



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Petition 355 of 2009**

**IN THE MATTER OF SECTION 84(1) & (2) OF THE CONSTITUTION OF THE REPUBLIC OF  
KENYA**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS  
AND FREEDOMS UNDER SECTION 70, 71, 72, 74, 75, 79, 80 & 82**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION  
AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL),  
HIGH COURT PRACTICE AND PROCEDURE RULES, 2006**

**AND**

**IN THE MATTER OF THE POLICE ACT, CAP 84 LAWS OF KENYA**

**AND**

**IN THE MATTER OF ADMINISTRATION POLICE ACT**

**AND**

**IN THE MATTER OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL  
RIGHTS**

**AND**

**IN THE MATTER OF INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND  
CULTURAL RIGHTS**

**AND**

**IN THE MATTER OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS**

**AND**

**BETWEEN**

**CHARLES OCHIENG OKONGA & 892 OTHERS.....  
..... PETITIONERS**

**VERSUS**

**THE HON. ATTORNEY-GENERAL.....  
.....1<sup>ST</sup> RESPONDENT**

**THE COMMISSIONER OF  
POLICE..... 2<sup>ND</sup>  
RESPONDENT**

**MINISTER OF STATE IN THE OFFICE OF THE  
PRESIDENT IN CHARGE OF THE PROVINCIAL  
ADMINISTRATION AND INTERNAL  
SECURITY..... 3<sup>RD</sup> RESPONDENT**

**JAMIA MASJID AHL-SUNNAT-WAL-JAMAIT (REGISTERED  
TRUSTEES OF JAMIA MOSQUE COMMITTEE)  
..... 4<sup>TH</sup> RESPONDENT**

**HUSSEIN AHMEDALI HEBATULLA,  
MUSTAFA AHMEDALI HEBATULLA,  
KUBRABAI YUSUFALI HAMMEED.....  
.....5<sup>TH</sup> RESPONDENT**

**RULING**

By a Petition dated 11<sup>th</sup> June, 2009 and filed on the 12<sup>th</sup> June, 2009 by Mwangi Wahome and Company advocates, some 891 petitioners filed proceedings under section 84 of the Constitution against the **(1) ATTORNEY-GENERAL , (2) THE COMMISSIONER OF POLICE, (3) THE MINISTER OF STATE IN THE OFFICE OF THE PRESIDENT IN CHARGE OF PROVINCIAL ADMINISTRATION AND INTERNAL SECURITY (4) JAMIA MASJID AHL – SUNNAT WAL-JAMAIT (REGISTERED TRUSTEES OF JAMIA MOSQUE COMMITTEE), and 5. HUSSEIN AHMEDALI HEBATUALLA, MUSTAFA AHMEDALI HEBATULLA & KUBRABAI YUSUFALI HAMMEED.** In the petition they seek a number of declarations as follows-

**A. A declaration that the Government of the Republic of**

**Kenya through the 1<sup>st</sup> , 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have failed and/or neglected their duties to respect**

***protect and fulfil the fundamental rights of the Petitioners as laid down in the Constitution and other international instruments to which it is a signatory for both the acts of a government, agents, and private actors.***

***B. The use of violence and threat of arrests, disruption of peaceful meetings as well as disruptions of work and conduct of business. The destruction and theft of the petitioners' tools of trade, works in progress, materials, equipment and third party vehicles whose lien was held by the petitioners.***

***C. A declaration that the Kenya Police, Administration***

***Police and the Provincial Administration or indeed any other government agency and the 4<sup>th</sup> and 5<sup>th</sup> Respondents be barred from interfering with the petitioners quiet possession of the plot of land known as L.R. No. 209/136/295 (formerly 209/136/259/24).***

***D. A declaration that the Government of the Republic of Kenya has a duty to compensate the petitioners for the loss of business, tools and equipment of trade and injuries sustained.***

***E. Any further or other relief that this Honourable Court may deem fit to grant.***

There was filed with the petition an affidavit of 37 paragraphs.

Filed contemporaneously with the petition was a Chamber Summons. The said application was said to be filed under Rules 20 and 21 of the Constitution of Kenya (***Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual***) High Court Practice and Procedure Rules, 2006. The orders sought in the application are as follows-

***1. THAT this application be certified as urgent and be***

***heard ex-parte.***

***2. THAT the Honourable Court be pleased to issue***

***Conservatory orders allowing the petitioners to continue doing their business on the plot of land known as LR. No. 209/136/259 (formerly 209/136/259/24) without any interference and the respondents be jointly and severally restrained from evicting or in any way interfering with the Petitioners in any way until the hearing and determination of the petition.***

***3. THAT the Milimani CMCC 865 of 2009 be and is***

***hereby stayed pending the hearing and determination of this petition.***

**4. THAT costs of this Application be in the cause.**

There are several grounds on the face of the Chamber Summons. These grounds are that-

**1. The petitioners are under a threat of eviction by**

**the 4<sup>th</sup> and 5<sup>th</sup> respondents who are claiming a right of ownership of the land known as L.R. No. 209/136/259 (formerly 209/136/259/24).**

**2. The 4<sup>th</sup> and 5<sup>th</sup> Respondents have made various**

**attempts using the police and the Provincial Administration to evict the Petitioners with a view to defeating and frustrating the Petitioner's claim.**

**3. The petitioner's fundamental rights and freedoms have been grossly violated by the Respondents and unless they are restrained the Respondents will continue violating the Petitioners' rights without the due process.**

**4. The petitioners claim is justifiable in law and they ought to be given an opportunity to present it to the law for hearing and determination without undue interference of their businesses and sources of livelihood.**

**5. The Milimani CMCC 865 of 2009 which was filed by**

**the 5<sup>th</sup> Respondent is in respect of the same subject matter of this petition L.R. No. 209/136/259 (formerly 209/136/259/24).**

**6. The 4<sup>th</sup> defendant too has laid a claim on the land L.R. No. 209/136/259 (formerly 209/136/259/24) and has indeed admitted being behind the attempts to forcefully evict the petitioners.**

The application was also filed with an **AFFIDAVIT IN SUPPORT** sworn by **LUKASI ELPHAS**, one of the petitioners/applicants on 11<sup>th</sup> June, 2009. The affidavit has 41 paragraphs. It is deposed, inter alia, that the applicant/petitioners assets and properties are being or have been destroyed by the respondents or with their approval or participation contrary to constitutional protection of rights to own property, and that the destruction of properties and harassment of the applicants has been done under the pretext of execution of a court injunction order issued in Milimani CMCC No. 865 of 2009 against three persons namely **MACHARIA CHARLES NGURE T/A MASHA AUTO GARAGE, DANIEL MUDONGE T/A DMK AUTO GARAGE, and JOHN ODONGO T/A FRAPELIZES COMPANY**, none of whom was one of the applicants herein.

When the application came up before me on 12<sup>th</sup> June, 2009, I certified same as urgent and ordered that it be served for inter-partes hearing. I also granted interim or temporary orders as sought in prayer 2, pending the determination of the application. When the application was served, the Attorney-General came on record for the 1<sup>st</sup> and 2<sup>nd</sup> respondents. M/s Ahmednasir, Abdikadir & Company advocates came on record for the 4<sup>th</sup> respondent, while M/s Hamilton Harrison & Mathews came on record for the 5<sup>th</sup> respondent.

Counsel for the parties filed responses and written submissions and lists of authorities. The matter

came up for hearing on 27<sup>th</sup> July, 2009. Mr. Muite made submissions on behalf of the applicants/petitioners. Counsel opposed strongly the objections raised by the 4<sup>th</sup> respondent, and submitted that they did not fall within what could be called preliminary objections and relied on the case of *MUKISA BUSCUIT MANUFACTURING CO. LTD. -VS- WEST END Ltd. [1969] [E.A. 696]*. Counsel opposed the contention that the whole petition should be struck out for the reason that it did not disclose a cause of action. Counsel stated that the rules, especially Rule 18 envisaged that a petition could not be struck out or dismissed at this preliminary stage because there is provision for the Chief Justice to give directions. Counsel contended that the 4<sup>th</sup> respondent was fully aware of the harassment being visited on the applicants. Counsel also submitted that the applicants had brought to the attention of this court, that they had applied for leave to file proceedings to obtain title for the subject plot through adverse possession. Counsel submitted therefore that the conservatory orders should be granted pending the hearing and determination of the petition filed.

The application, and entire petition was strongly opposed. Mr. Ombwayo for the Attorney-General submitted that the issue before court was one of ownership of the land between the applicants and the 4<sup>th</sup> and 5<sup>th</sup> respondents. Counsel argued that there was no Constitutional issue arising relating to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, as they were merely maintaining law and order, and were not part of the land ownership dispute. On prayer 2 of the Chamber summons counsel left the same to court for decision.

Mr. Ahmednasir for the 4<sup>th</sup> respondent made strong submissions to challenge both the Chamber Summons application, as well as the petition. Counsel argued that the issues raised were not constitutional issues.

