



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITON NO. 20 OF 2019

**IN THE MATTER OF: ENFORCEMENT AND PROTECTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS PURSUANT TO ARTICLE 23 OF THE CONSTITUTION**

AND

**IN THE MATTER OF: PROTECTION OF PRIVATE PROPERTY AND THE RIGHT
TO OWN PROPERTY IN KENYA PURSUANT TO ARTICLE 40 OF THE CONSTITUTION**

AND

**IN THE MATTER OF: NATIONAL SECURITY WITHIN THE CONTEXT OF THE PROTECTION
AGAINST INTERNAL THREAT TO AND DESTRUCTION OF PRIVATE PROPERTY,
PURSUANT TO ARTICLES 238 AND 244 OF THE CONSTITUTION**

AND

**IN THE MATTER OF: INTEGRITY OF PUBLIC OFFICERS UNDER CHAPTER SIX
OF THE CONSTITUTION IN DESTROYING A CHURCH BUILDING
AT NIGHT IN EXECUTION OF A COURT ORDER**

AND

IN THE MATTER OF: EXECUTION OF COURT ORDERS BEFORE 6.00 A.M.

IN CMC LAND CASE NO. 5 OF 2018 MALINDI BETWEEN JAPHET

NOTI CHARO (PLAINTIFF) VERSUS PASTOR PAUL MUTUNGA

& DELIVERANCE CHURCH (AS DEFENDANTS)

AND

**IN THE MATTER OF: THE ROLE OF POLICE OFFICERS IN
ENFORCEMENT OF ORDERS OF COURT IN CIVIL MATTERS**

BETWEEN

REVEREND PAUK K. MUTUNGA

DELIVERANCE CHURCH OF KENYA.....PETITIONERS

VERSUS

1. HON. ATTORNEY GENERAL
2. NATIONAL POLICE SERVICE
3. JUDICIAL SERVICE COMMISSION
4. INDEPENDENT POLICE OVERSIGHT AUTHORITY
5. HON. S.R. WEWA SPM
6. SAMUEL NTONGAI
7. OFFICER COMMANDING POLICE MALINDI
8. COUNTY COMMANDER MALINDI
9. JAPHET NOTI CHARO.....RESPONDENTS

RULING

1. By this Notice of Motion application dated and filed herein on 24th June 2019, Reverend Paul K. Mutunga and the Deliverance Church of Kenya (the Petitioners) pray for orders framed as follows: -

3. That pending the hearing and determination of this Petition, this Court do issue an order (staying) further proceedings and/or implementation of the Court order issued on 2nd April 2019 in CMCC Land Case No. 5 of 2018 Malindi;

4. That pending the hearing and determination of this Petition this Court do issue an order for Judicial review compelling the 1st, 4th, 6th, 7th and 8th Respondents to produce before this Court the full list of all the people including their national identity cards and employment numbers with their employers involved in the planning and execution of the Court order issued on 2nd April 2019 in CMCC Land Case No. 5 of 2018 Malindi; and

5. That (the) costs of this application be provided for.

2. The application which is supported by an affidavit sworn by the Reverend Paul Katithi Mutunga (the 1st Petitioner) is premised inter alia on the grounds that: -

i) The Applicants have filed a substantive Petition seeking the following fundamental prayers:

a) A declaration that the Order issued by the 5th Respondent on 2nd April 2019 in Malindi CMCC No. 5 of 2018 is unconstitutional, null and void and in conflict with the order of 16th June, 2015 in Malindi ELC No. 197 of 2015;

b) A declaration that by issuing the said order, the 5th Respondent breached the Constitutional rights for a fair trial for the Petitioners contrary to Article 50 of the Constitution;

c) A declaration that by issuing the said order, the 5th Respondent breached Articles 73 and 75 of the Constitution and more so attempting to issue an order to override the existing order issued in Malindi ELC No. 197 of 2015 aforesaid;

d) A declaration that execution of a Court order at 3.30 am or thereabouts before 6.00 a.m. and any other time after 6.00 p.m. is unconstitutional, illegal, null and void and a breach of Articles 73 and 75 of the Constitution;

e) A declaration that by executing a Court order at 3.30 a.m. or thereabouts before 6.00 a .m, the 6th Respondent breached the provisions of Articles 73 and 75 of the Constitution and is not fit to hold a public office as Court Bailiff in the Republic of Kenya;

f) A declaration the 2nd Respondent's officers involved in the supervision, authorization and or overseeing the execution of a Court Order at 3.30 a.m. or thereabouts before 6.00 a.m. offended the provisions of Articles 73 and 75 of the Constitution and are not fit to hold a public office as Police Officers in the Republic of Kenya;

g) A mandatory order against the Respondents for the restoration of the Petitioners structures to the state they were in as at 19th June 2019 or a compensation of the equivalent value of the structures before demolition be paid by the Respondents;

h) A declaration that the Petitioners are entitled to know the names of the Police Officers involved in the planning and execution of the Court Order issued on 2nd April 2019 under Article 35 of the Constitution; and

i) An order of injunction restraining the 9th Respondent by himself, his servants and/or agents from interfering with the peaceable occupation of the Petitioners on Plot Portion No. 14034 contained in Land Survey Plan No. 401352/Unsurveyed Plot Numbers 4, 5, 7, 8, 10 and 11 Sabaki Squatters Upgrading Scheme/Portion No. 10840

ii) The Petition will take a while before it is heard and determined. In the meantime the Applicants are apprehensive that the 9th Respondent may proceed through the use of unconstitutional means to totally take charge of the suit property and to evict the petitioners thereby denying them their right to access their place of worship.

iii) The Applicants believe that under Article 35 of the Constitution, the 1st, 2nd, 3rd, 4th, 6th, 7th and 8th Respondents have the names of the people who participated in the execution of a Court order at 3.30 a.m. or thereabouts on 20th June 2019.

iv) There is need to sustain a status quo which will guarantee the existence of the suit property when the Petition is fully heard and determined while at the same time preserving the status quo which existed before 20th June 2019; and

v) That unless the Court intervenes, the Petitioners stand to suffer irreparable loss and damage.

3. The application is opposed. By a Replying Affidavit sworn on its behalf by the Officer in-charge Malindi Police Station Stephen Mwachia, the National Police Service (the 2nd Respondent) avers that on 8th April 2019, they received a Court order issued in **Malindi Case No. 5 of 2018** requiring that the structures on the said Land Portion No. 14034 be removed with the help of supervision of the OCS Malindi Police Station.

4. The 2nd Respondent avers that upon receipt of the said orders, the OCS wrote to Malindi Law Courts on 9th May 2019 seeking to confirm the authenticity of the said Order. A response was received from the Court on the same day confirming that the order was genuine and authentic.

5. The 2nd Respondent avers that their officers accordingly proceeded to provide the Court Bailiff with security to execute the Court order on 20th June 2019 at 6.00 a.m. Prior to the exercise, the Police made sure there was no person in the church during the demolition exercise in order to avoid any casualties.

6. The Independent Policing Oversight Authority (the 4th Respondent) is equally opposed to the orders sought by the applicants. In a Replying Affidavit sworn on its behalf by the Head of Complaints Management Diana Watila and filed herein on 30th July 2018, the 4th Respondent avers that the Petitioners have not at any point in time lodged any complaint with the Authority regarding the conduct of any members of the 2nd Respondent to enable it to investigate the same.

7. Accordingly the 4th Respondent asserts that it has not failed to carry out its investigative mandate as required by its constitutive Act, to warrant the Court to compel it to do so. In addition, the 4th Respondent avers that given that the matter herein is now subject to Court proceedings, it is now barred under Section 26 of the Independent Policing Oversight Authority Act, 2011 from conducting investigations in regard thereto.

8. The application is further opposed by the Honourable Sylvia R Wewa, SPM (the 5th Respondent). In a Replying Affidavit sworn and filed herein on 13th August 2019, the Senior Principal Magistrate currently stationed at the Eldoret Law Courts avers that on 12th April 2018, **Malindi CM Land Case No. 5 of 2018; Japhet Noti Charo –vs- Pastor Paul Mutunga & Another** was lodged at the Chief Magistrates Court, Malindi accompanied by a Notice of Motion application which sought orders of a temporary injunction against the Defendants.

9. The 5th Respondent further avers that when the Motion first came up before the Honourable Carilus Nyawiri, SRM on 13th April 2018, temporary orders of injunction were granted. The application subsequently came up before the same Honourable Nyawiri on 25th April 2018 when it was allowed. On 2nd May 2018, the Plaintiff filed another application seeking committal of the Respondents to civil jail for disobedience of the injunctive orders.

10. The 5th Respondent further told the Court that following stay orders issued in **Malindi ELC No. 2 of 2012** on 3rd May 2018, the proceedings in **Land Case No. 5 of 2018** were stayed. On 11th October 2018 when the said **ELC Case No 2 of 2012** came up however, it was withdrawn with costs to the Defendant.

11. Subsequently on 1st March 2019, **Land Case No. 5 of 2018** was brought before the 5th Respondent with a Notice of Motion application dated 28th February 2019 which sought orders that the Court Bailiff be directed to enforce the orders earlier on issued on 13th April 2018 and confirmed on 25th April 2018. The 5th Respondent granted the prayers sought. She further told the Court that on 2nd April 2019, a further application for review of the orders issued on 25th April 2018 to include the removal of structures on the property under the supervision of the OCS Malindi was made. The 5th Respondent granted the orders.

12. The 5th Respondent asserts that the orders issued by herself were so issued in her capacity as the judicial officer presiding over the case and in the course of her lawful duties as such an officer and that the application herein thus lacks merit and ought to be dismissed.

13. Isaac Ntongai Samuel (the 6th Respondent) is similarly opposed to the Petitioners' application. In a Replying Affidavit filed herein on 13th August 2019, the 6th Respondent who is a Court Bailiff attached to the Malindi Law Courts avers that he was issued with Court orders issued by the Court on 13th April 2018 and a further one issued on 1st March 2019 which directed the enforcement of the orders issued on 13th April 2018.

14. The 6th Respondent further avers that on 2nd April 2019, the orders earlier on issued on 25th April 2018 were varied to include the removal of structures on the suit property under the supervision of the OCS Malindi. On receipt of the said Orders, the 6th Respondent proceeded to execute the same on 20th June 2019 at around 6.15 a.m in the company of Police Officers from Malindi Police Station.

15. The 6th Respondent asserts that all the actions he took were done in his capacity as the Court Bailiff and in execution of valid Court orders and he urges the Court to dismiss the Petitioners' application.

16. Japhet Noti Charo (the 9th Respondent) is similarly opposed to the application. In his Replying Affidavit filed herein on 5th July 2019, he avers that he is the registered owner of all that parcel of land known as Portion 14034 Malindi. The 9th Respondent avers that he had previously filed **ELC Case No. 2 of 2012** against the Petitioners but he has since withdrawn the same and filed **Land Case No. 5 of 2018** against them before the Chief Magistrates Court, Malindi.

17. The 9th Respondent further avers that the Petitioners refused and/or ignored to participate in the proceedings in **Land Case No. 5 of 2018**. On 2nd April 2019, the Court issued an order which was duly executed by the Court Bailiff with the help of the OCS Malindi Police Station.

18. I have carefully considered the Petitioners' application and the respective responses by the Respondents herein. I have similarly perused and considered the written submissions and authorities placed before me by the Learned Counsels representing the various parties herein.

19. The Petitioners before me have urged this Court to issue an order staying further proceedings and/or the implementation of the orders issued on 2nd April 2019 in **Malindi Chief Magistrates Land Case No. 5 of 2018; Japhet Noti Charo –vs- Pastor Paul Mutunga and the Deliverance Church**. In addition, they pray for an order of judicial review compelling the 1st, 2nd, 4th, 6th, 7th and 8th Respondents to produce before this Court the full list of all those who participated in the planning and execution of the said orders issued on 2nd April 2019 pending the hearing and determination of their Petition.

20. The basis of those prayers can be discerned from the supporting affidavit of Reverend Paul Katithi Mutunga from wherein it emerges that the Petitioners and the 9th Respondent have been embroiled in a number of Court cases one of them being **Malindi ELC Case No. 2 of 2012; Japhet Noti Charo –vs- Pastor Paul Mutunga**.

21. According to the Petitioners, they were unaware that the said **ELC No 2 of 2012** had been withdrawn by the 9th Respondent and only came to learn of that fact on 21st June 2019. The Petitioners assert that the 9th Respondent had previously attempted to withdraw the case without success and that the eventual withdrawal thereof was a calculated move to defeat justice and steal a match against themselves.

22. From the extract of proceedings in the said **ELC Case No. 2 of 2012** as attached to the Replying Affidavit of the 5th Respondent, it is apparent that the said **ELC No. 2 of 2012** was however not withdrawn unilaterally by the 9th Respondent as the Petitioners would want the Court to believe. From the said extract, it is evident that on 11th October 2018, the said suit was listed before this Court for dismissal for want of prosecution by dint of the provisions of Order 17 Rule 2 of the Civil Procedure Rules.

23. Contrary to the Petitioners' contention that they were unaware of the proceedings, the coram indicates that both the Petitioners and the 9th Respondent were represented in Court on the said day. In order to forestall the imminent dismissal of the suit, Mr. Ogetto Advocate holding brief for Mr. Otara for the 9th Respondent sought to withdraw the suit instead. In a response, Mr. Mukomba Advocate who still appears for the Petitioners herein had no objection to the withdrawal save for the Petitioners being granted the costs of that suit. Accordingly, this Court marked that suit as withdrawn with costs to the Defendants who are the Petitioners herein.

24. As it were, the Petitioners were granted an opportunity to file a Supplementary Affidavit and they indeed did file two affidavits on 2nd October 2019, some two months after the 5th Respondent filed the Replying Affidavit giving the details of the proceedings on 11th October 2018 and it is noteworthy that they neither denied nor made any reference to the proceedings of 11th October 2018.

25. It is further evident as stated in the 5th Respondent's Replying Affidavit aforesaid that long before the withdrawal of **Malindi ELC No. 2 of 2012**, the 9th Respondent herein had instituted against the Petitioners herein **Malindi CM's Land Case No. 5 of 2018**, the same having been filed on 12th April 2018. It is also apparent one day after the suit was filed, a Notice of Motion application dated 12th April 2018 filed under Certificate of Urgency was placed before the Honourable Nyawiri SRM then seized of the matter and the Learned Magistrate proceeded to grant orders as follows: -

1. That the application dated the 12th day of April 2018 be and is hereby certified as urgent and service be dispensed with in the first instance.

2. That a temporary injunction be and is hereby issued restraining the Defendant/Respondents by themselves, agents, servants, legal representatives or any other person claiming interest through them from constructing, trespassing, entering, remaining, selling, leasing, alienating, demolishing any perimeter wall and/or dealing with the Plaintiff's property known as Portion No.

14034 contained in land survey plan number 401352 in any manner whatsoever pending the hearing and determination of this application inter- partes.

3. That the OCS and/or the Deputy DCIO Malindi to ensure compliance of these orders.

4. That inter-partes hearing (be)on the 25th day of April, 2018.

26. It is also apparent that on the said 25th April 2018 when the application came up, the Petitioners had not filed any response and the Court then seized of the matter proceeded to confirm the orders of injunction. While it was not clear to me if the Petitioners were properly served prior to the confirmation of those orders by the Honourable Nyawiri SRM on the said 25th April 2018, this Court notes that the averments at paragraph 7 and 8 of the 9th Respondents Replying Affidavit herein have not again been contested by the Petitioners. In that Affidavit filed herein on 5th July 2019, the 9th Respondent states as follows: -

7. That upon withdrawing Malindi ELC No. 2 of 2012 I filed another suit against the Petitioners/Applicants in the Chief Magistrates Court being Land Case No. 5 of 2018 which was duly served upon them.

8. That the Petitioners/Applicants refused and/or ignored to participate in the proceedings in Malindi Chief Magistrates Land Case No. 5 of 2018.

27. In the absence of any response or reference to those circumstances when the Petitioner was granted a chance to respond to the same, this Court can only but make an inference that the Petitioners were aware of the proceedings in the said **Land Case No. 5 of 2018** but chose to ignore the same.

