



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 281 OF 2006

BETWEEN

RETIRED MAJOR SHADRACK MUTIA MUIU.....PETITIONER

AND

PROF. KIVUTHA KIBWANA1ST RESPONDENT

**ALLOIS MUIA MWAIWA (ALIAS SYOKATI.....2^D
RESPONDENT**

PETER NDUGU NGII.....3RD RESPONDENT

BONIFACE MUATHA.....4TH RESPONDENT

PHILIP MUIA MAITHA.....5TH RESPONDENT

WEEKINGTON NDETO.....6TH RESPONDENT

**MUKONZI KIVONDO.....7TH
RESPONDENT**

JOHN KAUMBU.....8TH RESPONDENT

**JULIUS NZOMO.....9TH
RESPONDENT**

JUDGMENT

Petitioner's Case

1. The petitioner is the registered proprietor of the property known as LR No. 9730/5 located at Sultan Hamud. He states that he has lived on the land since 7th June 1981 and has developed infrastructure on the property which includes a school, dispensary, hotel, quarry and permanent homestead. He carries out mixed farming. He has cattle, sheep, goats and poultry and grows citrus fruits and maize.
2. His grievance against the Respondents is that on 23rd April 2004 they incited a group of about 700 members of the public who invaded his land and destroyed his fence, trees and vegetables and created a road on it and have expressed the intention to seize his land and subdivide it amongst unknown members of the public.
3. He states that he has been willing to provide a way leave for public use in a legal and agreeable manner as he has already given out more than enough land for access roads.
4. He also accuses the Respondents of using public funds, acting in their private and official capacities

to invade the land.

5. The Petitioner seeks the following reliefs in his petition dated 30th May 2006:-

- A. *The Respondent or their agents or servants through any other person acting on behalf of the Respondents on their official or private capacity be restrained by the Honorable Court from invading, entering, trespassing or destroying the fence, quarry, school, homestead locations vegetation or trees of the Petitioner or from creating a road or subdividing the land of the Petitioner and further from inciting the members of the public, arming the said members with pangas, machetes and any other weapon or in any way from interfering with the private property known as L.R. NO. 9730/5 (Sultan Hamud) of the Petitioner and causing violence to the Petitioner until this Constitutional Application is heard and determined.*
- B. *The invasion of L.R. No. 9730/5 by the Respondents herein is illegal and creates no rights on any of the persons invading and trespassing on the land and that none of the rights, title or interest of the Petitioner in the said land should be derogated from by the said invasion and trespass.*
- C. *The compulsory taking of the possession and/or compulsory acquisition of part of the said L.R. 9730/5 by the Respondents is illegal and contrary to provisions of Section 75 of the Constitution of the Republic of Kenya.*
- D. *The entry by the Respondents or any other invaders on the premises of the Petitioner to wit L.R. No. 9730/5 was and is illegal and in contravention of the provisions of Section 76 of the Constitution of Kenya.*
- E. *The Commissioner of Police do take all lawful steps necessary to bring to an end the invasion of the property known as L.R. No. 9730/5 until the right of quiet enjoyment in respect to the said property has been restored to the Petitioner and/or all persons lawfully holding.*
- F. *The Respondents jointly and severally do pay General damages to the Petitioner in such sum as this Honorable Court deems just.*
- G. *The Respondents jointly and severally do pay Special damages to the Petitioners in such sum as this Honorable Court deems proved and just.*
- H. *The Respondents jointly and severally do pay aggravated exemplary damages to the Petitioner and such further sum as this Honorable Court deems fit.*
- I. *Such further and other consequential orders, writs, declarations and directions as this Honorable Court may consider appropriate for the purpose of enforcing and of the securing enforcement of any of the provisions of Sections 70 to 83 (inclusive), Constitution of Kenya.*
- J. *The Respondents jointly and severally do pay to the Petitioner the costs and incidentals to this Petition.*

6. The Petition is supported by the Petitioner's Affidavit sworn on 30th May 2006. He has also filed a Supplementary Affidavit sworn on 28th March 2011 wherein he states that upon application for subdivision, he surrendered the title for LR 9730/5 in exchange for the new subdivision. These subdivisions were approved in 2008 and he has been paying land rent in respect of the new plots. In his view he is still the beneficial owner of LRg 730/5 although the title has been surrendered.

7. In his further affidavit sworn on 4th August 2006, the Petitioner deals with the issue of Machakos High Court Civil Suit No. 46 of 2004. He states that the reliefs in that suit are different from the reliefs sought in this Petition. He also believes that not only some of the Parties differ but that this suit is intended to enforce his fundamental rights and freedoms enshrined in the Constitution.

