



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

CONSTITUTIONAL PETITION NO. 15 OF 2017

BANDARI INVESTMENT CO. LTD.....PETITIONER

VERSUS

NATIONAL POLICE SERVICE & 22 OTHERS.....RESPONDENTS

RULING

1. The Petitioners have moved this court by way of Notice of Motion application dated 1st December 2017. The application is premised on article 22 & 23 of the Constitution and Rules 23 & 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice & Procedure Rules 2013). The orders sought are as follows;

1) Spent;

2) That pending the hearing and determination of this Petition;

(a) This Honourable Court be pleased to allow the Petitioner to continue with the construction of a perimeter wall round Plot LR Sub-Division No. 817 (Original Number 324/2 Section II/MN) as allowed by the 4th Respondent through Permit No P/2016/499 and leave a gate for the 6th – 23rd Respondents to access their structures therein.

(b) This Honourable Court be pleaded to issue an order of Judicial Review in the form of orders of Mandamus compelling the 1st, 2nd and 3rd Respondents to provide the 5th Respondent Oriole Investment Ltd or such contractors as appointed by the Petitioner with sufficient uniformed and armed police officers while constructing the perimeter wall on Plot LR Sub-division No 817 (Original Number 324/2 (Section II/MN) and securing the perimeter wall from demolition.

(c) The Honourable Court be pleased to issue an order of injunction restraining the 6th – 23rd Respondents operating as Kaguta Self Help Group, Nguu Tatu Self Help Group and others all other invaders currently occupying Plot LR Sub-Division No 817 (Original Number 324/2 (Section II/MN) from interfering with the construction of the perimeter wall, demolishing the perimeter wall, subdividing, selling, constructing or in any other manner whatsoever dealing with Plot LR Sub-Division No 817 (Original Number 324/2 (Section II/MN) except for purposes of accessing their structures.

3) Spent.

4) Costs of the application be provided for.

2. The application is based on the facts listed on the face of the application as grounds and the affidavit of Ken Tobias Odero Sungu in support thereof. The grounds include the following:-

(a) The Petitioner/Applicant is a limited liability company wholly owned by BANDARI SACCO LIMITED and the registered proprietor of Plot Subdivision LR SUB-DIVISION NO. 817 (Original Numbers 324/2 (Section II/MN) for purpose of the petition this plot is referred to as the suit property.

(b) Sometimes in the year 2016 the 6th – 23rd Respondents operating as Kaguta Self Help Group, Nguu Tatu Self Help Group and others clad with pangas, bows and arrows, metal bars, knives and other crude weapons overran the Petitioner's security guards, took possession, occupied and subdivided the suit property amongst themselves. They chased away the Applicant's

security amidst threats of personal injury or death.

(c) The first group of invaders were few but currently the Petitioner understands that the 6th- 23rd Respondents operating as Kaguta Self Help Group, Nguu Tatu Self Help Group and others have been selling portions of the suit property to other unsuspecting squatters. On the ground now, there are scattered temporary structures made of wood, old iron sheets and plastered with mud. This process is ongoing and there is even a mosque under construction against the will and permission of the Applicant. Unless the court intervenes the construction of the mosque is a signal that those in occupation are there to stay and can now commence the construction of permanent structures.

(d) The intention of the Applicant in acquiring the suit property was to develop a low income residential estate with modern day facilities for its first membership. This plan was to enable the Applicant's membership to acquire fundamental basic rights under Article 40, 42, 43, 57 and 64 of the Constitution.

(e) The issues of invasion private property in Kisauni Constituency by use of force is a matter of public notoriety and this court should reverse the trend by enforcing the rule of law and defending sanctity of title. Citizens should understand that property acquisition under Article 40(6) of the Constitution demands full compliance with the law so that the title so acquired is constitutional and lawful.

(f) The 6th -23rd Respondents operating as Kaguta Self Help Group, Nguu Tatu Self Help Group and others, their servants, agents or assigns have totally blocked, have continuously breached the constitutional rights of the petitioner and unless this court intervenes the Applicant risk totally losing the suit property to the 6th – 23rd respondents operating as Kaguta Self Help Group, Nguu Tatu Self Help Group and others through unconstitutional means.

(g) The petition will take a while before being heard and finalized. The applicant is apprehensive that by the time the petition is heard and finalized more invaders will have moved in and occupied the remaining part of the suit property and make it extremely difficult for the applicant to regain possession due to implications associated with evictions.

(h) The applicant wishes to preserve the current status quo but not the eviction of the invaders in the interim. The invaders can stay where they are on condition that they do not carry further construction, sell more portions to other invaders or neighbours, bring into the property other invaders or neighbours and have the property secured to keep away other possible invasion.

(i) The only way to keep the status quo is to have a perimeter wall round the property and secure the place by use of armed police officers while maintaining a gate to be used by the current invaders.

