



REPUBLIC OF KENYA
IN THE HIGH COURT FO KENYA

AT MOMBASA

PETITION NO. 35 OF 2011

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES**

**2, 19, 20, 21, 22, 23, 25 (C), 40, 50, 165, 262 AND SECTION 19 OF THE 6TH SCHEDULE OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: PLOT NO. MN/1/5902, MN/1/856, UNSURVEYED PLOT AT SHANZU,
MOMBASA REFERENCE NO. 31500/XII/108 ON PLAN NO. 122149/22A UPON WHICH IS
BUILT THE FLAMINGO BEACH HOTEL, MOMBASA AND A WORKSHOP**

BETWEEN

AFRICAN SAFARI CLUB LTD.....PETITIONER/APPLICANT

AND

- 1. COMMISSIONER OF POLICE**
**2. PERMANENT SECRETARY IN CHARGE OF INTERNAL
SECURITY**
3. BISAM SECURITY COMPANY LIMITED
4. BUSINESS LIAISONS CO. LTD.
5. JUMA KIPLANGE
6. MR. SUNGUT, DEPUTY OCPD KISAUNI
7. JAMES MARUK, OCS BAMBURI.....RESPONDENTS

RULING

1. African Safari Club Limited hereinafter referred to as the Applicant, has filed a petition in this court seeking redress for alleged contravention of its fundamental Rights and Freedoms, which are enshrined in the Constitution of Kenya. Filed contemporaneously with the petition is an application under Rule 22 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the individual), High Court Practice and Procedure Rules, 2006 as read with section 19, Part V of the 6th schedule of the Constitution of Kenya, and Articles 2, 19, 20, 21, 22, 23, 25c, 40, 50, 165 and 262 of the Constitution of Kenya.

2. The orders sought in the application include the following:

§ Preservatory and conservatory orders restraining the 1st, 3rd, 5th, 6th and 7th respondents, their officers, agents, servants or junior officers from getting into or remaining upon plot Nos. MN/1/5902, MN/1/856 unsurveyed plot at Shanzu Mombasa, upon which is built the Flamingo Beach Hotel Mombasa, and a workshop and offices in use by the applicant, pending the hearing and determination of the petition.

§ An order that the respondents by themselves, their juniors, servants or employees or agents do forthwith leave and vacate plot No. MN/1/5902, MN/1/856 upon which is built Flamingo Beach Hotel Mombasa and a workshop.

§ An order declaring that there is no parallel command for the Kenya Police Service, and that the Kenya Police can no longer intimidate, harass or arrest persons or take away private property on the basis of orders from above, and a declaration that armed police officers are not private militia at the command of the 5th respondent or any other private person.

3. The background to the application as revealed in the grounds stated on the motion, and the affidavit sworn by the applicant's Managing Director Frank Neugebauer is as follows:

The applicant purchased plot No. MN/1/5902, MN/1/856 (hereinafter referred to as the suit property). For some reasons the applicant opted to purchase the suit property in the name of the 4th respondent. This was on the understanding that the shares of the 4th respondent which was a moribund company would be transferred to the Applicant and its nominee. Mr. Mahihu, his wife and children who were the directors of the 4th respondent would then resign from the company, thus leaving the company in the hands of the applicant or its nominee.

4. The applicant built the Flamingo Beach Hotel as well as a large complex containing offices, a large parking area and a workshop on the suit property. The applicant has been in exclusive possession of the suit property and has been managing and running Flamingo Beach Hotel for over 20 years without any interruption. The applicant has also been paying the land rent to the Commissioner of Lands as well as the rates to the Municipal Council of Mombasa.

5. On 17th June, 2011 the 5th respondent with the assistance of armed police officers, the 3rd, 6th, and 7th respondents, forcefully took over the Flamingo Beach Hotel and workshop, chasing away the applicant's employees and security officers. The 5th respondent justified the taking over of the hotel claiming he was acting on the orders of Mr. Daniel Toroitich arap Moi (presumably his Excellency the former president). The 6th and 7th respondents also justified the use of the police on the ground that it was to protect the hotel from terrorist attack, and that they were acting on behalf of the former president on

orders from above.

6. The applicant maintains that the actions of the respondents' were unlawful as the respondents could not divest the applicant his interest in the suit property nor use the police without any court order. The applicant therefore seeks preservatory and conservatory orders pending the hearing of the petition. The applicant contends that if the conservatory orders are not issued it will suffer severe loss. This is because it had planned to reopen the hotel and had made bookings for the high season. The employees of the applicant will also suffer if orders are not granted as they will lose their jobs.

7. Mr. Kinyua Kamundi who appeared for the applicant drew the court's attention to the definition of the word "*property*" in Article 260 of the Constitution. He submitted that the applicant was denied access to his offices and workshop. The applicant could not therefore access all his documents including files and books. Nor could the applicant access other moveable properties such as computers which contained records of its business transactions including hotel bookings. This was infringement of the applicant's right to property and right to privacy. Mr. Kamundi argued that even assuming for the sake of argument that the applicant was in the premises under a lease which had expired as contended by the 4th respondent, then the applicant has been operating by way of holding over. The applicant could not therefore be thrown out of the hotel without a court order.

8. The 1st and 2nd respondent replied to the application through a replying affidavit sworn by James Ekai Maruk who is the Officer Commanding Bamburi Police Station. The officer denied that the police had acted on behalf of the 4th respondent or the 5th respondent. He explained that the presence of police officers around major tourist establishments at the Coast is common and necessitated by threats of international terrorism. In addition there had been disturbances from workers of Flamingo Beach Hotel who claim that they had not been paid their dues. The officer swore that the police officers, who went to the hotel on 17th June, 2011 did not take the hotel by force. Their mission was to provide security as the police had information that there was a possibility of some disturbances arising. He denied that the police officers had taken possession of the hotel.

9. Mr. Njoroge, state counsel who appeared on behalf of the 1st, 2nd, 6th and 7th respondents, submitted that the presence of the police in the applicant's establishment had been satisfactorily explained. He urged the court to take judicial cognizance of threats of terrorism which were prevailing. He submitted that the orders sought against the police were not necessary as the police were simply maintaining security.

10. The 3rd and 4th respondents objected to the application through grounds of opposition filed on 11th July, 2011. The grounds raised were as follows:

a) That the procedure adopted does not either technically or substantially allude to incorporated bodies or endure for the benefit of incorporate persons such as the applicant.

b) The applicant is guilty of material non-disclosure.

c) A cursory look at some annexures (in particular those attached to the further affidavit) are in fact altered and do not conform to the actual originals thereof.

d) That the 3rd and 4th respondents shall contend that the applicant is not deserving of the orders, or indeed any orders at all from the court.

11. Lucy Wambui Yinda who claims to be a director of the 4th defendant also swore a replying

affidavit. She deponed that the 4th respondent acquired interest on property known as unsurveyed plot Shanzu area from Ezekiel Bergetuny and Councillor Philomen Chelangat who had been allocated the land by the Commissioner of Lands. The 4th respondent paid a consideration of Kshs. 404,810/= for the property and the transfer was duly recorded by the Commissioner of Lands.

12. The 4th respondent subsequently entered into two agreements with the applicant. Pursuant to the agreements, the applicant was to lend some money to the 4th respondent, in consideration of which, the 4th respondent undertook to construct a hotel on the suit property within one year and lease it to the applicant for a period of 15 years. After this period the applicant was to surrender the premises or renew the lease for a further 5 years term with the consent of the 4th respondent. That lease took effect from 1st May, 1989 and expired on the 30th April, 2004.

13. Lucy swore that the loan given to the 4th respondent was repaid in full. Payment was made through the rental payments for the lease, which was due from the applicant to 4th respondent, being off-set against the loan given by applicant to 4th respondent. Upon expiry of the lease, the applicant did not apply for renewal of the lease, and the 4th respondent therefore took possession of the hotel. Lucy denied that Mr. & Mrs. Mahihu sold or transferred the 4th respondent company to the applicant. She maintained that any money paid by the applicant in regard to land rent or rates for the properties were paid by the applicant to secure its interest as lenders and not as owners.

14. Mr. Buti who appeared for the 3rd and 4th respondents pointed out that no specific orders were sought against the 4th respondent either in the petition or the application. Mr. Buti argued that the applicant had failed to demonstrate how it purchased the suit property. He submitted that Lucy Yinda had explained how the transaction of loaning and leasing between the applicant and the 4th respondent was done. He maintained that the suit property has never at any time been owned by the applicant. Relying on **Re Kenya National Federation of Cooperatives Limited and Others (2004) 2EA 128** counsel submitted that the applicant was guilty of non-disclosure of material information. The applicant did not therefore deserve the orders sought. Mr. Buti further pointed out that a document annexed to the applicant's affidavit was doctored as the attesting words were contrary to the purport and tenure of the attested document.

15. The 5th respondent also swore a replying affidavit in which he objected to the orders sought against him. The gist of the affidavit was that the 5th respondent, who is an advocate of the High Court, was acting on behalf of his clients. He did not specify who the clients were, but indicated that the shareholders of the 4th respondent wanted to sell their interest in the Flamingo Beach Hotel. The 5th respondent visited the hotel accompanied by the new owners to procure possession for the new purchasers. He denied having any personal interest in Flamingo Beach Hotel other than his professional role as an advocate. He drew the court's attention to documents attached to the applicant's further affidavit which documents he maintained were interfered with.

16. I have carefully considered the application and the submissions made by counsel. It is clear that the applicant is seeking a conservatory order which is a remedy provided under Article 23 of the Constitution. Therefore it is important to appreciate the extent of this remedy and when it may be available to a litigant. In **High Court Petition No 7 of 2011 (Mombasa), Muslim For Human Rights (Muhuri) & Others V AG & Others**, Hon. Ibrahim J (as he then was), considering the criteria or principles applicable for the grant of a conservatory order, described a conservatory order as one which would:

“enable the court to maintain the status quo or existing situation or set of facts and circumstances so that it would still be possible that the rights and freedoms of the claimant would still be capable of

protection and the trial was not a futile academic discourse or exercise.”

17. In that case, Hon IbrahimJ set out four parameters to be applied in considering whether to grant a conservatory order. Those parameters are: Judicious exercise of discretion; the establishment of an arguable case which raise serious or fundamental issues; Degree of irretrievability i.e. whether the application or case will be rendered nugatory, if the conservation is not granted; and finally balance of convenience as between the applicant, the respondent and where applicable national or public interest. I am in entire agreement with the sentiments expressed by Ibrahim J and do adopt the principles as applicable in this case.

18. The applicant seeks the remedy of conservatory order on the grounds that his fundamental rights as provided under the Constitution have been violated. For the court to issue the conservatory orders, the applicant must demonstrate to this court sufficient circumstances upon which the court can conclude that substantial issues regarding the infringement or threatened infringement of the applicant's fundamental rights have been raised as to form prima facie, an arguable case. The applicant must also satisfy the court that it is necessary to issue the conservatory order so as to preserve the subject matter of the suit. In addition the court must consider the balance of convenience.

19. From the affidavit evidence, it is apparent that the applicant and the 4th respondent entered into two agreements which resulted in the applicant being given possession of the Flamingo Beach Hotel. Although there is a dispute as to the ownership of the suit property and indeed the hotel, it is common ground that the hotel was put up by the 4th respondent through a loan provided by the applicant. The issue as to whether the applicant has any interest in the ownership of the 4th respondent company is one which will have to be determined during the hearing of the petition.

20. It is intriguing that the applicant gave the 4th respondent an interest free loan, not only to buy the land but also to put up the hotel. The matter becomes of more interest because an issue has arisen as to whether the applicant is on the suit premises as an owner or lessee. Nonetheless for the purposes of this application, the applicant has demonstrated that it has been in possession of the suit property for the last 20 years and that the Flamingo Beach Hotel was constructed through finances provided by the applicant. For the purposes of this application, the issue of the applicant's exact status in the suit premises is neither here nor there. That is a matter for determination at the hearing of the main petition.

21. What is material is that the applicant has been in possession of the suit premises. Regardless of whether the applicant is an owner or lessee of the suit property, the 4th respondent could only have possession of the suit premises from the applicant through legal means. It is evident that the 4th respondent has purported to take possession of the suit premises from the applicant. The 4th respondent has not however demonstrated its authority to do so.

22. It has been alleged that the shares in the 4th respondent company have been transferred to new owners. The 5th respondent who is an advocate has explained his presence in the suit premises as assisting in facilitating the transfer and possession to the new owners. The 6th and 7th respondents also concede that their role was only to maintain security. That is to state that the threat to divest the applicant of the possession of the suit property was real.

23. Article 40 of the Constitution guarantees protection of right to property. As observed by the counsel for the applicant, right to property goes beyond immovable property. The applicant's complaint relates to not just the suit property and the Hotel of which they claim ownership, but extends to moveable properties such as books, files, records and computers which are alleged to have been confiscated by the respondent. This is a complaint which falls within the purview of Article 40 of the Constitution. It is a right which if established must be protected. That is to say, that the applicant has established a prima facie case with regard to the violation of its fundamental rights.

24. The next question is whether in the circumstances of this case it would be appropriate to issue a conservatory or preservatory order. In this case the applicant has alleged that it has been forcefully removed from the hotel. That is to say that the applicant has lost possession of the Flamingo Beach Hotel. The orders which the applicant now seeks are described by the applicant as preservatory or conservatory order.

25. A look at prayers (c) of the chamber summons dated 30th June, 2011, shows that what the applicant seeks is orders restraining the 1st, 3rd, 5th, 6th and 7th respondents or their servants, or agents from “*getting into or remaining upon*” the suit property upon which is built the Flamingo Beach Hotel and Workshop. While prayer (d) seeks an order that the 1st, 2nd, 3rd, 5th, 6th, and 7th respondents, their servants or employees “*to forthwith leave and vacate the suit property*”. Therefore what the petitioner is seeking is to have the *status quo ante* reinstated by having the respondents vacate the suit premises and restrained from getting into or remaining on the premises.

26. The question is whether the above orders are conservatory or preservatory orders. It is evident that the orders sought by the petitioner appear to be akin to an order of mandatory injunction. This is because the orders would have the effect of removing the respondents from the suit premises and although not specifically sought, reinstating the applicant into the premises. In my view, a conservatory or preservatory order is intended to preserve the subject matter of the suit. At the end of the day, the parties should not only be able to have their day in court, but also the main suit should not be rendered nugatory. Neither the applicant nor the respondent should be prejudiced by the issuance of the conservatory order.

27. In the circumstances of this case, the position at the moment is that the applicant has been removed from the suit premises. An order restraining the respondents, its staff or agents from getting into or remaining upon the suit property; or an order directing the respondents to forthwith leave and vacate the suit property; is not an order for preserving the status quo. It is an order for reinstating the status quo ante i.e. the position before the alleged breaches occurred. It would be premature and prejudicial for the court to issue such an order at this stage. Thus the applicant has not satisfied this court that the conservatory orders it is seeking are necessary to preserve the subject matter of the suit.

28. From the petition, it is evident that the subject matter of the applicant’s suit is essentially declaratory orders concerning the applicant’s fundamental rights over the suit property, general damages for trespass and conversion, as well as punitive and aggravated damages against the 3rd, 5th, 6th and 7th respondents for taking the law into their own hands and evicting or purporting to evict the applicant without any court order. Apart from the issue of ownership the prayers sought by the applicant are unlikely to be rendered nugatory by subsequent actions of the respondents.

29. As regards the applicant’s rights over the suit property, this part of the applicant’s claim can be rendered nugatory by subsequent actions of the respondents. The court has however not been asked to restrain the respondents from dealing with the suit property nor has the applicant specifically requested for an order to reinstate it back into the suit property. Indeed that is an order which could have been appropriately obtained by way of a mandatory injunction if the circumstances so justified. Nonetheless the applicant has chosen not to go that way. The court cannot give what has not been sought.

30. The applicant also sought interim declaratory orders concerning the operation of the Kenya Police Service. However, the declaratory orders concern the respondents’ conduct during the alleged eviction of the applicant from the suit premises. This is a matter which is at the heart of the applicant’s claim. It would be prejudicial to issue such a declaratory order at this stage.

31. Thus, the applicant has not satisfied this court that the conservatory orders it is seeking are necessary to preserve the subject matter of the suit nor am I persuaded that this is an appropriate case for me to exercise my discretion in the applicant’s favour. The upshot of the above is that the chamber summons dated 30th June, 2011 is dismissed.

Dated and delivered this 2nd day of August, 2011.

H. M. OKWENGU

JUDGE

In the presence of:-

Kinyua & Ms. Muyaa for the Petitioner/Applicant

Buti for the defendant Nos. 3, 4 & 5

Buoro Court Clerk