



**Boor v Director of Public Prosecutions & 2 others (Petition
25 of 2022) [2023] KEHC 2738 (KLR) (30 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2738 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PETITION 25 OF 2022
RN NYAKUNDI, J
MARCH 30, 2023**

BETWEEN

MONICA JEPKIRUI BOOR APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The applicant approached this court vide an application dated October 13, 2022 seeking the following orders;
 1. Spent.
 2. Pending hearing and determination of this application, a conservatory order be and is hereby issued restraining the Respondents, their servants and/or agents from investigating, arresting and/or prosecuting the Petitioner for whatever charges with regards to land parcel No Eldoret Municipality Block 14/2191.
 3. Pending hearing and determination of this petition, a conservatory order be and is hereby issued restraining the Respondents, their servants and/or agents from investigating, arresting and/or prosecuting the Petitioner for whatever charges with regards to land parcel No Eldoret Municipality Block 14/2191.
 4. Pending hearing and determination of this Petition, conservatory order be and is hereby issued restraining the Respondents, their servants and/or agents from directing the Petitioner to register lease documents with respect to land parcel No Eldoret Municipality Block 14/2191 in favour of the 1st Interested party.



2. The application is premised on the grounds set out therein and the contents of the affidavit sworn in support of the application.

Applicant's Case

3. The applicant is the Land Registrar Uasin Gishu County. Her case is that the 1st respondent has arbitrarily preferred charges against her in blatant abuse of his constitutional duty and without according her due process in blatant disregard to the Constitution of Kenya 2010. Further, that the respondents wrote a letter directing and/or mandating the Petitioner to commit an illegality by registering a lease over land parcel number Eldoret Municipality Block 14/2191 That Is Subject To Two (2) Pending Civil Suits Namely; Environment And Land Court Jr No 235 of 2015 Environment And Land Court Case No 369 of 2015 awaiting final determination by a competent court of law. The said letter dated May 24, 2022 the respondent directed the petitioner to register a lease with respect of land parcel Eldoret Municipality/block 14/291 in favour of the 1st Interested Party one Molerise Innovation Services Ltd.
4. The applicant urged that the directions to register the lease is a bid to subvert justice and that upon declining to succumb to the directions to register the respondent as the said letter dated May 24, 2022 the Respondent directed the Petitioner to register a lease with respect of land parcel Eldoret Municipality/block 14/291 In favour of the 1st Interested Party one Molerise Innovation Services Ltd. The applicant urged that If this Honourable Court does not issue the conservatory orders sought, there is a high chance that the Petitioner/ Applicant's right to freedom will be infringed upon. Furthermore, the substratum of the Petition will be overtaken by events.

1st Interested Party's Case

5. The 1st interested party submitted that the applicant's supporting affidavit and annexures clearly show that the lease and resultant certificates have been flagged as irregular and suspect for the reason that no leases were forwarded from Nairobi Lands Office to support issuance of the said lease certificates by the applicants. The interested party invited the court to call for the files and look at the order issued in May 2, 2019 by Justice Ombwayo that stayed the decision of the National land Commission and stayed the proceedings in Eldoret JR No 4 of 2018. It urged that the applicant had not established a prima facie case that warrants conservatory orders. It urged that the lease be registered and the certificate of lease be issued for forwarding to the court in Eldoret HCELC No 235 of 2015 consolidated with ELC No 369 of 2015.

2Nd – 10Th Interested Party's Case

6. The 2nd – 10th interested parties filed submissions on the application and was of the position that the orders sought are merited. the initial mother title being Eldoret/municipality Block/14/2191 was sub divided and new certificates of leases were issued creating new land namely Eldoret/municipality Block/14/2230-2241. That they became legitimate proprietors as they acquired the property in good faith and for valuable consideration without any knowledge of defect in titles.
7. The respondents have filed suits relating to the parcels which are still pending and the same are yet to be determined. Therefore, compelling the petitioner to register the parcel of land is a bid to subvert justice. That the land registrar cannot cancel or nullify a title which has been issued as that is a preserve of the court under section 25 of the Land Act. They urged that the application be allowed.



Respondent's Case

8. The 1st respondent opposed the application vide a replying affidavit dated November 11, 2022. David Sakwa deposed that during his investigations he discovered that there had been irregularities in the subdivision of Eldoret Municipality Block 14/291. That as a result of the discovery of the fraud, the director of land administration wrote a letter to the fraudster, the land registrar Uasin Gishu County, the Governor Uasin Gishu County, chairperson National Lands Commission, Director of Surveys, District land Officer Uasin Gishu County notifying them of the cancellation of the sub divisions and put them on alert. That on December 5, 2014 a lease in favour of the 1st interested party was forwarded to Eldoret for registration and the same was done in the old format. A new lease was prepared in the new format and sent in its place through a letter dated November 19, 2015. The 1st interested party made follow ups on the registration but the applicant failed to do the same.
9. The respondent deposed that there were no injunctive orders in ELC No 235/2015 and 369/2015 barring registration of the leases. He urged that the decision to charge was recommended but is yet to be made and in the absence of the go-ahead of the DPP they cannot arrest her. Further, that if the applicant is charged she will have ample time to defend herself and cite reasons why she defied the orders continuously. He urged that the application be dismissed.

