



**Bandari Investment Company Limited v National Police Service & others
(Petition 15 of 2017) [2021] KEELC 4483 (KLR) (28 January 2021) (Judgment)**

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Neutral citation: [2021] KEELC 4483 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

PETITION 15 OF 2017

M SILA, J

JANUARY 28, 2021

BETWEEN

BANDARI INVESTMENT COMPANY LIMITED PETITIONER

AND

NATIONAL POLICE SERVICE & OTHERS RESPONDENT

JUDGMENT

(Petitioner owning certain land which it claims was invaded by squatters; petitioner alleging that the police service and the County Government breached its fundamental rights by failing to evict the squatters and failing to enforce building regulations against them; petitioner inter alia seeking orders for the eviction of the squatters; contention that what the petitioner raises are issues that can be canvassed in ordinary criminal and civil litigation and not fit to invoke the constitution; the avoidance principle; when parties are required to pursue their remedies through prescribed ordinary litigation; the claim of eviction being one that ought to have been pursued through an ordinary civil suit and not a constitutional petition; no breach by the authorities in the circumstances of the case for failing to evict the squatters without a court order; petition dismissed)

1. This suit was commenced through a petition filed on 1 December 2017. The petitioner is a limited liability company wholly owned by Bandari Sacco Limited. They have sued the National Police Service (1st respondent), the Regional Coordinator Coast Province (2nd respondent) the Attorney General (3rd respondent) the County Government of Mombasa (4th respondent), Oriole Investment Limited (a construction company as the 5th respondent), whereas the 6th – 23rd respondents are individuals said to be operating as Kaguta Self Help Group, Nguu Tatu Self Help Group and others, being a group of squatters operating under the name of Nguu Tatu Development Community. There is a full list of membership which is attached to the affidavit in support of the petition.



2. The petitioner is the registered proprietor of the land parcel identified as Sub-Division No. 817 (Original Number 324/2) Section II/MN measuring approximately 59.6 acres (the suit land) which land is located at Nguu Tatu area, Kiambeni, Mombasa County. The petitioner avers that it purchased the suit land in the year 2012, and that at the time of purchase, the suit land was a farm and had no squatters occupying the same. The petitioner avers that it acquired the suit land with the intention of developing a low income residential estate with modern day facilities for its members. It has pleaded that it first planned to construct a perimeter wall to create a gated community, and in this regard, it applied for and obtained permission to do so from the 4th respondent, vide permit No. P/2016/499 dated 23 December 2016. The petitioner then awarded the contract to construct the wall to the 5th respondent.
3. It is contended that in the year 2016, the 6th – 23rd petitioners, armed with pangas, bows and arrows, metal bars, knives and other crude weapons, overran the petitioner's security guards, took possession of the suit land, occupied it, and subdivided it amongst themselves, and it is further contended that they have been selling portions of the suit land to other unsuspecting squatters. It is averred that currently there are scattered temporary structures made of wood, old iron sheets, and plastered with mud. The petitioner states that it reported the incident at Bamburi Police Station after which some of the invaders were arrested and charged in court.
4. It is pleaded that on 9 September 2016, 22 February 2017 and 1 March 2017, the petitioner obtained orders of eviction in Mombasa SRMCC No. 1686 of 2016 (Bandari Investments Co. Limited vs Hashim Loma & Others) but when the petitioner attempted to evict the 6th – 23rd respondents, the members resisted the eviction violently by attacking the agents of the 1st – 3rd respondents using crude weapons. The petitioner avers that the 5th respondent has therefore not been able to develop the wall and its agents cannot access the suit land for fear of instant death.
5. The petitioner states that it reported the armed invasion of the land to the agents of the 1st, 2nd, 3rd and 4th respondents ; in particular to the 1st – 3rd respondents, that a criminal offence has been committed, and to the 4th respondent, that the 6th respondent was occupying and developing structures without their approval as the licencing authority. It is pleaded that despite this report the agents of the 1st – 3rd respondents have not evicted the 6th – 23rd respondents, and that though the 4th respondent intervened by sending its officers to evict the 6th – 23rd respondents, they were met by strong opposition backed by armed violence, and the 4th respondent abandoned the exercise. The petitioner contends that the 4th respondent has power on its own to enforce the Building Code, the Public Health Act and the Physical Planning Act, to ensure that all structures constructed within its jurisdiction are approved and in line with the use of the land, and that where this is not possible, the 4th respondent can seek help from the 1st – 3rd respondents for armed protection of its officers.
6. The petitioner contends that by failing to enforce the Building Code, the Public Health Act and the Physical Planning Act, the 4th respondent has discriminated against the petitioner contrary to Article 27 of the Constitution. It is averred that the petitioner, being the registered proprietor, cannot develop the suit property without first obtaining its building plans approved by the 4th respondent yet the 6th – 23rd respondents are busy developing the suit property without obtaining such a permit from the 4th respondent.
7. The petitioner avers that it is a private company and its membership is composed of civilians who have no constitutional or statutory mandate to defend their properties against armed invaders like the 6th – 23rd respondents, and they are required to report invasion of their land to the agents of the 1st and 2nd respondents, which they have done.



8. The petitioner argues that it requires the arms of Government headed by the 1st & 2nd respondents to forcefully move to the suit land, and by use of state power, evict the 6th – 23rd respondents and others in possession of the suit land, and hand over the suit land to the petitioner and in the process the 1st respondent be at liberty to employ the elements of criminal law.
9. The petitioner contends that it has been discriminated against by the 1st – 4th respondents inter alia, despite being the registered owner, the 1st – 4th respondents have refused to utilize the full state machinery to evict the 6th – 23rd respondents and in the process charge them before a court of law; that the petitioner is being asked to produce a court order authorizing the eviction of the 6th – 23rd respondents but the 6th – 23rd respondents are not required to produce a court order showing how they entered and continue to occupy the suit land against the will and wishes of the registered proprietor. The petitioner avers that the 6th – 23rd respondents have totally blocked and have continuously breached the constitutional rights of the petitioner and unless the court intervenes the petitioner risks losing the suit land to the 6th -23rd respondents.
10. The petitioner has pleaded that Kenya is a democratic state where the constitution provides the process through which the lives of the citizens are to be governed and none of these provisions allow one class of citizens to use violent means to acquire property owned by another class of citizens. The petitioner has stated that Article 40 of the Constitution, Section 7 (d) of the Land Act, 2012, Section 36 of the Land Registration Act, 2012, and Section 7 of the Limitation of Actions Act, Cap 22, do not contemplate aspects of acquisition of land where entry into land, continued occupation and use of the land is through armed invasion. It has pleaded that attempts to acquire, occupy and use land through violent means against a registered proprietor, is unconstitutional, and unavailable in a democratic state.
11. The petitioner contends that the 1st, 2nd and 3rd respondents have failed and betrayed the constitution by not using the constitutional state power to stop the continued criminal activities of the 6th – 23rd respondents and (should) restore the suit land to the rightful owner who is the petitioner.
12. The petitioner has thus sought the following orders (slightly paraphrased for clarity and brevity):-
 - (a) A declaration that the 6th -23rd respondents operating as Kaguta Self Help Group, Nguu Tatu Self Help Group and others are not squatters but criminals who have forcefully breached and continue to so breach the constitutional rights of the petitioner to own property contrary to Article 40 of the Constitution.
 - (b) A declaration that by the criminal acts of the 6th – 23rd respondents operating as Kaguta Self Help Group, Nguu Tatu Self Help Group and others the constitutional rights of the petitioner to own property pursuant to Article 40 of the Constitution has been breached and continues being breached.
 - (c) A declaration that where an organized group of people armed with weapons of whatsoever description capable of maiming, harming, injuring, threatening to maim, harm or injure, without lawful court order enters into the property of a proprietor without his consent and continues resisting all manner of eviction attempts by the proprietor or the proprietor's agent, the right constitutional organ to evict such a group is the National Police Service.
 - (d) A declaration that where people arm themselves, enter and remain on private property by use of force and keep off the registered owner by way of violence such occupation offends the letter and spirit of Article 40 of the Constitution, Section 7 (d) of the Land Act, Act No. 6 of 2012, Section 36 of the Land Registration Act, Act No. 3 of 2012, and Section 7 of the Limitation



of actions Act, Cap 22. Attempts to acquire, occupy and use of land through violent means against the registered proprietor is unconstitutional and unavailable in a democratic state.

- (e) A declaration that the 5th respondent has failed and continues to fail in implementing; Architects and Quantity Surveyor's Act, Cap 525, Laws of Kenya (Sections 7,8 and 9); The Building Code, Local Government Building By-Laws 1986; National Construction Authority Act, No. 41 of 2011; National Construction Authority Regulations, 2014; The Physical Planning Act, Cap 286; The Survey Act, Cap 299; The Environmental Management and Coordination Act, Cap 387; and the Public Health Act, Cap 242.
 - (f) A declaration that the 4th respondent has discriminated against the petitioner contrary to Article 27 of the Constitution by applying the Building Code, the Public Health Act, and the Physical Planing Act, selectively and allowing the 6th-23rd respondents operating as Kaguta Self Help Group, Nguu Tatu Self Help Group, and others to construct on the suit land without approved plans.
 - (g) An order of judicial review in the form of orders of Mandamus under Article 23 (3) (a) (b) (c) of the Constitution do issue against the 1st, 2nd, 3rd and 4th respondents by themselves, their agents and/or assigns to promptly demolish all the structures erected by the 6th respondent and evict the 6th-23rd respondents operating as Kaguta Self Help Group, Nguu Tatu Self Help Group and others, their agents, servants and/or assigns currently occupying the suit property.
 - (h) A permanent injunction restraining the 6th-23rd respondents operating as Kaguta Self Help Group, Nguu Tatu Self Help Group and others by itself, its servants and/or agents from entering into, occupying and/or in any manner whatsoever from interfering with the petitioner's use and occupation of the suit land.
 - (i) Costs of the suit.
13. The petition is supported by the affidavit of Ken Tobias Odero Sungu, who is a director of the petitioner. He has deposed that the petitioner purchased the suit land in the year 2012 and a transfer effected to its name. He has deposed that they had an arrangement with its neighbour, Messrs Hussein Dairy Limited for securing their properties. He has stated that prior to the invasion, the petitioner's members would visit the land. He recalled that sometimes in the year 2016 the invasion of the land took place and the invaders chased away the petitioner's security amidst threats of personal injury or death. The petitioner then filed the suit SRMCC No. 1686 of 2016 against the original invaders namely Hashim Loma, Baya, Omar, Juma, Shida, Charo, Kashindo, Nahodha John and Chris. He has deposed that on 9 September 2016, 22 February 2017 and 1 March 2017, the court issued orders of eviction and that there was a partial eviction. He has deposed that to challenge the orders issued, two other invaders, namely Dalu Chigamba Munga and Ephrain Kitsayo Baya, filed the suit Mombasa High Court Judicial Review No. 7 of 2017, through which the orders issued in Mombasa SRMCC No. 1686 of 2016 were quashed by the High Court on 18 October 2017. He has averred that as the suit Mombasa SRMCC No. 1686 of 2016 was being challenged, the invaders aggressively brought in more people who are currently scattered in a big portion of the suit land.
14. He has stated that as a resident of Mombasa, he is privy to the tricks and approaches applied by civilian land grabbers at the Coast. He has claimed that the established practice is that a first group moves in with violence and takes possession of the target property. Once in possession they bring in a second level of invaders to purchase portions of the target plot and simultaneously construct temporary structures. This process goes on and unless evicted, permanent structures set in complicating the whole process of possible eviction. He deposed that the petitioner cannot access the suit land due to threats by the



invaders and it has not been possible to obtain the complete list of actual invaders. He has stated that the original invaders were few but they have been selling portions of the suit land and now there are scattered temporary shelters.

