



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC PETITION NO. 42 OF 2018

IN THE MATTER OF ARTICLES 3, 10, 20, 21, 22, 23, 40, 159, 184, 244 AND 245 OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED CONRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 24, 25, AND 26 OF THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF SECTIONS 29, 31, 33 AND 46 OF THE PHYSICAL PLANNING ACT CAP 286 LAWS OF KENYA, SECTIONS 20 AND 21 OF THE URBAN AREAS AND CITIES ACT NO. 13 OF 2011 & SECTION 111 OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012

AND

IN THE MATTER OF SECTIONS 24, 49, 51 AND 105 OF THE NATIONAL POLICE SERVICE ACT NO.11A OF 2011

AND

IN THE MATTER OF CONTRAVENTION OF THE RIGHT TO PROPERTY, EQUALITY AND FREEDOM FROM DISCRIMINATION AND RIGHTS TO FAIR ADMINISTRATIVE ACTION

AND

IN THE MATTER OF FAILURE BY THE POLICE TO PROVIDE SECURITY TO PROTECT THE PETITIONER'S PROPERTY

BETWEEN

MANOJ K. SHAH.....PETITIONER

AND

EMBAKASI YOUTH JUA KALI SELF HELP GROUP.....1ST RESPONDENT

MINISTRY OF LANDS, HOUSING

& URBAN DEVELOPMENT.....2ND RESPONDENT

NAIROBI CITY COUNTY.....3RD RESPONDENT

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

JUDGEMENT

1. Through the petition dated 22/06/2018, the Petitioner contended that he purchased Nairobi/ Block 82/1990, Nairobi/Block 82/1991, Nairobi Block 82/1992 and Nairobi Block 82/1993 from Le Stud Limited and that that these parcels of land were amalgamated and subsequently subdivided with the approval of the 3rd Respondent, on condition that the Petitioner would release 10 of the subplots created for public utility. The Petitioner contended that he complied with the condition and the 2nd Respondent issued him with leases over L.R. Numbers Nairobi/Block 82/8708, 8709, 8710, 8711, 8714, 8715, 8716, 8717, 8718, 8719, 8720, 8721, 8722, 8723, 8724, 8725, 8726, 8727, 8728, 8729, 8730, 8731, 8732, 8733, 8734, 8335, 8336, 8337, 8338 and 8339 situated at Donholm area in Nairobi.

2. The Petitioner averred that the 1st Respondent unlawfully invaded, trespassed and encroached on the Petitioner's parcels of land mentioned above claiming that the land belonged to it. He averred that the 2nd and 3rd Respondents have and continue to collude and acquiesce to the alleged fraud, encroachment and trespass by the 1st Respondent. He averred that due to the persistent and unabated trespass and encroachment by the 1st Respondent, he applied to the National Environment Management Authority (NEMA) for permission to build a boundary wall around his properties to protect the suit land from further encroachment and trespass. He claimed that he has not been able to build the boundary wall because his life and that of his agents and servants has been threatened by members of the 1st Respondent who he avers occupy his properties.

3. The Petitioner filed **Milimani Chief Magistrate Case No. 544 of 2011- Manoj K Shah v Embakasi Youth Jua Kali Self-Help Group** and obtained an order of injunction to restrain the 1st Respondent from trespassing, encroaching and erecting illegal structures on his properties. He withdrew the suit citing the reason that the Magistrate's court lacked jurisdiction to handle the matter. He contended that through the Officer Commanding Buru Buru Police Station (OCS), the 4th Respondent had refused, failed or neglected to enforce the injunction order issued in **Milimani CMCCC No. 544 of 2011-** and subsequent orders hence it was in contempt of court. He averred that on account of the alleged continuous trespass, encroachment and the construction of illegal structures on his properties in utter contempt of court orders, the Respondents have infringed on his right to property and in particular Articles 40(1), 184(1)(c) and 245(2)(b) of the Constitution. He further contended that the 3rd Respondent had breached the Physical Planning Act, Urban Areas and Cities Act No.13 of 2011 and the County Government Act No.17 of 2012.

4. The Petitioner also sought to be declared the owner of the properties known as L.R No's Nairobi/Block 82/8708, 8709, 8710, 8711, 8714, 8715, 8716, 8717, 8718, 8719, 8720, 8721, 8722, 8723, 8724, 8725, 8726, 8727, 8728, 8729, 8730, 8731, 8732, 8733, 8734, 8335, 8336, 8337, 8338 and 8339. In addition, he sought orders directed at the 4th Respondent under the command of the OCS, Buru Buru Police Station to provide adequate security in the demolition of the illegal structures erected on the suit land and an order to compel the 4th Respondent under the command of the OCS Buru Buru Police Station to provide adequate security to the Petitioner during the construction of a boundary wall around the suit properties. In the alternative, the Petitioner sought an order permitting him to enter the suit land. He also sought an injunction to restrain the 1st Respondent, its members, servants or agents from entering, remaining, using or enjoying the said properties together with all the developments and facilities thereon.

5. The Petitioner also sought a declaration that the 2nd and 3rd Respondents have allowed and abetted the invasion of the suit properties, and a declaration that the 4th Respondent had denied the Petitioner the right to ownership and use of the suit properties by refusing, failing and or neglecting to enforce and execute court orders. He also sought an order of mandamus to compel the 3rd Respondent to provide this court with a concise investigation report under oath of all the approvals if any, of on-going constructions on the properties within 21 days of the order to be made by this court and to submit details of all persons carrying out unlawful constructions on the land in the event that no approvals were given. He also sought punitive damages against the 1st to 4th Defendants, general damages for trespass against the 4th Respondent as well as costs of the suit.

6. The 1st Respondent opposed the petition through the replying affidavit of its Chairman, Samson Otieno Magogo, sworn on 15/01/2019. He deponed that the Petitioner has filed several suits against the 1st Respondent, where the 1st Respondent has challenged the Petitioner's ownership of L.R. No Nairobi/loBck 82/8708, 8709, 8710, 8711, 8714 to 8739. He annexed copies of pleadings in respect of **Milimani CMCCC No. 544 of 2011- Manoj Shah v Embakasi Jua Kali Self Help group** and **ELC Miscellaneous Application No. 77 of 2017- Manoj Shah v Embakasi Jua Kali Self Help Group** filed at Milimani. He deponed that the 1st Respondent has all along contended that the disputed parcels of land were surrendered to the government and that they form part of the riparian reserve adjacent to Nairobi River. He further deponed that vide a letter dated 29/07/2010, the 3rd Respondent authorised the 1st Respondent to plant trees along the riparian section of Nairobi River which the Petitioner now seeks to claim ownership of. He annexed a copy of the letter. He deponed that on 13/08/2010, NEMA and the Kenya Forest Services also authorised the 1st Respondent to plant trees along the Nairobi River riparian section and annexed copies of the letters.

7. The 3rd Respondent filed grounds of opposition dated 12/03/2019. The 3rd Respondent contended that the petition seeks unenforceable prayers against the 3rd Respondent and that the petition fails to establish any breach by the 3rd Respondent of the Constitution or relevant laws.

8. The 2nd, 4th and 5th Respondents filed grounds of opposition, dated 25/03/2019 and contended that the Petitioner seeks to base his claim on orders arising from Milimani CMCCC No. 544 of 2011 yet this suit was withdrawn and therefore proceedings and orders arising from the said suit do not exist. Further, that the Petitioner had not demonstrated how the 2nd, 4th and 5th Respondents have violated his rights and that the Petitioner had not demonstrated that the orders giving rise to the contempt of court were actually served on the 4th Respondent.

9. The Petitioner submitted that he owns the suit land and has title whose validity has not been challenged or revoked. He also submitted that

he obtained orders in **Milimani CMCCC No. 544 of 2011- Manoj Shah v Embakasi Jua Kali Self Help group** but that the Respondents disobeyed the orders led by government officers who refused to enforce the court orders and the Petitioner's right to property.

10. The 1st Respondent submitted that the issue raised by the Petitioner relates to trespass and eviction of squatters from the suit land which calls for the filing of an ordinary suit so that all the parties can ventilate their positions.

11. The 2nd, 4th and 5th Respondents submitted that basically this was an ownership dispute between the Petitioner and the 1st Respondent which should have been brought as an ordinary suit so that the parties can ventilate their issues at the hearing. The 2nd, 4th and 5th Respondents submitted that they were not parties to **Milimani CMCCC No. 544 of 2011** and as such the orders issued in that suit do not direct the police or the State to do anything. The 2nd, 4th and 5th Respondents also submitted that there is a procedure to be followed by private individuals who wish to seek police protection. The 3rd Respondent associated itself with the submissions made by the 1st, 2nd, 4th and 5th Respondents.

12. The court has considered the petition, responses and submissions filed by parties. The petition is largely pegged on an order given on 09/09/2011 in **Milimani CMCCC No. 544 of 2011**. The order was to the effect that a temporary injunction was issued against the Defendant, who is the 1st Respondent in this suit, restraining it from trespassing, encroaching and erecting illegal structures on the Petitioner's properties. The order was issued at the interlocutory stage before the suit was heard. It is not disputed that **Milimani CMCCC No. 544 of 2011** was withdrawn by the petitioner, who cited lack of jurisdiction on the part of the Magistrate's court.

13. The Petitioner contended that his right to property was contravened by the Respondents' refusal to enforce the injunctive orders arising from the suit. In the court's view, once the suit was withdrawn, the interlocutory orders that had been issued in that suit ceased to have effect. It cannot be said that the Petitioner's rights were contravened because the Respondents failed to enforce an order which had ceased to have effect upon the withdrawal of the suit.

14. From the petition and submissions made, it is clear that the Petitioner seeks to protect his property against what he claims is trespass by the 1st Respondent. In the court's view, the dispute is an ownership dispute between the Petitioner and the 1st Respondent which is more of a tort as opposed to a constitutional claim. Paragraph 11 of the Petitioner's submissions dated 16/04/2019 confirms this position. The Petitioner submitted that it was quite clear that the dispute herein was primarily who owns the disputed property.

15. The court takes the view that the Petitioner's claim for trespass to his property should be canvassed by way of an ordinary plaint where the parties will be afforded an opportunity to present their evidence and test the evidence presented by the other parties.

16. In a constitutional petition seeking to enforce fundamental rights and freedoms, the onus to prove breach or violation of the rights lies on the Petitioner. The Petitioner has failed to demonstrate to the court how the Respondents violated his rights. In **Anarita Karimi Njeru V. Republic [1979] eKLR** and **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**, the courts found that in constitutional petitions, it is not enough to cite provisions of the Constitution said to have been breached without presenting evidence of the infringement.

17. The Petitioner has failed to prove that the Respondents have violated or breached his fundamental rights as pleaded in the petition dated 22/06/2018. The court declines to grant the prayers sought in the petition which is dismissed with costs to the Respondents.

Dated and delivered at Nairobi this 22nd day of October 2019

K.BOR

JUDGE

In the presence of: -

R. Kamotho holding brief for P. Wawire for the Petitioner

Ms. Achieng holding brief for D. Olonde for the 1st Respondent

Ms. Fatma Ali for the 2nd, 4th and 5th Respondents

David Gatheru holding brief for Odhiambo for the 3rd Respondent

Mr .V. Owuor- Court Assistant