



**Malua v Yatta & 3 others (Constitutional Petition 1 of 2021)
[2023] KEELC 16713 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16713 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
CONSTITUTIONAL PETITION 1 OF 2021**

LG KIMANI, J

MARCH 28, 2023

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLE 21 (1) ,25 (C) , 27 (1)
AND 47 (1) AND (2), 50 (1) AND S.77(1) AND 77(A) OF THE REPEALED
CONSTITUTION AS READ WITH S.6 AND 7 OF THE SIXTH
SCHEDULE TO THE CONSTITUTION OF KENYA, 2010.**

AND

**IN THE MATTER OF THE PREAMBLE TO AND ARTICLES 1, 2, 3, 4, 10,
19, 20, 23, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF ARTICLE 8 AND 10 OF THE UNITED
NATIONS UNIVERSAL DECLARATION OF HUMAN RIGHTS**

AND

**IN THE MATTER OF THE LAND ADJUDICATION ACT CAP 284, AND
IN THE MATTER OF THE SPECIAL MINISTER FOR LANDS AND
PHYSICAL PLANNING APPOINTED FOR PURPOSES OF APPEALS
UNDER SECTION 29 OF THE LAND ADJUDICATION ACT CAP284**

AND

**IN THE MATTER OF THE DECISION /RULING IN APPEALS NO. 245 OF 1988 RELATING
TO PARCEL NO.188 NZALAE LAND ADJUDICATION SECTION AND APPEAL NO.241
OF 1988 FOR LAND PARCEL NO.186 NZALAE LAND ADJUDICATION SECTION DATED
30.4.2019 RESPECTIVELY.**

BETWEEN

BETWEEN

MUTINDA MUSILA MALUA APPLICANT



AND

NGUNGA YATTA 1ST RESPONDENT
DEPUTY COUNTY COMMISSIONER, KITUI WEST SUB-
COUNTY 2ND RESPONDENT
LAND AND ADJUDICATION AND SETTLEMENT OFFICER,
KITUI 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. Before the court is an application by the Petitioner filed under Notice of Motion dated 16th December 2022 praying for the following orders:
 1. Spent
 2. Spent
 3. That this Honourable Court be pleased to issue a conservatory order stopping any implementation of the impugned Minister's decision in relation to Land Appeal No.245 of 1988 and 241 of 1988 affecting Land Parcel 186 and 188 in Nzalae Mutonguni Adjudication Section pending an intended appeal against the decision/judgment in H.C ELC Petition No.1 of 2021.
 4. That the costs of this application be in the cause.
2. Judgment was delivered by this Court on 8th December 2022 dismissing the Petition. The Petitioner filed a Notice of Appeal on the same date.
3. In his supporting affidavit, the Petitioner stated that it is necessary to apply for preservative orders against the implementation of the Minister's decision, pending the hearing, determination and the outcome of the appeal intended to be lodged at the Court of Appeal.
4. The Petitioner is apprehensive that the implementation of the decision of the Minister will result in sub-division of the titles being issued in the name of the 1st Respondent or his legal representatives and thereafter the property could be charged, mortgaged or alienated and disposed off to a third party which will render the appeal nugatory.
5. The Petitioner noted that status quo has been maintained by preservative orders issued during the pendency of the Petition and he prays for further preservative orders pending the hearing and determination of this appeal. He states that he stands to suffer substantial loss and prejudice if the application is not allowed because he believes that his appeal raises pertinent issues concerning the legality of the Minister's decision, the constitutionality of Section 29 of the [Land Adjudication Act](#) among other constitutional issues.

The 1st Respondent's reply

6. Titus Ngunga, the personal representative of the estate of Ngunga Yatta who is the 1st Respondent herein, filed a replying affidavit in opposition to the Petitioner's application stating that the application is incompetent, misconceived, an afterthought, frivolous and an abuse of the courts process. He stated



that the court is divested of jurisdiction to entertain the application as framed and filed. He also stated that the Applicant has not demonstrated what loss, if any, he stands to suffer in the event that the application is dismissed.

7. The 1st Respondent's avers that the application is calculated to deny him enjoyment of the fruits of his judgment and that the decision in the Minister's Appeal is final and urged the court not to grant the order sought. In the event that the order is granted, the 1st Respondent prayed for costs as per the judgment since the Petitioner has not sought a stay of execution of the judgment.

