

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)**

MISCELLANEOUS CAUSE NO 419 OF 2017

- 1. MRS. ROSEMARY OMAMTEKER**
- 2. BUKENYA NICHOLAS**
- 3. OGUDI PERRY:APPLICANTS**
- 4. MAGEMBE JERRY DISAN**
- 5. KIMBUGWE ABDULAKIM**

VERSUS

- 1. PEACE BARIGYE**
- 2. KASSIM MAMBO-O.C CID, ENTEBBE POLICE STATION.....:RESPONDENTS**
- 3. ATTORNEY GENERAL**

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant brought this Application under Article 50 of the Constitution, Section 3(1) of the Human Rights (Enforcement) Act, 2019 and Rules 2 & 5(1)(a), 6,7(1), 8 & 11 of the Judicature(Fundamental & Other Human Rights & Freedoms(Enforcement Procedure) Rules, 2019 seeking the following orders that;

1. Grant of a declaration that the acts of the respondents and their agents of forcefully arresting the applicants on 3rd April 2022, are an infringement and a violation of the affected persons' fundamental and human rights enshrined in Articles 20,21(1) & (2), 26(1) & (2), 37, 38,39,40 and 44 of the Constitution of the Republic of Uganda.
2. A declaration that the respondents' acts of forceful taking and construction on the applicants land are a violation of the right to property, livelihood,

and economic rights enshrined in the Constitution of the Republic of Uganda.

3. A declaration that the respondents acts of unlawfully and forcefully entering, taking and building on the applicants land without prior compensation violates and infringes on the fundamental human rights of the applicants enshrined in Articles 20,21(1) & (2), 26(1) & (2), 37, 38,39,40 and 44 of the Constitution of the Republic of Uganda.
4. The 1st respondent's acts of beating and torturing the 1st applicant is a violation of the applicants' Non-derogable rights under Article 44 of the Constitution
5. Grant of Orders of redress by way of:
 - (a) *Compensation for flagrant violation of rights enshrined in Articles 20,21, 26, 37 and 40 of the Constitution of the Republic of Uganda.*
 - (b) *An order of compensation for forceful entry and taking part of the 1st applicant's land comprised in Plot 31A Uringi Crescent.*
 - (c) *An order of compensation for violation of rights to property, livelihood, environment, economic rights and freedoms enshrined in Articles 20,21, 26, 37 and 40 of the Constitution of the Republic of Uganda to the tune of 10,000,000/=*
 - (d) *An award of damages for the beating and torture the 1st applicant was subjected to.*
 - (e) *An award of general damages for the inconvenience, psychological torture and suffering occasioned to the applicants and other persons affected by the respondents' actions of violating their rights.*
 - (f) *Payment of interest on (b), (c), (d) and (e) above at court rate of 25% from the cause of action till payment in full.*
 - (g) *An Order for payment of punitive damages for arrogant and flagrant violation of rights.*
 - (h) *Costs of this application.*
 - (i) *Such other reliefs, as the court may deem fit.*

The grounds of this application are specifically set out in the affidavit of **Mrs. Rosemary Omamteker and Magembe Jerry Disan and Michelle Omamteker** which briefly states;

1. That the applicant is the registered owner of land comprised in Plot 31A on Uring Crescent Road in Entebbe and is in possession of the same to date.
2. That on the 3rd day of April 2022 the applicants were arrested while they were carrying out work at their piece of land without regard to their human rights.
3. That the respondents and their agents, employees and or workers forcefully and unlawfully entered on the applicants land without their consent and without regard to their fundamental human rights and illegally arrested the applicants.
4. That the respondents' acts of illegally arresting the applicants on their very own land deprived the applicants of their rights to equality, property, economic and cultural rights enshrined in Articles 20,21, 26, 37, 38, 39, 40 and 44 of the 1995 Constitution.
5. That the respondents' acts of forcefully entering on the 1st Applicant's land and arresting the applicants without regard to their human rights infringed on their rights to quiet possession and enjoyment of their land ownership and use.
6. That the 1st respondent on 3rd April 2022 did beat and torture the 1st applicant on her land while putting a fence contrary to Article 44 of the Constitution.
7. That the 1st applicant reported a case of criminal trespass on 6th March 2023. The 1st applicant and her daughter went back on the land and removed the gate and wanted to secure the land properly.

