



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

Petition 1300 of 2007

DR. JACK KAGUU GITHAE.....PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

**THE
PERMANENT SECRETARY OFFICE OF THE**

PRESIDENT PROVINCIAL ADMINISTRATION.....2ND RESPONDENT

J U D G M E N T

1. Dr. Jack Gakuu Githae in his Petition dated 15th November 2007 and filed on 21st December 2007 describes himself as “a re-known herbal practitioner operating under the aegis of Karati Rural Service Centre and School of Alternative Medicine and Technology through which he operates Satellite Clinics in Nairobi, Karati, Nyahururu (sic), Nyeri and Nakuru”.

2. In the Petition aforesaid, the Petitioners complaints can be summarized as follows;

(i) That he is the proprietor of land parcels numbers Karati/151, 11306/2 Kiremanditi Estate in Rumuruti, and 10024/4/ West of Rumuruti at Ng’arua and that the parcels of land were all intended to be used for agricultural purposes. That it was on these parcels of land and his home in Nyeri that, from the year 2004, he began experiencing threats to his life and property and;

(ii) That instead of addressing his security concerns, on 4th May 2004, the 2nd Respondent instigated the seizure of his firearm, a 0.33 mm lamma revolver without any lawful cause at all.

(iii) That on 18th October 2004, he was arrested by the OCS Njabini Police Station who had him charged after his land was invaded by strangers who attempted to cultivate the land without his authority.

(iv) That on 22nd January 2006, the DCIO, Nyeri Police Station invaded his home in Nyeri and

conducted an illegal search before taking away a 1.2 bore caliber shot gun and the Petitioner's "tools of trade" relating to his herbal medicine business were also taken away.

(v) That on 6th February 2006, the OCS, Nyeri Police Station arrested the Petitioner and police officers assaulted him and no action was taken against the said police officers even after a formal complaint was lodged against him.

(vi) That on 8th February 2006, he was arraigned and charged before the Nyeri Chief Magistrate's Court where he denied the offence of belonging to an illegal sect and it his case that the charges were merely brought to intimidate and harass him.

(vii) That prior to and on 24th July 2007, arsonists invaded his Kiremanditi Farm and burnt trees, stole machinery and equipment but no action was taken by the Respondents to bring the perpetrators to book.

(viii) That all the above actions were in breach of his right to life under **Section 71 of the Repealed Constitution**; right to property under **Section 75 of the same Constitution**; right to protection of the Law under **Section 77 aforesaid** and that his right to movement has also been violated.

3. The Petitioner now seeks the following Orders;

"(i) It be declared that the Petitioner is fully entitled to security of the person and protection of the Law and that the 1st and 2nd Respondents have contravened the Petitioner's Right to Life under Section 71 of the Constitution, Right to Property under Section 71 of the Constitution and his rights under Section 77 of the Constitution to Protection of the Law.

(ii) It be declared that the arbitrary arrests and harassment of the Petitioner by the 2nd Respondent's officers was made in contravention of the Petitioner's rights under Sections 70 and 71 of the Constitution in so far as it touches on the protection of right to life and security of the person.

(iii) It be declared that the that the 1st and 2nd Respondents have breached their statutory duties and acted negligently by abdicating their statutory mandate of safeguarding and guaranteeing the Petitioner's personal security and protection of the Law, protection of the privacy of his home and that of his trade secrets and property from deprivation.

(v) General damages"

4. The Respondents, although properly served, filed no Affidavits in response to the issues of fact pleaded by the Petitioner but filed Grounds of Opposition on 28th July 2008 which are as follows;

"(i) The Application lacks merit and disclosed no cause of Action.

(ii) The Application is misconceived, bad in Law and an abuse of the Court process.

(iii) The Application is incompetent and incurably defective.

(iv) The Application does not show legal or factual basis where the Applicants rights under Section 70 to 77 has been contraverted.

(v) The Application does not disclose any constitutional infringements and should be dismissed with costs."

5. Although the Respondents were granted an opportunity to file written Submissions in furtherance of the above grounds, none were filed and I am left with my own understanding of what the intended response to the Petition is as the Respondents failed to address me on any of the above issues.

6. In any event, I have read the Submissions filed on 7th July 2010 by the Petitioner and I should only highlight the fact that apart from relying on **Sections 71, 75, 76 and 77 of the Repealed Constitution**, the Petitioner also relied on the provisions of **Article 12 of the Universal Declaration of Human Rights** which provides as follows;

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour or reputation. Everyone has the right to the protection of the Law against such interference or attacks.”

7. **Article 9 of the Declaration** was also relied upon and it states as follows;

“No one shall be subjected to arbitrary arrest, detention or exile.”

8. The Advocate for the petitioner also filed a List of Authorities and referred to the following cases;

(i) *Kenneth Njindo Matiba vs. Attorney General, Misc. Application No.666 of 1990.*

(ii) *Roshamali Karmali Khimji vs. Attorney General, Misc. Civil Application No.216 of 2000.*

9. Both the above cases were not supplied to Court so I am unable to refer to them. They are also unreported so far as I can tell and so I cannot surmise what issue of Law was intended to be raised.

