



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 469 OF 2008

JOHN KAMAU MWANGI.....1ST PETITIONER/APPLICANT

VISION IN CHRIST CHURCH.....2ND PETITIONER/APPLICANT

AGNES WANJIRU GAITHO.....3RD PETITIONER/APPLICANT

GERALD CHEGE GAITHO.....4TH PETITIONER/APPLICANT

-VERSUS-

KENCLAIR LIMITED.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....4TH RESPONDENT

DISTRICT CRIMINAL INVESTIGATIONS

OFFICER THIKA.....5TH RESPONDENT

OFFICER COMMANDING THIKA

POLICE STATION.....6TH RESPONDENT

OFFICER COMMANDING MAKONGENI

POLICE STATION.....7TH RESPONDENT

JUDGEMENT

The Petitioners lodged the petition dated 17th June 2013 seeking the following orders:-

- a. A declaration that the Petitioners' right to fair administrative action under Article 47 of the

- Constitution has been violated/ and or infringed and/or is threatened.
- b. A declaration that the Petitioners' entitlement to the right of fair hearing under Article 50 of the Constitution has been violated and/or infringed and/or is threatened and accordingly, the Petitioners' right to due protection of the law guaranteed in the Constitution has been breached.
 - c. A declaration that the criminal charges leveled against the 4th Respondent are untoward, unfair, unfounded, malicious and ill willed.
 - d. A declaration be made by the court that the continued harassment, intimidation, threats of sanctions and/or capricious and unwieldy demands by the Respondents amounts to subjection to psychological torture contrary to and in breach of Article 29(d) of the Constitution.
 - e. The Respondents herein be directed to respect and uphold the Petitioners' aforementioned fundamental rights and freedoms enshrined in the bill of rights by ceasing and desisting from harassing, threatening, intimidating, arresting, charging and/or unduly entering and/or interfering with the suit property being all that land known as **9290/xiv/81 Block 15/866** also known as **LR No. 4953/4026** within Thika Municipality.
 - f. An order for certiorari do issue to quash the decision of the Respondents to charge the 4th Respondent at the Chief Magistrate's court at Thika Criminal Case no. **1694 of 2013** and to quash the said proceedings.
 - g. Costs of the Petition.
 - h. Such other or further reliefs as the court may deem just and fit to grant.

The Petition is supported by an affidavit sworn by the 1st Petitioner on 17th June 2013. The Petitioners' case is that they are in possession and actual occupation of all that parcel of land known as **9290/xiv/81 Block 15/866** also known as **LR No. 4953/4026** within Thika Municipality. The Petitioners have averred that during the pendency of this suit, interim orders were issued on 18th March 2013 protecting them from interference in respect to the suit property until the hearing and determination of the suit.

According to the Petitioners, the Respondents were duly served and notified of the court orders and a copy of a letter dated 20th March 2013 addressed to the Director of Criminal Investigations Department has been attached as evidence. It is alleged that instead of complying with the orders, the Respondents have resorted to harassing and threatening the Petitioners with arrest and prosecution on matters before the court in addition to coercing the Petitioners to relinquish their claims over the suit properties. Further, the Petitioners have averred that the Respondents have arrested the 4th Petitioner and a copy of a charge sheet has been exhibited.

It is the Petitioners' case that although the Respondents have powers to investigate, enquire, make findings, arrest and prosecute, the Respondents are abusing their powers and acting in a biased manner in a bid to favour the 1st Respondent to the prejudice of the Petitioners. The Petitioners have contended that their constitutional right to fair administrative process, equal protection of the law and due process as well as protection against harassment and torture of all kinds have been and will continue to be violated unless the orders sought are granted. The Petitioners are apprehensive that unless the orders sought are given, they stand the risk of being unlawfully, arbitrarily and without any colour of right arrested, harassed, charged and or otherwise deprived of their liberties and constitutional rights.

The Respondents did not respond to the petition despite being served with a hearing notice for the Petition as evidenced by an affidavit of service sworn by **Ben Muema** on 9th July 2013.

The issue for determination is whether the Petition raises constitutional issues which require intervention by the court and whether there has been any infringement of the petitioners rights and if so whether the petitioner is entitled to the reliefs sought.

The Petitioners have cited various articles of the Constitution which they allege have been infringed. However, no particulars of the alleged violations have been pleaded. For instance, the Petitioners have sought a declaration that their right to fair administrative action under Article 47 of the Constitution has been violated and/or infringed and/or is threatened. However, they have not demonstrated how their right to fair administrative action has been infringed as no particulars of the alleged infringement has been provided. The petitioners have not particularized the acts constituting the infringement that they allege has perpetrated.

It is now settled that constitutional violations must be pleaded with a reasonable degree of precision. This principle was established in the case of **Anarita Karimi Njeru -vs- Attorney General, (1979) KLR 154** where the Court held:

“We would however again stress 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 of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

Although the decision in **Anarita Karimi** was made before the enactment of the Constitution of Kenya 2010, the principle set out therein has been affirmed in the case of **Trusted Society of Human Rights Alliance -vs-**

AG & 2 others [2012] eKLR where the court had this to say regarding the decision in **Anarita Karimi Njeru**

“We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.

The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

The Court of Appeal in the case of **Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 others (---Nairobi CA NO. 290 of 2012** reaffirmed the principle in **Anarita Karimi Njeru**). The court in the **Mumo Matemu** case (Supra) stating that the petition did not meet the threshold in **Anarita Karimi Njeru** since there was no evidence to support the allegations of violations of constitutional provisions, the court held:-

"In view of this, we find that 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..."

Similarly, there is no evidence how the Petitioners' right to fair hearing under Article 50 of the constitution has been infringed or is threatened with infringement.

The Court has also been called upon to declare the criminal charges levelled against the 4th Respondent as untoward, unfair, unfounded, malicious and ill willed. The office of the Director of Public Prosecution is established under Article 157 of the Constitution. Under sub article 4, the Director of Public Prosecution has power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct.

In exercise of his state powers of prosecution, the Director of Public Prosecution may *inter alia* institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed. The court can therefore not interfere with the Director of Public Prosecution's exercise of his constitutional mandate and cannot declare proceedings instituted in a different competent court as unfair, unfounded, malicious and ill willed. If there is no evidence against the 4th Respondent, the court where criminal charges have been preferred will make an appropriate finding and the 4th Respondent will thereafter be at liberty to seek appropriate redress.

In respect to an order directing the Respondents to cease and desist from interfering with the suit property, there are interim orders already in existence. The Petitioners are at liberty to institute relevant proceedings seeking redress for disobedience of the court orders. In my view, the applicants have not shown and/demonstrated that any of their fundamental Constitutional rights have been infringed in any manner. I find the petition to be without any merit and I order the same to be dismissed. I make no order for costs in regard to the petition.

Judgment dated signed and delivered at Nairobi this...**24th**day of...**October**.....2014.

J.M. MUTUNGI

JUDGE

In presence of:

..... For the Plaintiff

..... For the Defendant