In opposition to this Application the Respondents filed affidavits of the 1st respondent, and 2nd respondent filed an affidavit in reply wherein they vehemently opposed the grant of the orders being sought briefly stating that;

1. That the application is frivolous and vexatious, prolix, scandalous and the affidavits in support are argumentative and the same should be struck off record.
2. That the 1st respondent is the registered proprietor of property comprised in LRV 3303 Folio 10, Plot 10B Uring Crescent, Entebbe.
3. That the 1st applicant has on various occasions threatened to take drastic measures to have the applicant vacate her land and this suit is intended to achieve that.
4. That the 1st respondent has never participated in any illegal arrest as alleged. She is not a police officer and neither does command any authority with security officers to enforce any arrests.
5. That the 1st respondent has never unlawfully entered on the 1st applicant's land nor has she destroyed any of her property as alleged or at all.
6. That sometime in 2022, the 1st respondent was surprised to learn from the town clerk of Entebbe that the 1st applicant had conjured a survey report that claimed that the 1st respondent was encroaching on her plot of land.
7. That on 28th February 2022, the Ministry of Lands, Housing and Urban Development assigned a survey team headed by Mr. Abarak Mukose to carry out a survey.
8. That a survey was carried by the said Abarak Mukose in presence of the applicant and her surveyors and lawyers and also 1st respondent. The survey report authored on 7th March 2022 confirmed there was no encroachment on the 1st applicant's property as she had falsely alleged.

9. That the 1st applicant continued to make incessant frivolous claims and accusations against the 1st respondent at police at Entebbe. The police invited parties to resolve the dispute at once by conducting another joint survey or boundary opening which the 1st applicant has refused to-date.
10. That the 1st respondent has never taken over any part of the applicant's property and the said allegations are baseless. The 1st respondent also denied any alleged torture, destruction of property or use of force by its employees, agents or servants.
11. The 2nd respondent received a complaint from the 1st respondent that the respondent was trespassing on her land. He visited the said land and indeed saw the 1st applicant. The parties were asked to present their documentation proving ownership and the 1st respondent produced a certificate of title.
12. That the 2nd respondent referred the matter to commissioner Surveys to intervene and assign a surveyor to resolve the dispute. The 2nd respondent asked the two parties to maintain the status quo until the boundary opening exercise was complete to establish the rightful owner.
13. That before the boundary opening could be done; the 1st applicant brought some people to construct a fence around the disputed land and claimed it was hers which deepened the wrangle.
14. That the 1st applicant deliberately and arrogantly refused to have a joint boundary opening and refused to take the notice or to avail herself for the boundary opening exercise.
15. That the 1st applicant then reported a case at Naguru Metropolitan Police Head Quarters and the two files were forwarded to that office. The matter was then put out of Entebbe.
16. That it is fair and equitable that the application be dismissed with costs to the respondents.

The applicant raised the following issues;

- 1. Whether the acts of the respondents and their agents of forcefully arresting, the applicants on 3rd April 2022, keeping them in police without any charge are an infringement and a violation of the affected person's fundamental human rights under Article 23 of the Constitution of Uganda?*
- 2. Whether the respondents' acts of forcefully entering, taking and constructing/building on the applicant's land without prior compensation are a violation of the right to property under Article 26 of the Constitution of Uganda?*
- 3. Whether the 1st respondent's acts of beating and torturing the 1st applicant violated the applicants' rights and freedoms from torture and inhuman treatment under Article 24 and 44 of the Constitution?*

The respondent raised the following issues.

- 1. Whether the application is frivolous and vexatious and is an abuse of court process?*
- 2. Whether the acts of the respondents and their agents of arresting, the applicants on 3rd April 2022, Keeping them in police without any charge are infringement and violation of the affected persons fundamental human rights under Article of the Constitution of the Republic of Uganda?*
- 3. Whether the respondents' acts of forcefully entering, taking and constructing/building on the applicant's land without prior compensation are violation of the right to property under article 26 of the Constitution?*
- 4. Whether the 1st respondent's acts of beating and torturing the torturing the applicant violated the applicant's rights and freedoms from torture and inhuman treatment under Article 24 and 44 of the Constitution?*
- 5. What remedies are available?*

The Applicant was represented by *Ekima Emmanuel* and *Masajjage Steven* of *Omongole & Co Advocates* while the 1st respondent was represented by *Ssebuufu Usaama* of *K&K Advocates* and the 2nd and 3rd respondents were represented by *Sam Tusubira* (State Attorney).

The parties were directed to file written submissions which was duly done. I have considered the said submissions in my ruling.

DETERMINATION

Whether the application is frivolous and vexatious and is an abuse of court process?

The respondents counsel submitted that the application is a deliberate attempt by the applicant to attempt to frustrate the 1st respondent from using her land. The application is premised on misleading and deliberate falsehoods as contained in the affidavit in support.

Counsel further submitted that the applicants have not availed any evidence to prove the various allegations which makes the application frivolous and vexatious. The applicants are trying to use the court process to push their agenda.

