



**IN THE HIGH COURT AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 310 OF 2012**

**BETWEEN**

**WATTS INSTITUTE OF PROFESSIONAL STUDIES LTD ..... PETITIONER**

**AND**

**COMMISSIONER OF POLICE ..... 1<sup>ST</sup> RESPONDENT**

**COMMANDANT ADMINISTRATION POLICE ..... 2<sup>ND</sup> RESPONDENT**

**PROVINCIAL COMMISSIONER, NAIROBI ..... 3<sup>RD</sup> RESPONDENT**

**DISTRICT COMMISSIONER, LANG'ATA ..... 4<sup>TH</sup> RESPONDENT**

**OFFICER COMMANDING POLICE DIVISION LANGATA ..... 5<sup>TH</sup> RESPONDENT**

**SUNSHINE COTTAGES LIMITED ..... 6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioner has moved this court by way of a petition dated 23<sup>rd</sup> July 2012 seeking to enforce its fundamental rights and freedoms under **Article 40** of the Constitution which protects the right to property.

**Petitioner's Case**

2. Its case is that it acquired the parcel of land known as LR NO. 1160/230 situated along Karen Bogani Road ("the suit property") in 2002, has occupied it and is in the process of subdividing it. It complains that on or about 19<sup>th</sup> July 2012, Administration Police Officers attached to the District Commissioner's Office in Karen and unknown persons invaded the land and took over the premises. In the circumstances, it has been unable to exercise the rights incidental to ownership of the property and as such there has been a violation of its rights. The petitioner avers that it later learnt that the police officers were on the property allegedly at the instigation of the 3<sup>rd</sup> and 4<sup>th</sup>

respondents.

3. It therefore asserts that its right and guarantee to property protected by **Article 40** of the Constitution has been violated and it seeks orders removing the police officers and strangers from the land and consequential relief. The petitioner's case was supported by the depositions of its Managing Director, Fatuma Abdi Yussuf sworn on 23<sup>rd</sup> July 2012 and 18<sup>th</sup> April 2013 respectively and written submissions.

### 1<sup>st</sup>- 5<sup>th</sup> respondents' Case

4. The petition is opposed by the respondents. John Elungata, the District Commissioner of Langata District, where the property is situated, deposed in the affidavit sworn on 15<sup>th</sup> April 2013 that in the area, there are many land disputes where people claim land on the basis of false documents. This, he asserts, has led to violence and destruction of life and property and hence when his office and the District Security Intelligence Committee were informed of trouble at the suit property, they dispatched police officers to the property. In his view, the officers were only stationed on the property to avert violence which became apparent when two contending groups laid claim to the property. It was his view that in the circumstances, his officers were entitled to maintain law and order as the matter of ownership was being resolved in the proper forum.

### 6<sup>th</sup> respondents' case

5. Although the petitioner does not set out any cause of action against the 6<sup>th</sup> respondent in the petition, after service of process two firms of advocates were appointed to represent the Sunshine Cottages Limited. One party had a certificate of incorporation dated 12<sup>th</sup> September 1997 with the registration number C77953 represented by the firm of *Kaplan and Stratton Advocates*. Its case was supported by the affidavits of its director, Sukhwinder Singh Jandu and another by Galeb Gulam. The thrust of all the affidavits is that it is the bona fide owner of the suit property having acquired it through an open and transparent process which was ultimately confirmed by the Chief Land Registrar.
6. Another Sunshine Cottages Limited, represented by first by the firm of *Ngatia and Associates Advocates* and then by *Issa and Company Advocates*, laid claim to the suit property. Although it did not file an affidavit in response to the petition, its case can be gleaned from the Notice of Motion dated 24<sup>th</sup> May 2013 in which it sought that Directorate of Criminal Investigations and the Inspector General of Police be compelled to release title documents to the property. In a supporting affidavit of its director, Vrajesh Bhagwandas Ruparel sworn on 24<sup>th</sup> May 2013, it too lays claims to the suit property. Its claim is that the title documents were taken from its advocate's offices, *Miller and Company Advocates*, to investigate alleged fraud on the piece of land.

### The Arguments

7. In summary, these are the facts that are before the court. Before the hearing commenced and as part of its submissions counsel for the petitioner urged the court to summon the Chief Land Registrar to be cross examined on the veracity of the title documents and in particular a letter dated 17<sup>th</sup> July 2013 which he wrote to the firm of *Kaplan and Stratton Advocates* confirming that the search attached to the petitioner's deposition as part of its documents is a forgery. Counsel submitted that the issues of fraud and forged documents could only be resolved by summoning the Chief Lands Registrar who would testify and be subjected to cross-examination
8. The 6<sup>th</sup> respondent, represented by *Issa and Company Advocates* submitted that the petitioner had not made out a case to warrant the grant of relief under **Article 22** and **23** of the Constitution as nothing had been placed before the court to demonstrate that it had acquired the property in a legal manner. Even though its counsel urged the court to direct that the matter be heard in the proper forum that deals with land matters, it supported the petitioner's application for the examination of

the Chief Land Registrar.

9. On the other hand, the 6<sup>th</sup> respondent represented by the firm of *Kaplan and Stratton Advocates*, argues that the evidence of its title is clear and unequivocal and that it has set out the full history of the transaction that led to the issuance of the title in its favour. In the circumstances, the Court should declare it the proper and legal owner of the suit property as this fact is confirmed by the Chief Land Registrar and in order to protect its right to property by issuing appropriate relief under **Article 23** of the Constitution.

### **Determination**

10. I have considered the petition, depositions and submissions and I take the following view of the matter. This petition has been brought to enforce fundamental rights and freedoms under **Article 40** which guarantee and protect the right to property. As the court has held before, property rights guaranteed under **Article 40** are not created by the Constitution itself but rather by substantive law (see *Joseph Ihugo Mwaura and 82 Others v Attorney General Nairobi Petition 498 of 2009 (Unreported)*).
11. It is the fundamental duty of the State under **Article 21(1)** of the Constitution to, “**observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.**” The State fulfils these guarantees by inter alia, enacting legislation and taking measures, policy or otherwise, which entitle every person to enjoy, to the fullest extent, the protection of these rights and fundamental freedoms.
12. In the case of property rights, these are articulated in the various land laws that make provision for the creation title to property, provide protection of title and provide a means of settlement of disputes arising from disputes to title. Hence from the point of view of the State’s obligation under **Article 21(1)** in respect of property rights guaranteed under **Article 40**, the state cannot be implicated in violation as there exist such laws and mechanisms for dispute settlement in the circumstances of this case.
13. This brings me to the dispute at hand, it is apparent that the land subject of this proceedings is contested. It appears that three parties lay claim to the property. The issue of who owns the land must be resolved through the normal processes that have been created for this purpose. Although the Court under, **Article 22** of the Constitution is entitled to provide relief for breaches of the Constitution and resolve cases on the basis of evidence, I think the facts and circumstances of this case are such that the court declines to exercise jurisdiction under **Article 22**. In the case of *Bishop Absalom Ndungu and Others v Attorney General and Others Nairobi Petition No. 444 of 2012 (Unreported)* I stated, “*The dispute between the petitioners and the Church is a property dispute, the responsibility of the State in such circumstances is to provide a framework for resolution of such disputes as a means of protecting the property. Various statutory enactments like the Land Act, Act No. 6 of 2012 and the Land Registration Act, Act No. 3 of 2012 which repealed previous statutory enactments like the Registration of Titles Act fulfil the protection guaranteed by the Constitution by providing an orderly manner of acquisition, holding and disposal of property. Where disputes arise between parties, the ordinary procedures for dispute settlement provided by the State are to be invoked. This is evidenced by the fact that our courts, on a day-to-day basis, deal with land cases within the framework established by the Constitution and law enacted pursuant to Constitutional provisions to protect property rights. (See Tony Munene v Commissioner of Lands and Others Nairobi Petition 322 of 2012 [2012]eKLR). It is therefore unnecessary to have recourse to constitutional provisions to resolve what is in fact an ordinary civil dispute respecting claims to property.*”
14. In the recent case of *Issac Ngugi v Nairobi Hospital and Another Nairobi Petition No. 407 of 2012 (Unreported)*, the court dealt with horizontal application of the Constitution where it stated that whether the court exercises its jurisdiction under **Article 22** and **23** of the Constitution is a question to be decided in each case. The court noted that; “[23] For instance, the court will be

*reluctant to apply the Constitution directly to horizontal relationships where specific legislation exists to regulate the private relations in question. In other cases, the mechanisms provided for enforcement are simply inadequate to effectuate the constitutional guarantee even though there exists private law regulating a matter within the scope of application of the constitutional right or fundamental freedoms. In such cases the court may proceed to apply the provisions of the Constitution directly.”*

15. In my view, the disputed nature of the facts of the case and the fact that there exists an efficacious manner of dealing with land disputes of this nature is the reason why I have expressed reluctance to consider the case and grant relief. It is also why I have exercised great circumspection in commenting on the merits of the respective claims.

16. The same argument goes for the 6<sup>th</sup> respondent represented by the firm of *Kaplan & Stratton Advocates*. I decline to grant relief in its favour for the reasons I have set out above.

### **Disposition**

17. In the circumstances, the petition filed herein be and is hereby struck out. The petitioner shall pay the costs of the 6<sup>th</sup> respondent represented by the firm of *Kaplan and Stratton Advocates*.

**DATED and DELIVERED at NAIROBI this 1<sup>st</sup> day of October 2013**

**D.S. MAJANJA**

**JUDGE**

**Mr Mokaya instructed by Mosota, Mokaya Advocates for the petitioner.**

**Ms Makori, Litigation Counsel, instructed by the State Law Office for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents.**

**Ms Mutua instructed by Issa and Company for the 6<sup>th</sup> respondent.**

**Mr Gachuhi instructed by Kaplan and Stratton Advocates for the 6<sup>th</sup> respondent.**