



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CONSTITUTIONAL PETITION NO. 15 OF 2018

PHOEBE WAITHERA MAREMMA & OTHERS..... PETITIONERS

VERSUS

NATIONAL POLICE SERVICE & OTHERS RESPONDENTS

JUDGEMENT

1. The petition was taken out by the six (6) petitioners against the thirty six (36) respondents seeking the following reliefs;

a) There do issue an order of judicial review in the form of orders of Mandamus compelling the 1st, 2nd and 3rd respondents, their agents and assignees to demolish all existing structures, arrest and prosecute in Criminal Court the 6th – 36th respondents' or any other person who enters, occupies, sales, trespasses, continues to trespass, constructs a structure on, or in any other manner deals with plot subdivision Nos subdivision No. 13794 (Original Number 363/2) Section II/Mainland North, Subdivision No. 13797 (Original Number 363/5) Section II Mainland North, Subdivision No. 13798 (Original Number 363/6) Section II/Mainland North, Subdivision No. 13801 (Original Number 363/9) Section II/Mainland North, Plot No. 364 Section II Mainland North, Subdivision No. 13800 (Original Number 363/8) Section II/Mainland North, Subdivision No. 13802 (Original Number 363/10) Section II/Mainland North, Subdivision No. 13799 (Original Number 363/7) Section II/Mainland North.

b) The court do direct the 1st, 2nd, 3rd and 4th respondents to facilitate reconciliation process between the petitioners and the 6th – 36th respondent's with a view of getting a permanent solution to the existing conflict and report to the court.

c) A permanent injunction do issue restraining the 6th – 36th respondents' from entering, remaining on, constructing on, subdividing, selling or in any manner whatsoever dealing with plot subdivision Nos Subdivision No. 13794 (Original Number 363/2) Section II/Mainland North, Subdivision No. 13797 (Original Number 363/5) Section II/Mainland North, Subdivision No 13798 (Original Number 363/6 Section II/Mainland North, Subdivision No. 13801 (Original Number 363/9) Section II/Mainland North, Plot No. 364 Section II Mainland North, Subdivision No. 13800 (Original Number 363/8) Section II/Mainland North, subdivision No. 13802 (Original Number 363/10) Section II/Mainland North, Subdivision No. 13799 (Original Number 363/7) Section II/Mainland North.

d) The costs of the petition.

2. The petitioners pleaded that they are the registered owners of the suit properties as described below;

a) PHOEBE WAITHERA MAREMWA

Subdivision No. 13794 (Original Number 363/2) Section II/Mainland North, subdivision No. 13797 (Original Number 363/5) Section II/Mainland North, subdivision No. 13798 (Original Number 363/6) section II/Mainland North.

b) PETER MAINA

Subdivision No. 13801 (Original Number 363/9) Section II/Mainland North.

c) SAMIRA AHMED OMAR (jointly with others)

Plot No. 364 Section II/Mainland North.

d) KELVIN NDEGWA

Subdivision No. 13800 (Original Number 363/8) Section II/Mainland North.

e) **EDITH ETEI**

Subdivision No. 13802 (Original Number 363/10) Section II/Mainland North.

f) **PATRICK MURIUKI**

Subdivision No. 13799 (Original Number 363/7) Section II/Mainland North.

3. In the petition, the petitioners stated that the functions of the 1st - 3rd respondents are set out under Article 244 of the Constitution. That the constitutional standard of human rights and fundamental freedoms include the right to the protection of private property from illegal alienation.

4. The petitioners plead that overtime they have experienced sustained hostilities from the 6th – 36th respondents manifested as follows;

(i) Occasional invasion by the 6th – 36th respondents' while armed with lethal weapons like pangas, bows and arrows, metal bars, knives, sticks, hammers and such like arsenal.

(ii) The armed invasion is well coordinated and funded. The invaders move in groups carrying new iron sheets, timber, nails, cement, ballast and other construction materials.

(iii) Once in the suit property, they overrun your petitioners' security and within hours demolish the petitioners' houses, subdivide the suit property among themselves, erect temporary structures and occupy the suit properties with absolute impunity and defiance.

5. That all the 6th – 36th respondents have vowed to frustrate the petitioners' attempts to occupy and use the suit properties by;

(i) The 6th – 36th respondents' having erected temporary structures on the suit properties which they do not ordinarily occupy and use. From outside it looks as if the structures are abandoned but their owners are just within the neighbourhood.

(ii) The 6th – 36th respondents' have enlisted the services of their youth and men who reside in neighbouring plots.

(iii) Once the petitioners/or the agents and servants of the petitioners are spotted on any part of the suit properties, the 6th – 36th respondents' youth and men while armed, attack them and chase them away.

(iv) The 6th – 36th respondents' have transformed the suit properties to a no-go-zone.

6. It is the petitioners' case that they can only access their respective properties when they are accompanied with armed police officers. They pleaded further that in the absence of law and order, the economic value of the suit properties is totally eroded contrary to Article 43 of the Constitution. The petitioners pleaded these breaches amount to their violations of their constitutional rights and urged the Court to grant them the reliefs sought.

7. The 1st – 4th respondents were personally served through the offices of the 4th respondent. The 5th – 36th respondents were served by way of substituted service through an advertisement placed in the Taifa Leo newspaper; on the Daily Nation of 18/4/2019 and affixing copies of the petition on the walls of the suit property. None of the respondents filed any response to the petition. The petitioners' advocate and Mr. Wachira for Attorney General had directions taken that the petition does proceed by way of written submission. The petitioners filed their submissions on 28/6/2019 while the Attorney General nor the 5th – 36th respondents did not file any. In essence, the petition proceeded unopposed.

8. The petitioners produced copies of titles which titles were annexed to the affidavit sworn in support of the petition. The ownership of the petitioners of the suit properties have not been challenged. Article 40(1) of the Constitution provides thus;

“40 (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property –

(a) Of any description; and

(b) In any part of Kenya.”

Equally Section 24 of the Land Registration Act No. 3 of 2012 provides thus;

“24. Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

9. The law thus allows the petitioners to own land in any part of the Country and as owners of the land, there are rights bestowed on them to enjoy. In their submissions, the petitioners cited the Case of *Florence Amunga Omukanda & Ano Vs A.G. & 2 others (2016) eKLR* where at paragraph 47 the Court stated thus;

“It is our view that Section 14 of the Police Service Act and now Section 24 of the National Police Service Act impose a negative obligation on the part of the Government in general and the police in particular not to violate the rights and fundamental freedoms but also imposes a positive obligation on the part of the said agencies to protect the people from threat of violation of the said rights and fundamental freedoms. To this extent and as to whether the State is liable for violations of fundamental rights and freedoms by private and or third parties, we are guided by the decision in *Association of Victims of Post Electoral Violence and Interights Vs Cameroon (19)* where it was held that:

“The respect for the rights imposes on the State the negative obligation of doing nothing to violate the said rights. The protection targets the positive obligation of the State to guarantee that private individuals do not violate these rights. In this context, the commission ruled that the negligence of a State to guarantee the protection of the rights of the Charter having given rise to a violation of the said rights constitutes a violation of the rights of the charter which would be attributable to this State even where it is established that the State itself or its officials are not directly responsible for such violations but have been perpetrated by private individuals ... According to the permanent jurisprudence of the commission, Article 1, imposes restrictions on the authority of the State institutions in relation to the recognized rights. This Article places on the State parties the positive obligation of preventing and punishing the violation by private individuals of the rights prescribed by the charter. Thus any illegal act carried out by an individual against the rights guaranteed and not directly attributed to the State can constitute, as had been indicated earlier, a cause of international responsibility of the State, not because it has itself committed the act in question, but because it has failed to exercise the conscientiousness required to prevent it from happening and for not having been able to take the appropriate measures to pay compensation for the prejudice suffered by the victims.”

10. In light of the above decision, there is a duty imposed on the 1st to 3rd respondents to ensure that the petitioners are free from threats of violations that affects their right to use and occupation of their respective properties. It should not be left for violence to rule for police to take action but they should endeavour to act proactively where they have been made aware of a likelihood of violation of rights taking place.

11. The petitioners have thus demonstrated a *prima facie* case from the facts pleaded which facts have not been controverted. Therefore I find no reason to refuse the reliefs pleaded. Accordingly I enter judgment in their favour as below;

a) *An order of judicial review in the form of orders of Mandamus compelling the 1st, 2nd and 3rd respondents, their agents and assignees to demolish all existing structures, arrest and prosecute in Criminal Court the 6th – 36th respondents’ or any other person who enters, occupies, sells, trespasses, continues to trespass, constructs a structure on, or in any other manner deals with plot subdivision Nos subdivision No. 13794 (Original Number 363/2) Section II/Mainland North, Subdivision No. 13797 (Original Number 363/5) Section II Mainland North, Subdivision No. 13798 (Original Number 363/6) Section II/Mainland North, Subdivision No. 13801 (Original Number 363/9) Section II/Mainland North, Plot No. 364 Section II Mainland North, Subdivision No. 13800 (Original Number 363/8) Section II/Mainland North, Subdivision No. 13802 (Original Number 363/10) Section II/Mainland North, Subdivision No. 13799 (Original Number 363/7) Section II/Mainland North.*

b) *The court directs the 1st, 2nd, 3rd and 4th respondents to facilitate reconciliation process between the petitioners and the 6th – 36th respondent’s with a view of getting a permanent solution to the existing conflict and report to the court within six months of the date of delivery of this judgment in the event no lasting and peaceful solution is achieved.*

c) *A permanent injunction is issued restraining the 6th – 36th respondents’ from entering, remaining on, constructing on, subdividing, selling or in any manner whatsoever dealing with plot subdivision Nos Subdivision No. 13794 (Original Number 363/2) Section II/Mainland North, Subdivision No. 13797 (Original Number 363/5) Section II/Mainland North, Subdivision No 13798 (Original Number 363/6 Section II/Mainland North, Subdivision No. 13801 (Original Number 363/9) Section II/Mainland North, Plot No. 364 Section II Mainland North, Subdivision No. 13800 (Original Number 363/8) Section II/Mainland North, subdivision No. 13802 (Original Number 363/10) Section II/Mainland North, Subdivision No. 13799 (Original Number 363/7) Section II/Mainland North.*

d) *Costs of the petition is awarded to petitioners payable by the 5th – 36th Respondents.*

Dated and signed at BUSIA this 4th day of June 2020.

A. OMOLLO

JUDGE

Judgment delivered electronically by email this 9th Day of June, 2020 due to Covid-19 pandemic.

A. OMOLLO

JUDGE