



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.425 OF 2014

BETWEEN

ALOIS S. K. KALAA.....PETITIONER

AND

THE ATTORNEY GENERAL1STRESPONDENT

THE DEPUTY INSPECTOR GENERAL.....2ND RESPONDENT

JUDGMENT

Introduction

1. This matter was filed by Alois S.K. Kalaa, on 22nd August 2014 and the filed document is titled an Originating Summons under **Article 22(1)** and **(2)(a)** of the **Constitution**. An amended Originating Summons dated 27th January 2015 was later filed on 5th February 2016. The Petitioner is acting in his capacity as an appointed attorney and holder of a special power of attorney by one, Kanza Musyoka and Jane Ndinda Zakayo, respectively.

2. The Originating summons is brought against the Attorney General, the 1st Respondent, in his capacity as the person 'charged with defending all crimes committed by Police Officers in the course of their duties' as per the Petitioner's description in paragraph 2 of the Amended Originating Summons. The 2nd Respondent is the Deputy Inspector-General of Police and is sued as being in charge of the daily movement and action of police officers in the course of their duties.

The Petitioner's case

3. The Petitioner filed an affidavit dated 22nd August 2014 reiterating the contents of the Originating Summons while annexing documents in support of his case. The summons relate to various grievances regarding parcels of land Nos. 3471 and 3472 within Kitui County whose ownership and occupation is in dispute.

4. According to the Petitioner, the land in dispute is owned by one Kanza Musyoka whose son, Mboya Musyoka, has been in occupation thereof since 1990 but one, Kamoli Kithome, with the assistance of police officers and in collusion with the Chief, Ikanga Location, caused the eviction of the said Mboya Musyoka accusing him of having earlier unlawfully evicted Kamoli Kithome and her 3 sons, Odinga Kithome, Kilonzi Kithome and Mulinge Kithome from the said land. In essence, the said Kamoli

Kithome had claimed ownership of the land in dispute.

5. The Petitioner alleges further that Mboya Musyoka was harassed by the police in order to avoid following up on the matter relating to the land in dispute to the extent that he had to flee to Mombasa in 1991 to avoid further harassment. Mboya's younger brother, Zakayo, also followed him in 2011 to avoid persecution by the police and subsequently Zakayo's wife was evicted from the disputed land on 23rd January 2014 with the assistance of police from Mutomo Police Station during which eviction, farm produce was also destroyed. The Petitioner further claims that the officer in charge of the station was bribed with Kshs.62,450/= to execute a fraudulent court order to carry out the eviction of the said Zakayo's wife and children.

6. It is also alleged that Kanza Musyoka had earlier taken up the matter with the Kitui District Land Disputes Tribunal in 2008 where her ownership of the land in dispute was confirmed against the claim by Kamoli Kithome. Through her son, Kamoli then filed an appeal against the tribunal's award to the Eastern Provincial Land Disputes Appeals Tribunal at Embu. The appeal was however not heard timeously as parties only appeared to testify in 2011. In the end, the appeal was allowed in the appellant's favor with parties ordered to maintain their existing occupations as per a sketch map drawn by the Kitui District Land Disputes Tribunal.

7. Subsequently, the land in dispute was adjudicated in favour of Kanza Musyoka as confirmed by a letter dated 20th May 2015 from the Mutomo/Ikutha District Land Adjudication and Settlement Officer annexed to the Petitioner's reply to the Respondents' grounds of opposition dated 27th August 2015. However, Kamoli, with the help of police officers has maintained occupation of the land in dispute rendering the alleged rightful owner and her daughter-in-law shelterless and unable to benefit from the land by residing on it, grazing livestock or farming on it as they claimed that they are entitled to. The Petitioner now quantifies the total loss in that regard at Kshs.18,000,000/= which he seeks in compensation thereof.

