



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURT
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 376 OF 2012

ISAIAH WAWERU NGUMI
.....PETITIONER

VERSUS

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

THE OFFICER COMMANDING STATION – KIKUYU POLICE STATION
.....2ND RESPONDENT

THE DISTRICT CRIMINAL INVESTIGATION OFFICER – KIKUYU DISTRICT
.....3RD RESPONDENT

LUCAS GATONYE KIMANI.....
.....1ST INTERESTED PARTY

MARTHA MUGURE GATONYE.....
...2ND INTERESTED PARTY

GEORGE KIMANI
.....3RD INTERESTED PARTY

EDWARD KINUTHIA KIMANI.....
..... 4TH INTERESTED PARTY

MWAURA KIMANI.....
...5TH INTERESTED PARTY

JUDGMENT

1. The petitioner has filed this matter seeking to stop the respondents from investigating events that occurred on 17th August 2012 involving the petitioner and the Interested Parties in relation to their adjoining parcels of land known as **Sigona/1808** and **Sigona/1311**.
2. In his Notice of Motion brought under Certificate of Urgency and dated 29th August 2012, the petitioner alleges that he has certain constitutional rights under Articles 22, 29, 40 and 47 which are threatened by the respondents and he therefore seeks the following orders:
 1. ***A declaration that the intended arrest, detaining, arraignment, filling of charges and prosecution against the Petitioner by the police through the 1st and 2nd Respondents or otherwise is discriminatory, unlawful, and unconstitutional and designed for a purpose other than Vindication of Justice.***
 2. ***A Prohibitory Order barring the 1st, 2nd and 3rd Respondent or their Agents from arresting, arraigning in court, preferring any charges or detaining the Petitioner in relation to the ownership of usage of Sigona/1808.***
 3. ***An order for Stay of investigations and prosecution by the Criminal Investigations Department of the police arising from the ownership and use of parcels of land known as SIGONA/1808 and SIGONA/1311 between the Petitioner and the Interested parties.***
 4. ***A Declaration that the dispute between the Interested parties and the petitioner in relation to the ownership of the user of parcels of land known as SIGONA/1808 and SIGONA/1311 is a Civil/Commercial dispute which should be adjudicated upon by the Civil/Commercial Court In particular ELC 342 of 2012 without resulting to criminal proceedings.***
 5. ***A declaration that the dispute between the Interested parties and the petitioner I relation to the ownership or the user of parcels of land known as SIGONA/1808 and SIGONA/1311 is a Civil/Commercial dispute which should be adjudicated upon by the Civil/Commercial Court in particular ELC 342 of 2012 without resulting to criminal proceedings.***
 6. ***Costs of this Petition***
 7. ***Such other Orders as this Honourable Court shall deem just.***
3. The petition is supported by an affidavit sworn by the petitioner on 28th August 2012. In the said affidavit, the petitioner avers that he is the owner of all that parcel of land known as Sigona/1808, a sub-division of Sigona/1437, and which borders Sigona/1311 jointly owned by the 1st and 2nd Interested Parties, who bought it from the petitioner's father, now deceased.
4. The petitioner has given a somewhat convoluted history of the sub-divisions of the said land parcels: that Sigona/1311, 1310 and 1312 resulted from subdivision of Sigona /799; that Sigona/799 bordered Sigona /800 which was subdivided into Sigona /1024-1030 and Sigona /1087-1090. He alleges that an access road bordering Sigona/799 was provided for but was never excavated as it was already being occupied by purchasers of Sigona/1024-1030 and 1087-1090.
5. Consequently, according to the petitioner, the owners of Sigona/1024-1030 and 1087-1090 trespassed into Sigona /799 by using the area along its boundary with their plots as an access road prior to subdivision of Sigona/799 into Sigona/ 1310-1312. He states that ultimately, Sigona/1311 was sold to the 1st and 2nd Interested Parties by his father; that Sigona/1310 and 1312 were combined with Sigona/167 to yield Sigona/1427 which was later subdivided to yield Sigona/1428-1437; and that parcel number Sigona/1437 was transferred to him by his father. He states that he then caused the said parcel of land to be sub-divided into Sigona 1808 and 1810.
6. As I understand it, the core of his grievance is that the 1st and 2nd Interested Parties failed to fence

