



Osman & another v Mohamud & 2 others (Constitutional Petition E002 of 2022) [2024] KEELC 957 (KLR) (28 February 2024) (Ruling)

Neutral citation: [2024] KEELC 957 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

CONSTITUTIONAL PETITION E002 OF 2022

JM MUTUNGI, J

FEBRUARY 28, 2024

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

1,2,10,22,23,26,27,28,40,48 & 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 23(1)(B) OF THE LAND ACT, NO. 6 OF 2012

AND

IN THE MATTER OF QUIET POSSESSION OF LR. NO. GARISSA/BLOCK/1/259

BETWEEN

IBRAHIM ALI OSMAN 1ST PETITIONER

BISHARA ABDULRAHMAN NASSIR 2ND PETITIONER

AND

ABDI MOHAMUD 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. Before the Court for determination are two applications. The first application is by the Petitioners dated 5th December 2022 and the second application is by the 1st Respondent dated 7th December 2022. The court on 23rd May 2023 directed that the two applications be heard together as they had correlation. The parties were to urge the applications by way of written submissions.



2. In the application dated 5th December 2021 by the Petitioners, the Petitioners sought inter alia an interim conservatory order restraining the 1st Respondent, their agents, employees, servants, accomplices and/or any other person from interfering with the Petitioners quiet possession of property known as LR. No. Garissa/Block 1/259 (hereinafter referred to as “the suit property”). The Petitioners application was supported on the grounds set out on the face of the application and the supporting affidavit sworn by Ibrahim Ali Osman, the 1st Petitioner herein. The Petitioners inter alia averred that they were the beneficial and registered owners of the suit property having purchased the same from one Dahir Omar Abdallah at a consideration of Kshs 20,000,000/-. They averred that following the purchase of the suit property, the 1st Respondent who was a senior Official at the Ethics and Anti Corruption Commission has in abuse of his office been harassing, threatening and intimidating them with the objective of having them to relinquish the rights over the property. The Petitioners aver that owing to the acts of the 1st Respondent, they have been unable to take possession and develop the suit property as they intended. The Petitioners thus claim their right to own property as enshrined under Article 40 of *the Constitution* has been violated by the acts of the 1st Respondent and that the 2nd and 3rd Respondents have failed to safeguard and uphold their right to property and therefore urged the Court to grant a conservatory order to preserve and safeguard their interest in the suit property.
3. The 1st Respondent upon being served by the Petitioners in apparent response to the petition and the Notice of Motions by the Petitioners filed the Notice of Motion dated 7th December 2022. In the application, the 1st Respondent inter alia sought an interim conservatory order restraining and barring the Petitioners from publishing either through the mainstream media or social media the purported allegations made by the Petitioner respecting the 1st Respondent in their pleadings in the petition. The 1st Respondent further sought to have his name struck out of the Petition and/or to have various paragraphs in the Petitioners petition and the 1st Petitioner’s Supporting Affidavit struck out for being false, libelous and disparaging of the 1st Respondent. The 1st Respondent’s application is supported on the grounds set out on the body of the application and on the Supporting Affidavit of the 1st Respondent sworn on 7th December 2022. The 1st Respondent asserts that he has no interest whatsoever in land parcel LR Garissa/Block 1/259 and that the Petitioners allegations were malicious, scandalous, vexatious and disparaging and were calculated to create the false and misleading impression that the 1st Respondent had an interest in LR No. Garissa/Block 1/259 when he had no such interest.
4. In regard to the 1st Respondent’s application dated 7/12/2022 Lady Justice Lucy Mbugua sitting at Nairobi where the petition was initially filed before being transferred to Garissa ELC Court on 20th December 2022 issued a conservatory order in favour of the 1st Respondent in the following terms:-

