REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 392 OF 2013

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 1, 2 (1), (4), 95) AND (60, 3 (10, 4 (10, 10, 21 (1), (3), 22 (1), 3 (D), 23 (1) (3) (A) (B) (C), 24 (10, 28, 35, 43 (10 (B), 45, 46, 48, 52, 60 (1) (C), 258, 259 AND 260

AND

IN THE MATTER OF ARTICLE 25 (1) OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948

AND

IN THE MATTER OF ARTICLES 11 (1) OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS OF 1996

AND

IN THE MATTER OF SECTION 87 (A), (B) AND (E) THE COUNTY GOVERNMENT ACT OF 2012

AND

IN THE MATTER OF TRANSITION TO DEVOLVED GOVERNMENT ACT NO. 1 OF 2012

AND

IN THE MATTER OF VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS

KIAMBU COUNTY TENANTS WELFARE ASSOCIATION.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF KIAMBU.....2ND RESPONDENT

JUDGEMENT

Petitioners case

The petitioner, an association of tenants aver that they are constitutionally entitled to the right to accessible and adequate housing under article 43 of the constitution, that the said rights are under threat due to imminent eviction from houses they have occupied for over twenty years, and that they are entitled to health and safety. The petitioner also claims rights to information under article 35 and also cites violation of articles 25 (1) of the Universal Declaration of Rights, 1948, and violation of Article 11 (1) of International Covenant on Economic, Social and Cultural Rights 1966. It is averred that the state and its organs have an obligation to protect rights enshrined under the constitution and the foregoing conventions. The petitioner seeks an order of injunction restraining the respondents from undertaking the said eviction and a declaration that the eviction in question it a violations of the rights of the members of the petitioners.

The second Respondents Response

On 13th May 2016,the second Respondent filed a replying affidavit sworn by David K. Gatimu, the Chief Officer, Lands Housing and Physical Planning stating *inter alia* that some of the petitioners were tenants in the houses located in Kiambu town, that the intended evictions are guided by law and in conformity with a court decision rendered in Civil Appeal No. 442 of 2010. Annexed to the said affidavit is a copy of a ruling rendered in the said case.

The ruling arose from an appeal in which the petitioners had challenged notices served upon them by the first respondent in PMCC No. 264 of 2010. The petitioners application for an injunction in the said suit was dismissed culminating in the aforesaid appeal in which the annexed ruling was rendered. While rendering the said ruling, the learned judge noted that the grounds raised before him were basically similar to those relied upon in the application in the lower court.

The Respondents further averred that serving the petitioners with the challenged notices cannot amount to infringing the petitioners rights under article 43 of the constitution or any rights to housing under international convention as alleged.

Petitioners Replying affidavit

In a Replying affidavit filed on 7th October 2016, sworn by Francis Muchemi Ndirangu, it is averred that rights under article 43 (3) of the constitution are non-derogable. With respect, this is totally incorrect. Non-derogable rights are outlined in article 25 of the constitution which provides that:- ***25.*** *Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—*

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude;

(c) the right to a fair trial; and

(d) the right to an order of habeas corpus.

Litigation history

By a consent, on 20th May 2016, The first Respondent was struck off the proceedings and the parties were ordered to file submissions within 35 days. On 22nd July 2016, a date for highlighting of

submissions was fixed for 16th August 2016 but on the said date Mr. Omwanza was said to be unwell and a fresh date as fixed for 10th October 2017. However, on the said date, the trial judge was not sitting and a fresh date was fixed for 2nd December 2016. However, from the record, nothing seems to have happened on the said date.

On 8th February 2017, the matter was listed before me and there was no appearance for the petitioner. I fixed the matter for directions on 17th May 2017 and directed the petitioners to be served. On 17th May 2017, there was no appearance on behalf of the petitioners. I also noted that the petitioners counsel had never filed submissions as ordered by Lenaola J on 20th May 2016. I fixed the matter for judgement on 26th June 2017. The second Respondent had on their part filed their submissions as ordered by the court.

Second Respondents counsels submissions

Counsel submitted that the quit notices were properly and validly issued and cited the ruling by Maranga J and reiterated that the petitioners rights were not violated at all, that the second Respondent was not duty bound to bound to provide the petitioners with alternative housing and that the petitioners are not entitled to the reliefs sought.

