



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

PETITION NO. 26 OF 2019

JAMES GATHOGO KAMAU..... 1ST PETITIONER

JOSEPH NDUNGU.....2ND PETITIONER

JOSEPH NJUGUNA.....3RD PETITIONER

JOHN OMUTEKU.....4TH PETITIONER

KENNEDY ASHIHUNDU..... 5TH PETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL..... 1ST RESPONDENT

OFFICER IN CHARGE OF POLICE STATION, KAPTEMBWA.....2ND RESPONDENT

OFFICER IN CHARGE OF THE POLICE DIVISION, NAKURU COUNTY3RD RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....4TH RESPONDENT

THE DEPUTY COUNTY COMMISSIONER, NAKURU WEST..... 5TH RESPONDENT

JUDGMENT

1. Through petition filed on 27th September 2016, the petitioners aver that the 1st petitioner together with one Abdi Hassan are the registered proprietors of a parcel of land known as LR No. 30563 – IR No. 168553 located in Nakuru County. They state that the respondents caused the arbitrary arrest and detention of the 2nd to 5th petitioners in September 2016 thus infringing on their right to property, human dignity and their fundamental rights contrary to Articles 20, 23, 25, 27, 35, 40, 48 and 232 of the Constitution.

2. The petitioners therefore pray for the following orders:

1. A permanent injunction be issued preventing the 2nd, 3rd, 4th and 5th respondents its officers, servants or agents from interfering with LR. NO. 30563-IR NO. 168553
2. A permanent injunction be issued against the 2nd, 3rd, 4th and 5th respondents from arresting the petitioners, their servants and agents in relation to their activities on L.R. NO 30563IR NO. 168553 until determination of this petition or further orders of the court.
3. A declaration that the 1st, 2nd, 3rd, 4th and 5th respondents have infringed on the rights of the 1st petitioner by restricting the enjoyment of his property.
4. A declaration that the 2nd, 3rd, 4th and 5th respondents have infringed on the 2nd, 3rd, 4th and 5th petitioners right to dignity.
5. A declaration that the 2nd, 3rd, 4th and 5th respondents have infringed on the 2nd, 3rd, 4th and 5th respondent’s right to freedom by

their arbitrary arrest.

6. The Honourable court do issue such orders and give such directions as it may deem fit to meet the ends of justice.

7. The costs of the petition be awarded to the petitioners.

3. The petition is supported by affidavits sworn by the 1st petitioner and the 2nd petitioner. The 1st petitioner deposed that he and one Abdi Hassan are the registered proprietors of the parcel of land known as LR. No. 30563 - IR No. 168553 located in Nakuru County (the suit property). He annexed as copy of a letter of allotment dated 11th September 1997 and a copy of a Certificate of Title dated 13th October 2015. He added that he sought approval from the County Government of Nakuru to build a boundary wall around the suit property and that approval was granted through letter dated 15th March 2016. That on 3rd September 2016, he engaged the 2nd to 5th petitioners to construct the wall and duly made payments to the 2nd petitioner so that he could purchase fencing materials. However at about 11.00 am on the same day, the 2nd petitioner called him and informed him that they had been arrested by police and taken to Kaptembwa Police Station in the company of the 5th respondent. The 1st petitioner then instructed his advocates who on reaching the police station found the 2nd to 5th petitioners in the cells. They were released and their tools returned to them. On 14th September 2016, the 1st petitioner instructed them to return to site and construct their wall but again at about 10.00 am on the same day, the 2nd petitioner called him and informed him that they had been arrested by police for alleged trespass and taken to the police station together with their tools and construction material. They were again released at the intervention of the 1st petitioner's advocates. The 2nd petitioner's affidavit was generally along the same lines as that of the 1st petitioner.

4. The petition was canvassed through written submissions. Citing **Articles 10 and 40** of the **Constitution**, the petitioners submit that the suit property is the 1st petitioner's private property and that the respondents' attempts to frustrate the construction of the perimeter wall is a violation of the constitution. Further, that the arrest of the 2nd to 5th petitioners was arbitrary and contrary to **Articles 29 and 47** of the **Constitution** and amounted to abuse of office. Accordingly, the petitioner urge the court to grant the orders sought in the petition.

5. Although the Attorney General entered appearance for all the respondents and even attended some court sessions, he did not file any response to the petition or any submissions. In the circumstances, the petitioner's case remains entirely unchallenged.

6. I have considered the petition, the affidavits filed and the submissions. The issues that arise for determination are firstly, whether the court has jurisdiction; secondly, whether the 1st petitioner's rights to property in regard to the suit property have been infringed and lastly, whether the reliefs sought are available.

7. It is important to enquire into whether the court has jurisdiction to deal with the matters before it since jurisdiction is the entry point in any litigation. The Supreme Court stated as follows in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** as regards the issue of jurisdiction:

(68) A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. ...

8. This court has jurisdiction to hear and determine disputes relating to the environment and the use and occupation of and title to land as provided for under **Article 162(2) (b)** of the **Constitution of Kenya, 2010**:

162. System of courts

(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).

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

(a) ...

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

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

9. Additional provisions on this court's jurisdiction are found at **Section 13** of the **Environment and Land Court Act, 2011** in the following terms:

13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article

162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes -

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

10. Therefore, the court has jurisdiction in matters to do with the environment and the use and occupation of, and title to, land as well as in matters concerning redress of a denial or infringement or threat to rights or fundamental freedom relating to a clean and healthy environment under **Articles 42, 69 and 70** of the **Constitution**. The court also has wider jurisdiction when dealing with disputes involving environment and land, to resolve claims concerning breaches of other fundamental rights related to environment and land. See **Daniel N Mugendi v Kenyatta University & 3 others [2013] eKLR**.

11. Issues of arrest and detention of the petitioners and the conduct of the police in the course of the arrest and detention as raised at prayers 2, 4 and 5 of the petition relate to freedom and security of the person under **Article 29**, rights of arrested persons under **Article 49** and police operations under **Articles 243, 244 and 245** of the Constitution. They therefore fall outside the jurisdiction of this court. The petitioners cannot bring them within this court's jurisdiction through pleading, be it innovative or otherwise. The Court of Appeal had the following to say recently in **Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others [2020] eKLR** as regards the issue of attempting to confer jurisdiction through pleadings:

... A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction simply means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. ...

A court cannot arrogate itself an original jurisdiction simply because claims and prayers in a petition are multifaceted. The concept of multifaceted claim is not a legally recognized mode for conferment of jurisdiction to any court or statutory body.

12. As was counselled in **Daniel N Mugendi v Kenyatta University & 3 others** (supra), parties should not file "mixed grill" causes in any court they fancy. In the circumstances, I strike out prayers 2, 4 and 5 of the petition since they raise matters that fall outside the jurisdiction of this court. That resolves the first issue for determination.

13. The second issue for determination is whether the 1st petitioner's rights to property in regard to the suit property have been infringed. From the material placed before the court, and in particular as can be seen from Certificate of Title dated 13th October 2015, I am satisfied that the 1st petitioner together with one Abdi Hassan are the registered proprietors of the parcel of land known as LR No. 30563 – IR No. 168553 located in Nakuru County. As such, they have the right to own the suit property under **Article 40** of the **Constitution** as well as freedom from being deprived of it or of any interest in or right over it.

14. They respondents have not denied that in September 2016 they arrested and detained the 2nd to 5th petitioners who had been authorised by the 1st petitioner to construct a boundary wall around the suit property. The construction had been approved by the County Government of Nakuru through letter dated 15th March 2016. It is not denied that the 2nd to 5th petitioners were taken to Kaptembwa Police Station in the company of the 5th respondent and detained there. A registered proprietor of land is entitled to lawfully enjoy his property. While the law provides for circumstances where the title of a registered proprietor of land can be challenged, no challenge to the 1st petitioner's and Abdi Hassan's title to the suit property has been presented. Since no reason has been offered to justify the interference with the 1st petitioner's efforts to deal with his property, I am satisfied that the 1st petitioner's right to property has been infringed by the respondents.

15. The last issue for determination is whether the reliefs sought are available. I have found above that prayers 2, 4 and 5 of the petition are not for determination by this court. Further, in view of the finding that the 1st petitioner's right to property was thereby infringed, prayers 1 and 3 should issue.

16. In the result, I enter judgment in favour of the petitioners as follows:

a. A permanent injunction is hereby issued restraining the 2nd, 3rd, 4th and 5th respondents, their officers, servants or agents

from interfering with the parcel of land known as LR. No. 30563 - IR No. 168553 located in Nakuru County.

b. A declaration is hereby issued that the 1st, 2nd, 3rd, 4th and 5th respondents have infringed on the 1st petitioner's property rights by restricting his enjoyment of the parcel of land known as LR. No. 30563-IR No. 168553 located in Nakuru County, a property that he jointly owns with Abdi Hassan.

c. The costs of the petition are awarded to the petitioners.

17. This judgment is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 11th day of June 2020.

D. O. OHUNGO

JUDGE