**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Petition 20 of 2012**

**IN THE MATTER OF ARTICLE 22 AND 23(1), (3) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE THREAT TO CONTRAVENE INFRINGE**

**ANDVIOLATE THE FUNDAMENTAL RIGHTS AND FREEDOMS**

**UNDER ARTICLE 40(1) (3) 27 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**JOEL KIPROTICH KOSKEI.....1ST PETITIONER**
**RAEL CHEMURE BARGEGO.....2ND PETITIONER**
**PAUL CHUMO.....3RD PETITIONER**
**JOHN SIGIRA.....4TH PETITIONER**
**PHILIP KIPYEGON KOECH.....5TH PETITIONER**
**HELLEN CHEPTANUI NGENO.....6TH PETITIONER**

**VERSUS**

**KENYA FOREST SERVICE.....1ST RESPONDENT**

**THE PERMANENT SECTRETARY MINISTRY**

**OF FORESTRY AND WILDLIFE.....2ND RESPONDENT**
**THE ATTORNEY GENERAL.....3RD RESPONDENT**

**RULING**

Joel Kiprotich Kosgei, Rael Chemure Bargego, Paul Chumo,John Sigila, Philip Kipyegon Koech and Hellen Cheptanui Ngeno (hereinafter called the petitioners) brought this petition seeking the following orders:-

1. A declaration that the entry or intended entry by the 1st respondent into their private property is illegal.

2. A conservatory order and injunctive order to restrain the respondents, any authority or person legal or otherwise from interfering in any manner whatsoever with their ownership, possession, use and or occupation of parcels Njoro/Naiswet Block 8/1745, 1742, 1658, 1697, 1724, 1542, 1688, 1708, 1709, 1798, 1690, 1999, 1700, 04923, 1717, 1718, 1719, 02152, 1721, 1737, 1738, 1739, 1740, 1741, 02297, 1761, 1762, 1764, 1767, 1977, 1783, 1960, 1978, 1763, 1642, 1653, 1654, 1666, 1667, 1680, 1682, 1681, 1694, 1701, 1715, 1722, 1736, 1744, 1759, 1767, 1783, 1798, 1796, 1795, 1604, 1734, 1784 (the suit properties);

3. That the petitioners be paid damages for breach of their constitutional rights; and

4. That the petitioners be granted costs.

Simultaneously with the petition the petitioners brought the notice of motion dated 22nd May, 2012 seeking the foregoing orders on interim basis.

The application is supported by the affidavit of the 1st petitioner (Joel Kiprotich Koskei) and is premised on the grounds that the petitioners are legal and legitimate owners of the suit properties; that they have been in possession of the suit properties since 1997; and that the respondent is interfering with their use and occupation of the suit properties.

In his reply the 1st respondent has deposed that the application is an abuse of the court process; that only a few of the petitioners (to be precise six) have title documents; that the petitioners were removed from the suit properties long before they went to court (in 2011); that the petitioners occupation of the suit properties was illegal and that their eviction was informed by public interest.

Counsels for the respective parties filed submissions which I have read and considered.

From the pleadings and the submissions, the sole question for determination is whether the petitioners have made up a case for granting of an injunction or the conservatory orders sought.

To determine whether the petitioners have made up a case for granting of the orders sought the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the petitioners are only required to establish a *prima facie* case with a likelihood of success. They must also demonstrate that unless the conservatory order is granted there is real danger which may be prejudicial to them. See **V/D Berg Roses Kenya Limited & Another** V. **The Hon. Attorney General & 2 others**, Nakuru HC Pet. No.9/2011.

It is the petitioners case that they have been in occupation of the suit properties since 1997; that their occupation is lawful; and that it has been uninterrupted. It is also their case that in 2012 officers of the 1st respondent, without any justification, attempted to eject them from their only home (the suit properties); that some of the petitioners have title to their respective parcels while others have letters of allotment; and that the provincial administration has confirmed that they are not squatters.

The 1st respondent, on his part, maintained that the allocation of the suit properties was unlawful, that at the time of the alleged allocations the forest had not been degazetted and that the rights under Article 40 do not extend to illegally obtained land. Counsel further submitted that the orders sought cannot issue because an injunction or conservatory order cannot issue if what is sought to be restrained has already happened. He cited the decisions of the Court of Appeal in **Yego** V. **Tuiya & another** (1986) KLR and that in **Esso (K) Ltd V. Mark Makwata Okiya** civil appeal No. 69 of 1991 where the court of Appeal held:-

**"Since there was no sufficient evidence to show what the status quo was, the best course would be to set aside the order of eviction and to remit the matter to the High Court for further evidence to be given."** and **" the purpose of Injunctions is to maintain status quo. Injunctions are not to be granted if the event meant to be restrained has taken place;** and **Courts should not grant orders not prayed for"** respectively.

From the petitioners own evidence, in particular, Paragraph 12 of the affidavit sworn on 3rd October, 2012 it is clear that by the time the petitioners went to court they had been ejected out of the suit properties.

Although counsel for the petitioner submitted that the 1st respondent acted illegally, by forcefully ejecting the petitioners from the suit property, at this stage the court is not supposed to make any definitive finding into the legality or otherwise of the 1st respondent's action. Similarly, the court cannot, at this stage make

a definitive finding as to whether the petitioners, more so the 53 without title had any bona fide claim to the suit property. See **V/D Berg Roses Kenya Limited & Another** V. **The Hon. Attorney General & 2V/D Berg Roses Kenya Limited & Another V. The Hon. Attorney General & 2 others** *supra*. It suffices at this point to make general observations as to the nature of claim advanced by each party to the petition and the affidavit evidence adduced in support thereof.

In **Rashid Odhiambo Aloggoh** V. **Haco Industries Ltd** Civil Appeal No.110 of 2001 (unreported) the Court of Appeal held:-

**"In a Constitutional reference where facts are not admitted or agreed, the Court has first to ascertain the factual position and if found that the factual position is not as stated by the applicants, that is the end of the matter but if the facts are as stated by the applicants, then the court has to move to the next stage and that is whether the facts constitute or amount or violation or contravention of the Constitution... ".**

Whereas the petitioners are seeking for an order of injunction to restrain the respondent from interfering with their possession, occupation, or ownership of the the suit properties, it is clear from the affidavit evidence that by the time they came to court the 1st respondent had already ejected them and taken possession of the suit properties. As an injunction cannot issue to restrain what had already happened before the aggrieved party went to court and given that the petitioners are not seeking for an order of re-entry, I am not persuaded that the petitioners' have made a good case for granting the orders sought.

In my view the only lawful way in which the petitioners would have regained access to the suit property would have been by a prayer for declaration that the eviction was illegal and an order compelling the respondent to allow them regain access. The fact that the respondent had used "unlawful" means to eject the petitioners from the suit property was not an excuse for the petitioners to misrepresent to the court that their occupation was continuous and uninterrupted. As the petitioners did not seek to be put back into the suit property, the interim orders granted to them could not form the basis of their re-entry.

Although the petitioners succeeded in obtaining an *ex parte* order against the respondents, having found the said order to have been obtained through misrepresentation and none disclosure of material facts this court has no choice but to discharge the said order. See **Uhuru Highway Development Ltd** V. **Central Bank of Kenya** Civil Appeal No.140 of 1995 the Court of Appeal held:-

**"Views expressed by a court at an interlocutory stage are not binding on the trial court as facts may emerge in a different light, or views may change or the court may not follow its own decision when found to be wrong. Concluded views can only be expressed on facts not in dispute facts which stand out as clear as day light."**

From the affidavit evidence, there is no doubt that the petitioners had been injected from the suit properties long before they went to court. It is also clear that the orders issued by the court did not order for their re-entry into the suit property. If they used the said orders to regain entry, I find and hold such re-entry to have been unlawful.

As an injunction cannot issue to restrain what had already happened before the court was seized of the dispute, I decline to grant the orders sought in the petitioners application dated 22nd May, 2012. Costs in cause.

**Dated, Signed and delivered on this 10th day of May 2013.**

**L N WAITHAKA**
**JUDGE**

**PRESENT**

Mr Kibet for petitioners/applicants

Ms Said for 1st Respondent

Mr Kirui for 2nd ,3rd respondent