Petitioner/Applicant's submissions

8. Counsel for the Applicant gave a recount of the Petition filed herein and submitted that the right to appeal is a fundamental right under Article 50(2)(q) of the Constitution in the Bill of Rights. It was his submission that the preservatory orders were in force up to the trial and determination of the petition and that they are the same orders that they seek now, to keep the parties at arm's length in relation to the suit land.
9. Counsel for the Applicant relied on Order 42(6) of the Civil Procedure Rules and Rule 32 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure rules-2013 stating that the court has powers to grant stay pending appeal and that the court maintains its inherent unlimited original jurisdiction to do so.
10. Regarding the reason why he did not seek an order of stay of execution pending petition, counsel for the Petitioner submitted that the judgment of the court was a negative one since it dismissed the appeal. It is their submission that their biggest apprehends that the 1st Respondent would implement the decision in the Minister's appeal and sub-divide the land and alienates it from the reach of the applicant.
11. The Applicant cited the case of Isaiab Luyara Odando & Another vs Kenya Revenue Authority & 6 others(2022)eKLR where the court analyzed the nature of conservatory orders and also submitted that the issue of the constitutionality of Section 29 of the Land Adjudication Act is a matter of public interest. The Petitioner prayed for orders as sought, even if for a limited time frame.
12. The 1st Respondent's counsel relied entirely on the replying affidavit and did not to file submissions while the 2nd and 3rd Respondent did not wish to participate in the application.

Analysis and Determination

13. The issue for determination is whether the Court should grant the conservatory order stopping any implementation of the impugned Minister's decision in relation to Land Appeal No.245 of 1988 and 241 of 1988 affecting Land Parcel 186 and 188 in Nzalae Mutonguni Adjudication Section pending appeal of the judgment delivered by this court on 8th December 2022.
14. The court derives authority to uphold and enforce the Bill of Rights under Article 23 of the Constitution. Under the Article the court can issue conservatory orders in constitutional petitions brought under Article 22. Conservatory or interim orders as prayed for by the applicant herein are provided for under The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules) Rule 23. In my view conservative orders envisioned under Rule 23 are issued when the petition is pending before the court and the said orders are granted pending hearing and determination of the petition. The rule states that;
 - (1) Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.



15. The applicant relies on the provisions of Article 165 (3) of the Constitution and Rule 32 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules) Section 3 (1) of the Judicature Act and Section 3 and 3 (A) of the Civil Procedure Rules Rule 32 of the Mutunga Rules provides for Stay pending appeal and states that;
- (1) An appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed.
 - (2) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling and the court may issue such orders as it deems fit and just.
 - (3) A formal application for stay may be filed within 14 days of the decision appealed from or within such time as the court may direct.
16. The Respondent opposed the application on the ground that the current application is for conservatory orders and not for stay of execution. Indeed the applicant concedes that the circumstances of the present application do not call for an order of stay of execution of the decree arising out of the judgement of this court for the reason that the petition was dismissed and thus arising out of the order of this court there is nothing to execute and thus nothing to stay. However, the applicant relies on the fact that the underlying subject matter of the petition herein were the proceedings and decision of the 2nd Respondent, the Deputy County Commissioner Kitui West Sub-County in appeal numbers 245 of 1988 and 241 of 1988 affecting land parcel No. 186 and 188 Nzalae Mutunguni Adjudication section respectively. The applicant seeks to stop implementation of the impugned Ministers decision.
17. It is the applicant’s case that in the event that the decision by the 2nd respondent is implemented the subject matter of the petition will be lost in that title deeds will be issued and will be available for sale, charging, leasing and/or any other transaction the 1st Respondent may be minded to engage in. It is thus the applicant’s case that he seeks to safeguard and preserve the land subject matter of the intended appeal. In my view rule 32 (2) of the Mutunga Rules gives the court latitude to consider the present application even though the same is not strictly speaking an application for stay of execution of the order issued by this court pending appeal. The rule states that “and the court may issue such orders as it deems fit and just.”
18. The Court of Appeal looked into the question of issuance of conservatory orders pending appeal and stated in Njuguna S. Ndungu vs. Ethics & Anti-Corruption Commission & 3 Others [2015] eKLR,:
- “A proper reading of this Court’s decision in Equity Bank Limited vs West Link MBO Limited (supra) shows that the Court has never been antipathetic towards the grant of what may be called conservatory orders in proper cases, the aim being to preserve the substratum of the appeal, to maintain the status quo and to avoid a scenario where parties exercising their undoubted right of appeal are embarrassed by harm having been visited on them pending the appeal. It is accepted that other than flowing expressly from the Rules, the power to order a stay of execution is inherent in the Court and it may, in appropriate cases, invoke and deploy the same ex-debito justiae.”
19. The law applicable to the issuance of conservatory orders was pronounced by the Supreme Court in the case of Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others [2014] eKLR as follows: -
- “(86) Conservatory 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 supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