28. As it were, the orders confirmed by the Honourable Nyawiri SRM on 25th April 2018 remained in force. Those were the orders that were varied by the 5th Respondent on 2nd April 2019 to include the removal of the Petitioners' structures from the suit property. The Petitioners are aggrieved by the decision and now urge the Court to stay the same and invoke its judicial review powers to compel the Respondents to provide information.

29. While one may understand the basis for the Petitioners' dissatisfaction with the orders of 2nd April 2019, it was clear to me that prior to the variation of the orders, there were in existence valid Court Orders that had been issued against them which orders they have neither set aside nor varied. While it may have been desirable that they be served with the application seeking variation of the orders prior to the issuance of the said orders, they have not put anything before me to demonstrate that in issuing the said orders and enforcing the same the 5th and 6th Respondents were acting in any other manner other than as officers of this Court in the execution of their duties.

30. From the material placed before me, it is apparent that the 5th and 6th Respondents came into contact with the dispute between the Petitioners and the 9th Respondent in the cause of their official duties. While the Petitioners have termed the orders issued by the 5th Respondent as illegal and unconstitutional, I did not think that the mere fact that the orders were issued by the Honourable Magistrate ex-parte, would ipso facto, render those orders unconstitutional.

31. There was no evidence placed before me to suggest that the Petitioners had sought a review or an appeal of the orders as required by law. As Mativo J stated in **Rhoda Wanjiru Kibunja –vs- RO. Mbogo & Another (2019) eKLR: -**

“The practice of litigants naming judicial officers in civil suits arising from their exercise of Judicial functions is gaining root in this Country despite the existence of clear provisions of the law granting Judicial Officers immunity from being sued in civil proceedings arising from the exercise of their duties. Such practice is not only unlawful, but if unchecked, has the potential of eroding faith in the administration of justice.”

32. Those words by the Learned Judge find their legal underpinning in Section 6 of the Judicature Act which provided thus: -

“No Judge or Magistrate, and no other person acting judicially, shall be liable to be sued in a Civil Court for an act done or ordered by him in the discharge of his Judicial duty, whether or not within the limits of his jurisdiction, provided he at the time, in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of a Court or other person bound to execute the lawful warrants, orders or other process of a Judge or such person shall be liable to be sued in any Court for the execution of a warrant, order or process which he would have been bound to execute if within the jurisdiction of the person issuing it.”

33. Those same provisions have also received Constitutional underpinning in Article 160(5) of the Constitution which stipulates that:

“A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.”

34. In this respect, I have considered the grounds cited in support of the Petition and the application before me. Those grounds clearly show the extent of the frustrations of the Petitioners with the actions taken by the 9th Respondent. However, while the 9th Respondent may as they state have stolen a match against them, the allegations made in particular against the 5th Respondent can only be, if well founded, grounds for an appeal but not for suing a Judicial officer in his or her personal capacity.

35. I have taken a long and careful study of the Petition and the application before me and have come to the conclusion that as framed, this Petition is an affront to the Judicial immunity granted to judicial officers. It follows that the Petition against the 5th and 6th Respondent is unsustainable and on that ground, the Petition against those two officers is hereby struck out.

36. It follows further that in the absence of any illegality *per se* in regard to the orders issued in **Malindi CM's Land Case No. 5 of 2018**, I do not find any basis for the grant of the orders of stay of proceedings.

37. In respect of the order sought to compel some of the Respondents to produce a list of those who participated in the execution of the orders, the Constitution is clear at Article 35 that information held by the State should be accessible to its citizens. That information is however available only upon request. For purposes of actualizing Article 35 of the Constitution, Parliament enacted the Access to Information Act, 2016. Under Section 8 of that Act, a citizen who wants to access information should do so in writing with sufficient details and particulars to enable the public officer understand what information is being requested.

38. From the material placed before me, there was no evidence that a request for information had been made to the named Respondents and that they had declined to grant the same to warrant their being compelled as sought by the Petitioners.

39. The upshot is that I did not find any merit in the Motion dated 24th June 2019. The same is dismissed with costs.

Dated, signed and delivered at Malindi this 2nd day of October, 2020.

J.O. OLOLA

JUDGE