“That an interim conservatory order is hereby issued restraining and/or prohibiting the Petitioners/Respondents or their Advocates, Servants/Agents, Associates, employees or any other person whomsoever from addressing, commenting on, restating or publishing in any public fora or in any mainstream media platform or social media platform whatsoever/ howsoever the purported allegations against the 1st Respondent/applicant as pleaded by the Petitioner/Respondents in their pleadings filed herein.
5. In response to the 1st Respondent’s application the 1st Petitioner filed a Replying Affidavit sworn on 17/4/2023 in which he reiterated that the 1st Respondent was behind the harassment that was visited upon the Petitioners agents to prevent the Petitioners from taking possession and utilizing the suit property. The 1st Petitioner said Replying Affidavit made generalized averments against the 1st Respondent which lacked any specificity and/or particulars. For instance, at Paragraph 8 the name of the person who was alleged to have been arrested and who was the 1st Respondent is stated to have



intervened to have released is not given. The allegation that the 1st Respondent was a close relative to a family who were fighting over the suit property with the former owner is not substantiated.

6. The Petitioners and the 1st Respondent urged the twin applications by way of written submissions. The Petitioners filed their submissions on 21/7/2023 while the 1st Respondent filed his on 25th September, 2023.
7. In the application by the Petitioners dated 5th December, 2022 the Petitioners pray for a conservatory order restraining the 1st Respondent, his agents, employees, servants, accomplices and/or any other person from interfering with their quiet possession of property known as LR No. Garissa/Block 1/259 Garissa. The 1st Respondent has denied he has any interest in the said parcel of land and/or that he has been in anyway instrumental in interfering with the Petitioners use and/or possession of the said property. The 2nd Petitioner was registered as proprietor of land parcel Garissa/Block 1/259 on 22/9/2022 and issued with a certificate of lease on the same date. Thus on the basis of Section 26(1) of the [Land Registration Act](#), 2016 she is prima facie the absolute registered proprietor of the subject land parcel to the exclusion of all other persons.
8. The 1st Respondent in the Affidavit in support of his application dated 7/12/2022 vehemently denied the Petitioners allegations contained in the petition and the application for conservatory orders. The 1st Respondent contended the allegations were false and malicious and were calculated to injure his reputation. He averred he was a stranger to the allegations and denied he had any interest whatsoever on the suit property. The 1st Respondent asserted that the Petitioners allegations were false, scandalous, vexatious and were malicious and made in bad faith with the intention to disparage him and that disclosed no cause of action and ought to be struck out. The 1st Respondent prayed to have the offensive paragraphs of the Affidavits and the Petition struck out.
9. In support of their application for conservatory orders, the Petitioners submitted that on the basis of the fact that they were the registered owners of the suit property, a fact that was not disputed by the 1st Respondent, they were entitled to enjoy unrestricted possession and use of their property but had been prevented from such enjoyment by sporadic acts of violence allegedly meted on them by agents of the 1st Respondent which made them to prefer a report to the police. It is their contention that they had demonstrated a prima facie case with a probability of success and satisfied the conditions for grant of an interlocutory injunction as established in the Case of Giella –vs- Cassman Brown & Company Ltd (1973) EA 358 where the Court at page 360 stated thus:-

“The conditions for the grant of an interlocutory injunction are not, I think, well settled in East Africa, first, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will normally not be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award in damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”
10. The Petitioners pointed to the statement recorded by their agent at the police station annexed as “1A0-3” to illustrate that their attempts to take possession and occupy their land were frustrated. The Petitioners maintained that the 1st Respondent was instrumental in marshalling the persons who prevented them (the Petitioners) from taking possession of their land and hence the necessity to have him restrained.
11. In regard to the 1st Respondents application the Petitioners submitted there was no basis to have the 1st Respondent’s name struck out as a party in the proceedings and/or to have the pleadings of the



Petitioners struck out. The Petitioners argued that as depicted in their Affidavits, the 1st Respondent was responsible for the marauding youths that prevented the Petitioners agents from taking possession of the suit property. The Petitioners submitted that the Court's power to strike out pleadings must be exercised sparingly and with caution to ensure that a party is not unwillingly driven away from the seat of justice. In support of the submission the Petitioners relied on the Case of Mohamed Mohamed Hatimy –vs- Lameck Oluoch T/a Lamethe Hygienic Foods (2018) eKLR where C. Yano, J relying on the Case of DT Dobie – Company (k) Ltd –vs- Muchina (1982) KLRI among others held as follows:-

“----- The Power to strike out pleadings must be sparingly exercised and can only be exercised in the clearest of cases. If a pleading raises a triable issue, even if at the end of the day it may not succeed the matter ought to go to trial.”