Firstly, the petitioners/applicants claim that they want to be allowed to continue business. However, they have not demonstrated any legal interest that would entitle them to do so. On this counsel argued that counsel for the petitioners/applicants had admitted that the subject land belonged to the 4<sup>th</sup> respondent. Secondly, counsel argued that the petitioners/applicants had not brought any evidence that they were lawful tenants of the owner of the land (**4<sup>th</sup> respondent**). Therefore the applicants had no legal basis to continue occupying the land. Counsel argued that the applicants were liable to be evicted because they had no legal right to be on the land. That was why several attempts had been made to evict them.

Counsel also argued that the applicants had not demonstrated contravention of fundamental rights and freedoms, therefore their request for conservatory orders cannot and should not be granted. Counsel further argued that the court cannot divorce the Chamber Summons from the petition. If no violation of fundamental rights and freedoms have been demonstrated, as in the present case, both the petition and Chamber Summons should not be allowed to stand. Counsel submitted that the grounds for granting interlocutory injunctions, should be applied to cases for granting of conservatory orders. At least there has to be established a prima facie case with probability of success. Counsel argued that the applicants seem to be pleading a right of trespass as their justification for the petition as well as the Chamber Summons. A crime cannot be enforceable by the court. Trespass is not a legal right, and in fact it is a criminal offence.

Counsel also submitted that the Bill of Rights constituted of rights bestowed on an individual by a Government, not a private individual like the 4<sup>th</sup> respondent. Therefore, it was wrong to sue the 4<sup>th</sup> respondent for an alleged contravention of fundamental rights.

On the claim by the applicants that their rights to livelihood had been contravened, counsel submitted that no evidence had been provided that the life of anybody had been taken away. In any case, if the 4<sup>th</sup> respondent would have taken away anybody's life, that would be a case of murder and not a constitutional issue. Counsel also submitted that no evidence was placed before the court that rights to liberty have been violated. In any event the 4<sup>th</sup> and 5<sup>th</sup> respondents do not have any cells or prisons or a police force.

On rights to property, counsel argued that the rights protected are only in relation to acquisition of

private property without following compulsory acquisition procedure as provided for in the law. The issue of damage to tools and equipment was a matter for the civil court, not for a constitutional petition.

The only issue raised, counsel argued, was an issue that applicants want to apply for adverse possession. Counsel argued that that is not a Constitutional issue, and the applicants can actually get stay orders in that cause for adverse possession rather than these Constitutional petition proceedings.

Counsel cited a number of authorities. Among them section 70, 71, 74 & 76 of the Constitution. Reliance was also placed on the case of **RICHARD NDUATI -VS- HON. LEONARD NDUATI KARIUKI & ANOTHER** – Nairobi HC Misc. Civil Application No. 7 of 2006 – wherein the court stated that constitutional rights were guaranteed against the state and not a private individual. Also relied upon is the case of **KENYA BUS SERVICE LTD -VS- ATTORNEY-GENERAL Nairobi Misc. Civil Suit No. 413 of 2005** – wherein it was stated that stay orders are not automatic in Constitutional applications.

Mr. Mikangi for the 5<sup>th</sup> respondent supported or associated himself with the submissions of counsel for the 4<sup>th</sup> respondent. Counsel further emphasized that the previous owner of the subject property or land was the 5<sup>th</sup> respondent, who transferred the same to the 4<sup>th</sup> respondent. Counsel also emphasized that a Notice to withdraw the Milimani CMCC No. 864 of 2009 was filed, therefore there is nothing to stay in that suit as requested by the applicants.

I have considered the matter and arguments filed and canvassed by all parties. I must state first of all that what I set for hearing and what has come for my determination is the Chamber Summons dated 11<sup>th</sup> June, 2009 filed under Rules, 20 and 21 of the Constitution of Kenya (***Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual***) High Court Practice and Procedure rules, 2006 - Legal Notice No. 6 of 2006, not the petition. I will therefore not make any order regarding the petition.

Rule 21 provides that such an application shall be by Chamber Summons supported by an affidavit and may be heard ex-parte. When the matter came to me first, I decided to hear the application inter-partes and ordered that the same be served for inter-partes hearing. However, due to the nature of the orders sought, and the circumstances explained to me by counsel for the applicants, I granted temporary orders, pending the hearing of the application inter partes.

In my view, the conservatory or interim orders envisaged under Rule 20 of the Rules have to emanate from the facts disclosed in the application. As stated in the case of **KENYA BUS SERVICE LTD – VS- ATTORNEY GENERAL** (supra), such conservatory or interim orders are not automatic.

