REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITIO NO.592 OF 2013

BETWEEN

SALOME MWIHAKI NJENGA, DAVID MWATHI KIBE AND JOHN KIBARU MWAI *(suing as Chairlady, Treasurer and Secretary of Twiga Estate Squatters Society) on behalf of* 4000 SOCIETY MEMBER EVICTEES FROM TWIGA ESTATE L.R. NO.9312, 9313, 3760 AND 252.....PETITIONERS

AND

THE HON. ATTORNEY GENERAL…….....1ST RESPONDENT

THE INSPECTOR GENERAL POLICE.....2ND RESPONDENT

RUIRU MUNICIPAL COUNCIL.....3RD RESPONDENT

MBO-I-KAMITI FARMERS CO. LTD.....4TH RESPONDENT

JUDGMENT

Introduction

1. The Petition dated 17/10/2013 seeks certain orders arising out of the eviction of Petitioners and those they represent from land known as Twiga Estate in Kiambu on 20th December 2013.

2. Simultaneously with the Petition, a Notice of Motion premised on the provisions of **Articles 22** and **23** of the **Constitution** and **Rules 3, 23** and **24** of the **Constitution** of Kenya (Protection of Rights and Fundamental Freedoms) **Practise** and **Procedure Rules, 2013** was filed. The said Motion seeks the following orders;

"(1) That this Application be certified as urgent and the service thereof be dispensed with for the purposes of its being heard ex-parte in the first instance.

(2) That Conservatory or Interim orders be urgently granted restraining and prohibiting the Respondents whether by themselves, their employees, servants or agents or any other person or body of persons restraining them from wasting, alienating, meddling in, transferring, attempting to transfer, holding themselves out as owners, dealing with and/or in any other manner howsoever and whatsoever interfering with the parcel of land known as L.R. No.9312, 9312, 3760 and 252 otherwise known as Twiga Estate Farm (hereinafter "the suit parcel of land") pending the hearing and determination of this Application inter parties.

(3) That a Conservatory or Interim order be granted restraining and prohibiting the Respondents whether by themselves, their employees, servants or agents or any other person or body of persons restraining them from wasting, alienating, meddling in, transferring, attempting to transfer, holding themselves out as owners, dealing with and/or in any other manner howsoever and whatsoever interfering with the parcels of land known as L.R. No.9312, 9313, 3760 otherwise known as Twiga Estate Farm (hereinafter called "the suit parcel of lands") pending the hearing and determination of the Petition herein.

(4) That an order be issued against the 4th Respondent to be enforced by Kiambu County Police Commander, the Officer Commanding Police Division (OCPD), Ruiru and the Officer Commanding Station (OCS), Ruiru restraining by a temporary injunction, the 4th Respondents, its servant/agents or anybody acting through or by it, from settling in, subdividing, fencing, trespassing upon or erecting any temporary or permanent structures, residential or otherwise, on the suit parcel of land L.R. No.9312, 9313, 3760 and 252.

(5) That the Petition herein be set down for hearing and determination on priority basis.

(6) That costs of this application be provided for."

Facts

3. On 20th December 2012, it is not disputed that the Petitioners and other squatters on L.R. No.9312 *(originally No.4728/1)*, L.R. No.9313 *(originally No.4728/2)* and L.R. No.3760 all comprising a farm known as Twiga Estate, were forcefully evicted and their dwellings demolished. According to the 1st Petitioner, at Paragraph 2 of her Affidavit sworn on 19th October 2013, the squatters were 4000 in number and they suffered great loss as a result of the eviction. That in fact two of them were shot dead by police officers involved in the eviction and countless others suffered physical injuries and loss of property.

Case for the Applicants

4. The Petitioners/Applicants have urged the point that the evictions were unlawful and were engineered by the 4th Respondent with the support and connivance of the 1st-3rd Respondents to achieve the following results;

   (i) Frustrate the applicants' claim to the land by way of adverse possession which claim is pending before the Environment and Land Court in ELC.149/2011 (O.S.)

   (ii) Put the 4th Respondent into possession of the land and thereafter enable it to sub-divide the three parcels of land and put other persons into ownership and possession of the land.

5. It is their case that to stop the 4th Respondent from achieving the above aims, conservatory orders are necessary because they have lived on the land for decades and *"that unless the Court stops the defendants (sic) by an injunction from surveying and sub-dividing [the] land or issuing title deeds to their members, [they] stand likely to be entirely deprived of [their] livelihood"*

   That the conservatory orders are also necessary to preserve the suit land until the Petition is heard and determined.

Case for the Respondents

6. the 1st-3rd Respondents filed no response(s) to the Motion before me but supported the 4th Respondent's submissions during the hearing.

7. The 4th Respondent on its part filed a Chamber Summons dated 7th January 2014 seeking to set aside or vary certain interim orders granted by this Court ex-parte on 3rd January 2014. For

avoidance of doubt, the orders issued on that day appear as if they were final but in fact the orders were to subsist until hearing inter-partes which is what happened on 28th January 2014. It was also my direction that since the 4th Respondent's Application aforesaid was in fact an answer to the Motion before me, the Affidavit of James Kamau sworn on 7th January 2014 would be treated as such.

8. In summary, the 4th Respondent's case is that the Applicants have not come to Court with clean hands because although the orders sought in the Petition were made as if there was urgency to the whole matter, it has not been explained why the Applicants took more than a year after their eviction to challenge that action. Further, that in fact the Applicants have pending applications for injunctive reliefs in HCCC.ELC No.487/2010 and HCCC.ELC No.57/2012 which were coming for hearing on 11th February 2014 before the Environment and Land Court and in both cases, the Court declined to grant interim orders in their favour.

9. It is also the 4th Respondent's case that the Applicants have previously filed other cases in a bid to secure the disputed parcels of land and in all of them, they have been unsuccessful. The previous suits, it is argued, include;

   i) **HCC No.781/2004**

   ii) **HCCC ELC No.170/2010**

   iii) **HCCC ELC No.20/2010**

   iv) **HCCC No.144/2012**

   v) **The two cases mentioned above.**

10. Finally, that the three Applicants named in the Petition are fraudsters who have collected money from innocent members of the public with the false claim that they have land to sell and when the 4th Respondent appeared in all the above suits, they lost their claim and the invaders were all evicted from the disputed parcels of land.

11. That the Motion is therefore an abuse of Court process and the alleged claim for adverse possession should be ventilated in the right forum and not in the guise of a Constitutional Petition. They seek dismissal of the Motion for the above reasons.

Determination

12. What is before me is an Application premised on **Article 23(3)(c)** of the **Constitution** as well as **Rule 23(1)** of **Legal Notice No.117 of 2013**. The principles to guide the Court in deciding whether to issue or not to issue conservatory orders sought in a Petition under the Constitution were discussed in **Centre for Rights Education and Awareness (CREAW) & 7 Others vs A.G, Petition No.16 of 2011 (Nbi)** where Musinga J. *(as he then was)* stated as follows;

> *"At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the Court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."*

13. Mohamed Ibrahim J. *(as he then was)* went further than Musinga J. and in **Muslims for Human Rights (MUHURI) & 2 Others vs AG & 2 Others [2011]eKLR**, he set the criteria to be applied in considering whether or not to grant a Conservatory order and he applied the following factors;

i) Discretion – that a Judge must exercise discretion and *"hold the scales of justice as between man and man as well as man and State"* - See **AG vs Bansray (1985)38 WIR 286 per**

ii) Arguable case – as stated by Musinga J. in **CREAW** (supra).

iii) Degree of irretrievably – whether the application will be rendered nugatory if the conservatory order is not granted. In **Furgoson & Anor vs AG & Anor, Claim No.CV 2008-00639 – Trinidad and Tobago,** Koraram J. had to deal with the question whether the deportation of the claimants would render his case useless. He stated that "it would be wrong in my view to extradite the claimants while this issue *(the constitutionality or otherwise of that action)* is pending in effect and which will render the matter of the constitutionality of the legislation academic"

In determining the issue whether compensation is an adequate remedy it has been argued, that it is not enough to say so because *"there are many constitutional and fundamental freedoms and rights if violated, stricto sensu, are not capable of being given back and are also in themselves not capable of being compensated."*

iv) Balance of Convenience – because there are always competing interests in cases filed under the Constitution, the *"Court must be astute to balance these competing interests in the interim while it deals with the substantive complaint of the Complainants" (as stated in **Bansray** (supra).*

14. Applying the above principles to this case and alive to the edict that at this stage, I should not delve too deeply into the merits of the Petition before me, I will opine as follows;

15. Firstly, in the Petition dated 17th October 2013, what is in issue is the legality or otherwise of the eviction allegedly conducted by the Respondents on 20th December 2012. While I agree that the issue is neither pedestrian nor one to be casually dismissed, it has also come to my notice that the issue is also live and is subject of on-going proceedings in **HCCC ELC No.57/2012** and it is not in dispute that the present Applicants in that suit have sought orders *inter-alia* stopping the 4th Respondent *"from alienating, disposing of, surveying, developing, charging and/or in any manner dealing with land parcel No.9312, 9313 and 3760 otherwise known as Twiga Estate Farm"*

The prayers in the present Application are in substance similar and it is an abuse of Court process to seek the same orders in this Court while similar prayers are awaiting determination in another Court. Without saying more, since the Applicants failed to disclose that fact, discretion can hardly be exercised in their favour.