12. The Petitioners contend given the attendant circumstances in the present matter, there is necessity that the matter progresses to full trial where the parties will have the opportunity to ventilate their issues. The Petitioners thus urged the Court to allow their application for conservatory order against the 1st Respondent and to dismiss the 1st Respondents application with costs.
13. The 1st Respondent for his part submitted that the Petitioners sensationally had published in the Star Newspaper an article that contained malicious, scandalous, vexatious and disparaging averments that were false relating to the 1st Respondent alleging that he had unlawfully prevented and frustrated them (Petitioners) from taking possession of the property known as Garissa/Block 1/259. The 1st Respondent submitted he was a stranger to the averments made by the Petitioners as he was in no way involved in any attempts to prevent the Petitioners from taking possession of the suit property as alleged.
14. The 1st Respondent further submitted that he had improperly been joined in the proceedings as there was no cause of action against him. The 1st Respondent sought that his name be struck out from the proceedings. The 1st Respondent placed reliance under Rule 5(d)(i) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the Rules) which provides as follows:-

“5(d) The Court may at any stage of the proceedings, either upon or without the application of either party, and, or such terms as may appear just –

- i. Order that the name of any party improperly joined be struck out -----“

15. The 1st Respondent contends that the Petitioners have failed to demonstrate and/or furnish substantiation that the 1st Respondent had violated any of their rights and have merely made unsubstantiated allegations without any specificity. The 1st Respondent's submissions under Paragraphs 11, 12, 13, 15 and 16 which I reproduce hereunder captures the 1st Respondents position on the issue of misjoinder of the 1st Respondent to the proceedings:-

11. In the instant case, the Petitioners have merely cited a myriad of constitutional provisions and flooded the Petition and the application dated December 5th, 2022 with false, malicious, scandalous and vexatious allegations, against the 1st Respondent.
12. The Petitioners have not demonstrated any of the rights of fundamental freedoms that the 1st Respondent is alleged to have denied, violated, infringed, or threatened to deny. In the circumstances, the 1st Respondent is not a proper party to the suit since the suit does not raise any grievance or concern against him. For that reason, there is no cause of action against him and the suit against him is not only misconceived but also frivolous and ought to be struck out.



13. Your Lordship, it is imperative to not that the 1st Respondent is neither a beneficial owner of the suit property nor has he laid any claim whatsoever over the suit property. It is thus absurd that the Petitioners seek orders against a party who has no interest in their suit property.
15. The facts set out in the Petition and the Petitioners' application do not give rise to any reasonable claim against the 1st Respondent but instead, raise false claims that the 1st Respondent has on two occasions frustrated the Petitioners' attempts to take over possession of the suit property by bringing goons to demolish the ongoing developments. The said claims are neither substantiated nor backed by evidence but merely create a false and misleading impression against the 1st Respondent.
16. The Petitioners have neither annexed any evidence linking the 1st Respondent with the alleged frustration over the possession of the suit property nor have they demonstrated the nexus between the proprietorship over the suit property and the 1st Respondent.
16. The 1st Respondent additionally submits there are various paragraphs in the Petitioners Petition and Affidavits that offend Article 33(3) and 35(2) of *the Constitution* as they are false and malicious and are injurious to the reputation and human dignity of the 1st Respondent and ought to be struck out.