Issues For Determination

Whether conservatory issues should issue

10. The principles to be considered in granting conservatory orders were outlined by the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 Others, Supreme Court Application No 5 of 2014 (2014) eKLR*, where the Court held that:-
 - (85) These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of “stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.
 - (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.” (Emphasis added).
11. The applicable principles for the grant of conservatory orders were detailed by Onguto J in *Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR*. In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of



- Rights, and whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether, to grant or deny a conservatory order.
12. This matter boils down to the land parcel known as Eldoret Municipality Block 14/291 wherein there are disputes as to its subdivision. It is not in dispute that the same is the subject of two matters which were consolidated being Eldoret Environment and Land Case 235/2015 and 369/2015. The interested parties have various claims regarding the ownership of the property with the 1st interested party claiming ownership vide a lease issued on October 22, 2015, the subject of Eldoret Environment and Land Case 369/2015. The 2nd-10th respondents are also contesting that they purchased parcels of the land in 2011 and have a pending court case being Eldoret Environment and Land Case 235/2015. It also emerges that the National Land Commission revoked the allocation of land vide a gazette notice dated November 9, 2018, a decision that is yet to be challenged.
 13. I have considered the letter written to the petitioner by the 1st respondent directing her to register a lease in favour of the 2nd respondent failure to which she would be subject to criminal sanctions. The letter is purported to be written pursuant to section 27 of the ODPP which directs as follows;
 1. A public officer, State Officer or State Organ, shall cooperate with the Director in the exercise of his or her powers and discharge of functions under the Constitution, this Act or any other written law, and shall in particular— (a) respond to any inquiry by the Director; (b) comply with the lawful directions of the Director; and (c) furnish the Director with such information as the Director may require to discharge his or her functions under the Constitution, this Act or any other written law. (2) Any public officer or State officer who contravenes subsection (1) shall be liable on conviction, to imprisonment for a term not exceeding one year or to a fine not exceeding three hundred thousand shillings or to both. (3) In addition to the penalty prescribed under subsection (2), the public officer or State officer may be subjected to the relevant disciplinary procedures
 14. The said section requires the directions of the Director to be lawful in order for the petitioner to exercise. As the matter is pending in court and involves the suit land the applicant has been directed to register in favour of the 11th interested party, it cannot be said that the direction is a lawful one as the 1st interested party cannot direct a registrar on matters registration of land.
 15. For the respondents to state that there are no injunctive orders in the ELC matters is wilful ignorance of the law as it is trite law that no actions can be taken on a parcel of land whose ownership is subject of pending court proceedings until the same are completely settled.
 16. I have considered the issues raised in this matter and the same paint a picture of suspicious activities. On one hand, the ODPP wrote to the applicant invoking section 27 of the ODPP Act while on the other hand there is a charge sheet alleged to charge the applicant with abuse of office. It is my considered view that something is afoot and there is a prima facie case. The actions of the 1st and 2nd respondent amount to harassment of the applicant and as institutions the same is not tenable.
 17. It seems to me that the real test for determining this question ought to be this, will the judgement or order as made by the court finally to dispose of the rights of the parties be rendered nugatory. In the case of Judicial Service commission v Speaker on of the National Assembly & another (2013) eKLR the court expressed itself as follows in regard to Conservatory orders: “ Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed



to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

18. It is therefore my considered view that the application is merited. The respondents need to let the courts determine the issues over the suit land to finality as issuing leases over property that is subject to court proceedings is an exercise in futility. The application succeeds as follows;
1. Pending hearing and determination of this petition, a conservatory order be and is hereby issued restraining the Respondents, their servants and/or agents from investigating, arresting and/or prosecuting the Petitioner for whatever charges with regards to land parcel No Eldoret Municipality Block 14/2191.
 2. Pending hearing and determination of this Petition, conservatory order be and is hereby issued restraining the Respondents, their servants and/or agents from directing the Petitioner to register lease documents with respect to land parcel No Eldoret Municipality Block 14/2191 in favour of the 1st Interested Party.
 3. Costs to the applicant.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 30TH DAY OF MARCH 2023

R NYAKUNDI

JUDGE

In the presence of

Mr Mugun for the State

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