himself with submissions of counsel for the First Respondent. Counsel submitted that the Petition had no merit at all, that is an abuse of the court process and should be dismissed with costs to the Respondents and to the Interested Parties.

ANALYSIS AND DETERMINATION

17. I have considered the Petition, the Supporting Affidavit thereto, the submissions of counsel for the Petitioners, the submissions by counsel for the First and Second Respondents, and the submissions of counsel for the Second Interested Party. The first question is whether the Petition herein meets the threshold of a constitutional Petition in light of decided cases, and the evidence in support thereof. Paragraphs 10, 11 and 12 of the Petition raise complaints against the First Respondent and the First Interested Party to wit:-

(a) the First Interested Party had over the years campaigned for their eviction;

(b) the First Respondent's Airport Manager, Moi International Airport Mombasa issued a seven (7) day notice to the Petitioners to vacate;

(c) the First Respondent was not acting in the interests of safety of Mombasa Airport but was instead acting as an agent for the First Interested Party;

(d) there was massive discrimination and lack of fair administrative action in the eviction.

18. The principle of constitutional threshold was determined in the celebrated but often misinterpreted decision in **ANARITA KARIMI NJERU VS. THE REPUBLIC [1976-1980] KLR 1272**, where the court said –

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

19. This principle was reaffirmed in the case of **MUMO MATEMU VS. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS** where the Court of Appeal said –

“We wish to reaffirm the principle on this question in ANARITA NJERU (supra). In view of this we hold that the Petition before the High Court did not meet the threshold established in that case.

It is our finding that the Petition before the High Court was not pleaded with precision as required in constitutional petitions. Having reviewed the Petition and supporting affidavit we have concluded that way did not provide adequate particulars of the claims relating to the alleged violations of the Constitution of Kenya and the Ethics and anti-Corruption Commission Act, 2011. Accordingly, the Petition did not meet the standard enunciated in the Anarita Karimi Njeru case.”

20. It is trite law that he who alleges must prove. As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purpose of section 107 of the Evidence Act [Cap80, Laws of Kenya] which provides –

S.107(1) Whoever desires any court to give judgment as to any legal right or liability depending on the existence of facts which he asserts must prove that those facts exist.

21. Furthermore, the evidential burden that is cast upon any party is the burden of proving any particular fact which he desires the court to believe in its existence. That is captioned in **sections 109 and 112** of the fact as follows –

“S.109 The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that proof of that fact shall lie on any particular person;

S.112 In civil proceedings when any fact is especially within the knowledge of any party to those proceedings the burden of proving or disproving that fact is upon him.”

22. In **JENNIFER NYAMBURA KAMAU VS. HUMPHREY MBAKA NANDI [2013] eKLR** while considering ss. 109 and 112, the Court of Appeal said –

“We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the applicant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, if an expert witness was necessary, the evidential burden of proof was on the applicant to call the expert witness. the applicant did not discharge the burden and as section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

23. In **STEPHEN WASKHE WAKHU & ANOTHER VS. SECURITY EXPRES LIMITED [2006] eKLR** the court stated –

“A party seeking justice must place before the court all material evidence and facts which considered in light of the law would enable the court to arrive at the decision as to whether the relief sought is available hence the legal decision “he who alleges must prove.””

24. In **NORTHERN NOMADIC DISABLED PERSONS ORGANIZATION [NONDO] VS. GOVERNOR, COUNTY GOVERNMENT OF GARISSA AND HON. ATTORNEY-GENERAL**, the Petitioners alleged that the First Respondent had made appointments to Garissa County Executive Committee in total disregard of the constitutional requirement that at least five percent of the members of the Executive Committee be persons with Disabilities and that this was not only unfair but was unconstitutional the court found –

(a) the Petitioners cited various articles of the constitution without any particulars of the alleged violation of those provisions;

(b) the Petition failed to list any particulars of derogation other than to state that the First Respondent had failed to comply with Articles 54 and 81 of the Constitution;