15. He deposed that when the first group of invaders moved into the suit land the petitioner reported at Bamburi Police Station but not much progress was made after this report. He has reiterated that the intention of the petitioner was to construct a housing scheme and they obtained planning permission to erect a perimeter wall. He has deposed that during the electioneering period of the months of June – November 2017, the 6th -23rd respondents embarked on massive sale of portions of the suit land. He has contended that the issue of invasion of private property in Kisauni Constituency by use of force is a matter of public notoriety and this court should reverse the trend by enforcing the rule of law and defending sanctity of title. He averred that the petitioner now requires the arms of Government headed by the 1st and 2nd respondents to forcefully move into the suit land, and by use of state power, evict the 6th -23rd respondents and any other party in possession of the suit land. He has deposed that unless the court intervenes, the petitioner risks losing its property and he has drawn the example of the Waitiki Farm where the proprietor lost his property to squatters. He has contended that to establish a squatter's interest a party needs to prove continuous possession of land for a period exceeding 12 years which the 6th -23rd respondents have not attained and that in any event they are invaders and not squatters.
16. Together with the suit, the petitioner filed an application seeking orders to be allowed to continue with construction of the perimeter wall while this suit is pending which orders were duly granted but later varied to be that the petitioner may build the wall up to a height of two feet.
17. The 1st – 3rd respondents filed a response through the State Law Office which response is titled "Grounds in Support of the Petition". They have pleaded inter alia that the petitioner enjoys all rights of use of the suit land guaranteed by Article 40 read together with Article 43 of the Constitution. It is stated that it is the desire of the 1st – 3rd respondents to provide normalcy, peace, calmness and order, on the suit property always. They have pleaded that a decree should be issued stopping all squatters and invaders from the suit parcel. In relation to prayer (g), they prayed that the court strikes a balance in the eviction orders to issue to ensure the rights of the registered owners are upheld. They have stated that the petition and the prayers therein are merited and should be granted.
18. The 6th, 12th, 20th, 21st and 23rd respondents entered appearance (under protest) through the law firm of M/s Stephen Macharia Kimani Advocate and they filed what they titled as "Statement of Facts in Opposition to/preliminary objection to the petition and application for interim relief." I will restrict myself to what is pleaded in respect of the petition since the application for interim relief was already canvassed. It is their contention that the petition is incompetent, inter alia, for reason that the petition is brought against private individuals who can neither enforce nor safeguard against the alleged contravention of the petitioner's fundamental rights. They averred that the eviction or squatters, or invaders of private land, who physically dispossess the title owners, and in whose favour time may run, is not the work of the National Police Service or the County Government of Mombasa. They pleaded that trespass or squatting upon private land, which physically dispossesses the title owner is neither criminal, nor does such trespass or squatting contravene the right against discrimination, or to property, under Articles 27 and 40 of the Constitution. They averred that the acquisition by the petitioner of the title to the suit land, when it was occupied by trespassers or squatters, does not place the purchaser in any better position than the vendor, who could only pass title to such land subject to any accrued overriding interests/rights of occupation, or claim under adverse possession or rights by prescription. They averred that the issues of wrongful entry or trespass and squatting on private land, or even forcible entry or detainer or development with intent to annoy, do not raise any constitutional issue, or issue involving the interpretation of the Constitution.



19. They stated that the issue of whether they are guilty of forcible entry or detainer, or squatters or trespassers, or if they have an overriding interest, is not a constitutional issue to warrant the filing of a constitutional petition, nor can such issues be determined by the County Government of Mombasa. They contended that their legal status vis-à-vis the suit land can only be determined by court upon hearing of various pending actions and they cited the following suits :-
- (a) Mombasa ELC No. 201 of 2013, Ibrahim K. Baya & 12 Others vs Mohamood Kassam & 7 Others (said to be a claim by squatters for recovery of Plot No. 819 of Section II Mainland North);
 - (b) Mombasa ELC No. 298 of 2013 (OS), Muhambi Kalinga & 188 Others vs Mohamed Kassam & 4 Others (said to be a claim for adverse possession over Plot No. 819 Section II Mainland North);
 - (c) Mombasa Constitutional Petition No. 74 of 2014, Kazungu Katana & 382 Others vs Mohamed Kassam & 6 Others;
 - (d) Mombasa ELC No. 301 of 2013 (OS) Martin Chiponda & 860 Others vs Mohamed Kassam & 13 Others (said to be a suit for recovery of plots No. 324, 382, 817 and 819 Section II Mainland North);
 - (e) Shanzu Criminal Case No. 822 of 2015, R vs Michael Fondo & 10 Others (said to be a charge of trespass)
 - (f) Shanzu Criminal Court Case No. 1252 of 2015, R vs Samuel Chivatsi (said to be a charge of injuring animals on the same land)
 - (g) Shanzu Criminal Case No. 1040 of 2016, R vs Joha Athumani Saha (said to be a charge of disobeying a lawful court order issued in Shanzu Criminal Court Case No. 822 of 2015 with regard to the same land)
20. It is said that the above civil and criminal cases are yet to be determined and the petitioner has abused the court process, by filing a constitutional petition over the same land, instead of filing an independent claim by plaint, or otherwise seek to join the existing claims in which persons who sold to the petitioner the suit land are named as defendants. It is said that the petitioner is aware of these pending proceedings. They have further pointed to the suit Mombasa CMCC No. 1686 of 2016 whose proceedings were quashed by the High Court. It is pleaded that the petitioner has simultaneously on the same facts invoked civil and criminal processes. They have urged that the petitioner has not cited a single section of the law that supports its plea that the National Police Service, the Regional Coordinator Coast Province, the Attorney General, and the County Government of Mombasa, have powers to evict trespassers or squatters. They urged that this petition be dismissed pending the hearing of Mombasa ELC No. 301 of 2015 to avoid a multiplicity of suits. They have further stated that the criminal justice process has not found them guilty of any criminal acts and thus the prayers in the petition cannot lie against them.
21. There is a replying affidavit filed by the 5th respondent, who was the one contracted by the petitioner to build the perimeter wall. I have gone through it. What the 5th respondent deposes on, to me, concerns a dispute that the 5th respondent appears to have, over the contract to build the wall, which contract the 5th respondent claims to have been breached by the petitioner.
22. I have seen on record an application dated 28 January 2019 filed on behalf of Kazungu Katana Kazia, Nazi Ngala Tsuma, Tunje Chiro, Cornelius Deche Chilango on behalf of Nguu Tatu Community



- Based Organisation, seeking orders to be enjoined to this suit as interested parties. I have no record of this application ever being prosecuted.
23. Nothing was filed by the 4th respondent and the 7th -11th, 13th -19th and the 22nd respondents.
 24. It was agreed that the petition be argued through written submissions with opportunity to highlight and this was duly done.
 25. In his submissions, Mr. Munyiya, learned counsel for the petitioner, inter alia submitted that the petitioner is the registered proprietor of the suit land. He repeated that the 6th -23rd respondents violently invaded the land. He submitted that when the petitioner reported the invasion by the 6th – 23rd respondents to security agencies represented by the 1st – 3rd respondents, they requested for a court order, and a report to the 4th respondent did not yield results. He submitted that the constitutional and statutory foundation of the petition is inter alia based on Sections 152A, 152B, and 152E of the Land Laws (Amendment) Act, 2016. He wondered why the 4th respondent has failed to enforce the provisions of the Building Code , the Public Health Act and the Physical Planning Act. He submitted that the right to property is guaranteed under Article 40 of the Constitution. He also referred me to Article 43 of the Constitution relating to Economic and Social rights in relation to the intention of the petitioner to develop housing on the property. He also referred me to Article 238 of the Constitution on national security and to Section 24 of the National Police Act, Act No. 11A of 2011, on the functions of the Kenya Police Service. He questioned the claim that the 6th -23rd respondents have been on the land for a long time and submitted that a claim for adverse possession cannot be sustained against the petitioner. He submitted that his clients seek police intervention as the 6th -23rd respondents are violent. He submitted that the petitioner has rightfully come to court to seek the eviction of the respondents and he referred me to Section 152E of the Land Laws (Amendment) Act, 2016 which provides a procedure for eviction of squatters and submitted that the petitioner has met the conditions necessary for the eviction of the 6th -23rd respondents. He submitted that the 1st -3rd respondents have a role in protecting private property. He referred me to various authorities which I have read.
 26. On his part, Mr. Kimani, learned counsel for the 6th, 12th, 20th and 23rd respondents, inter alia submitted that there is no constitutional issue arising from the facts pleaded in the petition. He submitted that trespassers who enter land with intent to annoy are dealt with under the Trespass Act and the Penal Code. He submitted that if they damage any property, or take anything of value, they are subject to criminal law on malicious damage to property or theft, as well as an action for damages or ejection. He submitted that some people have been prosecuted and convicted, and that the court directed the original owners to set aside some land for the squatters whose premises were established to be on the suit land. He submitted that the conviction is the subject of an appeal. He pointed out that the petitioner has not cared to comment on this aspect of the case. He submitted that a constitutional petition cannot unravel the alleged trespass, or held to enforce the due performance of a building contract, and that eviction is done by a bailiff decreed by an order of court. He referred me to the suit Mombasa CMCC No. 1686 of 2016 where the petitioner had obtained a decree which was quashed. He submitted that the police cannot be blamed that the High Court quashed the decree for possession issued by the lower court. He held the view that the police and the County Government cannot intervene because there are several pending civil cases filed before this petition. He asserted that the petitioner's remedy lies in civil law and not in a constitutional petition. He submitted that the facts do not show a breach of the petitioner's fundamental rights. He pressed that the removal of a trespasser or squatter is the domain of private civil law in an action for ejection and does not raise a constitutional issue. He submitted that the petitioner has not shown that the respondents were not in adverse possession when it purchased the land.



27. Mr. Mkan for the 5th respondent, filed submissions, but to me, they appear to argue whether or not the 5th respondent was entitled to file suit for breach of the contract to erect the wall. I do not see how they address the petition itself.
28. On his part, Mr. Makuto, learned State Counsel holding brief for Mr. Wachira Nguyo for the 1st – 3rd respondents, submitted that they support the submissions of the petitioner.
29. I now take the following view of the matter.
30. It is apparent that the petitioner contends that despite its land being invaded, and despite making a report to the police and to the 4th respondent, no action has taken place. The petitioner also feels discriminated because it had to seek building permission to put up a wall around the suit land, yet it is its view that the 4th respondent did nothing when the 6th – 23rd respondents made developments on the land without seeking any planning permission. The gist of the reply by the 6th – 23rd respondents is that the remedy of the petitioner lies in ordinary civil law and not in a constitutional petition and that no constitutional issues arise. What in essence, Mr. Kimani raised, is what is considered as the principle of “constitutional avoidance”, that is, that a court will not determine a constitutional issue when the matter can be determined on other basis. The Supreme Court addressed this principle in the case of *Communication Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others* (2014) eKLR where the court stated as follows :-
- (256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court, Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:
- “I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”
- (257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936)).
- [258] From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents’ claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.
31. A similar issue also arose in the case of *Uhuru Muigai Kenyatta vs Nairobi Star* (2013)eKLR. In that case, the petitioner alleged that the respondent had published statements that defame his character. A preliminary objection was raised, inter alia, that the remedy of the petitioner lay in the tort of defamation which could be canvassed in an ordinary civil suit. The court upheld the objection and dismissed the petition. In doing so, Lenaola J (as he then was) stated as follows :-
3. Turning now to the second issue, it is obvious that principally, the Petitioner’s complaint is that he was defamed by the publication whose facts are summarized above. If so, then the remedy for his pain, if at all, lies in Civil Law and not a reference under the Constitution.
14. In *NM & Others vs Smith and Others* (*Freedom of Expression Institute as Amicus Curiae*) 200 (5) S.A. 250 (CC) the Court stated thus;



“It is important to recognise that even if a case does raise a constitutional matter, the assessment of whether the case should be heard by this Court rests instead on the additional requirements that access to this court must be in the interests of justice and not every matter will raise a constitutional issue worthy of attention.”

15. Similarly in *Minister of Home Affairs vs Bickle & Others* (1985) L.R.C. Cost.755, Georges CJ held as follows;

“It is an established practice that where a matter can be disposed off without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so (*Wahid Munwar Khan vs. The State* AIR (1956) Hyd.22). The judge went on to add that: “Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”
32. It is therefore an established principle that where a person has remedies in ordinary civil law, or remedies provided for in statute, he needs to pursue those remedies and follow the provisions of the laid down statute, rather than invoking the constitution. Indeed, in many instances, a constitutional petition is not the best avenue to take, where there is an established civil remedy and procedure, for it may happen that there are facts in contention which can only be tested when the suit is heard in the manner that civil suits are ordinarily conducted.
33. It does appear to me that the basis of this petition is that there are persons who have invaded the land of the petitioner, and indeed, among the prayers that the petitioner seeks in this petition, is their eviction from the land. This is apparent in prayers (g) and (h) where the petitioner seeks the demolition of the structures erected by the 6th -23rd respondents, and their eviction, and a permanent injunction restraining the 6th -23rd respondents from the suit land. Eviction from land and a permanent injunction to bar a person from certain land are matters that are routinely heard through ordinary civil suits commenced by way of plaint. If the person sued wishes to resist the suit, say because he claims the land, then he will file a defence and probably a counterclaim. The case will then be heard by each party presenting evidence to support his/her respective case after which the court will render a decision. I do not see any basis upon which this court ought to circumvent that procedure upon consideration of the facts as contended by the petitioner. If the petitioner wants an order of eviction, and/or an order of permanent injunction against the 6th -23rd respondents, nothing bars the petitioner from filing an ordinary civil suit to seek these orders.
34. Indeed, it does appear that the petitioner had actually filed suit, being the case Mombasa CMCC No. 1686 of 2016. In that suit, the petitioner inter alia sought orders of eviction and destruction of all illegal structures erected on the suit land together with mesne profits. The petitioner obtained a judgment which was however quashed because the Magistrate’s Court did not have the requisite pecuniary jurisdiction. I do not see how an issue that the petitioner thought could be properly addressed through an ordinary civil action has now mutated into a constitutional issue. The petitioner has in fact not explained why it did not deem fit to file another suit in a court of competent jurisdiction to claim the same remedies it had sought in the case Mombasa CMCC No. 1686 of 2016.
35. My position is that the petitioner ought to have filed an ordinary civil suit rather than a constitutional petition. There are indeed issues raised by the 6th – 23rd respondents which cannot be heard and determined through this petition. For example, the 6th – 23rd respondents have raised the issue that they are in adverse possession and have pointed me to several cases that they have filed where they seek



orders of adverse possession in their favour. I cannot determine an issue of adverse possession through a petition and I cannot wish away their response. If indeed there is a question whether the 6th – 23rd respondents are in adverse possession, that is a question that can only be determined through a hearing in an ordinary civil suit.

36. Apart from the fact that the petitioner had filed a civil suit before the courts, the petitioner appears alive to the law regarding eviction of illegal occupants. Mr. Munyithya, learned counsel for the petitioner, in his submissions, referred me to Section 152E of the Land Act which provides as follows.

152E. Eviction Notice to unlawful occupiers of private land.

- (1) If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.
- (2) The notice under subsection (1) shall -
 - (a) be in writing and in a national and official language;
 - (b) in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;
 - (c) specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and
 - (d) be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.

37. Mr. Munyithya tried to submit that the above process has been undertaken through this petition. I do not buy that. This petition cannot be construed as a proceeding under Section 152E of the Land Act. If the petitioner wished to invoke the above section of the law, nothing stops the petitioner from doing so, but the petitioner cannot now turn to claim that this petition is akin to following the procedure provided in Section 152E above.

38. Given the foregoing it is my finding that this petition is an abuse of the process of court and devoid of merit.

39. I am aware that there are other orders sought by the petitioner against the 1st -4th respondents. However, the substratum of the petitioner's case remains the claimed invasion and occupation of its land by the 6th – 23rd respondents. If you remove the 6th – 23rd respondents from the equation, and assuming that there was no invasion of the suit land, then we would not have this case, and neither would the complaints raised against the 1st – 4th respondents exist. Having found that the petitioner ought to have filed an ordinary suit, the substratum of this petition fails, and I do not see how I can now grant the orders sought in this petition.

40. Nonetheless, there is an issue raised by the petitioner which I feel the need to address. The petitioner has claimed that the police failed to act despite being so informed, and if I got it right, the petitioner expected the police to proceed to forcefully evict the 6th -23rd respondents, upon presenting its complaint of invasion or occupation. I cannot fault the police for not proceeding to evict the 6th -23rd respondents based solely on the complaint of the petitioner. It does appear that the 6th – 23rd respondents or other occupants of the land had pending cases in court vide which they were asserting their title to the land. If the police had proceeded to evict the 6th -23rd respondents based on the complaint of the petitioner, then the police would have been circumventing the due process of the law.



41. In any case, I am not persuaded that in every event of an alleged illegal occupation of land, then all one has to do is report to the police and expect the police to proceed to evict such persons, based solely on that complaint. There is a possibility that persons in occupation of land, though not being the registered proprietors, have an overriding interest in the land, or have acquired rights, through prescription, or through other legally permissible ways, over the said land. These are rights that can only be ascertained by the courts and the police are not possessed of powers to determine such rights. Judicial authority does not lie with the police but with the courts. What the police can do is prefer criminal charges if they are persuaded, that from the facts, a criminal offence has been committed. Indeed, that was the basis of the holding in the case of *Moi Education Centre Co. Ltd vs William Musembi & 16 Others* (2017) eKLR, ironically referred to me by Mr. Munyithya. In that case, some persons who were squatting on land were forcefully evicted and their houses demolished under the supervision of police officers. The evictees claimed that this was done without any court order. They sued the appellant and the Inspector General of Police for various declarations of violation of their constitutional rights. One of the issues canvassed in this case was whether the appellant was obligated to obtain a court order prior to evicting the occupants. In the circumstances, the court was of the view that an order of the court was a prerequisite, although it did appreciate that each case must stand and be decided on its own facts. On the facts of this case, I am unable to fault the police for not proceeding to evict the 6th -23rd respondents without a valid court order. It is trite that the 6th -23rd respondents had pending suits claiming the land. I do not see any basis why the petitioner would have expected the police to evict the 6th -23rd respondents while they had pending cases. What the police appear to have done was to charge some persons with criminal offences and I cannot fault them for doing so instead of out rightly evicting the 6th – 23rd respondents.
42. On the complaint that the 4th respondent discriminated the petitioner I see no basis. The 6th -23rd respondents are claimed to be squatters. Again, in the circumstances of this case, one cannot expect the 4th respondent to simply move in and demolish the structures the squatters had built without any valid court order. I really do not see the need of belabouring this point.
43. I will now turn to the specific prayers in the petition. Prayer (a) seeks a declaration that the 6th -23rd respondents are not squatters but criminals. I am unable to make that declaration. Whether or not the 6th -23rd respondents are criminals is not an issue that can be determined through a constitutional petition but through the ordinary criminal process. I cannot, through these proceedings, find the 6th -23rd respondents guilty of any criminal offence. Prayer (a) is thus disallowed. Prayer (b) seeks a declaration that the “criminal acts” of the 6th -23rd respondents have violated the constitutional right of the petitioner to own property. I will repeat that I cannot declare the acts of the 6th -23rd respondents to be criminal through these proceedings. I have also already held that the question of invasion of property by the 6th – 23rd respondents is one that ought to be addressed through an ordinary civil suit. I therefore disallow prayer (b). Prayer (c) of the petition seeks a declaration that where an organised group forcefully invades land, then the constitutional organ to evict such a group is the police. I cannot make a blanket declaration as sought by the petitioner. I will yet again refer to the case of *Moi Education Centre vs William Musembi*, where the Court of Appeal held that each case must stand and be decided on its own facts (see paragraph 56 of the said decision). In the circumstances of this case, I have stated that I cannot fault the police for seeking an order of the court before evicting the persons claimed to be occupying the suit land. Prayer (c) is thus disallowed. Prayer (d) seeks orders that forceful occupation of land is unconstitutional and unavailable in a democratic state. At the outset, I cannot encourage persons to violently take possession of any person’s land. However, I cannot make blanket declarations when there is no substratum in a case as I have held here. On prayer (e) similarly, I am unable to make declarations against the 5th respondent. If it is the view of the petitioner that the 5th respondent, whom



it contracted to build the wall, has violated the building code and the various statutes mentioned in prayer (e), nothing stops the petitioner from suing the 5th respondent for breach of contract. Prayer (e) is thus dismissed. Prayer (f) is a prayer against the 4th respondent claiming discrimination. I have already held that in the circumstances of this case, the County Government of Mombasa cannot be faulted for failing to destroy the structures on the land without a valid court order. That prayer is thus disallowed. Prayer (g) is for eviction and prayer (h) is seeking a permanent injunction against the 6th – 23rd respondents. I have held that if the petitioner wants these prayers, then the avenue is to file a civil suit for determination. These prayers are thus disallowed. The final issue, prayer (i) regards costs. I have found the petition unmerited but considering all the surrounding circumstances of this matter, I make no orders as to costs.

Judgment accordingly.

DATED AND DELIVERED THIS 28TH DAY OF JANUARY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

