



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC PETITION 9 OF 2018

IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT OF THE PETITIONERS, CONSTITUTIONAL RIGHTS UNDER ARTICLE 2(4),19,20,21,22,23,35,40,47,159,165,258 AND 259 OF THE CONSTITUTION OF KENYA ,2010

=AND=

IN THE MATTER OF RULE 1,4,10,11,13 AND 14 OF THE CONSTITUTION OF KENYA(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES ,2013

=BETWEEN=

ANDREW WAIGANJO NJOROGE (SUING FOR AND ON BEHALF OF

UTHERI WA RUAI.....APPLICANT

=VERSUS=

THE COMMISSIONER OF LANDS AND 7 OTHERS...RESPONDENTS

RULING

1. This is a ruling in respect of a Notice of Motion dated 13th February 2018. The application is brought by the Chairman of a community based organization called Utheri Wa Ruai. The Petitioner had filed a Constitutional Petition on 14th February 2018 in which he contends that the constitutional rights of the members of the Petitioner have been infringed. The Petitioner contemporaneously filed a notice of motion in which he seeks an injunction against the 7th and 8th respondents restraining them from harassing or evicting the members from LR No.10904/43/4 (suit property).

2. The Petitioner contends that the members of Utheri wa Ruai which comprises of 47 families who are squatters have been residing on the suit property which they contend is Government land for decades. The Petitioner's members moved into the suit property after the Government which was excavating stones from it through Ministry of Roads moved out. The Petitioner's members started quarrying activities and rehabilitated some sections which they use for farming.

3. The 7th and 8th Respondents started disturbing them in the year 2005. The Petitioner now contends that its members face imminent eviction from the suit property unless the court grants an injunction stopping the 7th and 8th respondents from evicting them. The Petitioner's members contends that they have nowhere to go and that that is the only place they call home.

4. The 1st to 6th respondents have opposed the applicant's application based on grounds of opposition dated 13th March 2018 and filed in court on 21st March 2018. The 1st to 6th respondents contend that the Petitioner has no rights capable of protection under Article 40 of the Constitution and that the issues which the Petitioner has raised revolve around ownership of the land which can be best addressed through an ordinary suit and not through a Petition where only affidavits are considered. They also contend that the Petition does not touch on the 1st to 6th respondents and in any case the Petitioners have not demonstrated that they have a prima facie case to warrant issuance of injunction.

5. The 7th and 8th respondents on the other hand have opposed the applicant's application based on a replying affidavit sworn on 8th May 2018. The 7th and 8th respondents contend that the suit property is private property owned by the 7th respondent. They contend that the petitioners are a group of vicious land grabbers who invade private property and in case they succeed, they quickly sell the land to unsuspecting members of the public and move on to the next property available. The 7th and 8th respondent further state that the applicants are not on the suit property as they allege. If the court were to grant an injunction it will assist the applicants to move into the property and removing them will be a challenge.

6. I have carefully considered the applicants application as well as the opposition to the same by the respondents. Though the applicants have come to court by way of a Constitutional Petition, they have opted to seek injunctive orders under Order 40 of the Civil Procedure Rules. This is not the correct procedure as rules of Civil Procedures are not applicable in Constitutional Petitions. Rules for filing constitutional petitions are governed by what are commonly known as Mutunga Rules whose end results in case orders are granted is normally conservatory orders. However be that as it may, I will proceed to determine whether the applicants have made out a case for grant of an injunction. One of the principles for grant of injunction is that the applicant has to demonstrate that they have a prima facie case.

7. In the instant case, the applicants are contending that the suit property is Government Land which they want allocated to them. The 7th and 8th respondents have demonstrated that the suit property is private property which was transferred to 7th respondent in 1987. The 7th and 8th respondents have annexed a copy of title to confirm this. The 1st to 6th respondents have no interest in the suit property. It is therefore clear that the applicants have not demonstrated that they have any case with chances of success.

8. The 7th and 8th respondents contend that the suit property is not occupied by the applicants. The applicants have been making attempts to invade the suit property by constructing structures at night but the 7th respondent has always thwarted the attempts. There was no further replying affidavit by the applicant to refute this. I therefore find that the applicants wanted to get injunctive orders through misleading information. I find no merit in the application which I proceed to dismiss with no order as to costs.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 20th day of September 2018.

E.O.OBAGA

JUDGE

In the absence of parties who were aware of the time and date for delivery of Ruling.

Court Assistant: Hilda

E.O.OBAGA

JUDGE