On the Petitioners application for conservatory orders, the 1st Respondent placed reliance on the Supreme Court Case of Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 others (2014) eKLR and submitted that the Petitioners did not satisfy the Principles/conditions for grant of conservatory orders and was therefore underserving of any. In the Case of Supreme Court stated as follows:-

“Conservative orders “bear a more decided public law connotation for these are orders to facilitate, ordered functioning within public Agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not unlike interlocutory injunctions, linked to such private – party issues as “the prospects of irreparable harm” occurring during the pendency of a Case; or “high probability of success” in the Applicant’s case for orders of stay conservatory orders, consequently, should be granted on the inherent merits of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

17. The 1st Respondent further relied on the Case of Judicial Service Commission –vs- Speaker of the National Assembly (2013) eKLR to illustrate that conservation orders are distinct from interlocutory injunctions as the former have a public interest connotation whereas the latter intrinsically involve private entities. In the Case Odunga, J (as he then was) stated as follows:-

“Conservatory orders in my view are not ordinary Civil Law remedies but are remedies provided under *the constitution*, the Supreme Law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

18. I have reviewed and considered the petition and the twin applications by the Petitioners and the 1st Respondent. The competency of the Petition is put to question and that goes to the jurisdiction of the Court to sustain the same. The 1st Respondent has asserted that the Petition lacks specificity in regard to the alleged violations and lacks substantiation. The Court in the premises has to consider



whether the petition as presented by the Petitioners met the threshold of what would constitute a Constitutional Petition to be entertained by the Court as such. In order for a matter to qualify to be raised as a Constitutional Petition it ought to satisfy the criteria that was established in the Case of Anarita Karimi Njeru –vs- Republic (1979) eKLR. Firstly, there has to be a precise complaint; Secondly the specific provision of *the Constitution* alleged to be infringed; and Thirdly, the manner in which the Constitutional provision was infringed. In the Anarita Karimi Njeru Case (supra) the Court held that:-

“If a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

19. The Court of Appeal in the Case of Mumo Matemu –vs- Trusted Society of Human Rights, Alliance & 5 others (2013) eKLR reaffirmed the principle established in the Anarita Karimi Njeru Case (supra). The Court of Appeal at paragraph 44 of the Judgment stated as follows:-

(44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this we find the petition before the High Court did not meet the threshold established in that case. At the very least the 1st Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the Respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of the shortcomings, it was not enough for the Superior Court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting” without requiring remedy by the 1st Respondent.”

20. In the instant petition the Petitioners merely made unsubstantiated allegations against the 1st Respondent that he prevented them from taking possession of the suit property that they had lawfully purchased. The petitioners gave no particulars of the dates when they alleged the 1st Defendant prevented them from accessing the suit property and neither did they furnish any particulars of the alleged agents and/or goons, the 1st Respondent was supposedly using to restrain the Petitioners agents from accessing the property. The Petitioners allegation that the 1st Respondent was using his public office as a Senior Official of the Ethics and anti-Corruption Commission to harass and intimidate them was general and was not substantiated. It is my view that the petition lacked reasonable precision to enable appropriate reply. The petition clearly fell short of the threshold established in the Annarita Karimi Njeru Case (supra) and cannot be sustained as a Constitutional Petition.

21. Besides not every infringement and/or violation of a right qualifies to be taken up as a Constitutional petition. Where there are alternative remedies that could be pursued through the ordinary Civil Courts, such remedies ought to be pursued. The present matter has the hallmarks of a Civil dispute that ought to be pursued through the ordinary Courts of Law and not to be couched as a Constitutional Petition. The 1st Respondent has emphatically stated he has no interest whatsoever with the suit property. The Petitioners should exercise their ownership rights over the suit property and deal directly with any person who obstructs them from enjoying their full ownership rights.

22. Having come to the conclusion that I do not have a competent Constitutional Petition before me, I do not have to make any determination on the twin applications, as without the petition, they have no foundation. I accordingly order the applications and the entire petition struck out. Each party shall bear their own costs of the applications and the petition.

Orders accordingly.



**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 28TH DAY OF
FEBRUARY 2024.**

J. M. MUTUNGI

ELC - JUDGE