10. Having so said, I have read the Supporting Affidavit sworn on 11th December 2007 and annexed to it are a number of letters exchanged between the Petitioner and the Kenya National Commission on Human Rights as well as the OCPD, Laikipia. They relate to the Kiremanditi Farm in Rumuruti and alleged invasion by arsonists.

11. Other letters relate to a dispute between the Petitioner and one Anny Githae (*who was or is the Petitioner’s wife*) and by a letter dated 20th April 2005 addressed to the District Commissioner, Nyandarua, the District Officer, South Kinangop, one Mr. Were Simiyu, stated as follows;

“This is a very complicated case that has reached a very dangerous and potentially explosive stage. I refer it back to you for further action. One Anny Githae is a rude lady who is not ready for arbitration”

12. It is unclear to me what the dispute was about but in a letter dated 2nd February 2006, the Petitioner stated as follows;

“It is worth noting that on the 4th May 2004 my children would have either killed me with my workers or at least assaulted us and maliciously burnt my Kinangop home to ashes were it for the fact that I boldly scared them away by firing one bullet in the air from my 0.3mm caliber lamma revolver. The most surprising thing on observation however was the fact that the revolver and ammunitions were confiscated at a time when I needed it most; I did not shoot or kill anybody inspite of the gross provocation and threat on my own life and that of my seven workers. The matter was further complicated by the fact that the processing of the application for the removal of the revolver and shotgun firearms licence was further suspended in July 2004 pending investigations into purported firearm misuse”

13. In the same letter, the Petitioner, addressing four (4) Law Firms viz; Anthony Gikaria & Co. Advocates, Mirugi Kariuki & Co. Advocates, Kagucia & Co. Advocates and Kamau Kuria & Co. Advocates stated as follows;

“I have sufficient evidence to prove beyond reasonable doubt that I have been a target for destruction for a long time. My inherent honesty and natural inclination and African Renaissance Activism has not augured well with the prevalent sabotageous corruption and petty politicking that are

apparently destroying our culture, country, continent reputation and integrity all over Africa. It is apparent that my family and institutions are being disrupted to weaken me and obviously domestic and institutional crisis are systematically being used to have me either poisoned in custody or in jail and/or to psychologically stress and depress me to death.

The apparent failure of appropriate government organs to appropriately respond to my repeated formal pleas for protection and support confirms that indeed the government is passive to the continued unconstitutional harassment, intimidation and denial of my fundamental Human rights. Consequently I am kindly urging you individually and jointly to pursue the matter with the International Human Rights Commission.”

14. It is unclear what action was taken by the lawyers but I have reproduced the above issues because it would seem to me that part of the problems that faced the Petitioner in 2004, and thereafter, were triggered by family differences involving his wife and children on one hand and the Petitioner on the other hand.

15. Turning back to the Rumuruti property, by a letter dated 21st September 2007, the OCPD, Laikipia, one Peterson Maelo, stated that the property measured 150 acres and that in 1992, the Petitioner closed a Herbal Medicine Institute called SAMTECH which was situated on it because of tribal clashes but he left behind a skeleton staff including guards who had dogs to secure the premises. The Petitioner was however unable to pay the staff and they left without informing him and so the same was vandalized and upon a report being made at Rumuruti Police Station, investigations were conducted and one Anne Chemaiyo Kimutai was arrested and charged in Rumuruti Criminal Case No.752/11/2007 Court file No.1901/2007 with the offence of stealing. He then added;

“Advise the Petitioner (Mr. Githae) to provide any information he gets to the DCIO Laikipia for further investigation than resorting to writing letters of complaint everywhere. I absolve my department from any form of blame.”

16. The Petitioner by letter dated 30th November 2007 denied that his workers had abandoned the property and argued that the Police were actively involved in a conspiracy to disarm him and later steal and destroy him and his properties. He added that the Police deliberately released some suspects in the theft and even when he took some police officers to the scene where his house was being destroyed, they fired in the air and scared off the culprits who were eventually never arrested.

17. I have also seen a letter dated 11th July 2005 from the District Officer, Kinangop and in it, he stated that some logs were confiscated on transit from the Petitioner’s farm and that the Police were dealing with the matter. He concluded by stating thus;

“There are other numerous Courts cases pending relating to the matter that are yet to be concluded. The way forward is for the Court verdict to be obeyed by the concerned parties”.

18. In a letter dated 27th June 2005, the Petitioner stated as follows;

“Dear Sirs,

REF: PROTEST AGAINST ILLEGAL DESTRUCTION AND DISPOSAL OF LIVESTOCK AND TREE PLANTATION

I write once again to report and protest against unabated destruction and disposal of livestock and trees, among other farm properties, an action that is against government orders and instructions.

It is worthwhile noting that to date, over 1,000 trees, 20 head of cattle and over 50 head of sheep have been indiscriminately disposed off within less than one year contrary to government orders. Hundreds of trees were cut and disposed off even after the area District Officer (DO) cautioned against the trend

during his recent reconciliation meeting on the farm in which the Sub-Chief and Area Chief attended.

Several trees and a precious dairy cow were disposed off last week without my knowledge and authority.