The respondents further contended that this is the latest in the series of various frivolous law suits that have been brought by the applicant against the 1st respondent. The 1st applicant has three (3) other suits against the 1st respondent all arising out of the same set of facts and same issue and these are spread over various courts.

In addition, the applicant has filed various criminal complaints against the 1st respondent alleging trespass against her and this matter is proceeding before the Magistrates' court in Entebbe. All the civil suits are currently pending before the various courts and all are in respect of the same property.

Counsel submitted that this application is an abuse of court process and the intention is to frustrate, annoy and irritate the 1st respondent. These cases are frivolous and devoid of any merit. The filing of several suits in different courts is an act of forum shopping by the applicant.

Analysis

The respondent's counsel has submitted that the application is frivolous and vexatious and an abuse of court process.

The applicant has filed multiple suits revolving around the same dispute in different courts which amounts to abuse of court process. The applicant has filed **Civil Suit No. 814 of 2022**, *Rosemary Kizza Omamteker v Peace Barigye* in High Court Land Division; **Civil Suit No. 279 of 2022**, *Rosemary Omamteker v Peace Barigye and 2 Others* in High Court Civil Division; **Civil Suit No. 316 of 2022**, *Rosemary Omamteker v Peace Barigye and 2 Others* in High Court Civil Division. In addition there are other complaints at police which have culminated into criminal cases at Entebbe Chief Magistrate's court.

This court in ***Male Mabirizi v Attorney General (Miscellaneous Application 917 of 2021)*** cited with approval the case of in ***Chief B. A. Allanah & Ors v. Mr. Kanayo Kpolokwu & Ors N.W.L.R. Part 1507 Page 1, Per Amiru Sanusi Jsc; of the Supreme Court of Nigeria***

"The concept of abuse of court process is not precise as such. It involves peculiar or various conditions, but in a nutshell, the common feature of abuse of process of court centers on improper use of judicial process by a party in litigation aimed or targeting on interference with due administration of justice. To my mind, some of the features of abuse of court process include the under mentioned features, even though they are by no means exhaustive. These features are:

- I. Filing of multiplicity of actions on the same subject matter against the same opponents on the same issues or numerous actions on the same matter between the same parties even where there is in existence, a right to commence the action.*
- II. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.*
- III. Where two or more similar processes are used in respect of the exercise of the same right, for instance, a cross appeal and a respondent's notice.*

IV. *Where two actions are instituted in court the second one asking for relief which may however, obtained in the first, the second action is prima facie vexatious and an abuse of court process.*”

The court has indeed verified and established that the applicant has indeed filed several matters in different courts over the same facts and moreover by the same advocates. This is an act that borders on abuse of court process and vexatious litigation by the applicant.

The applicant did not have any justification for filing the several matters and also turning civil claims or wrongs (torts) into human rights violations as this is an abuse of court process.

Parties and their respective counsel should take the necessary steps to safeguard the integrity of the judiciary and to obviate actions likely to abuse its process. See ***Caneland Ltd & Others vs Delphis Bank Ltd Civil Application No. 344 of 1999 (Kenya Court of Appeal)***

Every litigant who approaches the court, must come forward not only with clean hands but with clean mind, clean heart and with clean objective.

The court must come with a very heavy hand on a litigant who seeks to abuse the process of the court; as the Supreme Court of India has observed;

“No litigant has a right to unlimited drought on the court time and public money in order to get his affairs settled in the manner he wishes. Easy access to justice should not be misused as a licence to file misconceived and frivolous petitions”.
Budhi Kota Subbarao v K. Parasarab, AIR 1996 SC 2687;(1996) 5 SCC 530.

The nature of the applicants’ case is simply a civil wrong which the applicants’ counsel is trying to craft or model as a human rights violation case. The nature of rights that the applicants’ contends were violated appears too remote and far-fetched to be within the bracket of a human rights violation case.

It is an abuse of court process to use another remedy under the Constitution to avoid a set procedure. In the case of ***Harrikisson v Att-Gen (Trinidad and Tobago)[1980] AC 265 at 268*** Lord Diplock underscored the importance of limitation to the constitution right of access to courts:

“The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms: but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action....the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for the appropriate remedy....”

The applicant is basically challenging the conduct of the police in arresting them as a human rights violation. The police are mandated under the law to enforce law and order in Uganda. When they execute this mandate it is upon reasonable grounds and it can never be a violation of human rights when police carries out arrests on suspicion of a crime. This can never be a violation of rights issue as counsel contended.

