



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT OF KENYA**

**AT MAKUENI**

**CONSTITUTIONAL PETITION NO.3 OF 2019**

**IN THE MATTER OF PETITION UNDER ARTICLE 21(1), (3), 22(1), (3), 25(a), 29(a),**

**(d), (e), (f), 30(2), 40,49(1)(a)(i) & 159 OF THE CONSTITUTION OF KENYA,2010**

**AND**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE**

**INDIVIDUAL UNDER THE CONSTITUTION OF KENYA 2010 AND THE PROVISIONS**

**AND POWERS OF THE CHIEF’S ACT (CAP 128, LAWS OF KENYA)**

**BETWEEN**

**MUSEMBI KINGUTA.....1<sup>ST</sup> PETITIONER/APPLICANT**

**ELIZABETH MUTAVE KINGUTA.....2<sup>ND</sup> PETITIONER/APPLICANT**

**JOSEPH MUTUNE NDISYA.....3<sup>RD</sup> PETITIONER/APPLICANT**

**NZOU KINGUTA.....4<sup>TH</sup> PETITIONER/APPLICANT**

**-VERSUS-**

**HENRY KAVOLU NDISYA.....1<sup>ST</sup> RESPONDENT**

**RICHARD NZOU NDISYA, CHIEF KITUNDU LOCATION.....2<sup>ND</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY, MINISTRY OF INTERIOR & COORDINATION OF  
NATIONAL GOVERNMENT.....4<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**RULING**

1. The 1<sup>st</sup> and 4<sup>th</sup> Petitioners are siblings and the 2<sup>nd</sup> Petitioner is their mother. In their pleadings, they aver that the 3<sup>rd</sup> Petitioner purchased land parcel No. Makueni/Kitundu/4957 (*suit land*) from their late father, Kitunguta Kitungu but one of their relatives, Mutua Kitungu, is claiming ownership of the suit land and is also claiming to have sold it to the 1<sup>st</sup> Respondent.

2. Their grievance is that on 11<sup>th</sup> March, 2016, they were arrested by the 2<sup>nd</sup> Respondent at the instigation of the 1<sup>st</sup> Respondent and

incarcerated at Mbooni West Police Station until the morning of 14<sup>th</sup> March, 2016. They aver that during their incarceration, they were subjected to forced labour at the 1<sup>st</sup> Respondent's home and their mother, who is paralyzed from the waist down, was deprived of care and forced to go without food, clothing and had to perform her ablution needs in her bed.

3. They also aver that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have threatened to cause their arbitrary arrest and incarceration once more and have been using the local administration and regular police to harass them.

4. In the petition, the Petitioners are seeking, *inter alia*, a declaration that the 2<sup>nd</sup> Respondent's acts are ultra vires, general damages and costs. They are also seeking to have the Respondents permanently prohibited from harassing, arresting and/or in any other manner interfering with their personal liberty and the 3<sup>rd</sup> Petitioner's proprietorship of the suit land.

5. Together with the petition, the Petitioners filed a Notice of Motion application, dated 02<sup>nd</sup> May, 2019, seeking the following reliefs;

a) Spent.

b) *That in view of the urgency hereof, this honorable Court be pleased to make ex parte in the very first instance; interim orders prohibiting the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents from subjecting the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> Petitioners to cruel, inhuman or degrading treatment or punishment pending the hearing and determination of the petition herein.*

c) *That in view of the urgency hereof, this honorable Court be pleased to make ex parte interim orders prohibiting the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents from in any way interfering with the personal liberty of the Petitioners/Applicants and/or their freedom of movement.*

d) *Costs be in the cause.*

e) *Any other orders and directions deemed appropriate.*

6. The application is supported by the grounds on the face of it, the affidavit of Musembi Kiguta sworn on the same day and a supplementary affidavit sworn on 24<sup>th</sup> July, 2019. He deposed that he had been authorized by his co-Petitioners to swear the affidavits on their behalf. He has exhibited a sale agreement as annexure **MK-1**, a letter from the land department, Mbooni Division as annexure **MK-2** and a title deed as annexure **MK-3**.

7. The 2<sup>nd</sup> Respondent filed a replying affidavit sworn on 22<sup>nd</sup> July, 2019 where he deposed that he is a retired chief of Kitundu Location, Mbooni Sub County. He also deposed that he had been authorized by the 1<sup>st</sup> Respondent to swear the affidavit on his behalf and confirmed that the 1<sup>st</sup> Respondent has never claimed any proprietary rights over the suit land.

8. The gist of the opposition is that the 1<sup>st</sup> and 4<sup>th</sup> Petitioners were arrested on 10<sup>th</sup> November, 2016 at around 6pm for trespassing on the 1<sup>st</sup> Respondent's land *to wit* Makueni/Kitundu/5291 and uprooting the sisal boundary erected thereon. He exhibited a sale agreement as annexure **RNN-A** and extracts from the occurrence book as annexure **RNN-B**. He deposed that the arrest and release were conducted in compliance with the law hence this Court has no jurisdiction to supervise a Constitutional body on how to conduct its business.

9. He deposed that on 11<sup>th</sup> March, 2016, the two Petitioners admitted the trespass in the presence of clan elders and offered to reinstate the boundary which they subsequently did. An agreement to that effect was exhibited as annexure **RNN-C**. He also exhibited a letter dated 30<sup>th</sup> May, 2017 as annexure **RNN-D** to show continued trespass and destruction. He denied the alleged violations *in toto* and deposed that their aim is to hoodwink this Court. Title documents for parcel 5291 were exhibited as annexure **RNN-E**.

10. It is also his deposition that the 3<sup>rd</sup> Petitioner has trespassed again and commenced construction. A photo to that effect is exhibited as annexure **RNN-F**.

11. In rejoinder, the two Petitioners deposed that during their incarceration, they were at the mercy of the local administration and the only way to secure their release was by signing a coerced undertaking. They also deposed that the 1<sup>st</sup> Respondent has never sought the services of a surveyor to ascertain the extent of his land which is evidently smaller than the 3<sup>rd</sup> Petitioner's parcel.

12. There was no response from the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents.

13. The application was canvassed by way of written submissions.

14. The Applicants submitted that the arrest of the 1<sup>st</sup> and 4<sup>th</sup> Applicants while they were working in the 3<sup>rd</sup> Applicant's parcel of land was an illegality and violation of their Constitutional rights.

15. They further submitted that Chiefs have no Constitutional or statutory jurisdiction to deal with disputes relating to land.

16. They also submitted that the arrest of the 1<sup>st</sup> and 4<sup>th</sup> Applicants for trespass without the expert opinion of a registered land surveyor lacked a legal basis and was *ultra vires* the powers of the 2<sup>nd</sup> Respondent.

17. Relying on the Constitution of Kenya 2010 and section 13 (7) of the Environment and Land Court Act, they submitted that this Court is competent to regulate and supervise the operations of any person, state organ or body in matters related to and/or incidental to land.

18. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the Petitioners have not established any case against them to warrant this honorable Court to grant the orders sought both in the application and the petition. They contend that they are not arresting agents and that no evidence was adduced to prove the alleged violations. They submitted that this Court has no jurisdiction to make a declaration of violations of rights on a claim of 'instigation' as can be discerned from the pleadings.

19. They submitted that this Court cannot interfere with the functions of another arm of Government unless a clear cut case is made out. They rely *inter alia* on the case of **Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR** where the Court of Appeal observed as follows;

*“It is not in doubt that the doctrine of separation of powers is a feature of our Constitutional design and pre-commitment in our Constitutional edifice. However, separation of powers does not only proscribe organs of Government from interfering with the other’s function. It also entails empowering each organ of Government with countervailing powers which provide checks and balances on actions taken by other organs of Government. Such powers are however not a licence to take over functions vested elsewhere.”*

20. They also submitted that a party seeking a conservatory order must demonstrate that they have a prima facie case and must present evidence to show that their rights have been infringed.

21. It is also their submission that the Petitioners have pleaded torture without supporting evidence and rely on the case of **Peter Njuguna Mwangi alias Materero & 2 others –vs- The Honourable Attorney General (2017) eKLR** where it was held that;

*“While torture has been described as one of the most reprehensible of actions, it cannot be pleaded as casually as the Petitioners have done in the present petition.”*

22. Having looked at the application, responses, annexures and the rival submissions, it is my considered view that the only issue for determination is whether the threshold for grant of conservatory orders has been met.

23. The principles to consider in determining whether to grant conservatory orders were discussed by a three judge bench in **Centre for Human Rights and Democracy & 2 others –vs- Judges and Magistrates Vetting Board & 2 others (2012) eKLR**. They are;

*a) The credentials of the Petitioners.*

*b) The prima facie correctness or nature of information before the Court.*

*c) Whether the grievances expressed in applying for conservatory orders were genuine, legitimate, deserving and appropriate.*

*d) Whether the Applicant had shown or demonstrated the gravity and seriousness of the dispute and whether the Petitioners had engaged in wild vague indefinite or reckless allegations against the Respondents.*

24. From the evidence adduced, the 3<sup>rd</sup> Applicant is the registered owner of the suit land while the 1<sup>st</sup> Respondent is the registered owner of Makueni/Kitundu/5291. The two parcels of land share a common boundary and it is therefore evident that the dispute herein is not about proprietorship of the suit land as presented by the Applicants. It is a boundary dispute between the 3<sup>rd</sup> Applicant and the 1<sup>st</sup> Petitioner.

25. The 1<sup>st</sup> and 4<sup>th</sup> Applicants complained about being incarcerated from 11<sup>th</sup> March, 2016 to the morning of 14<sup>th</sup> March, 2016. According to them, they were unnecessarily being harassed about the suit land yet it was genuinely sold by their father to the 3<sup>rd</sup> Applicant. The OB extract however shows that they were arrested for trespass and damage. In my view, this lends credence to the Respondents' version that the 1<sup>st</sup> and 4<sup>th</sup> Applicants were arrested for trespassing on the 1<sup>st</sup> Respondent's land. Further, the 1<sup>st</sup> and 4<sup>th</sup> Applicants do not deny signing the undertaking that secured their release save for contending that the undertaking was procured under duress.

26. The bottom line however is that the means in which the undertaking was procured does not negate the fact that the two Applicants were released on 11<sup>th</sup> March, 2016 and not 14<sup>th</sup> March, 2016 as claimed. The *prima facie* correctness of the information presented by the Applicants is therefore questionable.

27. The 2<sup>nd</sup> Respondent reported the trespass at Kikima Police station and at paragraph 6 of the supporting affidavit; the two Applicants admit that they were arrested by police officers. The case was however compromised at the police station and did not proceed to trial. I am unable to see any impropriety in these events because whenever a complaint is made at the police station, it is expected that they will act on it by investigating, making the necessary arrests and following the due process. As correctly submitted by the Respondents, a Court cannot interfere where processes are carried out within the law.

28. The two Applicants insist that the 3<sup>rd</sup> Applicant's parcel is 'evidently bigger' than that of the 1<sup>st</sup> Respondent but at the same time agree that the expertise of a registered surveyor is needed. This clearly shows their awareness that the real issue is a boundary dispute. Their grievance about being harassed over the proprietorship of the suit land is therefore not genuine. Further, there is no evidence to show that the 2<sup>nd</sup> Respondent dealt with the land issue in his capacity as the chief or otherwise.

29. The upshot is that the application does not meet the threshold for grant of conservatory orders and must therefore fail. In the circumstances, I hereby proceed to dismiss the application with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

**Signed, dated and delivered at Makueni via email this 29<sup>th</sup> day of May, 2020.**

**MBOGO C.G.,**

**JUDGE.**

**Court Assistant:** Mr. G. Kwemboi