16. To drive the above point home, I have read the judgment of Majanja J. delivered on 3/12/2012 in Petition No.144/2012. That Petition related to a Notice dated 29/3/2012 issued by the 3rd Respondent requiring all persons who had erected illegal structures on Twiga Farm to remove those structures within 14 days or face consequences. The present Applicants filed that Petition seeking certain orders including *"a declaration that the Applicants have a right to peaceful and quiet enjoyment of the properties subject thereto"*

17. It is important to note that the notice aforesaid expired and the Applicants were evicted and it took them more than one year to lodge the present proceedings challenging the legality of that eviction. In any event, Majanja J. upon hearing the parties determined that;

i) The eviction was pursuant to the Notice issued and also pursuant to a consent order recorded in **ELC No.487/2010** in which the Applicants were represented by people who they later claimed were not bonafide officials of Twiga Estate Squatters Society. Despite that claim, he held that the Petition before him was *res judicata*. That issue was also raised by the 4th Respondent in the present proceedings and I do not find it to beidle.

ii) That since other proceedings were pending before the Environment and Land Court in **ELC No.57/2012**, then *"if indeed, relief is to be sought, then that relief must be sought in **ELC***

No.57 of 2012"

I have elsewhere above indicated that regarding the prayers in the Motion before me, it is an abuse of Court process to seek those prayers in the Environment and Land Court and duplicate them in this Court.

iii) That since the consent order in **ELC No.57/2012** was properly recorded before a Court of competent jurisdiction, the learned judge was *"not permitted … to give orders which would amount to setting aside an order issued by another High Court Judge"* **(See John Githongo & Others vs Harun Mwau & Others Petition No.44 of 2012 (unreported)**

18. I totally agree with Majanja J. and his reasoning equally applies to the matter at hand.

19. Secondly, Mr. Njiru in his Submissions spent considerable time on the point that his clients' claim to the land is based on adverse possession and that is why the eviction was *prima facie* unconstitutional. He submitted authorities on the doctrine of adverse possession and my finding is that those authorities were irrelevant to the issue at hand. I have elsewhere above set out the principles to be applied when determining an application for conservatory orders. While indeed the nature of and the issues raised in a Petition are important considerations, in fact there is no prayer in the present Petition for orders of adverse possession, even if such a prayer could be made under the Constitution. The substratum of the present Petition is in fact the legality or otherwise of the eviction conducted on 20th December 2012 and not the claim by way of adverse possession.

20. In fact, the prayer for adverse possession is the subject of determination in **ELC No.20/2010 (O.S.)** In that case, the officials of Twiga Estate Squatters initially sought and obtained orders that they were entitled to the land by adverse possession.

21. They obtained an ex-parte judgment in that regard and later the 4th Respondent sought a review of that judgment. In his Ruling dated 30/11/2010, Muchelule J. partly stated as follows;

"The ex-parte judgment entered in this case on 8th July, 2010 is reviewed and set aside. Further, the entire suit is struck out with costs for being an abuse of the process of the Court".

22. If that suit was struck out, where then is the claim for adverse possession being pursued? I have seen a ruling by Muchele J. in **ELCC.487/2010** where Twiga Estate Squatters had sued the 4th Respondent again claiming the suit land by fact of adverse possession. The learned judge struck out the suit on the ground that it was *res judicata* in view of previous proceedings in **ELC No.20/2010 (O.S.)** and **HCCC.781/2004.**

23. It is obvious to me that the facts being as they are, to predicate the grant of the present Application on adverse possession is to misunderstand both the Petition as framed and previous orders of the High Court on the subject.

24. Fourthly, it is admitted by the Applicants that they are squatters on suit land. They also admit that title is held by the 4th Respondent and that they have been dispossessed of the land upon eviction on 20th December 2012. Their claim to the land by adverse possession is still merely a claim. Rights under adverse possession only accrue upon a declaration by a competent Court under **Section 37(1)** of the **Limitation of Actions Act, Cap.22**. The Applicants are not in possession of such a declaration and they have insisted that they were *"squatters"* on the land and their organisation is styled *"Twiga Estate Squatters Society"*.

"Squatter" is defined in the **Black's Law Dictionary, 9th Edition** as;

"a person who settles on property without any legal claim or title".

Further, ***"squatter's rights"*** are defined thus;

25. The definitions above are attractive to my mind because it clarifies the issue that without crystallised rights by adverse possession *(and none have been shown to me)*, the balance of convenience must surely tilt in favour of the 4th Respondent which has title to the disputed lands and which title must be protected under Article 40 of the Constitution. It is very difficult to tilt discretion and balance of convenience to the Applicants where their approach to enforcement of rights has been confused, unstrategic and fundamentally flawed in terms of the legal process.

26. Lastly in the Petition, two major prayers are made; that of restitution and compensation. I will say little of either at this stage but suffice it to say that if compensation is sought, it only means that if the Petition succeeds, all will not be lost for the Applicants.

Conclusion

27. I have endeavoured to show that the Motion before me is misguided and looking at the facts as placed before me, I am unable to exercise discretion in favour of the Applicants and the balance of convenience must tilt in favour of the 4th Respondent.

28. The final orders to be made are that the Petitioners' Application dated 17th October 2013 is dismissed and the one by the 4th Respondent dated 7th January 2014 is granted in terms of prayer 3 thereof with the result that the interim orders granted in favour of the Petitioners/Applicants on 3rd January 2014 are discharged.

29. The Petitioners/Applicants shall pay the costs of the Application.

30. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF MARCH, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Njiru for Applicants

Mr. Sekwe holding brief for Mr. Obura for Respondent

No appearance for 2nd, 3rd & 4th Respondent

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE