

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW NO. 8 OF 2021

REPUBLIC.....APPLICANT

VERSUS

O.C.S KALOLENI POLICE STATION & 6 OTHERS.....RESPONDENTS

AND

DAVID NJAGI WANGAI.....EX-PARTE APPLICANT

RULING

(Application for leave to commence judicial review proceedings; ex parte applicant wishing to have an order of mandamus to compel arrest of persons he claims have trespassed into his land; application dismissed as ex parte applicant can as well file a civil action against the trespassers)

1. What is before me is an application dated 8 April 2021 and filed on 8 July 2021 seeking leave to commence judicial review proceedings for an order of mandamus to compel the 1st respondent (OCS Kaloleni Police Station) to take action and/or arrest the 2nd, 3rd, 4th, 5th, 6th and 7th respondents in respect of case reference OB No. 21/26/10/2019 in Kaloleni Police Station. The ex parte applicant also wishes to have the 2nd - 7th respondents prohibited from having any dealings with the ex parte applicant's property which is described as a parcel of land at Mutulu Village in Mwananwanga Location of Kaloleni (the suit land). The applicant seeks that the grant of leave do operate as stay of any trespass or dealings with the land in dispute.
2. The application is supported by the affidavit of the ex parte applicant. He deposes that he is the owner of the suit land and that the 2nd – 7th respondents trespassed into the land on 24 October 2019 and destroyed almost every tree and his maize field. He states that he reported the matter to Kaloleni Police Station through the OB No. 21/26/10/2019 but that the 1st respondent has declined to take any action or arrests. That is why he seeks the orders herein.
3. The grant of leave to commence judicial review proceedings is in the discretion of the court. I have considered the matter and I am not persuaded that this is a fit case for grant of leave as prayed. Firstly, there can be many reasons why the OCS may not have effected an arrest. I do not think that I have sufficient material to order the OCS to arrest the 2nd – 7th respondents. If the ex parte applicant is of the strong opinion that a criminal offence has been committed and no action is being taken, he can complain to the Independent Police Oversight Authority (IPOA) or to the Inspector General of Police for them to investigate the matter. He also has the right to private criminal prosecution. Apart from the criminal path, he also has a right to commence a civil action against the 2nd – 7th respondents. Nothing stops him from filing suit to assert his rights. If he feels that there has been trespass or destruction of his property, he has every right to file an ordinary civil suit for relief. In any event, the rights (if any) of the alleged trespassers cannot be determined in a suit merely compelling their arrest. That can only be determined in an ordinary civil suit.
4. For the above reasons, I dismiss this application but make no orders as to costs.
5. Orders accordingly.

DATED AND DELIVERED THIS 28TH DAY OF OCTOBER 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA.