



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. PETITION NO. 18 OF 2017

IN THE MATTER OF THE CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER ARTICLES 2 (5) & (6), 28, 31, 40, 258 AND 260 OF THE CONSTITUTION OF KENYA, 2010

AND

THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

SECTION 13 OF THE ENVIRONMENT AND LAND COURT ACT, 2011

AND

BETWEEN

SIGMA PHI INVESTMENTS LIMITED.....PETITIONER

VERSUS

THE INSPECTOR GENERAL OF THE

NATIONAL POLICE SERVICE.....1ST RESPONDENT

THE DEPUTY INSPECTOR GENERAL

OF THE ADMINISTRATION POLICE SERVICE.....2ND RESPONDENT

JUDGEMENT

1. In the Petition dated 4/5/2017, the Petitioner seeks a declaration that the 1st and 2nd Respondents, their employees, servants, agents or officers' actions of 25/4/2017 at the Petitioner's property known as L.R. No. 209/11434 situated in Maasai Road, off Mombasa Road Nairobi ("the Suit Property") constituted a denial, threat, infringement and violation of the Petitioner's right to property contrary to Article 40 of the Constitution; the Petitioner's rights to privacy of their property contrary to Article 31 (1) (a) and (b) and the Petitioner's right to dignity protected by Article 28 of the Constitution.

2. The Petitioner also seeks a conservatory order to restrain the 1st and 2nd Respondents and their agents from threatening, intimidating, harassing, restricting, undermining or disturbing the Petitioner's use, ownership, possession, development and construction of the Suit Property. It also seeks a permanent injunction to bar the 1st and 2nd Respondents from interfering with its possession and development of the Suit Property.

3. Further, the Petitioner seeks an order of compensation against the 1st and 2nd Respondents to compensate it for the denial, violation, infringement and threat of fundamental rights and freedoms as well as any other order for the protection of its fundamental rights freedoms under the Constitution together with costs of the petition.

4. The petition is supported by the affidavit of Catherine Wangari, the Petitioner's Sales and Administration Manager. She depones that on 25/4/2017 at around 4 p.m. she was informed that a land rover full of armed Administration Police officers had arrived at the entrance of the Suit Property while the Petitioner was carrying out construction through its contractor and agent known as Juja Blocks Limited. She states that the police officers identified themselves as being attached to Langata Sub County Offices situated at Wilson Airport and demanded access to the Suit Property to conduct a search.

1. She depones that the Police officers informed her that a dispute over the ownership of the Suit Property had been reported and they wanted to know if it belonged to the Petitioner. She claims the police demanded that the Petitioner cease construction and present its land ownership documents to the Deputy County Commissioner at the Wilson Airport Police Station with. She maintains that the police action was unlawful and amounted to harassment of the Petitioner and its agents who are fearful that they could be harmed by the police. She depones that the Petitioner instructed its advocates to write to the Respondents demanding that they desist from harassing or intimidating the Petitioner but the Respondent refused to respond to the letter and continued to direct the Petitioner to stop the construction.
2. The Petitioner is apprehensive that its right to own and use its property which is protected by Article 40 of the Constitution will continue to be denied, threatened or breached by the Respondent. It is also apprehensive that it will suffer great prejudice and financial loss if the administration police officers continue with the harassment and intimidation of its workers. The Petitioner is also apprehensive that it will suffer more loss when the contractor demands a higher contract sum due to the threats by the police.
3. The Plaintiff annexed a copy of the certificate of incorporation showing that it was incorporated in 1987 and a copy of the title for the Suit Property which shows that it was transferred to the Petitioner in 1995. The Petitioner annexed copies of the earth moving equipment on the site. The Petitioner also annexed copies of the emails exchanged on 2/5/2017 to demonstrate the threat to the contractor as well as the demand letter written by its lawyers. It also produced a copy of its letter dated 2/5/2017 on the letterhead of its sister company addressed to the contractor directing it to continue construction unless they received contrary information from the Petitioner.
4. This court gave conservatory orders on 29/6/2017 after the Respondents had been served and they failed to file any response to the application dated 4/5/2017 brought under certificate of urgency.
5. The Respondents filed a replying affidavit sworn by Philip K. Lemalasia who is the Deputy County Commissioner, Langata Sub County within Nairobi County which was sworn on 21/9/2017. He states that on 18/4/2017, Mr. Tom Odhiambo Owiyo lodged a complaint in his office alleging that unknown individuals had encroached on his parcel of land being L.R. No. 209/11434 located along Maasai Road, Off Mombasa Road within Nairobi County and there was a looming confrontation between his employees and the other party's agents. On 25/4/2017 the Deputy County Commissioner received further information that two people were confronting each other over L.R. No. 209/11434 located along Maasai Road off Mombasa Road.
6. On the strength of those complaints, he informed the Sub-County Administration Police Commander Langata, to respond and ensure that law and order was maintained since in the past the area commonly known as Kyang'ombe had had land disputes that had caused loss of lives, injury and loss of property. This is the same area from which more than 3000 illegal squatters were evicted and their illegal structures demolished sometime in 2010 or 2011. Being cautious and wary, any looming dispute within the area is taken seriously and security officers are involved to

- ensure law and order is maintained.
7. He avers that the police officers were instructed to visit the scene to ascertain the status and prevent the escalation of the dispute. The police officers found Mr. Tom Odhiambo with his workers and the agents of the Petitioner engaged in the construction works at the scene which was a clear indication of a looming confrontation. He depones that he was informed that, without harassing, arresting or threatening anyone, the police officers peacefully reconciled the parties and advised them to report to the Deputy County Commissioner's office so that each party could avail the documents confirming ownership of the land in dispute. Only Mr. Tom Odhiambo attended while the Petitioner's representative failed to show up.
 8. He depones that one of the duties of his office is to resolve land disputes and maintain law and order with the help of other security agencies. As chairman of the County Security Committee, he has on several occasions intervened on land related disputes in the area with the intention of maintaining law and order. Thereafter they may advise parties to go to court or go to the Ministry of Lands or the National Land Commission.
 9. He avers the National Police Service is mandated under the National Police Act of 2011 to preserve peace and protect rights and fundamental freedoms under the Bill of Rights. He avers that the Petitioner filed this case yet his office had invited the parties for talks with the view to resolving the dispute amicably.
 10. Parties filed submissions. The issues that are to be determined are whether the Petitioners' right to property, right to privacy and right to dignity under Article 40 (1), Article 31 (10) and Article 28 of the Constitution respectively were denied, threatened, infringed or violated.
 11. The Petitioner submits that it is the registered owner of the Suit Property and its rights are protected by Article 40 of the Constitution and Section 26 of the Land Registration Act which provides for the indefeasibility of title. The Petitioners complaint is that the Petitioners have refused to provide further details of the complainant who claims ownership of the Suit Property save to give his name.
 12. The Petitioner submits that since the Respondents have admitted entering the Suit Property that fact confirms violation of its rights under Article 31 and 40 of the Constitution. The Petitioner relies on various court decisions on the point that since searches infringe the right to privacy, there exists safeguards to regulate the way in which state officials enter the domains of ordinary citizens (see **Samura Engineering Limited & 10 Others v Kenya Revenue Authority** [2012] eKLR)
 13. It also relies on the decision of **Alex Mautia Morume v. Republic** [2014] eKLR on the point that the police should obtain a search warrant prior to such search and seizure. It highlights the general principle that a man's house is his castle and a policeman is never in principle allowed to enter and search a man's house. These decisions are not relevant since from the photographs produced by the Petitioner there is no house on the Suit Property which the police could possibly have searched.
 14. The Petitioner avers that the Respondents have not adduced any evidence to justify the entry into the Petitioners property by the administration police officers without a search warrant. The Petitioner submits that the police ought to have conducted a search at the lands registry to ascertain the lawful owner of the Suit Property.
 15. The Respondents filed their submissions. They submit that as law enforcement officers they are tasked to maintain law and order hence curtailing their movement would lead to a greater violation of people's constitutional rights. By visiting the Suit Property and summoning the parties to report to the police station for purposes of determining ownership of the Suit property, it cannot be said to be a violation of the Petitioner's rights. The presence of the police was to prevent a situation where there would be a breach of peace between the parties when the police reacted to the complaint lodged on ownership and the report it had received on the disturbances in the area. The Respondents argue that if the police had chosen to do nothing at all, it is conceivable that there would have been more severe breaches of the rights of the parties concerned including the Petitioner's rights.
 16. Further, the Respondents argue that the rights alleged to have been infringed are not absolute and can be constitutionally limited under Articles 24 and 25 of the Constitution. A right or fundamental freedom in the Bill of Rights can be limited by law where the limitation is reasonable and justifiable taking into account factors such as the need to ensure that the enjoyment of rights and fundamental freedoms by an individual does not prejudice the rights and freedom of others.

- The Respondents submit that the actions the administration police officers took meet the constitutional threshold.
17. They argue that the limitation occasioned by the Respondent's agents was not absolute and only lasted for a short period of time until the dispute between the parties could be resolved. The 2nd Respondent required both parties to appear before it for it to make a determination as to whom the land belongs to before the Petitioner could continue enjoying its right to own property. The Respondents submit that the restriction imposed was reasonable and that the police did not use any kind of force and that human dignity was not undermined. The Respondents maintain that the rights the Petitioner alleges were infringed do not fall under Article 25 which lists the rights and freedoms that cannot be derogated from.
 18. The Respondent relies on the case of **Muslims for Human Rights (Muhuri) & 4 others v Inspector General of Police & 2 Others** [2014] eKLR on the point that being a creature of the Constitution, the National Police Service is bound by the constitutional provisions and the limitations of rights by police is subject to Article 244 of the Constitution and the extent permitted by Article 24 of the Constitution.
 19. On the allegation of carrying out a search without a warrant, the Respondents deny that any search was carried out by the police who only went to the site to conduct investigations in respect of the complaint it had received. The area in question being notorious for land disputes, the police could not sit back and wait for the worst to happen. It was paramount that they maintain law and order and that they uphold and maintain peace. This would include preventing situations that may lead to the breach of peace. The Respondents submit that the police cannot be faulted for arriving at the scene in the nick of time to avert a potential confrontation. The Respondents submit that the police officers discharged their duty in compliance with Section 60 of the National Police Service Act and that there was no proof that they acted beyond their powers.
 20. The Respondents submit that the police went to the Suit Property to investigate the complaint they had received and to prevent the commission of a crime. They did not go to the Suit Property to resolve a land dispute. They argue that the Petitioner ought to have cooperated with the police and produced its copies of title.
 21. The Respondents rely on Article 159 of the Constitution which allows for alternative forms of dispute resolution to be employed to resolve disputes and uphold justice. The Respondents deny that the County Commissioner's instructions amounted to usurping the powers of the Environment and Land Court as urged by the Petitioner. It is within the ambit of the 1st Respondent to investigate land related disputes especially where they transcend land law and raise criminal, and law and order issues. The Respondents maintain that they were lawfully discharging their duties and urge that the Petitioner's action of disregarding lawful orders of the police smacks of impunity and utter disregard for institutions mandated by the Constitution to discharge such functions.
 22. The Respondents also relied on **Petition No. 113 of 2009 Consolidated with Petition No. 44 of 2009 and Petition No. 48 of 2012 Charles Murigu Murithii and 2 Others v. Attorney General** [2015] eKLR where it was held that the duties of the police force in Kenya include the prevention and detection of crime and apprehension of offenders. The police force is also to protect life and property. The property and life to be protected must be the life and property of Kenyan Citizens including that of the government and of those who claim the protection of Kenyan Law. The court found that the State through its security agencies including the police had a positive obligation and duty to facilitate and create a peaceful environment in which rights enshrined in the Constitution, including the right to security of person and to property, would be freely and fully enjoyed by persons within its jurisdiction. The duty is a general one owed to the general public.
 23. The Respondents urged the court to appreciate the difficult balancing act the police must undertake in discharging their functions while at the same time not violating the rights of the parties enshrined in the Constitution.
 24. Under Article 24 of the Constitution, a right may be limited by law to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account factors such as the importance of the limitation of the right and the need to ensure that one's enjoyment of their right does not prejudice the rights and freedoms of others.
 25. The police are mandated by law to investigate crime and maintain law and order. The Constitution enjoins the police to strive for the highest standards of professionalism and discipline. From the

facts in the affidavits filed in court, the court is unable to find that the police actions in averting a confrontation at the Suit Property which is volatile and prone to violence, were unreasonable or that they led to the violation of the Petitioner's rights as pleaded in the Petition. No search was conducted by the police as there is no structure on the Suit Property. No evidence was led to show further threats to the Petitioner as it alleges nor did the Petitioner demonstrate that the police subsequently stopped it from further constructing on the Suit Property after 25/4/2017.

26. The Respondents gave the name of the party who lodged a complaint with the police claiming ownership of the Suit Property which the Petitioner maintains belongs to it. In the court's view, the Petitioner ought to have attended the meeting called by the Deputy County Commissioner to resolve the issue. It would then have had an opportunity to look at the other claimant's documents of ownership to enable it take a decision on whether to file a suit against that claimant before this court for a determination of ownership since it appears there was double allocation of the Suit Property.

27. The court has considered the petition, the affidavits together with the submissions of counsels and finds that the petition lacks merit. It is dismissed with costs to the Respondents.

Dated and delivered at Nairobi this 12th day of June 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Obonyo for the Petitioner

Ms. Fatma holding brief for Mr. Eredi for the Respondent

Mr. V. Owuor- Court Assistant