(87) The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

- (i) the appeal or intended appeal is arguable and not frivolous; and that
- (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

(88) These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the *Constitution* of Kenya, 2010, a third condition may be added, namely:

- (iii) That it is in the public interest that the order of stay be granted.”

20. On the 1st consideration made in the Gatirau case this court has already made a determination on the merits of the case and dismissed the same, however the court recognizes the parties’ right to be heard on appeal.
21. I have considered and found merit in the applicant’s submission that as it is likely that if the decision of the minister in appeals No 245 of 1988 and 241 of 1988 is implemented, the land subject matter of the intended appeal may be lost and thus render the said intended appeal if successful nugatory or an academic exercise.
22. I have considered whether it is in the public interest that the order of stay be granted. The application at hand is one for preservation of private land whose interests were determined by the decision of the 1st Respondent in the minister’s appeals and in and of itself the said land has no public interests in it. However, I note that as well as determination of the private interests and rights in the suit land the Petitioner challenged the constitutionality of Section 29 of the *Land Adjudication Act*. Challenge to Section 29 and the administrative process of determination appeals to the minister have been the subject of litigation by way of a number of constitutional petitions, judicial review applications and normal suits and in my view it is in the interests of the public that the constitutionality of the said section be settled by the appellate court. Particular challenge has been lodged to the provision of the said section that states that “the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”



23. Following the above reasons, I would exercise this court's inherent jurisdiction and allow the application herein. Alnashir Visram J (as he then was) quoted as follows in the case of *Patricia Njeri & 3 Others v National Museum of Kenya* [2004] eKLR on injunctions pending appeal.

“In the Venture Capital case the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be “exercised judicially and not in whimsical or arbitrary fashion.” This discretion is guided by certain principles some of which are as follows:

- (a) The discretion will be exercised against an Applicant whose appeal is frivolous (See *Madhupaper International Limited vs Kerr* (1985) KLR 840 (cited in *Venture Capital*). The Applicant must state that a reasonable argument can be put forward in support of his appeal (*J. K. Industries vs KCB* (1982 – 88) KLR 1088 (also cited in *Venture Capital*))
- (b) The discretion should be refused where it would inflict greater hardship than it would avoid (See *Madhupaper supra*).
- (c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See *Butt vs Rent Restriction Tribunal* (1982) KLR 417 (cited also in *Venture Capital*).
- (d) The Court should also be guided by the principles in *Giella vs Cassman Brown & Company Ltd* (1973) EA 358 as set out in the case of *Shitukha Mwamodo & Others* (1986) KLR 445 (also cited in *Venture Capital*.”

24. I therefore make the following order;

- A. That an order be and is hereby issued stopping implementation of the 2nd Respondent's Minister's decision in relation to Land Appeal No. 245 of 1988 and 241 of 1988 affecting Land Parcel 186 and 188 in Nzalae Mutonguni Adjudication Section respectively pending hearing and final determination of an intended appeal against the decision/judgment in H. C ELC Petition No.1 of 2021.
- B. The intended appeal to the Court of Appeal to be filed within thirty days from the date hereof in default of which the orders herein will automatically lapse.
- C. Costs of this application will be in the cause.

DELIVERED, DATED AND SIGNED AT KITUI THIS 28TH DAY OF MARCH, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE KITUI

Ruling read in open court and virtually in the presence of-

C/A Musyoki

Kilonzi for Applicant

Ngolya for 1st Respondent

N/A for 2nd – 4th Respondents