(c) the Petition indicated particulars of discrimination but no particulars were given;

and the Judge (Hon. S. N. Mutuku stated –

“The Court of Appeal in MUMO MATEMU case found that the Petition did not meet the threshold in ANARITA KARIMI NJERU for similar reasons like in this case where there is no evidence to support the allegations of violations of constitutional provisions. As submitted by the Respondents, there is no evidence that any of the members of the Petitioners presented themselves for appointment and were rejected. There is no evidence of the number of their members and the distribution of membership in all the counties of Northern Kenya given that their membership covers a region they refer to as Northern Kenya. There is no evidence to show the number of their members who belong to Garissa County. There is no evidence to show how many of those members that meet the criteria for appointment under section 35 of the County Government Act.”

25. Having alleged that their rights had been contravened or threatened with violations, the Petitioners were under a duty, **firstly** to demonstrate that they had a right to occupy the land restricted for exclusive use by the First Respondent and that such right is capable of being protected, and **secondly** demonstrate how that right was violated or threatened with violation. As the Petitioners failed to establish the existence of any right whatsoever as against the First Respondent the Petition must fail as against the First Respondent. Would the position be different in relation to the Second Respondent? With respect, I do not think so.

26. The Second Respondent as it then was, and as the custodian of unoccupied government land, was empowered by the Government Lands Act (Cap 280, Laws of Kenya, now repealed), to grant and revoke Temporary Occupation Licence. Section 40 of the Act provided –

“40(1) Licences to occupy unalienated Government land for temporary purposes may be granted by the Commissioner;

(2) Unless it is expressly provided under this section shall continue for one year and thenceforth until the expiration of any three months notice to quit.

PROVIDED that the notice to quit may be served upon the licensees at any time after the expiration of nine months from the date of the licence.”

27. Beyond the rights under the Temporary Occupation Licences from the Second Respondent, the Petitioners have no other legal basis, and/or protection with which they may agitate as they purport to do in this Petition, that it is unfair, illegal or discriminatory for notices issued to them to vacate and not their neighbours and other licencees and holders of Temporary Occupation Licences.

28. By the annexures “**EKT – 3,4, 8 and 9**” (to the Supporting Affidavit of the First Petitioner), the Petitioners submitted their respective Temporary Occupation Licences (TOLs) issued by the Second Respondent. It is clear from those TOLs, that it was a mandatory condition for the grant of the said TOLs that the Petitioners undertook to vacate their respective premises upon issuance of notice to so vacate. The said TOLs provided as follows –

(1) ‘EKT-3-4 (b)’ You (Licencee) undertake to surrender the said piece of land as and when requested by the council at no cost/compensation paid to you at a month’s notice.

(2) “EKT -3” 9(c), thereof “You undertake to vacate and hand back vacant possession of the site to the council on three months’ notice at no cost to the council.”

(3) EKT -3 -4(c)” You undertake to vacate and hand back vacant possession of the site to the council on one month’s notice at no cost to it.

29. It is clear from the above, **firstly**, that the Petitioners took possession and occupation of their respective pieces of land under licence from the Second Respondent with full knowledge and notice that they would be required to vacate the said pieces of land at no cost to the Second Respondent, the licensor.

30. **Secondly**, it was not a term or condition of the Temporary Occupation Licences that the Petitioners’ grant of the TOLs and continued occupation thereof, was in any form and/or manner predicated upon the continued occupation of any other licencees.

31. The mere fact that the full three months notice period was not provided does not and did not vitiate the legality and/or validity of the notice to vacate or clear and unequivocal legal and necessary reasons for such vacation. Counsel for Second Respondent relied on the English Court decision in **REGINA VS. GREATER MANCHESTER CORONER, ex parte TAL, QB67 at 83**, where the learned justices held that -

“where an error of law has occurred and there is a degree of certainty that the decision would have been the same despite the error, the court will refuse to grant judicial review relief.”