8. The Petitioner for the above reasons prays for Judgment against the Respondents jointly or severally in the following terms:

“a) Compensation for refusal by Kenya Police (in favour Ms. Kamoli Kithome) not to make use of our land either in form of farming or grazing our livestock since 1990 up to date. (Sic)

b) Compensation for the loss we incurred through bus fares attending Tribunal and court matters those were initiated by Kenya Police for the cover up of Ms. Kamoli Kithome's hidden motives with intent to grab our land through all forms of fraud to the tune of over Shs.13,000/= that is including lodging, bus fare, food from home to Kitui town, home to Embu town and filing court papers at Kitui Law Courts at Embu at the Land Tribunal Appeal No.38 of 2009; (Sic)

c) Compensation to us for the forced eviction of Mrs. Jane Ndinda Zakayo on 23/1/2014 and destruction of her farm produce products plus her three Houses and a toilet and also be compensation for sleeping outside her matrimonial home together with her three children daily from 23/1/2014 up to date and worst of all disturbing the dead sleeping ones by Ms. Kamoli Kithome who has resorted to doing farming on the five graves within Ms. Kanza Musyoka's land that now Ms. Kamoli Kithome is still refusing to move out; (Sic)

d) An order directing the OCS I/C Mutomo Police Station and the OCPD at Mutomo Police Division (both from Kitui County) to remove Ms. Kamoli Kithome and any of her sons or farm workers out of our land before 1/4/2015 failure the Police officer commanding Mutomo Police Station move in and have Ms. Kamoi Kithome and Mr. Michael Kilonzi Kithome arrested and be charged with trespass same time for doing farming in our land and for her continued stay with her son in our land parcel No.3472 within Kathungu sub-location, Ikanga Location, Mutomo Division, Mutomo District, Kitui County. Same time pay Kshs.10,000/= for the destruction of trees in that land that some of the trees she sold it to New Hope Education Centre on 8/1/2015 and carried by their vehicle registration No.KAS 621N. (Sic)

e) Compensation for loss of our earning out of our grabbed land since 1990 up to date. (Sic)

f) General damages.

g) Interest of (a), (b) and (c). (Sic)

h) Cost of this Application

i) Any other relief this Honourable Court may deem fit.”

The Petitioner, in addition to the above, argued his case orally in Court and filed written submissions. The record also is replete with correspondence from the Petitioner addressed to other public officers not parties to this Petition including the Court on aspects of the matters complained of. Letters were for instance sent to the Office of the Director of Public Prosecutions, the Chief Land Registrar, the 1st Respondent as well as the Judges and Magistrates Vetting Board. I will return to them later.

9. The Petitioner has also not framed any issues for determination by this Court but made general statements containing his grievances under no specific heads. I will later, however, frame issues that I consider pertinent in addressing those grievances.

The Respondents' case

10. The 1st Respondent filed the following Grounds of Opposition in opposing the Petitioner's Amended Originating Summons:

a) The Application does not disclose any constitutional violation by the Respondents upon the Applicant.

b) The Constitutional mandate of the Hon. Attorney General does not include solving disputes of any nature between private persons.

c) The application does not disclose any public interest issues.

d) The application is misconceived, incompetent and bad in law and the orders sought by the applicant are not tenable against the respondents.

Miss Wawira learned State Counsel appearing for both Respondents did not file or make any submissions but adopted the above Grounds of Opposition at the oral hearing.

Rejoinder by the Petitioner

11. The Petitioner filed a reply to the Grounds of Opposition dated 17th August 2016 and maintained that the Summons disclosed constitutional violations, the cause of action specifically being disclosed in the affidavit and annexures to it. He therefore reiterated the orders sought in the said Amended Originating Summons.

Determination

12. As I stated earlier, neither the Petitioner nor the Respondents framed any issue for determination. I have therefore painstakingly and patiently perused the pleadings and other documents on record in trying to understand what exactly is before this Court for determination. I would attribute my difficulties in doing so to the fact that the Petitioner was acting in person and not only filed the pleadings but also conducted the hearing and filed submissions. He is also hard of hearing and it was therefore not surprising that the Respondents were at difficulties to defend the matter and proceeded the way they did in filing Grounds of Opposition. In the circumstances, I discern the following to be the issues for determination:

a) Whether the Originating Summons as Amended is competent.

b) Whether the remedies sought are tenable against the Respondents.

Whether the Application is competent

13. The proceedings were instituted as a petition. But, apart from the case being referred to as a petition, the primary pleading filed was an Originating Summons application which was later amended to an Amended Originating Summons. In the body of that application and the supporting affidavit, the Petitioner made no reference to any constitutional or statutory provision breached nor did he lead evidence to that end.

14. I also note that the Petition was titled as having been lodged under the provisions of **Article 22** of the **Constitution** and in that regard the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules)** contains the rules that are applicable, in accordance with **rule 3** thereof, to all proceedings filed in Court under **Article 22** of the **Constitution**. The overriding objective of the said rules is to facilitate access to justice for all persons as required under **Article 48** of the **Constitution** with a view to advancing and realizing the rights and fundamental freedoms enshrined in the Bill of Rights. The Court also retains the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

15. On the face of it therefore, there is no doubt that the Petition as filed does not conform to **Rule 10** of the **Mutunga Rules** which sets out the contents of a petition for the protection or enforcement of rights and fundamental freedoms namely; the petitioner's name and address, the facts relied upon, constitutional provisions violated, the nature of the injury caused or likely to be caused to a petitioner or person in whose name the petition has instituted the suit or in a public interest case, to the public, class of persons or community, as well as defaults regarding any civil or criminal case involving a petitioner or any petitioners which is related to the matters in issue in a petition. The petition is also to be signed by the Petitioner or his advocate. It must also contain the relief sought in the Petition.

16. In that context, as was held by the Court of Appeal in **Mohamed Fugicha v Methodist Church in Kenya (suing through its registered trustees) & 3 Others [2016] eKLR**, which position I subscribe to, the constitutional text now doubtless presents an epochal shift that would preserve informal pleadings that would otherwise have been struck out in former times. The Court ought however to be satisfied as to what a petitioner's complaints are, against whom they are, and the provision of the Constitution he alleges has been violated or contravened. Such information, it is obvious to me, can be found from a proper reading of the present Petitioner's entire affidavit, however inelegantly framed and presented.

17. Further, **Article 22 (2) (a)** of the **Constitution** allows the filing of proceedings claiming that a right or fundamental freedom in the Bill of rights has been infringed, to be instituted, *inter alia*, by a person acting on behalf of another person who cannot act in their own name. This position has been reiterated by Courts including the Court of Appeal in **Nation Media Group Limited v Cradle - The Children's Foundation suing through Geoffrey Maganya [2016] eKLR**. The Petitioner in this instance, is a holder of powers of attorney in respect of Kanza Musyoka and Jane Ndinda Zakayo and in my view, he is properly before this Court as such an attorney.

18. In that regard, from all the documents filed, my deduction is that the Petitioner's grievances are two fold. First there is the issue of ownership and occupation of land in dispute being plots No.3471 and 3472 aforesaid and secondly, the use of police officers through corruption, in meting out physical violence and destruction of property to effect the eviction of the 'rightful' owner. I say so because there appears to be an unresolved dispute as to who the legal owner of the land in dispute is.

19. I also note from the annexures to the Petitioner's Affidavit of the existence of **Machakos High Court Civil Appeal No.145 of 2011 Kanza Musyoka v Kamoli Kithome** being an appeal against the decision in **Eastern Provincial Land Dispute Appeal No.38 of 2009**. As indicated earlier, the said Appeal's Tribunal had found in favour of Kamoli Kithome. Since the Petitioner did not address the Court on the

nature and status of the appeal before the High Court, my inference is that the issue of occupation and ownership of land is to be addressed conclusively in those proceedings and I am therefore unwilling to venture into making any determination on the matter, the issue being reserved in any event for the Environment and Land Court established under **Article 162(2)(b)** and **165(5)(b)** of the **Constitution** which states as follows:

“162(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –

(b) the environment and the use and occupation of, and title to, land.”

and

165(5) The High Court shall not have jurisdiction in respect of matters –

(b) Reserved for the exclusive jurisdiction of the courts contemplated in Article 162(2)

In the event that the Petitioner has raised aspects of violation of the Constitution with regard to the land dispute, the Environment and Land Court would be able to address such matters in those proceedings. This is all I should say on that issue.

20. As for the second grievance, relating to the indiscretion by police officers, the Petitioner alleges several issues ranging from bribery, assault and destruction of property. There was also the allegation that unnamed police officers relied on a forged Court order in executing the eviction aforesaid. These issues, as can be seen from the record, are issues the Petitioner has sought to address with various relevant institutions especially the Office of the Director of Public Prosecutions and the Inspector General of Police. The same issues have been addressed in some instances from several correspondences on record. For instance in one of the letters from the Office of Director of Public Prosecutions dated 3rd June 2014, it emerges that some of the issues raised are of a criminal nature and are already before the relevant Courts.

21. The Petitioner has however not addressed the effect of these correspondences and the status of the pending criminal proceedings and how this court can lawfully intervene in them by this petition. In addition, the Petitioner did not name the specific officers involved and relate it to the Respondents and in the premises, I am reluctant to speculate on the real issues in controversy because the Petitioner is obligated to frame and present his case with clarity in order for the Court to equally make an informed determination on these issues. (see **Anarita Karimi Njeru v The Republic (1976 – 1980) KLR 1272**).

22. Further, I am unable to pronounce myself on the forgery allegations relating to certain Court orders because these are issues that require investigation and expert analysis under the existing laws. This Court is neither seized of the investigative powers nor the relevant expertise to do so in the manner suggested by the Petitioner. He certainly has other legal avenues in pursuing such allegations including through the making of reports to the Criminal Investigations Department and the Ethics and Anti-Corruption Commission which have the constitutional mandate to inquire into such issues and make necessary recommendations to the Director of Public Prosecution who many then decide whether to undertake any prosecution where necessary. The Court can only thereafter make a determination on the matter once it is proper before it. At the moment, therefore, these issues are not properly before the Court and having greatly and patiently grappled with the Petitioner’s circumstances, I am unable to find any constitutional question for me to determine in the Petition as filed and argued.

Whether the Petitioner is entitled to the remedies sought

23. **Article 23(3)** of the **Constitution** sets the reliefs that may be granted in any proceedings brought under **Article 22** of the **Constitution**. These reliefs include a declaration of rights, an injunction and an order for compensation. The Petitioner has in that regard sought several orders for compensation relating to the occupation and use of the land in dispute including what he termed as compensation for forced eviction. He also seeks a refund of Kshs.13,000.00 being travel expenses in attending to the Land

Disputes Tribunal and Court matters and Kshs.10,000.00 as damages for the destruction of trees during the eviction. He also prayed for an order against Kamoli Kithome to be enforced by the OCS in charge of Mutomo Police Station and the OCPD, Mutomo Police Station. As I mentioned earlier, these are issues well within the realm of the Environment and Land Court and other agencies, to be made, if at all, within their constitutional mandates. Moreover, the Petitioner did not demonstrate the basis for any assessment of damages and I therefore decline to award such compensation.

24. The Petitioner has also sought an order to have Kamoli Kithome and Michael Kilonzi arrested and charged with trespass and use of the land in dispute. This prayer is untenable against any of the Respondents. The prerogative to institute and undertake criminal proceedings against any person before any Court in respect of any offence alleged to have been committed is bestowed upon the Director of Public Prosecutions by virtue of **Article 157(6)(a)** of the **Constitution**. The constitutional independence of the office of the Director of Public Prosecution is buttressed by **Article 157(10)** of the **Constitution** which power is to be exercised without any control or direction of any person or institution except in circumstances set out in **Article 157(11)** which circumstances have not been shown to exist in the present case.

25. The constitutional mandate of the 1st Respondent is also expressly limited to representing the national government in court on legal proceedings to which the National Government is a party, other than criminal proceedings. It has not been shown that the said mandate ought to be exercised in any way in the present proceedings. In a nutshell, none of the prayers sought can be granted. While I therefore commend the Petitioner for his efforts in pursuing justice in his limited abilities, his petition is wanting and I have stated why.

Disposition

26. The upshot of all the above is that the Petition lacks merit and the same is dismissed with no order as to costs.

27. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF MAY, 2017

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 4TH DAY OF MAY, 2017

E. CHACHA MWITA

JUDGE