off their parcel of land, Sigona/1311; that as a result owners of adjoining parcels excised from Sigona /800 continued to encroach on Sigona 1311 by using it as an access road; and that in turn, the 1st and 2nd interested parties then encroached on his parcel of land Sigona/1808 by digging up trenches to construct a perimeter wall. The alleged trespass was done through the 3rd, 4th and 5th interested parties. He alleges that the scenario related to the alleged trespass is the subject of Milimani High Court ELC Case No. 342 of 2012.

7. According to the petitioner, on or about 17th August 2012, the Interested Parties invaded his land parcel number Sigona/1808. He alleges that they did so under the supervision of police officers under the command of the 2nd respondent; that he had prior to that sought the help of ‘*Area administration*’; that he was denied assistance and was instead summoned to appear at Kikuyu Police station on what he alleges was a false report.
8. The petitioner contends that the acts of the 2nd respondent in allowing police officers to accompany and aid the Interested Parties to trespass into his land without any lawful authority is not only unfair but also amounts to infringement of his right to property and security; that the respondents want to prefer charges against him on malicious grounds as demonstrated by their act of aiding the Interested Parties; that he is under undue pressure and intimidation by the respondents; that his freedom of movement and liberty are at stake; and that the respondents have discriminated against him and have applied double standards.
9. In his submissions on behalf of the petitioner, Mr. Gichovi submitted that Article 22 provides for enforcement of the Bill of Rights, and that the court has the jurisdiction to ensure that such rights are not violated. He submitted that the petitioner was alleging violation of his right under Article 40 and Article 29; that his freedom and liberty is at stake as the Interested Parties had invaded his land under the protection of police from Kikuyu Police Station; that there was an allegation that he had maliciously damaged their property by destroying a fence; that the Interested Parties made a false report to the police that the petitioner had threatened them with a panga which, according to Mr. Gichovi, led the police to constantly threaten the petitioner with arrest if he did not go to the police, a violation of Article 29 of the Constitution.
10. Mr. Gichovi further submitted that there was a violation of the petitioner’s right under Article 47. He contended that the issues in dispute are the subject of Milimani High Court ELC No 342 of 2012; and that it will be an infringement of the petitioner’s rights if he is arrested while there is a civil suit pending.

The Response

11. The case for the Interested Parties is set out in the replying affidavit of **Elizabeth Njoki Kimani** sworn on 8th October 2012 and the written submissions dated 30th October 2012.
12. The Interested Parties state that they purchased the property known as Sigona/1311, which is adjacent to the subject property, from the petitioner’s father, one Philip Ngumi Rukungu (deceased); and that there is no dispute in relation to their title to the property.
13. They aver, however, that the petitioner and his siblings, beneficiaries of the estate of Philip Ngumi Rukungu, are embroiled in a series of suits where they are litigating over inter alia the division of the land, the boundaries of the land and place of burial of their father. Such suits include **Nairobi HCCC No. 342 of 2012, Godfrey Philip Ngumi and Others -vs- Isaiah Waweru Ngumi**. The Interested Parties state that they are not party to these suits, but they have suffered the spill-over from the dispute.
14. They state that on 16th September 2012, in light of the dispute between the petitioner and his siblings, and in order to safeguard their premises, they decided to remove the temporary wire fence between their land and the petitioner’s land and erect a permanent perimeter fence; that they

brought materials and employed labourers to do this; that on 17th September 2012 the petitioner entered into their land and fenced part of it without any justification, alleging that it formed part of his land, and then destroyed the fence that they had erected.