Abuse of court process

As pointed out above, annexed to the second Respondents Replying affidavit is a ruling rendered by the High Court in Civil Appeal no. 442 of 2010. The said ruling arose from an application filed by the petitioners in the said appeal seeking injunction orders to stop the second Respondents from evicting them from the second Respondents houses which they occupied as tenants. Curiously, their application for similar orders was dismissed in the lower court in PMCC No. 264 of 2010 prompting the said appeal.

After losing the said application in the High court, the petitioners now filed this petition which in my view seeks to obtain the same orders they were unable to obtain in the lower court and in the High court. This is clear from prayers one and two in the petition. In their petition, the petitioners did not mention the previous proceedings even though they involved the same subject matter and the same parties and same grounds. To me, this is utter dishonesty and clear abuse of judicial proceedings and cannot be entertained at all.

The information relating to the petitioners appeal to the high court is contained in the replying affidavit. The only issue to note is that in the lower court and in the appeal in question, the petitioners sued by their names, but in the present petition, they sued in the name of an "association of tenants" whose registration status was not disclosed yet the correspondence annexed to the petitioners documents refer to 36 tenants and annexeture FMN 1 is a copy of the notice addressed to an individual tenant and not the association.

Given the striking similarity in the reliefs sought in the application in the high court and the lower court and this petition, crucial questions do arise such as whether it is open for the petitioners to file identical suits in two different divisions of this courts, seeking identical reliefs. Also, another question is whether the petitioners are seeking orders in this court, which if allowed would amount to obtaining the orders they were unable to obtain in the high court and in the lower court, thereby, indirectly inviting this court to overturn a decision rendered by the high court and whether such conduct amounts to abuse of court process.

In *Agnes Muthoni Nyanjui & 2 Others vs Annah Nyambura Kioi & 3 Others*[1]I observed that "It is trite

law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black's law dictionary defines abuse as “Everything which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use."[2]

The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[3] The situations that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

(a) *Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.*

(b) *Instituting different actions between the same parties simultaneously in different court even though on different grounds.*

(c) *Where two similar processes are used in respect of the exercise of the same right.*

(d) *Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.*

(e) *Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.***[4]**

(f) *Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.*

(g) *Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.*

(h) *Where two actions are commenced, the second asking for a relief which may have been obtained in the first.* **[5]**

Abuse of judicial process is a term generally applied to a proceeding which is wanting in *bona fides* and is frivolous vexations and oppressive.[6] Abuse of process can also mean abuse of legal procedure or improper use of the legal process.[7] Justice Niki Tobi JSC observed that abuse of court process creates a factual scenario where a party is pursuing the same matter by two court process. In other words, a party by the two court process is involved in some gamble; a game of chance to get the best in the judicial process.[8]

It’s settled law that a litigant has no right to purse *paripasua* two processes which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice

their different position clearly, plainly and without tricks. In my humble view, the two processes are in law not available simultaneously. The pursuit of the two processes at the same time constitutes and amount to abuse of court/legal process."[9]

Thus, the multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse.[10] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right *per se*. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice.[11] Turning to this case, I find no difficulty in concluding that this petition and the high court appeal seeking substantially the same reliefs amount to gross abuse of court process and on this ground alone this petition fails.

The concept of the Supremacy of the Law is a vital feature in Constitutionalism, where by the law as a whole ought to be regarded with great esteem. The law includes but is not limited to the Constitution. Other laws in the queue include the laws enacted by legislative organ of the given State and laws governing conduct of judicial proceedings. This primarily involves the supremacy of the Constitution and respect of others laws made there under and laws governing institution of court proceedings, which are consistent with the constitution. Everybody, including institutions and organs of Government and litigants and their advocates are bound and must respect the constitution, all laws enacted there under and court processes. All citizens are constitutionally mandated to safeguard the Constitution or any provision thereof and all laws and must respect court processes. Any court proceedings instituted in total abuse of court proceedings ought to be declared as such and rejected so as to protect the supremacy of the law and respect for court proceedings.

Whether this petition raises constitutional issues

The crux of the petitioners case is that their rights under Articles **43** of the constitution have been violated in that they being tenants were served with quit notices, that the intention of the second Respondent is to sell the houses and that they ought to be accorded first priority. First, there is nothing to show that the notices issued by a landlord in conformity with the contractual obligations and terms governing termination of a tenancy are illegal.