3. The 1st – 3rd and 5th Respondents are supporting the grants of the orders being sought. The 4th Respondent, the 7th – 11th Respondents and the 13th – 19th and 22nd Respondents did not file any pleadings in response to the application. The petition and the application was served by way of advertisement on the local dailies. On 7th March 2019, the Interested Parties were joined to the petition pursuant to their application dated 28th January 2019. By consent, the Interested Parties were also given seven (7) days from 7th March 2019 to file and serve their response if any to the Notice of Motion dated 1st December 2017. None has been filed. The application is thus opposed only by the 6th, 12th, 20th, 21st and 23rd Respondents.

4. Mr Martin Chiponda the 6th Respondent swore an affidavit dated 18th December 2017 in response to both the petition and this application. He opened his affidavit by stating that he is also a petitioner No. 4 in ELC Petition No. 74 of 2014 and 1st Plaintiff in ELC Case No. 301 of 2015 relating to parcels of land Nos. 324, 382, 817 and 819 all Section II/MN. He annexed the pleadings in the two cases as annexure "A". The 6th Respondent denied any eviction took place on 9th September 2016, 22nd February 2017 or 1st March 2017 as alleged by the Petitioner. That it is a lie for the Petitioner to state that her building plan for the construction of a wall was approved on 23rd December 2016 after the 4th Respondent confirmed there were no squatters on the land yet the Petitioner had filed Case No. CMCC 1686 of 2016 in September of the same year seeking eviction orders.

5. The 6th Respondent deposed that it would be grave for the court to allow one party to take possession at an ex parte stage in a dispute such as this by permitting the building of the perimeter wall yet such an order would convolute the dispute. That the order of 4th December 2017 has the undesired effect of assisting the Petitioner to take possession. The 6th Respondent denied that the residents of Nguu Tatu CBO who reside in the suit parcels have been selling the land as alleged or otherwise. That the 6th – 12th, 20th, 21st and 23rd Respondents have been on the suit land for over 12 years. The 6th, 12th, 20th, 21st and 23rd Respondents thus oppose the granting of the orders being sought.

6. The advocates for the Petitioners and for the 6th, 12th, 20th, 21st and 23rd Respondents filed their respective written submissions. The Petitioner submitted that on 4th December 2017, the court allowed prayer 2(a), (b) and (c) and 3 of the Motion. That prayer 2(a) was varied partially providing for construction of a two (2) feet wall round the property. That what remains for determination is prayer 2(a) and (b) as presented in the application to be granted pending hearing and determination of the petition.

7. The Petitioner submits that she is entitled to the grant of the orders sought because;

(a) She is the registered proprietor of the suit parcel No. 817/II/MN and her title has not been invalidated by any court or tribunal.

(b) This court on 4th December 2017 granted the Petitioner orders to construct a 2 feet perimeter wall under security of 1st –

3rd Respondents.

(c) That after the Respondents application to the Court of Appeal was dismissed the 6th – 23rd Respondents, their agents and servants demolished the entire wall and carried away most of the building materials.

8. That the Petitioner is entitled to provision of security because they have pleaded in paragraph 22 and 23 of the Petition the existence of violence. That as at 19th December 2017, only the 5 Respondents have responded to the Petition and the application in their individual capacities. The Petition submits that the building of the wall will block further invasions and that the orders sought are not for ascertaining the ownership. In support of her submission, the Petitioner cites the decision of **Gatirau Peter Munya –versus- Dickson Mwenda Kithinji & 2 Others (2014) eKLR** that defined the purposes of conservatory orders.

9. In his submissions filed on 29th January 2018, Mr Kimani learned counsel for the 6th, 12th, 21st and 23rd Respondents submits as follows; Under Rule 28 of Local Government Adoptive By-laws, a construction of a wall must be approved by the relevant authority. That a court of law cannot sanction an act in contravention of the law. That if the building of the wall was started before the approval done on 23rd December 2016 then the court had no business to grant an order to continue construction of the perimeter wall which started before its approval and design.

10. The said Respondents submit that it is an abuse of the court process to file a constitutional process to redress a simple tort of trespass. He referred the court to the decision of **Thames Launchers –versus- Trinity House (1961) 1 ALL E. R 26**. That fencing in the Respondents with the limited access to the land essentially gives possession to the Petitioner who hitherto had none at all. Secondly that a litigant cannot seek possession of land subject of a pending litigation and they relied on the case of **Manchester Corporation –versus- Conolly (1970) Ch 420 and Bradford Metropolitan City Council –versus- Brown (1986) 84 I GR 730**. That this court misdirected itself when it issued the orders of 4th December 2017 and 19th December 2017 when the 6th, 12th, 20th, 21st and 23rd Respondents herein had sought stay of these proceedings.

11. That the Petitioner in spite of being aware of the existence of other cases i.e **CMCC 1686 of 2016** and four other civil cases relating to Plot No. 324, 817, 818 & 819 still brought this suit disguising it as a constitutional petition. That by allowing one party to take possession of a disputed land, the court has prejudiced the trial of all these cases by giving the Petitioner a head start. These Respondents urged the court to stay this suit on the basis of the other existing cases and the intended appeal that may arise in light of the ruling of this court given on 19th December 2017. These Respondents also questioned the conduct of the Attorney General in these proceedings. They prayed for orders as set out in their motions dated 18th December 2017 and 29th December 2017.

12. I have considered the pleadings filed and submissions rendered in respect to the present application. The 6th, 12th, 20th, 21st and 23rd Respondents have objected to the grant of the orders sought in three material respects; first that the orders herein will prejudice the trial of their cases Nos. 74 of 2014 and 301 of 2015 which relates to Plot Nos. 324, 817, 818 & 819 touching on a claim for adverse possession. Secondly that the grant of the orders would amount to giving possession of the suit land to the Petitioner while the matter is still pending and thirdly that the subject matter in dispute is the tort of trespass which dispute can be resolved by way of a civil claim. Therefore this pleading filed as a constitutional petition amounts to abuse of the court process.

13. The Petitioner on her part contends that the purpose of seeking the order is to enable her secure the property from further invasions by the squatters, be able to determine the persons in occupation and because of provisions acts of violence experienced, she be provided with state security during the construction exercise. The Petitioner also pleaded that while constructing the wall, she will leave a gate for in-gress and egress to be used by the Respondents currently in occupation of the Suitland.

14. On the issue of whether these proceedings should be stayed, the application for stay of proceedings filed by the 6th, 12th, 20th, 21st & 23rd Respondents has not been set down for hearing. Therefore the court will not grant the orders as prayed in the application dated 18th December 2017 as submitted by the said Respondents. The orders sought in the Notice of Motion dated 29th December 2017 were spent in the previous proceedings. The intended appeal against the orders issued by this court was also already determined.

15. The Petitioner listed in her grounds in support of the motion that the grants of the orders sought herein is only intended to preserve the suit property and her rights under Article 40, 42, 43, 57 and 64 of the Constitution. That the orders given will not ascertain ownership of the property but to stop further invasions by the squatters which invasion is a major challenge within Kiasauni Constituency where the property is located. The 6th, 12th, 20th, 21st & 23rd Respondents denied this averment deposing that there was no evidence of such invasion shown by the Respondents.

16. I note that the orders as sought does not interfere with the occupation of the Suitland by the 6th, 12th, 20th, 21st & 23rd Respondents. The Petitioner sought to fence the suit property and leave a gate for in-gress and egress. Since the Petitioner has stated under oath that the fencing of the wall will not be used as evidence to ascertain the ownership of the suit property, I do not see how the 6th, 12th, 20th, 21st, 23rd Respondents right if any under adverse possession shall be prejudiced in allowing the orders. The petitioner clearly stated this under paragraph 21 of the grounds in support of the application **“The applicant wishes to preserve the current status quo but not the eviction of the invaders in the interim. The invaders can stay where they are on condition that they do not carry further construction, sell more portions to other invaders or neighbours, bring into the property other invaders or neighbours and have the property secured to keep away other possible invasion.”**

17. The Respondents annexed an order issued in Judicial Review. Case No. 7 of 2017 which order operated as a stay then. In the pleadings filed by both parties here, it is agreed that the Judicial Review case was concluded with the result that the proceedings and orders issued in **Msa CMCC 1686 of 2016** was struck out. The annexed order cannot be said to be still operational after the suit where it was issued was determined. The Respondents (6th, 12th, 12th, 20th, 21st & 23rd) other than annexing the Notice of Motion dated 5th December 2016 made in ELC Case No. 301 of 2015 did not annex any orders issued by this court in respect to that application or in those suits that touch on the

petitioner here.

18. Secondly, on the face of that application other than citation of plot numbers 817, the name of the Petitioner herein is not added. Therefore in the absence of a demonstration that there are existing orders in the mentioned files which would be conflicted if the present application is allowed, I do hold that the existence of these suits should not be used as a bar to grant of an interim relief where a party has approached the court such as this case.

19. Is the Petition as filed an abuse of the court process? Article 159 2(d) provides that justice shall be administered without undue regard to procedural technicalities. The question being raised by the respective Respondents is on want of form and it does not go into the root of the dispute. I am therefore persuaded to find that the filing of the suit as a Petition *per se* is not abuse of the court process.

20. Having considered all the issues raised by both parties, I find no justifiable cause to deny the Petitioner the prayers sought in the Motion dated 1st December 2017. Accordingly I do allow the application by granting **prayers No. 2(a), (b) and (c)** pending hearing and determination of the Petition. The costs of the application ordered in the cause.

Dated, Signed and Delivered at Mombasa this 18th day of July 2019.

A. OMOLLO

JUDGE.