



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO.16 OF 2018

IN THE MATTER OF: ENFORCEMENT OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATION

AND

IN THE MATTER OF: ARTICLE 1, 10, 22, 23, 27, 35, 40 AND 50 OF THE CONSTITUTION

AND

IN THE MATTER OF: FAIR ADMINISTRATION OF JUSTICE

FREDRICK KINGI MLEWA & 51 OTHERS.....PETITIONERS/APPLICANTS

VERSUS

MOMBASA AUTO CARE LIMITED.....1ST DEFENDANT/RESPONDENT

LAND REGISTRAR KILIFI.....2ND DEFENDANT/RESPONDENT

THE DISTRICT SURVEYOR KILIFI.....3RD DEFENDANT/RESPONDENT

HONOURABLE ATTORNEY GENERAL.....4TH DEFENDANT/RESPONDENT

KENYA POLICE SERVICE.....5TH DEFENDANT/RESPONDENT

RULING

1. I have before me for determination two applications both brought by way of Notice of Motion.

2. By the first application dated 24th October 2018, the 51 Petitioners pray for Orders that pending the hearing and determination of this Petition, this Court be pleased to issue a conservatory order against the Respondents restraining them from acquiring, picking, surveying, geo referencing, erecting beacons, evicting the Petitioners or dealing with all that property known as Plot No. 123/Mtangani/Malindi.

3. The application is supported by an affidavit sworn by the 6th Petitioners Mwero Kalimbo Mudzo wherein he avers that at all times material, the Petitioners have been in exclusive physical occupation and possession of the suitland where they have lived for a period exceeding 40 years. The Petitioners accuse the 1st Respondent of moving to the suit property and beginning the process of surveying and geo-referencing the same to establish the border lines with a view to evicting the Petitioners and demolishing their houses in execution of a decree emanating from *ELC No. 157 of 2015; Mombasa Autocare –vs- Japhet Pasi Kilonga & 9 Others*.

4. The Petitioners aver that they were never parties in the said suit and that as affected residents, they have a Constitutional right to be heard in order to have the issues determined on merit. It is their case that should execution proceed and their properties are demolished, they will suffer irreparable loss and damage which may not be adequately compensated by the Respondents.

5. The second application is dated 18th December 2018. By the said application, Mombasa Auto Care Ltd (the 1st Respondent) prays for an order that this Court be pleased to strike out the Petitioner's Motion and entire Petition for failure to disclose any reasonable cause of action in law.

6. The second application is based on the grounds that:-

a. The 1st Respondent is the rightful owner of the suit property and is entitled to the full protection of the Constitution.

b. The Prayers sought in the Petition are at variance to the facts pleaded in the body of the Petition and hence cannot be granted in the manner sought. The Petition does not disclose any reasonable cause of action as against the 1st Respondent.

c. The Petitioners have not demonstrated what rights they have in the 1st Respondents property and how the same have been violated.

d. The Honourable Court has no basis legal or otherwise to interfere with the sanctity of the 1st Respondent's title to the suit property and/or to continue to entertain and/or hear the Petitioner's application dated 24th October 2018 and the Petition herein.

7. The 2nd, 3rd, 4th and 5th Respondents are also opposed to the Petitioner's application. By Grounds of Opposition dated and filed herein on 18th December 2018 on their behalf by the Honourable the Attorney General, the Respondents state:-

1. That the application has not met the threshold for grant of the temporary conservatory orders sought.

2. That the application is an abuse of the Court process since the Respondents are only acting in accordance with an order of the Court.

3. That the Constitutional rights alleged to be at threat of being breached are not absolute but limited and the Petitioners have not demonstrated that they deserve the remedies sought.

4. That a lawful eviction cannot amount to a violation of the rights of an individual and that proof of ownership is cardinal when determining violation of the right to property.

5. That by dint of Section 24 of the National Police Service Act, the 5th Respondent has the mandate to inter alia maintain law and order and the enforcement of the same unless proven to be arbitrary cannot amount to a violation of the Petitioners' rights.

8. The Petitioners on the other hand are equally opposed to the 1st Respondent's application. By Grounds of Opposition dated and filed herein on 28th January 2019, they assert:-

1. That the application is an abuse of the Court process and ought to be dismissed for wasting the Court's time.

2. That (the) subject matter herein being a parcel of land, it is essential and of paramount importance for this Court to arbitrate on the issues of legal entitlement and or ownership at the very instance.

3. The Petitioners have an equitable right to have this matter heard and determined on merit since the subject issue directly affects their entitlement to the suit property.

4. That the application is a sham and lacks merit, since the Applicant is simply asking the Court to shut its eyes and facilitate an injustice.

5. That the application is a mockery as it aims to occasion a travesty of justice contrary to Article 22 (1) of the Constitution of Kenya, 2010.

9. I have perused and considered the two applications and the responses thereto. I have equally perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

10. The Petitioners' application seeks a Conservatory order to issue restraining the Respondents from acquiring, picking, surveying, geo-referencing or in any manner dealing with the suit property pending the hearing and determination of the Petition dated and filed herein on 24th October 2018.

11. In the said Petition, the Petitioners pray for:-

1. A declaration that the actions of the 1st Respondent to compulsorily acquire the Petitioners properties is unlawful and unconstitutional;

2. A declaration that the Petitioners have established their claim through adverse possession and they be registered as lawful owners over all their properties covering Plot No. 123/Mtangani/Malindi; and

3. An order directing the 2nd Respondent to cause entry and registration of the Petitioners pursuant to their respective portions and they be issued with title documents.

12. I have perused the entire Petition and the Verifying Affidavit. I am unable to see any action pleaded on the part of the Respondents which could be termed unlawful or unconstitutional. Neither is there any attempt by the Petitioners to lay a claim for adverse possession over the suit property.

13. As filed before me at Paragraph C of the Petition, the Petitioners give what they describe as the Constitutional and Legal Foundation of the Petition in 9 paragraphs as follows:-

1. Article 3 of the Constitution mandates every person including the Respondents to uphold and defend the Constitution.

2. Article 10 of the Constitution binds all state officers including the Respondents to conform with the Constitution of Kenya 2010.

3. Article 22 and 23 of the Constitution of Kenya confers upon the Petitioners the right to enforce fundamental rights and freedoms;

4. Article 35(1b) of the Constitution of Kenya gives the right to information including from the Respondents.

5. Article 40 (3) of the Constitution protects the right to private property and procedure to acquire private property.

6. Article 47 of the Constitution endeavours that any administrative action taken against an individual he must be accorded the opportunity to be heard and reason given.

7. Article 50 of the Constitution provides for a fair hearing.

8. Your humble Petitioners rights vide the Constitution of Kenya (have been) contravened and are being threatened with further breach thus this Petition.

9. This Honourable Court has powers under this Constitution pursuant to Article 23 to protect the rights of the Petitioners under Article 22 of this Constitution of Kenya.

14. As it were, those Constitutional stipulations are not backed with any factual basis for the Petition. There is nowhere in the short Petition where the Petitioners demonstrate what the Respondents have done and/or how all or any of them have contravened or threatened the breach of the Articles of the Constitution cited in the nine(9) paragraphs above.

15. As filed, the Petition neither gives the relationship between the Petitioners and the suit property nor that of their own and the Respondents. Other than in their Prayers there is no legal or factual basis given for the claim for adverse possession.

16. In the circumstances before me, I find no difficulty whatsoever in agreeing with the 1st Respondent that the Petition fails to disclose any reasonable cause of action in law. That being the case, it follows that the Motion dated 24th October 2018 premised on the same Petition has no legs to stand on.

17. Accordingly I hereby strike out both the Petition and the Motion with costs.

Dated, signed and delivered at Malindi this 29th day of April, 2020.

J.O. OLOLA

JUDGE