



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**PETITION NO. 12 OF 2019**

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL**

**AND**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40, 45, 47, 48, 157 AND 224 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

DAVID KABERIA..... 1<sup>ST</sup> PETITIONER

PAULINE NJABANI..... 2<sup>ND</sup> PETITIONER

DORCAS MUKOMAU ..... 3<sup>RD</sup> PETITIONER

FREDRICK KIRIMI ..... 4<sup>TH</sup> PETITIONER

ERIC MWENDA.....5<sup>TH</sup> PETITIONER

**AND**

ROBERT M'IMPWI ..... 1<sup>ST</sup> RESPONDENT

INSPECTOR GENERAL OF POLICE .....2<sup>ND</sup> RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION .....3<sup>RD</sup> RESPONDENT

**THE DISTRICT LAND & ADJUDICATION**

**& SETTLEMENT OFFICER – IGEMBE .....4<sup>TH</sup> RESPONDENT**

**J U D G M E N T**

1. This matter emanates from an amended petition dated 20<sup>th</sup> May 2019 in which the petitioners seek among other orders, declarations; that the respondents had failed to appreciate the petitioners' right to participate and consent to alienation of their matrimonial property; that the institution of criminal charges against the petitioners was unconstitutional and damages for breach of their constitutional rights and freedoms.
2. The 1<sup>st</sup> petitioner is the brother of one **Isaya Kamenchu (Isaya)** while the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners are the wives of the said **Isaya** and the 4<sup>th</sup> and 5<sup>th</sup> petitioners are two of the 14 children of **Isaya**.
3. The petitioners alleged that on 7<sup>th</sup> August, 2014, they filed **Maua CMCC No. 159 of 2014** wherein they sought to prohibit the said **Isaya** as owner of land parcel **No. 6974 Akirang' Ondu 'A' Adjudication Section ("the suit land")** from selling the same on the basis that it was their matrimonial and ancestral home. On the same day, the Chief Magistrate's Court, Maua issued an inhibition on the land irrespective of any dealing. They had already lodged a caveat on the suit land with the 4<sup>th</sup> respondent which was duly acknowledged and noted on the register.

4. A day earlier, the 6<sup>th</sup> of August, 2014, the prospective buyers of the suit land **Stephen Murungi** and **Paul Mwenda Jeremiah** had colluded with **Isaya** and filed a suit against Isaya, **Maua CMCC No. 157 of 2014**. The following day 7<sup>th</sup> August 2014, a consent judgment was entered for the transfer of 0.40 acres and 0.30 acres of the suit land to **Stephano Murungi** and **Paul Mwenda Jeremiah**, respectively.

5. On learning of this mischief, the petitioners filed an application in the said **Maua CMCC No. 157 of 2014** whereby on 28<sup>th</sup> August 2014, the court stayed the implementation of the decree it had issued. The two suits were subsequently consolidated and the earlier prohibitory orders confirmed. Before the suit could be heard, **Stephen Murungi** died.

6. The petitioners further alleged that despite the existence of the said orders, **Paul Mwenda** conspired with the officers working for the 4<sup>th</sup> respondent to secretly sub-divide the land and transfer portions thereof.

7. On 16<sup>th</sup> March 2019, the 1<sup>st</sup> respondent came to their home and started sub-dividing their land and fenced off a portion which included parts of their homes. They, together with some of their family members and neighbors, pulled down the newly erected fence. This resulted in the 1<sup>st</sup> and 2<sup>nd</sup> petitioner being arrested and charged in **Maua Criminal Case No. 1362 of 2019** with the offence of malicious damage to the 1<sup>st</sup> respondent's property. That considering that the inhibition was still registered against the suit land, the sub-division and creation of parcel Nos. 10848 and 10847 was obviously illegal and a direct contravention of a valid court order.

8. On the basis of the foregoing, the petitioners prayed for various orders and declarations.

9. In his answer to petition, the 1<sup>st</sup> respondent stated that he was the registered owner of **LR. Akirang'ondou "A"/10848**. That he had legally purchased the same from **Paul Mwenda Jeremiah** and that he was an innocent buyer without notice with a clean and untainted title. That he had purchased the property after due diligence. That he was never a party to the suits referred to in the petition and that the petition is bad in law and without merit.

10. None of the other respondents filed any response to the petition. However, the 4<sup>th</sup> respondent filed documents on 14<sup>th</sup> June, 2019 pursuant to an order made by this court on 4<sup>th</sup> June, 2019. The petitioners and the 1<sup>st</sup> respondent filed their submissions which this court has carefully considered. The following are the issues that arise for determination: -

11. This petition and response made has raised four main issues:

*a) Whether the matter is properly before this court?*

*b) If in the affirmative, whether the sub-division and consequent alienation of portions of the Suit Land was done in a manner that violates the petitioners' rights?*

*c) Whether the institution of Maua Criminal Case No. 1362 of 2019 was unconstitutional and a violation of the petitioners' rights?.*

*d) Whether the petitioners are entitled to damages?*

12. A constitutional petition relate to alleged breaches of the Constitution and violation or threatened violation of rights and fundamental freedoms set out in the Constitution. When exercising its jurisdiction under **Article 165 (3) (b) and (d) (ii) of the Constitution**, this court inquires as to whether the rights or fundamental freedoms in the Bill of Rights have been denied, violated, infringed or threatened; and whether the actions complained of were done under the authority of the Constitution or of the law or was inconsistent with, or in contravention of the Constitution and the law.

13. In the case of **Centre for Human Rights and Democracy & another v the Judges and Magistrates vetting Board & 2 Others [2012]eKLR**, the court held:-

***“Where a legal wrong or legal injury is caused to a person or to determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has power to grant appropriate reliefs so that the aggrieved party is not rendered helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission”***

14. In the present case, the petitioners have alleged that they have been denied the due protection of the law; that their right to property is about to be infringed; that the criminal proceedings now pending before the Maua Chief Magistrate's Court is meant to coerce them to drop their claim on what they consider to be their matrimonial and ancestral home; that they have made reports to the investigative agencies of the state of their claim and no action has been taken, amongst other allegations. All these allegations have not been denied or controverted.

15. This court is alive to the fact that, the primary claim in this matter is land. Issues touching on claims of land are primarily the preserve of the Environment and Land Court. However, intertwined with the claim to land is the allegation that the coercive powers of the state through its agencies are being used in the interim to the prejudice of the petitioners. That criminal proceedings have been commenced before the Maua Chief Magistrate's Court against the 1<sup>st</sup> and 2<sup>nd</sup> respondent contrary to the letter and spirit of the Constitution and law. The Articles of the Constitution that are alleged to be violated have also been cited.

16. To my mind, those allegations are not pure hot air. They are well founded:-

- a) there is an allegation that a caution had been lodged against the suit land. The documents produced by the 4<sup>th</sup> respondent show that the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners did caution the suit land on 7<sup>th</sup> June, 2007;
- b) there is no evidence that the said caution was ever lifted before the suit land was subdivided and transferred to 3<sup>rd</sup> parties;
- c) it is not clear when the court order in the **Maua CMCC No. 157 of 2014** was recorded in the claim register against the suit land;
- d) the 4<sup>th</sup> respondent had himself given consent to the petitioners to sue in respect of the suit land;
- e) it is unheard of that a case can be filed and judgment entered the following day. **Maua CMCC No. 157 of 2014** was filed on 6<sup>th</sup> August, 2014 and on 7<sup>th</sup> August, 2014 a consent judgment was recorded. Several issues arise:-
  - i) were Summons issued and served? If so, when?
  - ii) how possible was it that the consent judgment could be filed and signed on the same day? Was the court waiting for the filing of the consent?
  - iii) did the parties appear before court as the notes in the document intituled "Consent" shows?
  - iv) what is the effect of the said 'consent judgment' issued on 8<sup>th</sup> August, 2014 by the Resident Magistrate vis a vis the Chief Magistrate's order of 7<sup>th</sup> August, 2014 in **Maua CMCC No.159 of 2014**?
  - v) if the consent judgment was stayed, was the 4<sup>th</sup> respondent entitled to act of the decree arising therefrom as his officers purport to have done?
  - vi) if it be true that the two cases were consolidated as alleged, how could **Maua CMCC No. 159 of 2014** be dismissed alone and leave the other suit pending? Was that not meant to sustain the impugned judgment and irreparably prejudice the petitioners?

17. The foregoing questions remain unanswered. They can only be answered before the Land and Environment Court. When viva voce evidence is taken.

18. There is the issue of the 1<sup>st</sup> respondent's alleged 'clean title' on the strength of which he invaded the suit land fenced it and instigated the **Maua CM Criminal Case No. 1362 of 2019** against the 1<sup>st</sup> and 2<sup>nd</sup> petitioners.

19. There are allegations that the petitioners and other children of **Isaya** are in possession of the suit land. That title no. **Igembe/Akirang'ondu 'A'/10848** was a portion of the cautioned suit land. The 1<sup>st</sup> respondent came and fenced that portion which included some homes of the petitioners. The following questions arise?

- a) was the seller of **Igembe/Akirang'ondu 'A'/10848**, the aforesaid **Paul Mwenda Jeremiah** in exclusive possession of the property he purported to sell?
- b) did the 1<sup>st</sup> respondent visit the suit property before purchasing the same? What due diligence did he undertake to qualify as an innocent purchaser for value without notice? Did he inquire as to why the petitioners were in occupation?
- c) why would the 1<sup>st</sup> respondent fence into the said **Igembe/Akirang'ondu 'A'/10848** homes belonging to the petitioners and not the seller? Was the occupation of that property by the petitioners not enough notice to the 1<sup>st</sup> respondent before he purported to purchase it or was the 'purchase' an act meant to sanitize or further a fraud?

20. These are serious questions which only can be unravelled after a full trial where evidence is tested through cross-examination. Before that is done in the Land and Environmental Court, the petitioners are facing **Maua CM Criminal Case No. 1362 of 2019** on the strength of a title obtained by the 1<sup>st</sup> respondent through questionable means.

21. The petitioners are crying that an irresponsible and drunkard man was about to completely impoverish them by disposing off the only home they know of. Before their cries were heeded to and the process of the disposal of parts of the suit land which they occupy investigated, on the face of a blatant violation of court orders, the 2<sup>nd</sup> respondent was content in swiftly rounding up the 1<sup>st</sup> and 2<sup>nd</sup> petitioner and handing them over to the 3<sup>rd</sup> respondent to prosecute them. Where is equality before the law?

22. Looking at the evidence on record, the 4<sup>th</sup> respondent cannot be excused. I am unable to accept the report dated 6<sup>th</sup> June, 2019 in view of what is contained on record and the questions I have raised above which remain unanswered.

23. To my mind, without going to the powers of the 3<sup>rd</sup> respondent under **Article 157 of the Constitution**, I think this is a proper case where, the prosecution of the petitioners or anyone pursuant to the impugned process is excepted under **Article 157 (11)**. The prosecution is against

public interest and meant for other purposes other than criminal justice. It is meant to silence those opposed to a well-orchestrated fraud meant to further impoverish an already poor family which is painfully seeking justice.

24. In the premises, I allow the petition and make the following declarations and orders: -

a) a declaration hereby issues that the failure by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent to investigate and appreciate the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners' rights under **Article 45** was unconstitutional and in breach of **Article 27 of the Constitution**.

b) the institution and prosecution of **Maua CM's Criminal Case No. 1362 of 2019** is unconstitutional and a violation of the rights of the petitioners under **Articles 40, 45 and 47 of the Constitution**.

c) the 2<sup>nd</sup> and 3<sup>rd</sup> respondent are hereby restrained from in any way whatsoever and howsoever arresting and/or charging any member of the petitioners family in relation to the facts being relied on in the **Maua CM's Criminal Case No. 1362 of 2019**.

d) the petitioners do forthwith lodge in the court with jurisdiction, a proper case for the investigation of the matters complained of in relation to the sub-division and consequent alienation of the suit land.

e) for the reason of order No. (d) above, I decline to grant the other orders sought in the petition.

f) the petitioners will have the costs of the petition in any event.

It is so decreed.

**DATED** and **DELIVERED** at Meru this 19<sup>th</sup> day of September, 2019.

**A. MABEYA**

**JUDGE**