In fact, Rule 20 even seems to give a discretion to the court to hear the application for conservatory or interim orders. The said rule provides-

***“20. Notwithstanding anything contained in these***

***Rules, a judge before whom a petition under rule 12 is presented may hear and determine an application for conservatory or interim orders”.***

In my view, the use of the word ***may*** above gives the court a discretion to hear or not to hear the application for conservatory or interim orders. I have myself however decided to hear and determine the Chamber Summons application

Having perused the documents filed and having had a chance to hear all the parties canvass their position in this application for conservatory or interim orders, I am of the view that the main prayer is prayer 2 of the Chamber Summons which states: -

***“2. THAT the Honourable court be pleased to issue***

***conservatory orders allowing the petitioners to continue doing their business on the plot known as L.R. 209/136/259(Formerly 209/136/259/24) without any interference and the respondents be jointly and severally restrained from evicting or in any other way interfering with the petitioners in any way until the hearing and determination of the petition”***

From the above, the applicants want to protect their conduct of business on the plot, for the time being pending hearing and determination of the petition. However, they do not appear to claim any right to ownership of the same. They do not claim in the Chamber Summons that the land is theirs through title under an Act of Parliament, or that it is ancestral land, or that they have any arrangement with the owner or purported owner to do business or stay on the land. They appear to rely on paragraph 12 of the affidavit sworn by **LUKASI ELPHAS**, in which it is deposed as follows: -

***“12. THAT we have worked and have been on the***

***said parcel L. R. NO. 209/136/259(formerly 209/136/259/24) since 1985 when we were assigned the said portion. Annexed marked “LE5” herewith is a copy of the letter from our former Starehe MP that helped us settle on the parcel of land”***

I observe that the above paragraph does not state what ownership rights or official or statutory authority the Hon. MP had to settle people on the land in that capacity. In addition, perusal of the subject letter “**LE5**” indicates that the letter was in fact not signed by the MP, but it was a letter dated 25<sup>th</sup> May, 1985 signed by **G. K. KIRIMA**, as Kanu Chairman Central Ward. Further, the letter addressed to the SSP Central Police Station in paragraph 1 and 2 states: -

***“The above named JUA KALI MECHANICS had been practicing their work at Grogan Road Open Market for a long time.***

***Now, this area is being developed. The Starehe Sub DDC (District Development Committee) held a meeting on 8<sup>th</sup> May, 1985 regarding as where they should continue with their only way and means of their daily bread, and agreed that they use Kijabe Road/Street temporarily until an alternative place is being found for them.”***

From the above contents of the letter relied upon, the letter was not written by the MP as alleged, and it was a request for only temporary use, to give a chance for possibility of finding an alternative place.

Considering the above, it is apparent that the applicants have come to this court for conservatory or interim orders, but they are not disclosing the truth, so they have not come with clean hands. The letter was definitely not signed by the MP. The letter they rely on also does not appear to strengthen their plea for conservatory orders, because even in 1985, which is more than 20 years now, they were meant to be there only temporarily.

In my view, the applicants should have demonstrated in the Chamber Summons what tangible right they have or they consider to have that they need the court’s protection by the grant of conservancy or interim orders. In my view, they have not done so. Therefore I find it impossible to grant them conservatory or interim orders pending the hearing of the petition.

On the request for stay of Milimani CMCC No. 865 of 2009, I observe that, none of the applicants is a party in those proceedings Secondly, no order was made or purported to be made against any of the applicants. In those circumstances, I also find it impossible to stay those proceedings because the applicants have not shown any nexus between them and that case.

I will add that if the applicants made a contention that they had title under any of the Kenyan statutes,

or an offer for the same, or that the land was ancestral or customary land, or that they had a right of inheritance whether statutory or customary, or if the letter relied upon was written by a government official, I would have no hesitation in granting conservatory or interim orders pending the hearing of the petition. In the absence of any such contention, I find it impossible to grant the orders sought. The applicants' counsel has tried, in submissions, to refer to an application made for leave to file proceedings for issuance of title through adverse possession. My observation is that the orders in the court therein, are not before this court. In any event, this ruling does not affect any decisions or appropriate orders, even of an interlocutory nature, that can be made in those proceedings.

Consequently, and for the above reasons, I dismiss the Chamber Summons application and decline to grant the orders sought. Any temporary or interim orders granted, are hereby vacated.

Since the petition is still not determined, I order that costs will be in the cause.

Dated and delivered at Nairobi this 27<sup>th</sup> day of October, 2009.

**GEORGE DULU**

**JUDGE.**

**In the presence of-**

Mr. Muite and Mr. Mwangi for applicant/petitioners

Mr. Onyiso for 2<sup>nd</sup> and 3<sup>rd</sup> respondents

Mr. Ahmednasir for 4<sup>th</sup> respondent

Ms. Mikangi for 5<sup>th</sup> respondent