15. The Interested Parties allege that when the 3rd, 4th and 5th Interested Parties went onto the suit land, they found the petitioner brandishing a panga and threatening to visit grievous harm on anyone who attempted to access the land. As a result, they reported the matter at Kikuyu Police Station; that the police came to the land to establish the situation and upon their arrival the petitioner fled; that the police summoned all the parties to the Kikuyu Police Station to record statements on the events; that everyone except the petitioner attended; and that the petitioner chose instead to file this petition.
16. The Interested Parties take the position that there is no basis for this petition: there are no summons or warrants, nor any charge sheet produced by the petitioner to support the claim of violation of rights. They contend that the petition has been presented to frustrate the investigation of their valid complaint to the police with regard to threats of violence against them by the petitioner on 17th August 2012.
17. Mr. Njenga submitted that the threats were made when, as a result of the dispute between the petitioner and his siblings, the Interested Parties decided to fence their property. On the material day, the 17th of August 2012, they instructed their parents to carry out the work; that while their parents were in the process of fencing the property, the petitioner came to the property armed with a panga and threatened the 3rd, 4th and 5th Interested Party with violence, which precipitated a complaint to the area Chief and subsequently to the police.
18. They aver that all the persons involved in the matter were summoned by police to record statements in order for the police to evaluate whether a criminal offence had been committed; that all except the 1st and 2nd Interested Parties who are not domiciled in Kenya recorded a statement, but the petitioner refused to do so.
19. Mr. Njenga submitted that the summoning of any person by the Kenya Police to explain a situation cannot be a violation of constitutional rights; that one cannot be allowed to choose whether to obey summons by the police or not; that whether there would be a basis for charging anyone, or whether the charges are valid or not, would be determined by the criminal court.

The Respondents' Case

20. Mr. Wamotsa, counsel for the respondents, associated himself with the submissions of the Interested Parties. He submitted that issuing of summons by the respondents is part of the investigative mandate of the police; that the police summoned the petitioner on the basis of a complaint and statements; that it would have been fair for the petitioner to utilize the opportunity to assist the police to establish whether or not an offence had been committed; that even if this was a land matter as alleged by the petitioner, there are allegations of commission of an offence and the police have a right to carry out investigations.
21. Mr. Wamotsa submitted therefore that no violations of rights have occurred by the petitioner being summoned to record a statement, and that the petition is premature and should be dismissed with costs.

Determination.

22. The petitioner alleges violation of his constitutional rights under Articles 29, 40, and 47 of the Constitution. The basis of his complaint is that he has been summoned to record a statement by police from Kikuyu Police Station with regard to events that occurred on 17th August 2012. There is a conflict with regard to the date when the events in question took place, as the petitioner alleges

that it was on the 17th of August 2012 while the Interested Parties aver that it was on the 17th of September 2012. It appears that, given the fact that this petition was filed on the 29th of August 2012, the Interested Parties are mistaken on the date when the events occurred. Nothing, however, turns on this point.

23. The petitioner and the Interested Parties have made various averments pertaining to the ownership of the land and allegations and counter allegations about trespass on their respective land parcels and destruction of fences. However, the matter before me is a constitutional petition alleging violation of constitutional rights. Issues pertaining to trespass to land or the extent of boundaries, or indeed the alleged destruction of the Interested Parties' fence, or the digging up of a trench allegedly on the petitioner's land, do not fall for determination in this matter and I will not address my mind to them.

24. This petition raises one simple issue: **whether there has been a violation or threatened violation of the petitioner's constitutional rights in his being summoned to record a statement on the events of 17th August 2012.**

25. The law with regard to petitions alleging violation of constitutional rights is clear. The petitioner is required to cite the provisions of the Constitution that have been violated, and to demonstrate the manner in which they have been violated in relation to him—see **Anarita Karimi Njeru -vs- Republic (1976-80) 1 KLR 1272** and **Trusted Society of Human Rights Alliance-v- Attorney General & Others High Court Petition No. 229 of 2012.**

26. In this case, the petitioner alleges violation of Articles 29, 40 and 47 of the constitution. Article 29 contains the protection of the right to personal liberty and security of the person by providing inter alia, that:

29. Every person has the right to freedom and security of the person, which includes the right not to be—

(a) deprived of freedom arbitrarily or without just cause;

(b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;

27. Article 40 contains the constitutional guarantee of the right to property and provides as follows:

40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

28. The Constitution protects, at Article 47, the right to fair administrative action by providing that:

47. (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.

