



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CONSTITUTIONAL PETITION NO. 1 OF 2018

JOSEPH GICHURI MARARO.....PLAINTIFF/APPLICANT

-VERSUS-

NATIONAL POLICE SERVICE.....1ST RESPONDENT

REGIONAL CORDINATOR COAST.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

OFFICER COMMANDING UKUNDA

POLICE STATION.....4TH RESPONDENT

KHAMIS OMAR MWANDARO.....5TH RESPONDENT

KOMBO GUDE.....6TH RESPONDENT

RULING

1. For my determination is the notice of motion application brought under the provisions of article 22 and 23 of the Constitution and Rule 23 and 24 of the Constitution of Kenya Practice & Procedure Rules 2013. In the motion, the petitioner/applicant seeks to be granted orders:

1) Spent

2) Spent

3) That the Honourable Court be pleased to issue a mandatory injunction directing the 1st, 2nd, 3rd and 4th Respondents to evict the 5th, 6th, 7th Respondents and any other person occupying or attempting to occupy KWALE/DIANI BEACH BLOCK/673 pending the hearing and determination of this petition.

4) That this Honourable Court be pleased to issue an order of injunction restraining the 5th, 6th, 7th Respondents and other invaders currently from entering, subdividing, selling or in any other manner whatsoever dealing with KWALE/DIANI BEACH BLOCK/673 pending the hearing and determination of this petition.

5) That cost of the application be provided with.

2. The motion is supported by the grounds inter alia that the petitioner acquired the suit property in 1990 through purchase & has been using private guards to oversee its security. That sometime in 2018, the 5th – 7th Respondents armed with pangas, bows, arrows & other crude weapons overran the petitioner’s guards, took possession and occupied the suit property and chased away the petitioner’s guards. That the petitioner cannot currently access the property as a consequence of threats by the invaders. Further that the 5th – 7th Respondents have started selling off portions of the suit property to unsuspecting 3rd parties as well as putting up temporary structures now scattered everywhere without the consent of the petitioner. The petitioner avers further that issues of invasion of private property in Kwale County has gained public notoriety which trend the Court should reverse by directing the 1st & 2nd Respondents to use State power in evicting the 5th – 7th Respondents and any persons in occupation of the suit property.

3. In opposing the application, the 1st – 4th Respondents filed grounds of opposition on 20th April 2018. These Respondents state that prayer 2 (a) and 3 cannot be granted at the interim stage but only after the hearing and determination of the suit on merits. The 1st – 4th Respondents prayed for the dismissal of the application with costs.

4. The 6th & 7th Respondents are also opposed to the grant of the orders sought in the application by their replying affidavit of IDD Rama. He deposed that the suit land comprises of a huge junk of land in South Coast that is subject of a perceived historical injustice and unlawful alienation. Mr IDD deposes that the said land was adjudicated in 1978 and the indigenous members of the Digo Community issued with letters of allotment. However the indigenous have never been given title deeds instead in the 1990s a scheme was hatched by Kwale Land's Registry; Provincial Administration and local Politicians to register new allottees who are non-indigenous. The 6th Respondent continued that some of the subsequent allottees have never visited their plots allowing the indigenous settlers to remain in possession and that he is one such settler.

5. The 6th & 7th Respondents case is that their grievances were brought to the attention of the National Land Commission who after holding a public baraza made recommendations to the Cabinet Secretary Ministry of Lands & Physical Planning as per copy of the letter annexed as **IR – 2** in his Replying Affidavit. According to the 6th & 7th Respondents the instant petition is meant to circumvent the findings and recommendations of the National Land Commission. The 6th – 7th Respondents also pleaded that this Court lacks jurisdiction to hear this matter which they plead is an ordinary suit masquerading as a constitutional petition. They urged the Court to dismiss the petition with costs.

6. The 5th Respondent also filed a replying affidavit on 9th April 2018. He deposed that he is a stranger to the suit property and the entire petition. The 5th Respondent deposes that he has never claimed the suit property and has never interfered with the petitioner's right over the subject matter. He states that he lives on the neighbouring plot number Kwale/Ukunda/219 which he jointly owns with Hamisi Omari Shibe as per copy of the title annexed as "**KOM – 1**". The 5th Respondent further deposed that the petitioner has not demonstrated this case falls within the preview of a constitutional petitioner. That the petition and the application does not raise any substantive evidence or grounds against him. He therefore urges the Court to dismiss the present application dated 12th January 2018.

7. The parties filed written submissions which I have read and considered while writing this ruling. The application is seeking temporary orders of injunction to be issued as against the 5th, 6th, & 7th Respondents. For this orders to issue, the applicant must demonstrate the principles set out in the case of **Kenya Small Scale Farmers Forum vs Cabinet Secretary Ministry of Education, Science and Technology & 5 others (2015) eKLR** which he listed in his submissions as follows:

a) The applicant ought to demonstrate a prima facie case with a likelihood of success;

b) The applicant is likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order or interim relief is not granted.

c) The grant or denial of the conservatory order or interim relief ought to enhance Constitutional values and objects specific to the rights or freedoms in the Bill of Rights.

d) If the conservatory order or interim relief is not granted, the Petition or its substratum will be rendered nugatory.

e) The public interest should favour a grant of the conservatory order or interim relief.

f) The circumstances dictate that the discretion of the Court be exercised in favour of the applicant after a consideration of all material facts and avoidance of immaterial matters.

8. The applicant submits that he has demonstrated a prima facie case by showing he is the registered owner and that he has been occupying the suit property. It is true the Applicant has annexed a title deed for the suit property in his name. The question is has he demonstrated his occupation? When was the invasion done and by who? The Applicant did not annex any affidavit by the security guards that he had hired to oversee the security of the suit property. In the body of his affidavit in support of the motion he deposes that sometimes in 2018, the 5th – 7th Respondents overran his security. This affidavit in support of the motion was sworn on 12th January 2018; which is just the beginning of the year 2018. Why didn't he specify the dates based on information given to him by the guards and date of the report made to the police (paragraph 6 & 10 of the affidavit in support).

9. It is my considered opinion that this information was necessary for proof of the invasion that merits the grant of conservatory orders because the 5th Respondent has deposed that he does not live on the suit land and has no claim of the same. Secondly the 6th & 7th defendants have deposed to have been on the land for a longer time based on some alleged demarcation done in 1977 and that the new allottees have been to their various plots.

10. An order of temporary injunction can only issue where the incident complained of threatens or the subject is likely to be wasted, damaged or alienated or sold. The Applicant must therefore demonstrate that the acts complained of will change the status of the subject matter thus rendering the execution of a decree if he is successful impossible. The Applicant ought to have refuted the claims by the 5th – 7th Respondents particularly the averment by the 5th Respondent that he is not living on nor claiming the suit property. The submission by the applicant that all his averments have not been controverted and that the other parties have not denied invading the place is not in tandem with the facts contained in the two Replying affidavits filed by the 5th, 6th & 7th Respondents.

11. The Applicant also said the 5th – 7th Respondents have started selling portions of this land. There was no evidence of such sale put forth in the grounds of the application or in the affidavit. Secondly the Applicant has not shown/demonstrated that there are many people on suit

the land which will render the substratum of the petition nugatory. The upshot is that I find prayer 4 seeking orders of temporary reliefs to be without merit and the same is denied/refused.

12. The Applicant also sought prayers for mandatory injunction to issue against the 1st – 4th Respondents compelling them to remove the 5th – 7th Respondents and any other invaders from the suit land. It is trite law that mandatory orders are given only in very special and clear cases. In the case of **Locaball International Finance Ltd vs Agro Export & others (1986) All ER 901 at page 901** it was held that before granting a mandatory interlocutory injunction, the Court had to feel a high degree of assurance that at the trial, it would appear the injunction had rightly been granted. A different & **higher standard was required that for a prohibitory injunction**. Lastly that interlocutory mandatory injunction is granted in exceptional and special circumstances.

13. The applicant must thus convince the Court that this case is special and also lay a basis on a higher level for seeking the order to a higher level. The applicant did not plead or submit on what makes this case special. Secondly based on the contents of the letter by the National Land Commission dated 22.2.2017 annexed as **IR – 2** and the facts deposed to by the 5th & 6th respondents which I have set out before, I do not think this is a simple and clear case. Further it is deposed by the applicant that there are more people on the land other than the 5th – 7th Respondents, it is imperative that the case be heard to determine the basis of their occupation if at all. It is thus premature to seek an order compelling the 1st – 4th Respondents to evict the so called invaders at this interlocutory stage in the absence of proof of when the invasion is alleged to have taken place. The prayer for mandatory injunction is thus premature and the same is also dismissed.

14. In conclusion, I find the notice of motion dated 12.1.2018 as wholly lacking in merit. The same is dismissed with costs to the Respondents.

Dated, signed & delivered at Mombasa this 6th Dec. 2018

A. OMOLLO

JUDGE