32. Though it did not issue any notice to vacate, the Second Respondent acknowledges that the Petitioners are entitled to a three months notice to vacate under the mandatory provisions of section 40(2) of the Government Lands Act.

OF THE PROVISION OF ALTERNATIVE LAND AND APPOINTMENT OF A SURVEYOR (PRAYERS (B) AND (C) OF THE PETITION)

33. A constitutional Petition is intended to seek from the court for the interpretation of and/or affirmation of same constitutionally guaranteed right of the Petitioner which has been or is at risk of being violated. Any orders from the court ought therefore to flow from that intention and purposed to ensure the protection of such rights.

34. In this Petition, and in particular from prayers (b) and (c) of the Petition, the Petitioners are in essence seeking from the court, compulsory orders compelling the Second Respondent to gift or to award alternative land to the Petitioners without any special right or circumstance. However, the Second Respondent retains without any underlying obligation to compensate, to issue TOLs over unoccupied government land, and to demand for its return from such licencees.

35. **Fourthly** the prayers as drafted are illegal and lack specificity in that the Petitioners:-

(1) are seeking for a “reasonable time” to vacate the premises but not specify the amount of time they consider as being reasonable or are entitled to;

(2) want the Second Respondent to be compelled to provide them with “alternative land on the same geographical area” as that which they presently occupy but again fail to specify that particular parcel or parcels of land they have identified for such alternative occupation;

(3) want the court to order a “reputable surveyor” to file a survey report and do such other things, but again fail to specify which surveyor.

36. In **OFFICIALS OF THE ASSOCIATION OF SPIRIT MANUFACTURERS OF KENYA VS. INSPECTOR GENERAL OF POLICE SERVICE & 3 OTHERS [2015] eKLR**, Lenaola observed –

“that the orders sought in the interlocutory application were vague, ambiguous and with respect to the Petitioner incapable of being granted for lack of specificity”... The court cannot issue orders ... whose effect and specificity of enforcement would be unknown to this court.”

CONCLUSION

37. It is not in dispute that the Petitioners are neither lawfully registered owners of the pieces of land they occupy nor do they hold any proprietary interest over the said land. They hold Temporary Occupation Licences, and are therefore licencees merely, and hold their licences at the pleasure of the Second Respondent under the provisions of the Government Lands Act (now repealed).

38. There is also no dispute the Petitioners are occupying land along the flight path and lights of Moi International Airport in contravention of International Aviation Safety Standards. Those safety standards require that such approach grounds be left open. The continued occupation of the land by the Petitioners exposes and continues to expose a present and continuing risk to airline and/or flight transport to Moi International Airport structures and occupiers and members of the public generally.

39. The court also notes that the property, the subject of the Petition is a restricted area specifically zone for safety during the landing and taking off of aircraft. The property is under the jurisdiction of the Kenya Airports Authority (the First Respondent), and the Petitioners continued use is likely to put in danger the users of Moi International Airport, Mombasa; that is a risk which this court recognizes as unacceptable, from the safety and welfare of the thousands of users of Moi International Airport, Mombasa.

40. Lastly, counsel for the First Respondent asked why a Petition of this kind is brought to court. Counsel described the Petition as a frivolous and vexatious Petition. What constitutes a frivolous and vexatious case was defined by Ringera J. in the case of **TRUST BANK LIMITED VS. AMIN COMPANY LIMITED & ANOTHER [2000] KLR 164** as –

“a pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expense. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expense which will prejudice the fair trial of the action.”

41. This Petition is one which can be termed a frivolous and vexatious claim.

42. For all those reasons the Petition herein is dismissed with costs to the Respondents, and to the Second Interested Party.

43. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 9th day of December, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mr. Ali holding brief for Mr. Gikandi for Petitioners

Mr. Wateru for 1st Respondent

Miss Egesa holding brief Mr. Kibara for 2nd Respondent

No Appearance for 1st & 2nd Interested Parties

No Appearance for 3rd Interested Party

Mr. Silas Kaunda Court Assistant