The alleged violations of the applicants’ rights are merely an intention to intimidate or annoy or vex the respondents in order to resolve a land dispute between the 1st applicant and 1st respondent. Human rights issues are not imputed but are directly discernible from what has been done and the court should be careful to limit ingenious litigants who think they will use human rights lenses in every decision of government officials or police or private persons. It is true that every claim or cause of action (Commercial, Civil, Land, Family or Criminal) can be turned into a human rights case under chapter four of our Constitution. This should not be encouraged otherwise it will clog the court system with human rights cases.

The applicant's claim is a land dispute bordering on trespass and may be a tort of trespass to person or assault. The said claims (torts) cannot not by be turned into right to property, or compulsory acquisition or a violation of a right to torture and inhuman and cruel and degrading treatment or violation of the right to personal liberty as the applicants want this court to believe. The applicant should have filed any civil case for trespass to land or recovery of land or tort of false imprisonment or trespass to person especially against the 1st respondent.

This court agrees with the 1st respondent's counsel that human rights cases are not simply made by alleging that the rights are violated. The person has the onus to show court which right and how it was violated. It is not a simple case of alleging violation of a constitutional right that entitles one to a remedy. It would be foolhardy to assert that all one has to do is simply to allege a right was violated without necessarily having to establish and prove the same. The courts would be clogged with multiple enforcement cases simply because one claims there is a violation of human right which is becoming the trend these days.

This application is indeed an abuse of court process since the applicants are trying to use a wrong procedure of getting a remedy from court and disguising the same as a human rights violation.

This application would fail on this ground alone

Whether the acts of the respondents and their agents of forcefully arresting, the applicants on 3rd April 2022, keeping them in police without any charge are an infringement and a violation of the affected person's fundamental human rights under Article 23 of the Constitution of Uganda?

The applicants' counsel submitted that the respondents violated their fundamental and human rights when the 1st respondent caused the 2nd respondent to wrongfully arrest and intimidate the applicants off their land. The applicant's counsel contended that they were unlawfully arrested by police and released on police bond without any charge which in his view was a violation of their right to personal liberty and it was arbitrarily done.

The 1st respondent submitted that she did not in any way infringe, violate or threaten the rights of the applicant. Counsel contended that the applicant have not adduced any cogent evidence to link the 1st respondent's alleged influence over the police.

The 2nd to 4th respondents were lawfully arrested by police and the applicant has not shown any proof of arrest. The police is authorized under the law to arrest any person suspected of having committed an offence. The respondents' counsel contended that the arrest was legal lawful.

Analysis

Arrest is carried out where there is reasonable ground for suspicion of guilt. The test to be applied is that the onus of proof is on the person making the arrest to justify his conduct, must be that of a reasonable person acting without passion or prejudice. An arrest properly made by the police cannot amount to breach of fundamental rights. It is the duty of police to keep law and order and it can effect an arrest of any suspect.

The police are mandated to keep law and order and any actions rooted from their core mandate under Article 212 of the Constitution can never be interpreted as an infringement of rights of parties. The functions of the Uganda Police Force shall include;

- (a) To protect life and property;
- (b) To preserve law and order;
- (c) To prevent and detect crime; and
- (d) To cooperate with civilian authority and other security organs established under this Constitution and with this Constitution and with the population generally.

The applicants' were lawfully arrested and it is not a requirement of the law that a person must only be arrested with a warrant of arrest. There are different modes of arrest under the law with or without a warrant. Even an ordinary person can effect an arrest and hand over the suspect to police. The Applicants were suspected of having committed an offence of criminal trespass they could therefore be arrest upon that reasonable suspicion of having committed those offences. The applicants personal liberty by arrest was deprived in accordance with Article 23(1)(c) of the Constitution.

In the case of ***Magezi Raphael v Attorney General HCCS No. 977/2000*** which adopted the decision in ***Lutaaya v Attorney General HCCS No. 461/1989*** Court noted as follows;

“ An arrest becomes wrongful when the same is carried out before one is arrested and subject to some to some exceptions, in the absence of an arrest warrant...in our laws arrests in the absence of warrants are permitted only where the police or private individual has reasonable cause to suspect that the person being arrested had committed or is about to commit a crime”.

And that in relation to this case there was sufficient probable cause as stated in different paragraphs of the Respondents affidavits in reply that the applicants were committing or were about to commit more crimes.

There was no violation of the applicants’ right to personal liberty when the applicants were arrested by police.

Whether the respondents’ acts of forcefully entering, taking and constructing/building on the applicant’s land without prior compensation are a violation of the right to property under Article 26 of the Constitution of Uganda?

The applicants’ counsel submitted that the respondents and their agents, employees and or workers forcefully and unlawfully entered on her land without her consent and without due regard to her fundamental human rights.