29. In this case, as far as I am able to gather from the petitioner's pleadings, there is no dispute with regard to his ownership of land parcel numbers Sigona/1808 or Sigona 1437. He has not been arbitrarily deprived of the property by the state, nor is any of the respondents or Interested Parties

claiming title to it. If there was a challenge to the petitioner's title, that would be, as he rightly states, the subject of litigation before the Environment and Land Court.

30. The petitioner has alleged violation of Article 47. From the evidence before me, there is no administrative action that the respondents have taken that violates or threatens the petitioner's rights. What he is aggrieved by is the fact that he has been summoned to the police station to record a statement. No action has been taken against him by the respondents that would be deemed to be a violation of his rights. What the police have done is to summon all those involved in the events of 17th August 2012 to the police station at Kikuyu to record statements with regard to the said events.
31. Such action on the part of police officers is in accord with their powers under the National Police Service Act, 2011. One of the functions of the Kenya Police Service is to investigate crimes. Section 52 of the Act empowers the Police to summon anyone to attend the Police Station in their investigation of the alleged commission of a crime. It is therefore not open to anyone, including the petitioner, to allege that because he or she has been summoned by police to record a statement with regard to any matter pending before the police, that amounts to a violation of rights. Not only do the police have power to summon anyone, they also have powers of arrest should their investigations disclose the commission of an offence. Provided that such powers are exercised in accordance with the Constitution and the law, they are not open to challenge.
32. Consequently, on the material before me, I can find no basis for challenging the exercise of such powers by the police officers who summoned the petitioner to record a statement. The petitioner has not yet been arrested. If he is arrested, he is entitled to the safeguards provided under Article 49 and 50 of the Constitution to an arrested person who is charged with a criminal offence.
33. The point is that summoning a person to record a statement with the police, or arresting him or her and charging him in court should investigations reveal the commission of a criminal offence, are all lawful processes sanctioned and underpinned by the Constitution. It would be to undermine the rule of law if the court were to tie the hands of the respondents simply because a person in the position of the petitioner alleges violation of rights, without providing even an iota of evidence to support his claim.
34. The petitioner alleges that the matters at issue in which he is required to record a statement are civil matters which are the subject of litigation in the Environment and Land Court. That may well be the case, although the Interested Parties have averred, (and this has not been disputed by the petitioner, who avers only that the Interested Parties are aware of the pending cases) that High Court ELC Case No. 324 of 2012 relates to the estate of the petitioner's father.
35. However, even if there were a civil dispute between the petitioner and the Interested Parties, should the police find that their investigations of the events of 17th August 2012, in which the petitioner is alleged to have threatened the Interested Parties with a panga, disclose the commission of an offence, there is nothing to stop them from arresting and charging the petitioner with the offence disclosed.

36. Section 193A of the Criminal Procedure Act is clear on this. It states as follows:

"Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings."

37. In the circumstances, I find no merit in this petition, and it is hereby dismissed with costs to the respondents and the Interested Parties.

Dated, Delivered and Signed at Nairobi this 23rd day of August 2013.

MUMBI NGUGI

JUDGE

Mr. Njeru Gichovi instructed by the firm of Njeru Gichovi & Co. Advocates for the Petitioner

Mr. Njenga instructed by the firm of Muchoki Kang'ata & Co. Advocates for the Interested Parties.

Mr. Wamotsa, Litigation Counsel, instructed by the State Law Office for the Respondents.