Once again, the purpose of this letter is to seek your kind assistance, guidance and advice as the scenario now is provocative. This may compel me to adopt whatever self-help initiative and strategy that I may find appropriate as the need for intervention is apparent.

Your kind intervention and guidance in this regard will be greatly appreciated.

*Yours faithfully,
Dr. Jack K. Githae*

cc

1. Area Sub Chief

2. Area Chief

3. The D.C. Nyandarua

4. Anthony Gikaria & Co. Adv”

It is unclear what action was taken but it is obvious that the Area chief and Assistant chief were involved in reconciliation efforts at the Petitioner’s farm and the protagonists were well known.

19. **With the above matters in mind, is the Petitioner entitled to the reliefs that he seeks?**

(i) Security of the Person and Protection of the Law

On this point, I should begin by addressing the withdrawal of the firearms that the Petitioner was licensed to have. By his own admission, the firearms were withdrawn pending investigations as to whether he misused the same. He also admitted that he shot in the air to scare off his children who were intent on attacking him and his workers.

20. To my mind, the Respondents cannot be blamed for taking the action that they took to secure both the Petitioner and the public at large including his children. I am certain that the need for the Petitioner’s security must be balanced with the security of others especially where he is armed with a lethal weapon which has the propensity, if misused, to cause catastrophe.

21. Regarding the Petitioner’s arrest on two occasions, he has stated that he was taken to Court and charged. My view is that if the charges were maliciously engineered, he has a right to raise the issue in the trial Court and it is not right for this court, with the scanty, one-sided evidence presented, to purport to make legitimate findings of fact in favour one party; the Petitioner. The Rule of Law presupposes that Courts should be able to weigh each case on the merits and the Petitioner has not complained that any of his rights were violated by the trial Courts.

22. On the allegations that he was assaulted on 6th February 2006, again the evidence before me is so scanty that I am unable to find in favour of the Petitioner. Save for a one paragraph complaint made in both the Petition and the Supporting Affidavit, I am unable to find any evidence of such assault. I note in any event that on 8th February 2006, the Petitioner was arraigned before the Chief Magistrate, Nyeri. **Did he raise the complaint then? Where is the evidence that he did so when his “wounds” were still fresh and that the Court failed to take action?** I find none and I am unable to act on the basis of a bare statement to that effect. That being the case and from the evidence before me, I am unable to find in favour of the Petitioner on this aspect of his case.

23. I should add something about what the Petitioner calls “harassment”. I gather that this has something

to do with the searches conducted prior to his being arraigned in Court to face charges of belonging to an illegal sect. That matter is connected to the case before the Chief Magistrate, Nyeri and it would be improper for this Court to select that issue and purport to determine it to the exclusion of all other related and connected matters leading to the charge. The issue would best be dealt with at the Court in Nyeri.

(ii) Alleged breach of Statutory Mandate by the Respondents

24. It is argued by the Petitioner that the Respondents failed to act as required of them to protect the Petitioner and ensure his personal security, protection of the Law, protection of his property and that of his trade secrets.

25. I have partly addressed these matters above but I wish to add as follows;

26. Elsewhere above, I have shown that the District commissioner, Nyandarua, the District Officer, Kinangop, the OCPD, Laikipia and the Kenya National Commission on Human Rights were all deeply concerned about the Petitioner's Welfare. A number of matters relating to the Petitioner's complaints ended up in court for resolution. Attempts were made by a Chief and Sub-Chief to resolve some of them on the home front. Arrests were made where there was evidence and culprits taken to Court. The Petitioner was asked to assist in further investigations to enable more concrete action to be taken when any Law was violated as against him.

27. All the above actions were taken by and on behalf of the Respondents and I am certain that from the evidence tendered by the Petitioner, he was not left to fend for himself in the face of violation of his person and property. It will be noted that prior to the beginning of his problems, both at the domestic and professional level, he was licensed (by the state) to carry two (2) firearms for his personal protection. The firearms were withdrawn for reasons elsewhere advance above and for good reasons.

28. When the Petitioner abandoned his Rumuruti Farm and shifted to Nyeri, he had an obligation to provide sufficient security and I am certain that he is to blame at least, for the initial vandalism of the abandoned institution called SAMTECH.

29. In any event, I am not satisfied that the Petitioner has proved any negligence on the part of the Respondents.

Conclusion

30. The Petitioner is no doubt a strong believer in the Rule of Law and Good Governance. He is an ardent and fervent Pan-Africanist and the concept of African Renaissance. Those are good and noble attributes but the failure of his dreams to have a united family and a thriving herbal medicine business cannot be blamed on the Respondents. He has been given fair treatment in his circumstances and he ought to rebuild his life because he is clearly a man of resilience.

31. As for the Petition before me, and with respect, it cannot meet the threshold required by Law and is best dismissed.

32. I shall not make any orders as to costs.

33. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 15TH DAY OF JUNE, 2012

**ISAAC LENAOLA
JUDGE**

In the presence of:

Irene – court clerk
Petitioner present
Mr. Kiage for Respondent

Order

Judgment duly read.

ISAAC LENAOLA
JUDGE
15/6/2012