Secondly, such a termination, cannot be said to be a violation of the constitutional rights of the petitioners under article 43 as alleged. It can in my view if proved to be correct, a breach of contractual obligations which is not a constitutional issue. In my view there are **no** constitutional issues raised in this dispute.

It is convenient to state that a constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.[12] This court ought to discourage invocation of the constitutional process where there exists parallel or alternative statutory remedies. In *John Harun Mwau vs Peter Gastrol & 3 Others*[13] the court made the following observation:-

"Courts will not normally consider a constitutional question unless the existence of a remedy is dependent on it…….It is an established practice that where a matter can be disposed of without recourse to the constitution, the constitution should not be involved at all."

From the facts before me, I find that this petition does not raise constitutional issues at all and on this ground, the petition fails.

Whether or not the petitioners have proved their case to the required standard

As observed above, this petition alleged violation of rights to property. It is premised on the fact that the petitioner were tenants in houses owned by the second Respondent,. It is alleged that the second Respondent served them with notices to vacate the said houses. It I also alleged that the second Respondent desired t sell the houses to other persons. The petitioners case is that since they were tenants, they ought to have been given the first option to buy the houses. Prayers two and three in the petition seek an injunction to stop the alleged eviction while prayer three seeks a declaration that the eviction will amount to violating the petitioners rights.

The alleged violation of right to property is in my view totally unfounded. I find that no contravention of constitutional rights has been proved at all. The evidence tendered on behalf the petitioners in my view does not demonstrate the alleged violation. Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights they must not only state the provisions of the Constitution allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of that infringement[14]and the nature and extent of the injury suffered (if any). I find not infringement of constitutional rights at all where a landlord serves a quit notice to a tenant on the strength of a tenancy agreement. The only issue that can arise is the validity of the termination notice which is not a constitutional question.

In my view the petitioner has failed to discharge the burden of prove to the required standard. To my mind the burden of establishing all the allegations rests on the Petitioner who is under an obligation to discharge the burden of proof. All cases are decided on the legal burden of proof being discharged (or not). **Lord Brandon** in *Rhesa Shipping Co SA vs Edmunds*[15] remarked:-

"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by **Rajah JA** in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*[16] **:-**

"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"

With the above observation in mind, the starting point is that *whoever desires* any court to give *judgement* as to any legal right or liability, dependant on the existence of fact which he asserts, *must prove* that those facts exist. The *burden of proof* in a suit or proceeding *lies* on that person *who would fail if no evidence at all were given on either side.* The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of *Miller vs Minister of Pensions*,[17]**Lord Denning** said the following about the standard of proof in civil cases:-

'The …{standard of proof}…is well settled. It must carry a reasonable degree of probability…..if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'

Determination

I have carefully considered the Petition before me and the response by the second Respondent together with the second Respondents submissions. I find that the petition does not raise any constitutional issues at all. Secondly, the Petitioner has failed to prove the alleged infringement of constitutional rights to the required standard.

I find that this petition has no merits. Consequently, I dismiss this petition with costs to the second Respondent.

Orders accordingly.

Signed, Dated, Delivered at Nairobi this **7th** day of **June** 2017

John M. Mativo

Judge

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[1] Succ Cause no 920 of 2009 & Shvji Jadva Parbat & 2 Others vs The Hon. Attorney General & three others, Pet No 442 of 2016

[2]Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11

[3] Public Drug Co V Breyerke cream Co, 347, Pa 346, 32A 2d 413, 415

[4] Jadesimi V Okotie Eboh (1986) 1NWLR (Pt 16) 264

[5] (2007) 16 NWLR (319) 335.

[6] In the words of **Oputa J.SC** (as he then was) in (1998) 4SCNJ 69 at 87.

[7] Ibid

[8] Supra Note 1

[9] Supra note 1

[10]Ibid

[11] Ibid

[12]http://www.yourdictionary.com/constitutional-question

[13]{2014}eKLR

[14] See John Kimanu vs Town Clerk, Kangema NBI Pet. No. 1030 OF 2007

[15]{1955} 1 WLR 948 at 955

[16]{2007} 4 SLR (R} 855 at 59

[17] {1947} 2ALL ER 372