



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 188 of 2011

KYANGOMBE RESIDENT ASSOCIATION..... 1ST PETITIONER

SAMUEL OKWANY 2ND PETITIONER

STEPHEN OYIER 3RD PETITIONER

VICTOR OCHIENG 4TH PETITIONER

KASIEMA KIBIBIA 5TH PETITIONER

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

KENYA AIRPORTS AUTHORITY..... 2ND RESPONDENT

THE COMMISSIONER OF LANDS 3RD RESPONDENT

JUDGMENT

Petitioner's Case

1. The petitioners are residents of Kyangombe Village which is said to be near **LR No. 21919** which is occupied by the Jomo Kenyatta International Airport operated by the Kenya Airports Authority (“KAA”). They state that they were allocated this area in 1992 by the Nairobi Provincial Commissioner and have since settled there, put up schools, churches, businesses and other social amenities they also have a title for **LR No. 209/17236** which is in the name of Kyangombe Self Help Organisation of

Nairobi.

2. The gravamen of their case is that on or about 15th September 2011, the KAA issued a notice informing dwellers of, inter alia, Kyangombe Village to vacate the area around the airport. They state that these notices were dropped in the village on 3rd October 2011. Consequently, the petitioners and residents of that village were evicted with consequent injury to some of the petitioners and their loss of property.

3. As a result of the loss, injury and damage they have suffered, the petitioners have filed this claim to enforce their fundamental rights and freedoms under the Bill of Rights which include the right to life, freedom from discrimination, right to human dignity, security, movement, residence, protection of property. They seek relief from this court under **Article 22** of the Constitution.

Respondents' Case

4. The petition is opposed by the respondents. Charles Kipkurui Ngetich, the Registrar of Titles, has sworn the affidavit on 16th February 2012. He depones that **LR No. 209/17236** actually belongs to a company known as Great Properties Limited and not the 1st petitioner. It is the position of the 3rd respondent that the petitioners cannot lay claim to land belonging to a third party.

5. The KAA through the replying affidavit of Joy Nyaga, the acting Company Secretary, sworn on 22nd October 2011 depones that **LR 21919** is the property upon which the Jomo Kenyatta International Airport stands. It is the case of KAA that by virtue of the **Kenya Airports Authority Act**, it is entitled to regulate all buildings and structures on airport land. In this case it has not authorised the construction of any structures built by the petitioners and as such any structures on KAA land are illegal.

6. Ms Nyagah also depones that this petition is similar to a previous suit filed by the petitioners in respect of the two properties subject of this petition; **ELC No. 213 of 2009 Thomas Kioko, John Katuta and Mary Nzioki (Suing as Officials of Kyangombe Self Help Organisation) and Others v Kenya Airports Authority**. According to Ms Nyaga, as the suit is still pending, this matter is an abuse of the court process.

Determination

7. I have considered the pleadings, depositions and submissions made by the respective counsels and I take the following view of the matter.

8. In **ELC No. 213 of 2009**, the petitioners or persons acting through them and through the same firm of advocates filed the suit seeking declarations that they are the owners of **LR No. 209/17236** and an order of injunction restraining KAA from evicting them from the property on the ground that it did not encroach **LR No. 21919**. Together with the plaint, an application for injunctive relief was filed.

9. In a considered ruling titled 'judgment', Justice Nambuye dealt with the matter and declined to grant an interim injunction. The learned judge addressed herself to the dispute concerning **LR No. 21919** and **LR No. 209/17236**. If I were to proceed to determine this petition, I would in effect be determining the issues in **ELC No. 214 of 2009** which is still pending.

10. This court has, on numerous occasions, stated that parties should not dress up civil matters pending in other courts as issues of enforcement of fundamental rights and freedoms. (See **Edwin Thuo v Attorney General & Another Nairobi Petition No. 212 of 2011 (Unreported)**, **Richard Nduati Kariuki v Leonard Nduati Kariuki & Another Nairobi Misc Civil Appl. No. 7 of 2006 (Unreported)**, **Booth Irrigation v Mombasa Water Products Ltd (Booth Irrigation No. 1)**, **Nairobi HC Misc. Appl. No. 1052 of 2004 (Unreported)**) This will attract the court sanction. The High Court in **ELC No. 213 of 2009** is well placed to deal with all matters in issue including any matter of enforcement of fundamental rights and freedoms.

11. Secondly, in order to protect the right to property, a party must establish a proprietary right or interest in land. The Constitution does not itself create these rights or interests. In the case of ***Joseph Ihugo Mwaura and Others v The Attorney General and Others Nairobi Petition No. 498 of 2009 (Unreported)***, I observed that, “[46] ***Section 75 of the Constitution contemplates that the person whose property is the subject of compulsory acquisition has a proprietary interest as defined by law. The Constitution and more specifically section 75 does not create proprietary interests now does it allow the court to create such rights by constitutional fiat. It protects proprietary interests acquired through the existing legal framework.***” Thus the issue whether the petitioners own or are entitled to LR 209/17236 is likely to arise in this case. It is also an issue in ***ELC No. 213 of 2009***.

Disposition

12. In view of the existence of ***ELC No. 213 of 2009***, this petition is an abuse of the court process and it is hereby struck out with no order as to costs.

DATED and DELIVERED at NAIROBI this 31st day of October 2012.

D.S. MAJANJA
JUDGE

Ms Gitau instructed by Kamunye Gichigi and Company Advocates for the petitioners.

Ms Muchiri, Litigation Counsel, instructed by the State Law Office for the 1st and 3rd respondents.

Mr Gatonye with him Mr Mutua instructed by E. K. Mutua and Company Advocates for the 2nd respondents.