



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

**Misc Appli. 1789 of 2005**

**JESEE MACHARIA MUTHINJI.....APPLICANT**

**VERSUS**

**COMMISSIONER OF POLICE.....RESPONDENT**

**JUDGMENT**

Jesee Macharia filed this Originating Summons pursuant to Order 36 Rule 7 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act against the Commissioner of Police. He seeks the following orders:-

1. A declaration that the Respondent has contravened the Applicants rights under S.71 of the Constitution, to life by blocking the Applicant from taking up possession using and developing his own commercial plot No. C-20 Harambee Estate Infills;
2. A declaration that the Respondent has contravened the Applicants rights under Section 75 of the Constitution by arbitrarily and oppressively denying the Applicant access and entry into his own plot C-26 Harambee Estate Infills for the purposes of managing it;
3. A declaration that the Respondent has contravened the Applicant's right under Section 77 (9) of the Constitution to have his right to secure protection of the law by the Respondent;
4. A declaration that the Respondents have through the handling of or involvement in the interferences and possession of the said commercial plot No. C-26 Harambee Estate Infills contravened the Applicant's rights under S.82 of the Constitution not to be subjected to arbitrary or capricious exercise of power;
5. A declaration that the Respondents have devalued and/or depreciated the Applicant's rights under S.75 of the Constitution, to property through their blocking of or denying, access, possession, using and developing the said commercial plot C-26 Harambee Estate Infills;
6. A declaration that the Applicant is by virtue of Section 75 and 82 of the Constitution entitled to the said commercial plot C-26 Harambee Estate Infills after the purchase and subsequent allotment by the City Council of Nairobi on the 8<sup>th</sup> May 2002;
7. A declaration that the orders by the Respondents, through the OCS Harambee Police Post and the Officer Commanding Depot, Industrial Area Police Station, instructing the police officers based at Harambee Police Post to demolish the fence and structures erected therein and to evict and dispossess the Applicant of the said commercial plot No. C-26 Harambee Estate Infills is not only illegal but also null and void ab initio as the said orders are untenable, oppressive unreasonable and arbitrary within the meaning of Wednesbury Principles;
8. A prohibitory injunction do issue restraining the Respondent on account of and in respect of the actions and intended action of the police officers and particularly the police officers based at Harambee Police Post from interfering with possession, use and development of the said commercial plot No. C-26 Harambee Estate Infills;
9. Costs of this application be provided for.

This Originating Summons is premised on grounds found on the face of the application and an affidavit sworn by the Applicant. The Originating Summons was opposed by the filing of grounds of opposition dated 16<sup>th</sup> June 2008.

The Applicant contends that he is the sole and lawful registered allottee of the commercial plot No. C-26 Harambee Estate Infills in the suit land. He exhibited as JM 1 an allotment letter dated 8<sup>th</sup> May 2002 from the Nairobi City Council and that he paid a stand premium of Kshs.16,000/= and annual rent of Kshs.1600/= vide receipts JM2. The said plot was allotted to him after purchase from one Gladys Wanjiku Gioche vide an agreement dated 19<sup>th</sup> October 1999 (JM 3). Since the said purchase he has been unable to access the plot as access has been denied by Police Officers from Industrial Area Police Station. He instructed his advocate who wrote a complaint to the Attorney General but nothing has yet to be done and that prompted him to file this suit.

Mr. Menge filed grounds of opposition to the effect that the Applicant has no locus standi to bring this suit as he has not demonstrated that he is the owner of the plot and that the letter of allotment does not confer title.

That this claim arose in 1999 but it is not until 2005 that this suit was filed and that it is so filed contrary to Chapter 39 and 40 Laws of Kenya which provide that suits against the Government should be filed within one year from the time of action.

That the Applicant has not shown how the 1<sup>st</sup> purchaser acquired the land and that his remedy lies with the City Council of Nairobi. That the prayers of injunction and prohibition which have been sought do not lie against the Government and he urged the court to dismiss the application.

In reply Mr. Gathaara Counsel for the Applicant urged that this is a continuing mischief and that there is no time limit to breach of Constitutional rights.

By the time this Originating Summons was filed in 2005, the Chief Justice had promulgated legal Notice 133/01 commonly referred to as the 'Chunga Rules' which governed the procedure regarding constitutional applications - the Rules were repealed with the coming into force of Legal Notice 6/06. The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 (the Gicheru Rules) which govern the Procedure for bringing applications under the Constitution. Such application can be made by way of Originating Summons as properly brought. The Applicant has indicated that the Originating Summons is brought under Order 36 Rule 7 Civil Procedure Rules. That is in regard to the manner of coming to court. However, there is indication as to under which law he brings this application. Application under Chapter V of the Constitution, the Bill of Rights must be brought pursuant to Section 84 of the Constitution. The Applicant has not invoked S.84.

It is also trite and the courts have repeatedly said that an application under Chapter V must be specifically pleaded as to the Section, the paragraph or even sub-paragraph to enable the Respondent know what case is before them to be able to respond. It is only in the prayers that the Applicant invokes Section 71, 75, 77(9) and 82 of the Constitution but there is no pleading in relation to any of the said sections. I will be considering each of these sections later in this judgment.

