



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ENVIRONMENT AND LAND CASE NO. 82 OF 2015

FORMERLY CONSTITUTIONAL PETITION NO. 28 OF 2015

AWADH SALEH SAID.....PLAINTIFF/APPLICANT

-VERSUS-

O.C.S BAMBURI POLICE STATION & SIX OTHERS.....DEFENDANTS/RESPONDENTS

RULING

1. In a notice of motion application dated 30.4.2015 brought under article 22, 23 (3) (b) & (c) of the Constitution and Rules 3, 4, 19 and 23 of the Constitution the petitioner herein after referred to as the applicant prayed for the following orders :-

1. *Spent*
2. *Spent*
3. *Spent*
4. *Partly compromised by consent reached between the applicant and the 1st – 3rd respondents*
5. *That his honourable Court be pleased to grant injunction restraining the 5th 6th and 7th respondents jointly and severally by themselves or through their servants, employees, agents, assigns or other wise from entering upon interfering with and/or having any dealings of adverse nature with the suit property pending the hearing and final determination of this petition.*
6. *The Court do grant a conservatory order prohibiting the 5th, 6th & 7th Respondents or their assigns from carrying out or continuing with construction of any buildings or any other structures on the suit property pending determination of this petition.*

2. The application is supported by several grounds on the face of it and several affidavits sworn by Awadh Saleh Said and Swale Hussein. In brief, the applicant deposes that he is the eldest son of the late Saleh Said Sherman who owns land in utange L. R MN/Subdivision No 398 comprised in certificate of title Mombasa C.R No 7805/1. On 18.3.2015, he learnt through Swaleh Hussein that a group of unknown people had invaded their property without any authority. After lodging the complaint with police who visited the suit property, the trespassers escaped but the 5th respondent was arrested and charged. The same group invaded the land again on 17th April 2015 and commenced construction of various structures on the property. The applicant deposed that their fundamental rights as beneficiaries of this property is threatened and is being infringed by all the respondents.

3. Mr Swaleh Hussein deposed that he is a nephew to the petitioner and beneficiary to the estate of the late Saleh Said Sherman. He corroborated the issues put forth by the applicant as regards the

- invasion by the respondents. In a further affidavit sworn by the applicant on 8th July 2015, the applicant deposed further in response to a replying affidavit that the matters raised therein are irrelevant to the petition. He denied the facts put forth by the respondents that they have always been on this land. He deposed that he has full capacity to bring this suit and denied the orders sought herein will amount to evictions. He urged the Court to allow their application.
4. This application is not opposed by the 1st – 3rd & 4th respondents who through Mr Ngari, State Counsel submitted that it is their duty to provide security and ensure law and order is maintained. They had no problem providing security to the applicant in implementing the orders if any granted by this Court. The motion is opposed by the 5th, 6th and 7th respondents. The 5th respondent swore an affidavit on his behalf and on behalf of the 6th and 7th respondents. The 4th respondent deposed that they have stayed on the suit land for several years uninterrupted. He also deposed that the petitioner filed this petition without disclosing the existence of CMCC No 474 of 2015 in which they (respondents) have sued Saleh Said Sherman from evicting them from this land and No 58 of 2015 seeking ownership by adverse possession.
 5. The 5th respondent stated further that there are many squatters on this land and even built up permanent structures. He also stated the applicant has no capacity to sue as an administrator of the estate is yet to be determined. He averred that the applicant wants to use these orders to evict them and have them arrested. He urged the Court to dismiss both the application and the petition.
 6. The advocates on record made oral submissions on 8th July 2015 for and against the application. Mrs Oluoch – Wambi advocate submitted that the petitioners have fulfilled the requirements set out in the case of **Giella Vs Cassman Brown** and merits the granting of the orders sought. She submitted that article 22 of the Constitution has expanded the regime of locus in Constitutional matters and in this instant, the petitioner has shown his interest in the suit property as he is a beneficiary and he has spent a lot of money taking care of it. On violation of his rights, the petitioner states that the 5th – 7th respondents have entered the suit property without their consent. Under the head of irreparable loss, the petitioner submitted that the 5th – 7th respondents have commenced construction on the suit property thus committing it to waste and referred the Court to the case of **Waithaka Vs ICDC** where the Court held that money is not enough compensation. Lastly the petitioner submits that the balance of convenience should be in terms of this Court issuing an order stopping the respondents from constructing or any further dealings on the land until the suit is determined. In support of this, the petitioner relies on the case of **Caltex Oil Vs Evanson Njiri (2009) e KLR**. He urged the Court to grant the orders sought.
 7. Mr Owino advocate for the 5th – 7th respondents opposed the grant of the orders. He opened his submissions by stating that there are other cases pending against one of the beneficiaries of the estate over the same subject matter. Mr Owino submitted further that the petitioner lacks capacity to sue the 5th – 7th respondents, as he is not the administrator of the estate of the deceased registered owner of the suit property. On this, he referred the Court to the cases of **Coast Bus Vs Samuel Mbuvi and Peter Karanja Vs Joseph Kamande (page 2)**. Lastly he submitted that the petition is not merited and urged the Court to dismiss it with costs.
 8. Having considered the pleadings filed and the submissions rendered, I find two issues are for determination in the present motion ;

