



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL & JUDICIAL REVIEW DIVISION**

**PETITION NO 438 OF 2014**

**BALJIT SOKHI PARAMJEET SOKHI .....**  
**PETITIONERS**

**VERSUS**

**HON CHARITY NGILU, CABINET SECRETARY,  
MINISTRY**

**OF LANDS HOUSING AND URBAN DEVELOPMENT..**  
**.....RESPONDENT**

**RULING**

**Introduction**

1. The petitioners filed the petition dated 3<sup>rd</sup> September 2014 alleging violation of their constitutional right to property under Article 40 of the Constitution. Together with the petition, they also filed an application by way of Notice of Motion also dated 3<sup>rd</sup> September 2014 in which they sought the following orders.

1. ***That this motion be certified urgent and a date for inter partes hearing be granted on a priority basis.***
2. ***That conservatory order be issued to prohibit the Cabinet Secretary Lands, Housing and Urban Development, by herself, her officers, agents employees or otherwise howsoever from committing acts of tress pass to land by entering, harassing or haranguing the petitioners and/or the petitioners employees or in any other way infringing on the petitioners rights to quietly possess or use the property known as L.R No 209/8660/6 pending the hearing and determination of this Application.***
3. ***That this Order be enforced by the Officer Commanding Station, Spring Valley Police Station.***
4. ***The costs of this summons to be in the cause.***

2. The grounds on which the application is based are that the petitioners are the legal and registered owners of all that parcel of land known as L.R. No 209/8660/6 situate on Lower Kabete Road, Nairobi. They allege that the respondent has infringed their right to property guaranteed in Article 40 of the Constitution by trespassing onto the property and ordering the petitioners' contractor to

- stop construction of a residential dwelling house. Further, the respondent has failed refused and/or neglected to retract her unlawful order or give a formal letter detailing her reasons for stopping construction. The petitioners argue therefore that they have suffered damage and would continue to suffer damage unless the orders that they seek are granted.
3. The matter was certified urgent and directions given for service on the respondent for inter partes hearing on 16<sup>th</sup> September 2014. On that day, Learned State Counsel, Mr. Moimbo, sought time to seek instructions and respond to the application. The application was therefore adjourned to the 19<sup>th</sup> September 2014.
  4. When the matter came up before the court on that day, Mr. Moimbo indicated that he had not yet received instructions from the respondent. He was therefore not in a position to respond to the application. However, in view of evidence that the respondent had been served with the application and had elected not to respond, I directed Counsel for the applicant, Mr. Macharia, to proceed with the application.
  5. Mr. Macharia submitted that the applicants were seeking conservatory orders in terms of prayer 2 of the application pending hearing and determination of the petition. He reiterated the facts set out in the petition and affidavit in support: that the Cabinet Secretary had gone to the petitioners' property, L.R No. 209/8660/6 situate on Lower Kabete Road and had ordered their contractors, Sagar Builders, to immediately stop construction of a residential building; that a meeting was thereafter arranged between the Cabinet Secretary and the 1<sup>st</sup> petitioner on 11<sup>th</sup> August 2014 in which the petitioner sought to know from the respondent her basis for stopping the construction, but that the respondent again reiterated her orders but declined to issue a formal notice giving reasons why she was making the order. They state that her verbal reason was that the petitioners were encroaching on riparian land.
  6. Mr. Macharia submitted further that the petitioner's advocates wrote to the respondent pleading for a formal notice but the respondent has completely ignored the letter.
  7. The petitioners contend that they had obtained all the necessary approvals from all government entities with respect to the construction, and that there is therefore no basis for the Cabinet Secretary to order a stoppage of the construction. It is their case that they are likely to suffer loss if the stoppage continues as the opinion of their quantity surveyor is that continued suspension of the work is likely to lead to permanent and irreplaceable damage to the structural integrity of the building. Mr. Macharia therefore urged the court to grant the orders sought, submitting that if the works continue and it is found that there was breach on the part of the petitioners, there are laws to deal with the breach.
  8. I have read the application by the petitioner and the affidavit in support sworn by the 1<sup>st</sup> petitioner, Mr. **Bhaljit S. Sokhi** on 3<sup>rd</sup> September 2014. Mr. Sokhi avers that they acquired the property on 15<sup>th</sup> March 1996, and has annexed a copy of the title to the property. He has also annexed documents showing that they applied for and obtained approvals for the development from the Nairobi City Council; that the Commissioner of Lands has also given his approval, as has the National Environment Management Authority, which gave its approval on 10<sup>th</sup> September 2012; as well as the Water Resource Management Authority whose approval was issued on 25<sup>th</sup> July 2012.
  9. Following these approvals, the petitioners commenced construction of the subject premises after engaging **M/s Studio Infinity Architects and M/s Sagar Builders Ltd** who commenced construction in October 2013. I have considered the said documents, and they seem to have been duly issued by the authorities concerned.
  10. The petitioner avers, however, that on 9<sup>th</sup> August 2014 at about 10. 00 a.m. the Cabinet Secretary, Lands Housing and Urban Development came to their property and ordered the contractor to

immediately stop construction on the basis that the petitioners were infringing on riparian lands. The petitioners have annexed to their application a photograph which they aver is of the Cabinet Secretary at their property, and a letter from the constructor dated 11<sup>th</sup> August 2014 advising of the stoppage.

11. The 1<sup>st</sup> petitioner contends that he had a telephone conversation with the respondent who insisted that she is the one who had stopped the work on account of riparian infringement; that he met the respondent in her office at 2.30 p.m on 11<sup>th</sup> August 2014 for further discussion; that he showed her all the approvals granted by the various regulatory organs; that she promised to look at them **“but insisted ominously that we must not proceed with further construction without her express orders.”** The respondent did not then and has not to date written formally to state the reasons for stopping the construction. The 1<sup>st</sup> petitioner avers that their contractor is afraid of resuming work without a court order as the respondent allegedly insinuated that she would arrest any person who breached her orders stopping construction.
12. This is a strange application. It is based primarily on fear, the kind of fear that citizens should not be subjected to by any authority, and which citizens assumed they had seen the last of with the expansion of democratic space in the country, particularly after they promulgated the new Constitution in 2010 with its emphasis on rule of law and good governance. It appears that the only basis on which work stopped on the petitioners’ property is that the respondent, a Cabinet Secretary who is responsible for matters relating to land, threatened to arrest the contractor or anyone who breached her order, which the petitioners consider unlawful, stopping the construction
13. It must be assumed that the petitioners are persons of sound mind who would not run to court with a matter of this nature if they had no basis for doing so. In the absence of a reply from the respondent therefore, it must be assumed that she made the orders and threats alleged, and that the averments by Mr Sokhi are true.
14. Article 22 and 23 of the Constitution gives the court jurisdiction to intervene where a petition is brought alleging violation or threatened violation of a fundamental right and freedom, and to grant the petitioner appropriate relief. In the present circumstances, should the court be satisfied that there is a basis for the present application, then it must not hesitate to exercise its mandate to protect the constitutional rights of citizens against arbitrary and unlawful infringement.
15. The question then is on what basis the respondent would make the kind of orders alleged. Does the Cabinet Secretary in charge of lands have power to stop a citizen from proceeding with construction work that has been duly approved? Is there a provision of law that empowers her to do this, even if the reason she is doing so is as laudable as protecting the riparian reserve? And even if she had such powers, can she make such an order, arbitrarily, without giving reasons which an aggrieved party can then deal with? Further, does the Cabinet Secretary for land have power to arrest or order the arrest of any person alleged to have committed an offence?
16. In my view, the answer to all the above questions is in the negative. The respondent is a state officer, a creature of the Constitution. As such, she is bound by the Constitution. Article 10 requires that any person purporting to exercise any powers must do so in accordance with the principles set out therein, key among which is the rule of law.
17. If the respondent was purporting to exercise some administrative powers, then she was under a duty to do so procedurally and reasonably. Article 47 provides that

**“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**“(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”**

18.As noted above, it is not clear what powers the respondent was purporting to exercise in her order to the petitioners. The petitioners have averred that no reasons were given for the order, and their requests for reasons, including a request made in writing by their Advocates, has elicited no response. There is, however, no basis in law for an order to be made that has far reaching consequences for a citizen without following due process.

19.In the circumstances, I can find no basis for the orders said to have been issued. Indeed, I can find no basis for the contractor to have obeyed a verbal order made in the circumstances alleged. It is the antithesis of a country that is aspiring towards a democratic state governed by the rule of law for citizens to live in fear, to be paralysed and their work stopped by an order made by those in whom they have vested the power to govern without any lawful basis and without following the rule of law. The actions of the respondent suggest abuse of power and authority, and arbitrary action with no basis in law.

20.For the above reasons, I am constrained to find that the orders sought are merited, and I grant orders in terms of prayer 2 of the application dated 3<sup>rd</sup> September 2014 pending hearing and determination of the petition. Costs shall be in the cause.

**Dated Delivered and Signed at Nairobi this 22<sup>nd</sup> day of September 2014**

**MUMBI NGUGI**

**JUDGE**

**Mr Macharia Waiganjo instructed by the firm of Macharia Waiganjo & Nyoike & Co. Advocates for the petitioner**