The applicant contended that the 1st respondent violated the applicant’s right to property when they encroached on the applicants land with her consent and compulsorily acquired it.

The 1st respondent’s counsel submitted that the 1st respondent’s action did not in any way amount to breach of Article 26 of the Constitution. The 1st respondent is the registered proprietor of property comprised in LRV 3303 Folio 10, Plot 31B Uring Crescent, while the 1st applicant is registered proprietor on a different piece of land.

Counsel contended that the applicant has refused to carry out a joint survey of the land to establish the proper boundaries of the land. The actions of the 1st applicant are intended to use illegal methods to annex the respondent’s land.

Therefore, there is no violation of the applicants' right to property or compulsory acquisition of the same.

Analysis

The right to property or the right to own property is often classified as a human right for natural persons regarding their possession.

The right to property is protected under Article 26 of the constitution of the Republic of Uganda, 1995. It provides;

“Every person has a right to own property either individually or in an association with others. No person shall be compulsorily deprived of property or any interest in or right over property of any description with exceptions.”

The applicant owns property comprised in LRV 3220 Folio 18 Plot 31A Uring Crescent and the 1st respondent also owns an adjacent plot comprised in LRV 3303 Folio 10 Plot 31B Uring Crescent. It is clear both parties own separate pieces of land or plot. This is case of establishing the boundaries of the said plots in order to determine the exact location of the plots. It is wrong for the applicant to call a case of mere boundary trespass if at all it exists into a case of violation of the right to property and above all calling it compulsory acquisition of land between private persons.

Justice is much more than a game of hide and seek. It is an attempt, our human imperfections notwithstanding, to discover the truth. Justice will never decree anything in favour of a slippery party. Thus a party will not be allowed to take one stance in his pleadings and then summersault during the trial. There must be credible evidence for a party to succeed on balance of probabilities in civil trials.

The respondent has not contended anywhere in the pleadings how her land which is titled has been taken over by the 1st respondent. She is still in possession of her land and continues to occupy the same without any disturbance. The court is not presented with any credible evidence to prove any dispossession from her land. The claim for violation of right to property is baseless and devoid of merit.

Whether the 1st respondent's acts of beating and torturing the torturing the applicant violated the applicant's rights and freedoms from torture and inhuman treatment under Article 24 and 44 of the Constitution?

The applicant submitted that the respondent in a bid scare the applicants from their land used a peg to beat up the 1st applicant and her daughter Michelle Omamtekere causing her injuries, an act that was a violation for their rights.

The respondent counsel submitted that the applicants, who claim that their rights were violated, have the onus to show court that which right and how it was violated. It is not a simple case of alleging any violation of a constitutional right that entitles one to a remedy.

Analysis

This is the most laughable and incredible allegation of human rights violation which the applicant has made in an entire bogus case present as a human rights violation. The applicant alleged that she was beaten with a peg with her daughter causing her injuries.

This court would not definitely dilute human rights violation or torture to such an alleged beating of the applicant with a peg which is an assault or a simple tort of trespass to person.

Section 2 of the Prevention And Prohibition of Torture Act, 2012 defines torture to mean any act or omission, by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person by or at the instigation of or with the consent or acquiescence of any person whether a public official or other person acting in an official or private capacity for such purposes as;

- obtaining information or a confession from the person or any other person;
- punishing that person for an act he or she or any other person has committed, or is suspected of having committed or of planning to commit; or
- intimidating or coercing the person or any other person to do, or to refrain from doing, any act.

For an act to amount to torture, not only must there be a certain severity in pain and suffering, the treatment must also be intentionally inflicted for the prohibited purpose. This court has noted that; *“the courts should apply a very strict test when considering whether there has been a breach of an individual’s right to freedom from torture or inhuman or degrading treatment. Only the worst examples are likely to satisfy the test.”* **See Agaba Kenneth v AG & 3 Others HCCS No. 247 of 2016**

The applicant is trivializing torture or making a mockery of what amounts to torture which is quite absurd and an abuse of Human Rights Enforcement Act. This must be discouraged as every litigant will simply allege torture in simplistic manner than the gravity with which it ought to be taken and appreciated.

The 1st applicant has not proved the alleged torture and it was a mere allegation added to the entire frivolous and vexatious human rights violation claims in order to spice up the wild and baseless allegations.

In sum therefore, the nature of evidence in this case is so hollow to support any of the allegations of violation of the applicants’ rights.

What remedies are available to the parties?

This application fails and is dismissed with to costs to the respondents.

I so order.

SSEKAANA MUSA
JUDGE
14th July 2023