i) Whether the petitioner has locus to bring this motion and the suit.

ii) Whether the orders sought are merited Article 22 (1) of the Constitution provides that every person has the right to institute Court proceedings claiming a right or fundamental freedom has been denied or violated and 22(2) Court proceedings may be instituted by

(b) a person acting as a member of or in the interest of a group or class of persons. The petitioner submits he falls under person referred to under article 22 as he is a beneficiary to the suit property. The respondents (5th to 7th) submits otherwise and state that the petitioner required to obtain letters of administration to commence this suit.

9. I have considered the cases cited by the respondents to support this submission. In the **Benson Maina Vs Joseph Mwangi (2006) e KLR**, the Court found the plaintiffs required letters of administration to bring a claim on behalf of the deceased estate. In paragraph 8 of this petition, the

petitioner pleads thus :-

“That as a beneficiary of the estate of the deceased the petitioner is entitled to enjoy all the rights and privileges belonging thereto including but not limited to the right to possession and quiet enjoyment of the suit property without any hindrance or restriction”.

The prayers contained in the petition is to secure the rights of the petitioner as a beneficiary. The claim is therefore brought solely on behalf of the estate the deceased. On this account, I find the petitioner has every right to institute this petition as he has a stake on his own behalf in the suit property.

The preliminary objection on lack of locus is therefore unfounded. The case laws relied on by the 5th – 7th respondents are distinguishable as the claims therein are entirely different from the present case.

10. On the merits of the motion, the pleadings reveal the 5th – 7th respondents attempted to get possession at the time this suit was commenced. In paragraph 10 of the affidavit of the petitioner/applicant, he deposes that on 17th April 2015, the 5th – 7th respondents unlawfully entered the suit property and commenced construction of structures and or buildings. The photographs annexed showed some complete and incomplete semi – permanent houses. The respondents may have illegally entered the plot but this Court has to be certain and careful not to issue orders that will result into eviction at an interlocutory stage. However to preserve law and order, it is necessary that an order be issued that is conservatory in nature so that the petition is not rendered nugatory and an academic exercise. For this to be achieved, I find prayer No 6 of the motion necessary and I hereby allow it. The 1st – 3rd respondents shall provide security to ensure this order is implemented.

11. In regard to prayer 5 on injunction, the 5th defendant deposed that the land is invaded by several squatters some of whom are not known to him. Secondly that they have lived on this land for several years uninterrupted. The petitioner in his further affidavit stated that the respondents claim on being on the land have not been substantiated by any material evidence or photographic evidence. The photographs annexed by the petitioner showed some new foundations being dug as well as complete houses in the background. I could not tell whether those houses comprised part of this plot or not. The fact that there may be other squatters who are not parties to this suit and who are no agents and or assigns of the 5th – 7th respondents, and on the basis of lack of clear evidence whether the houses appearing on the photographs also form part of the suit land, I am unable to grant prayer 5 and 7 as pleaded. Instead I do make an order of status quo to be maintained so that no further dealings are undertaken on the land. This application succeeds to that extent only. I also order that each party shall bear their respective legal costs of the motion.

Ruling Dated and Delivered at Mombasa this 29th day of September, 2015

A. OMOLLO

JUDGE