



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 27'B' OF 2012

PETER WANYORO KINUTHIA

MARY WAMBUI WAITHAKA

CHEGE KARERI

MARGARET WANJIRU

WARIO SARA

GALICHA DIBA

ALI GUYO

ALI WARIO

SORA DABASO

HUSSEIN JALDESA

HUJI MAHAMMED

PAUL GASHUSHI.....PETITIONERS/APPLICANTS

VERSUS

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

THE COMMISSIONER OF LANDS.....2ND RESPONDENT

LUCY WANGUI NJOROGE.....3RD RESPONDENT

RULING

Introduction

1. These proceedings concern the fate of what are commonly known as “informal settlements” in urban areas and enforcement of socio economic rights particularly the right to accessible and

adequate housing under Article 43 of our Constitution. The Applicants are seeking injunctive orders against the Respondents to stop their eviction from what they have known as their homes settlement in Mathare Village 2 for over four decades and which according to the Applicants, is also home to approximately 2,000 families. Mathare Valley, it is common ground, is one of the larger informal settlements in Nairobi city.

2. In the Originating Notice of Motion dated 23rd January, 2012, the Applicants seek the following main reliefs:
 - i. *That an interim injunction be issued restraining the 3rd respondent, her servants or agents from entering, disposing of, developing or otherwise dealing with all those pieces of land allegedly known as Land Reference Number 36/V/21 and Land Reference Number 36/V/125, as well as any other property on which the Mathare Village 2 settlement now stands, pending the hearing of this application.*
 - ii. *That an interim injunction be issued restraining the 3rd respondent either by herself or through her servants and/or agents from harassing, intimidating, threatening to evict or otherwise interfering with the Applicant's occupation of all those pieces of land known as Plot Land Reference Number 36/V/ 121 and Land Reference Number 36/V/125, as well as any other property on which the Mathare Village 2 settlement now stands pending the hearing of this application.*
 - iii. *That this Honourable court do issue a declaration that the land known as Land Reference Number 36/V/121 and Land Reference Number 36/V/125, as well as other property on which the Mathare Village 2 settlement now stands on which the Applicants and other residents of Mathare Village 2 Settlement have been living for over forty years should be allocated to them.*
 - iv. *That this Honourable Court do order that any purported allocation to any individual of the land known as Land Reference Number 36/V/121 and Land Reference Number 36/V/125, as well as other property on which the Mathare Village 2 Settlement now stands ... is in violation of government policy of upgrading of informal settlements and the constitutional rights to adequate and accessible housing to residents of informal settlements, including the Applicants, and the residents of the Mathare Village 2 Settlement, particularly.*
 - v. *That this Honourable court do issue an order directing the 2nd respondent to forthwith cancel the alleged indentures both dated 26th October, 1992 and allocate all those pieces of land known as Land Reference Number 36/V/125, as well as other property on which the Mathare Village 2 settlement now stands, to the persons resident thereon.*
3. At this stage I am only addressing the interim reliefs set as (I) and (ii) above and in seeking the above orders, the Applicants claim that the suit property has been their settlement since 1969 and that their livelihood is centered around the Village Settlement.
4. The Applicants further complain that the 2nd Respondent has purported to issue an indenture of conveyance transferring the suit property to the 3rd respondent in blatant disregard of the Applicant's right of access to adequate housing. The Applicants have cited several authorities on the right to adequate housing and as shall become apparent at the end of my Ruling, I see no need to restate them at this stage of the proceedings.
5. In an Affidavit sworn on behalf of the Applicants by Mr. Peter Wanyoro Kinuthia, a resident of Mathare Village 2 Settlement and the 1st Applicant herein, the Applicants aver that they have enjoyed quiet uninterrupted occupation of the suit property for over forty years until the year 2000 when one Joel Ndoho Mwaura filed High Court Civil Case No. 555 of 2000 in which he claimed that the land had been conveyed to him. In that suit, the Plaintiff had sought that "*An order do issue that the Defendants/Squatters, their servants and or agents in Land Reference Number 36/V/119 Original Number 36/V/4/2 situated at Mathare Valley in Nairobi remove, demolish and*

or vacate all semi-permanent, all structures erected to pave way for the Plaintiff to develop his Land and the area chief be caused to facilitate in effecting such Court Orders.” This suit was however abandoned and there is no evidence that any party benefited from its existence.

6. Further, it is deponed in the said Affidavit that the residents enjoyed peace until the year 2005 when the 3rd Respondent descended on the land parcels in dispute and attempted to evict the residents of the settlement by issuing eviction notices as well as filing suit at the Chief Magistrates’ Court to get the residents to move out. The suit filed was Chief Magistrate’s Court, Civil Suit No. 387 of 2005 but the suit was ultimately struck out whereupon the 3rd Respondent filed another suit, viz Civil Suit No. 7401 of 2009 which suit is still pending before the Chief Magistrates’ Court.
7. It is the Applicants’ claim that in Civil Suit No. 387 of 2005, the Court before striking it out, set aside an earlier *ex parte* eviction order issued to the 3rd Respondent and that in doing so, the Court made a finding that the evidence of the residents' continued occupation of the disputed land for over four decades had not been brought to the attention of the court.
8. In a *Supplementary Affidavit* filed on the 19th April, 2012, sworn by Mr. Kinuthia, the Applicants refute the 3rd Respondent’s claim of legal ownership to the property stating that the documents in support of ownership had been irregularly and fraudulently obtained. In any case, the Applicant’s claim, the documents of ownership adduced dated back to the year 1992 while the Applicants had occupied the suit property for years.
9. For the above reasons, they seek the orders elsewhere set out above.

Respondent’s Case

10. In a Replying Affidavit filed on the 6th March, 2012, the 3rd Respondent opposes the Application contending that she is the registered proprietor of the suit property over which she pays the land rates and makes reference to an indenture of conveyance dated 25th September, 1992. She admits that she has in the past made attempts to evict the Applicants from the suit property and that there is currently a matter pending before the Chief Magistrates Court, Nairobi, being Civil Suit Number 7401 of 2009 which is not yet determined.
11. It is further contended that the 3rd Respondent is under no constitutional duty to provide accessible, adequate housing to the Applicants and that the Applicants’ conduct amounts to continued trespass to private property.
12. The Applicant’s claim of adverse possession is further challenged on grounds that the Applicants had not proved that there was open, continuous, peaceful or un-interrupted possession or occupation for a period of 12 years preceding such a claim.
13. It is the 3rd Respondent's prayer, for the above reasons, that the proceedings be dismissed with costs.

Determination

14. Several issues were canvassed by the opposing parties including the preliminary issues raised by the 3rd Respondent relating to the nature and format of the Applicants’ pleadings through the Supplementary Submissions dated the 23rd May, 2012. However, I shall not delve into these issues as the critical issue for me to determine at this juncture and which I shall confine myself to is the effect of Civil Suit Number 7401 of 2009 filed by the 3rd Respondent and consequentially, whether the matter is properly before this court and whether the Applicants are entitled to the reliefs sought in the application.

15. The existence and nature of the Civil Suit Number 7401 of 2009 filed by the 3rd Respondent is not in dispute. Both parties have revealed that the proceedings relate to the same subject matter and is still ongoing and pending before the Chief Magistrates' Court. In the Respondent's Replying Affidavit, it is deponed as follows; '*I have a civil suit number 7401 of 2009 for their eviction pending hearing and determination in the Chief Magistrate's Court at Nairobi*' and that seems to be the issue to be addressed in the magistrate's court.

16. The Applicants in this case have however come to court alleging breach of their fundamental rights and duties under the Constitution. In **Fleur Investment Limited v Permanent Secretary, Roads and Another Nairobi Petition No. 173 of 2011 (Unreported)**, the court observed as follows; "*Bearing in mind that these are proceedings for the enforcement of fundamental rights and freedoms under the Constitution, I think the most important consideration is whether, holding that the suit is an abuse of the court process impedes the petitioners right of access to this court to vindicate its property rights. In Chokolingo v The Attorney General of Trinidad and Tobago [1981]1 WLR 106, Lord Diplock warned that, "It would be undesirable to stifle the grant of constitutional relief when a claim for relief is established and such relief is unavailable through the ordinary avenue of appeal. As it is a living, so must the Constitution be an effective, instrument."*

The issue that was being addressed in the above matter was the effect of pending litigation over a similar subject matter but where constitutional violations were not in issue.

17. I agree and adopt these sentiments. It is the duty of this court under Article 22 and 23 not to shut its doors to such claims. This is a matter concerning allegations of breach of fundamental rights and these are specifically enforceable only in a superior court and not the subordinate courts under Articles 23 and 165 of the Constitution. These are issues that cannot therefore be fully canvassed and disposed off through Civil Suit number Civil Suit Number 7401 of 2009. I am aware of Article 23(2) of the Constitution which is as yet in-operational for lack of a legislative framework. I am therefore satisfied that the matter is properly before this court.

18. The Respondent also contends that the Applicants in their submissions have departed from their original pleadings. This, in my view is a non-issue as it is open for parties to submit on any issue in their submissions for purposes of advancing their case. However, the pleadings must clearly state what the other party is supposed to respond to (the germain of the matter) so as to enable adequate response. I think what is important in any event is that the other party is given sufficient notice of the nature of the claim. In **Joseph Kimani Mwai v Town Clerk Kangema Nairobi Petition No. 1039 of 2007 (Unreported)**, the court observed that, "*The reason for this requirement is twofold; first the respondent must be in a position to know the case to be met so as to prepare and respond to the allegations appropriately. Secondly, the jurisdiction granted by section 84 of the Constitution is a special jurisdiction to enforce specific rights which are defined by each section of the bill of rights...*"

19. Similarly in the more recent case of **Trusted Society of Human Rights Alliance v Attorney General and Others Nairobi Petition No. 229 of 2012 (Unreported)** the court opined that it was not necessary to set out constitutional violations with mathematical precision but in a manner that would enable the respondent have notice of the allegations and defend himself and enable the court adjudicate upon the alleged violations of fundamental rights and freedoms.

20. In this case, based on the material before me, I am satisfied that the Respondents had sufficient notice of the Applicants' allegations and this court is able to adjudicate on them based on the issues raised and there is nothing to be made of the Respondents' contention to the contrary.

21. Having said so, the Applicants' action in enjoining five more Applicants without leave of this court and or notice to the Respondent is improper and ought to be deprecated. Although this court will refuse to be chained by the bonds of technicalities as required of it under Article 159, certain aspects such as parties to a suit are important factors and the opposite party ought to have

adequate notice of any addition of parties so as to respond accordingly. In the circumstances of this particular case, I am however of the view that no injustice is occasioned to the parties in the joinder of the five Applicants as they add or take nothing from the pleadings.

22. The final issue for my determination is whether the Applicants are entitled to the reliefs sought. I will take little time with that issue because on careful evaluation of the material before me, I am of the view that the Applicants have established a *prima facie* case. They have lived in the said property for a long period and it is the place which they have called home and indeed where they earn their livelihoods. In CMCC No. 387/2005, the magistrate's court found this to be a factor in setting aside earlier orders of eviction and the Respondents have never appealed that decision. I take finding as significant and today, seven (7) years later, there is no evidence that the Applicants have ceased their occupation of the suit land.

23. Further, there is absolutely no evidence that any prejudice would be caused to the 3rd Respondent if the *status quo* as regards the occupation of the land is maintained until the issues at hand are determined in *substantio*.

24. I say this because whereas the 3rd Respondent has an interest in the properties in dispute, she has not developed it and has no physical occupation of the same. The Applicants on the other hand have physical occupation and on a balance of convenience, that fact must tilt the scales of justice, for now, in their favour.

25. I am also of the view that the damage caused by massive eviction of thousands of families from their residences will most certainly be unquantifiable in monetary damages. I am therefore inclined to grant the interim reliefs pending the full hearing and determination of the Originating Motion.

26. Because under Article 23(3) of the Constitution, this court is empowered to grant an appropriate relief including the interim orders sought, I hereby grant the following orders:

- a. *That an interim injunction be issued restraining the 3rd respondent, her servants or agents from entering, disposing of, developing or otherwise dealing with all that piece of land allegedly known as Land Reference Number 36/V/21 and Land Reference Number 36/V/125, as well as any other property on which the Mathare Village 2 settlement now stands pending the hearing of the Originating Notice of Motion dated 23rd January, 2012.*
- b. *That an interim injunction be issued restraining the 3rd respondent either by herself or through her servants and/or agents from harassing, intimidating, threatening to evict or otherwise interfering with the Applicant's occupation of all those pieces of land known as Plot Land Reference Number 36/V/ 121 and Land Reference Number 36/V/125, as well as any other property on which the Mathare Village 2 settlement now stands pending the hearing of Originating Motion dated 23rd January, 2012.*
- c. *Costs shall be in the cause.*

27. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 22ND DAY OF FEBRUARY, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Wambua for 1st and 2nd Respondent's

No appearance for Applicant's

Order

Ruling duly delivered

ISAAC LENAOLA

JUDGE

Order

Mention on 15/3/2013

Notice to issue.

ISAAC LENAOLA

JUDGE

22/2/2013