8. Mr. Shijenje who argued the Petition before me adopted the written submissions filed on the Petitioner's behalf on 8th April 2009. He was of the view that the Petitioner's rights under Sections 70, 75 and 76 had been violated to his client's detriment.

9. He further submitted that the law protects the sanctity of title through section 23 of the Registration of Titles Act (Cap 281 of the Laws of Kenya) and the forceful taking away of his proprietary rights by invaders incited by the respondents was a breach of the rights.

10. Mr. Shijenje also submitted that the Respondents as individuals could be sued in their own capacity for breaches of the Constitution. He relied on the case of Steve Luseno –vs- Kenya Airways Ltd

Nairobi Petition No. 717 of 2006 (Unreported) [2008]eKLR and Mwangi Stephen Mureithi V. Daniel arap Moi Nairobi Petition No. 625 of 2009 (Unreported)[2011]eKLR.

Respondents' Case

11. Boniface Muatha Kilonzo, the 4th Respondent swore a Replying Affidavit on 28th July 2006 in opposition to the Petition on behalf of the Respondents.

12. His main ground of attack is that the Petitioner filed a suit seeking a permanent injunction, general and special damages against the 1st and 2nd respondents namely; ***Machakos High Court Civil Case No. 46 of 2004*** which is still pending and wherein the court has issued temporary injunction orders. The petition, he depones, was filed after two years.

13. He also states that this petition is filed in response to a visit by officers from the Ministry of Lands, Directorate of Physical Planning which culminated in a notice in the East African Standard of 24th May 2006. The said notice carried a proposal for a 20 m road passing through the petitioner's parcel of Land.

14. The deponent further avers that the consequences of the decision cannot be visited upon the Respondents who have nothing to do with the survey conducted in 2006. In any event, the Petitioner should have moved to set aside the survey through judicial review.

15. The Respondents also filed skeleton arguments dated 7th June 2010 where they urged me to strike out this claim on grounds that it is subjudice in view of the pending suit in Machakos and that the claim cannot be enforced against the respondents in their personal capacity. Mr. Nyamu submitted that the private law remedies ought to have been pursued. He argued that the case of **Kenya Bus Services Ltd & others – Vs. The Attorney General & others Nairobi Misc. Suit No. 415 of 2005 [2005]eKLR.** Supported this proposition.

16. Mr. Nyamu, who argued this matter on the respondent's behalf, adopted the skeleton arguments and urged me to dismiss the petition with costs.

Effect of Previous existing suit

17. Apart from deciding on the violations alleged, it is important to consider effect of the existing suit and if so, whether it affects the relief sought under section 84 of the Constitution.

18. **Machakos High Court Civil Suit No. 46 of 2004** was filed on 29th April 2004 by the **Petitioner against Professor K. Kibwana, Kalembe Ndile, Alloys Muia and Nicodemus Mutuku Ngalawa.** The suit was in respect of LR No. 9730/5 at Sultan Hamud. In the suit, the Plaintiff made the following prayers:-

(1) Special Damages Kshs.108,000/=

(2) General Damages for trespass, and injury to the dispensary, School, hotel, quarry, the land and general disturbance of the Plaintiff's peaceful enjoyment of his land.

(3) A permanent injunction order be issued against the Defendants in their private and public capacity by themselves or agents or servants or any person claiming anything using the Defendants names.

(4) An order of temporary injunction be issued against the Defendants by themselves or their agents or servants or anybody claiming anything using their names and the Defendant be further restrained inciting, arming or intoxicating the members of the public to invade the land of the Plaintiff and be restrained from creating roads or any road on the plaintiff's land or from damaging the Plaintiff's fence or safes or Quarry or trees or vegetation until this suit is heard and determined.

(5) The costs of the suit be provided to the Plaintiff.

(6) Exemplary or punitive damages be awarded since the Defendants and their group acted with malice to destroy private property.

(7) Any other relief that this Honorable Court deems fit and just to grant.

19. Together with the suit, the Petitioner filed a Chamber summons wherein he sought an injunction

restraining the respondents in their official and private capacities from entering, trespassing, or destroying the fence or vegetation or trees of the plaintiff or from creating a road or subdividing the land of the plaintiff or in any other way interfering with the suit premises known as LR 9730/5 of the plaintiff and causing violence to the plaintiff until the suit is heard and determined.

20. After hearing the application, Justice R.V. Wendoh in a ruling delivered on 13th July 2004 stated as follows;

The applicant has shown that he is the registered owner of the parcels of the land parcel No. LR 9730/5. There is no evidence that part of it or all of it belongs to anybody else than the applicant. There is evidence even from the newspapers that there was invasion of the suit land by the defendants with a big crowd who were referred to as squatters who caused chaos and damage to the said land. This is private land and the defendants have not shown that they had any right to invade it with a group of squatters. If such invasion is repeated the applicant is bound to suffer irreparable loss and having shown that the applicant is the owner of the land, it is only proper that an order of injunction do issue restraining the defendants/respondents, their agents or servants from interfering with the said land in any way till this matter is heard and determined. Costs to be in the cause.

21. The Machakos suit is still pending and the injunction order is still in force.

22. I have looked at both the pleadings in the Machakos suit and those of the Petition before me. The subject matter involves the trespass and/or invasion of LR 9730/5, the reliefs are substantially similar and the parties are all accused of the same acts. Only the 1st and 2nd Respondents in this petition are parties to the Machakos suit.

23. In my view, the provisions of section 6 of the Civil Procedure Act are satisfied. Section 6 is a statutory expression of the general rule on subjudice that is, no court shall proceed with the trial of any suit or proceeding in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other court having jurisdiction in Kenya to grant relief claimed.

24. The Petitioner has contended that the matter before the Court is one that concerns the enforcement of the Constitution and therefore under section 84(1), the Petitioner is entitled to bring this Petition “*without prejudice to any other action with respect to the same matter which is lawfully available*” Mr. Shijenje submitted that whether in fact the previous action seeks the same reliefs is irrelevant for purposes of the relief sought under section 84.

25. Counsel for the Respondent, urged me to adopt the sentiments of Justice Nyamu in the **Kenya Bus Service case** where he held that the court mandate given under Section 84 of the Constitution is a serious one and cannot be trivialized or abused by filing applications which are patently frivolous, vexatious and legally oppressive. The Court, he urged me, has the power to prevent an abuse of process. This case is one case that calls for exercise of this power.

26. Section 84 of the Constitution is a separate right, the right for a person whose rights are violated, infringed or threatened to move the High Court unhindered. The Court should exercise great circumspection in interfering with the gateway of enforcement lest the rights guaranteed under the Constitution become worth the paper they are written on.

27. This view is not inconsistent with the power of the Court to prevent abuse of its process or do justice. Allowing of abuse to take root in our system breeds impunity and the direct result is that the efficiency of Court orders is lessened thereby undermining the same rights that are to be enforced.

28. Under section 84, the Court is entitled to take into account the issue of subjudice and consider whether indeed, it affects the rights to be enforced. The Court is not powerless and cannot gloss over the abuse of its process merely because the matter before it is dressed an enforcement of fundamental rights action. It must act when called upon to halt an abuse of its process in appropriate circumstances.

29. This matter is directly and substantially in issue as the one in *Machakos* and I consequently find that these proceedings are an abuse of the court process. My finding is reinforced by the fact that the state is not a party to these proceedings. It is a dispute between litigants on their personal capacities. For all intents and purposes the petition is a suit for trespass. Both suits achieve the same end.

Violation of section 75 of the Constitution

30. Even if I were wrong on the issue of abuse of process, I would still be constrained to dismiss this petition on the ground that the right in respect of protection of the property under Section 75 of the Constitution is against the state. It is the state is entitled to compulsory acquire property and pay compensation. It is not alleged in this petition that the state has done anything that amount to deprivation of the petitioner's property or proprietary interests.

31. Further, even if I am convinced that the respondents or some of them were acting on behalf of the state I would be unable to make such a finding against the state as it is not a party to these proceedings. I adopt the dicta in the case of *Pashito Holdings & another v Ndung'u I & 2 others KLR [E &L] 1, 295* where the Court of Appeal held that the court could not make a determination in respect of the powers of the Commissioner of lands to allocate land in the absence of the Commissioner as a party to the suit as this was a breach of the rules of natural justice.

32. Individuals such as the respondents are of course liable under the common law for acts of trespass and damage and if any evidence were required to demonstrate the efficacy of our legal system, it is the fact that the Petitioner has in his favour an injunction and is in the process of vindicating his rights in *Machakos HCCC 96 of 2004*.

Conclusion

33. I take the view of Lord Diplock who stated in *Harrikison v Attorney General of Trinidad and Tobago [1980] AC 265* that the value of the right to apply to the High Court for enforcement fundamental right would be diminished if it is allowed to be misused as a general substitute for normal procedures for invoking judicial control of administrative action. This advice is no less applicable to a case such as this involving private parties.

34. I dismiss the petition with no order as to costs.

DATED and DELIVERED at NAIROBI this 21st day of November, 2011

D.S. MAJANJA
JUDGE

Mr. Shijenje instructed by Kilonzo & Company Advocates for the petitioners.

Mr. M. Nyamu instructed by Nyamu & Nyamu Advocates for the respondents.