In **ANARITA KARIMI NJERU VERSUS REPUBLIC (1979) KLR 154** the court had this to say of pleadings in constitutional applications. (Travelyan and Hancox JJ stated) at page 156:

**“We would however again stress that if a person is seeking redress from the High Court or an order which invokes a reference to the constitution, it is important (if only to ensure that justice is done in his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”**

In the case of **CYPRIAN KUBAI V STANLEY KANYONGA MWENDA NRB HMISC APP 612/02**, Justice Khamoni reiterated what was said in the **ANARITA CASE** and stressed that the pleadings should be very precise and to the point. He said as follows:

**“an Applicant moving the court by virtue of Section 60, 65 and 84 of the Constitution must be precise and to the point in relation not only to the Section but also to the subsection and where Applicable the paragraphs and subparagraph of the Section out of 70 and 83 allegedly contravened plus the relevant act of that contravention so that the Respondent knows the nature and extent of the case to enable the Respondent prepare accordingly and also to know the exact extent and nature of the case it is handling.”**

The courts have been of the same view in many other cases. This is because some of the constitutional provisions have paragraphs and subparagraphs with limitations thereto and the Respondent has to be clear what to respond to.

The Applicant herein has failed to plead with precision and it is not easy for the Respondent to respond to this case adequately.

Section 71 of the Constitution offers protection to life and livelihood. At the 1<sup>st</sup> declaration, the Applicant seeks a declaration that the right to life has been breached by the Respondent blocking him from taking up possession and using or developing the plot.

The applicant has not demonstrated how that was done and it remains a mere allegation.

Section 75 of the Constitution offers protection against compulsory acquisition of ones property. Before one seeks such a remedy he must establish that the property or land belongs to him. The question here is whether a letter of allotment is evidence of ownership of land. The Court of Appeal considered is question of whether an allotment letter confers title in **DR. JOSEPH M.K. ARAP NG'OK V JUSTICE MOIJO OLE KEIWA & ANOTHER CA 60/1992** where the court said,

**“It is trite that such title to landed property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.”**

The letter of allotment is dated 8<sup>th</sup> May 2002. It lists all the payments that the allottee was supposed to make. The last paragraph of the conditions reads as follows:

**“If acceptance and payment is not received within 30 days from the date hereof the offer herein contained will be considered to have lapsed without further reference to yourself.”**

The applicant has not demonstrated whether he accepted the offer within 30 days or not. I note that the payments were made to the Nairobi City Council on 15<sup>th</sup> September 2005 about 3 years after the letter of offer. It is a wonder whether the Applicant ever accepted the offer and if so why has not been issued with a title document.

In my considered view the Applicant has not demonstrated that he has title to the suit property. There is no explanation as to why a title has not been issued to the applicant to date. In addition, it is my view that the City Council who allotted the property should have been a party to these proceedings so that they could shed light on whether the Applicant complied with the terms of the offer or not. The Applicant having failed to establish title or ownership to the suit land, S.75 of the constitution cannot offer him protection. That Section reads:

**“S. 75 (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied-**

**(a) The taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country or the development or utilization of property so as to promote the public benefit; and**

**(b) the necessity therefore is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and**

**(c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.**

**(2) Every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court;**

**(a) the determination of the interest or right, the legality of the taking possession or acquisition of the property interest or right, and the amount of any compensation to which he is entitled; and**

**(b) .....**

**(3) .....**

(7) .....

For Section 75 to be invoked the Applicant has to show that he has a right or interest over the suit land. The letter of allotment does not confer any right but it is a letter of offer which the Applicant has to accept and comply with the terms therein and which he has not demonstrated that he did comply for this section to avail. His claim under S. 75 cannot be sustained even if it had been properly pleaded.

The 3<sup>rd</sup> declaration alleges that the Respondent has contravened the Applicant's right under S. 77 (9) of the Constitution to wit his right to secure protection of the law.

S.77 (9) provides for fair hearing before a court of law of competent or any other adjudicating authority in civil proceedings. It reads as follows;

**“S.77 (9) A court or other adjudicating authority prescribed by law for determination of the existence of or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority; the case shall be given a fair hearing within a reasonable time.”**

The Applicant has not pleaded this Section nor has he adduced any evidence in support thereof. There is no allegation that the Respondent adjudicated in a civil matter involving the Applicant and another in unfair manner. There is no basis upon which the prayer sought under S.77 (9) can be granted.

The Applicant at the 4<sup>th</sup> declaration alleges contravention of his rights under S.82 of the Constitution, not to be subjected to arbitrary or capricious exercise of power. Section 82 of the Constitution offers protection against discrimination. The section sets out the various grounds upon which one can be discriminated against and defines what 'discriminatory' means at S.82 (3). It reads:

**“S. 82 (3) in this Section the expression ‘discriminatory’ means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, or residence or other local connexion, political opinions, colour creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description”**

The Applicant has not categorized the nature of discrimination that was accorded to him and which group of persons were given preferential treatment to him. He has not pleaded the said arbitrary exercise of power as alleged and the claim is baseless and cannot lie.

All in all what the Applicant has placed before the court is claim which is unsupported by pleadings and evidence and the same cannot succeed.

It is hereby dismissed with the Applicant bearing the costs of the Originating Summons.

Dated and delivered this 30<sup>th</sup> day of September 2008.

R.P.V. WENDOH

JUDGE

**Present**

Mr. Gathaara – Applicant

Daniel – Court clerk