



**Karage & another v Cabinet Secretary of Interior & Co-ordination of National Government & 6 others; Eastend Development Properties Limited (Interested Party) (Environment & Land Petition E047 of 2022) [2023] KEELC 17035 (KLR) (18 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17035 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E047 OF 2022  
EK WABWOTO, J  
APRIL 18, 2023**

**BETWEEN**

**JACKSON KARAGE ..... 1<sup>ST</sup> PETITIONER**

**STEPHEN KARARI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**CABINET SECRETARY OF INTERIOR & CO-ORDINATION OF NATIONAL GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**NAIROBI WATER & SEWAGE COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**OCPD KAYOLE POLICE STATION ..... 3<sup>RD</sup> RESPONDENT**

**DCIO KAYOLE POLICE STATION ..... 4<sup>TH</sup> RESPONDENT**

**OCS RUIAI POLICE STATION ..... 5<sup>TH</sup> RESPONDENT**

**DCIO RUIAI POLICE STATION ..... 6<sup>TH</sup> RESPONDENT**

**DEPUTY COMMISSIONER NJIRU SUB-COUNTY ..... 7<sup>TH</sup> RESPONDENT**

**AND**

**EASTEND DEVELOPMENT PROPERTIES LIMITED ..... INTERESTED PARTY**

**RULING**

1. This Ruling is in respect to three applications. The 2<sup>nd</sup> Respondent’s application dated 25<sup>th</sup> November 2022 and the Petitioner’s applications dated 14<sup>th</sup> October 2022 and 12<sup>th</sup> January 2023.



2. In the 2<sup>nd</sup> Respondent's application dated 25<sup>th</sup> November 2022, the 2<sup>nd</sup> Respondent sought the following orders: -
  - i. The conservatory orders issued by the Honourable Court on 18<sup>th</sup> October 2022 be stayed pending the inter partes hearing of this application.
  - ii. The conservatory orders issued by this Honourable Court on 18<sup>th</sup> October 2022 be vacated or set aside.
  - iii. This Petition be struck out for being sub-judice Nairobi ELC case no 1243 of 2016-East End Development Properties Limited vs The Cabinet Secretary for Interior and Co-ordination of National Security and 9 Others.
3. The application was supported by the Affidavit of Timothy Kiarie sworn on 25<sup>th</sup> November 2022.
4. In the Petitioner's application dated 12<sup>th</sup> January 2023, the following orders were sought: -
  - i. Spent ....
  - ii. That this Honorable Court be pleased to find and hold that the OCS Ruai Police Station, Donald Mwzighe Mwachofi, the OCPD Kayole, Paul Wambugu and Deputy County Commissioner, Njiru Sub County, James Chacha are in contempt of this Honourable Court's orders issued on the 18<sup>th</sup> October 2022
  - iii. That accordingly, this Honourable Court be pleased to mete out appropriate punishment to the said contemnors for contempt of this Honorable Court's orders issued on the 18<sup>th</sup> October 2022 including but not limited to detaining them in prison for a period of six (6) months or such period that this Honorable Court deems just and appropriate.
  - iv. That the costs of this Application be provided for in any event
5. The Defendant's application is supported by the grounds on the face thereof and the Affidavit of Jackson Karage, sworn on 12<sup>th</sup> January 2023.
6. The Petitioner's application dated 14<sup>th</sup> October 2022 also sought for interim conservatory orders pending the hearing and determination of the Petition.
7. Pursuant to the directions of the court issued on 8<sup>th</sup> February 2023, the court directed all the applications to be heard together upon which a ruling will be rendered in respect to the same. Parties were directed to file their written submissions simultaneously within 14 days. The Petitioner filed its written submissions together with its list of authorities through Awuor & Company Advocates dated 31<sup>st</sup> March 2023. The 2<sup>nd</sup> Respondent filed its submissions through Limo and Njoroge Advocates dated 6<sup>th</sup> April 2023.
8. In opposition to the application dated 25<sup>th</sup> November 2022, the 1<sup>st</sup> Petitioner-Jackson Karage swore a Replying Affidavit dated 14<sup>th</sup> January 2023. It was averred that the Petitioners took time to file the petition since they were not aware of the Gazette Notice as the Kenya Gazette Publications are rarely available to members of the public. Additionally, it was averred that the Petitioners were not parties to the ELC No. 1243 of 2016 and there was no way the subject matter of the present petition is similar to the said matter.



9. The Petitioners also submitted that they had made out a case for grant of conservatory orders sought therein by meeting the principles setting out in the case of *Giella v Cassman Brown & Co. Ltd* [1978] EA 358 and hence the same ought to be granted. On the prima facie case, the Petitioners submitted that the Gazette Notice was in respect to L.R No. 12979 which was nonexistent. In respect to damages being inadequate for the harm to be suffered, it was submitted that they fear that the 2<sup>nd</sup> Respondent will waste public funds towards the project and on the balance of convenience they submitted that the balance of convenience tilts in their favour.
10. In its submissions dated 6<sup>th</sup> April 2023, the 2<sup>nd</sup> Respondent submitted that Nairobi ELC case number 1243 of 2016-Eastend Development Properties Limited -vs- The Cabinet Secretary for Interior and Coordination of National Security and 9 Others (hereafter “the ELC case”) was instituted by the interested party. The pleadings exhibited to the 2<sup>nd</sup> respondent’s Supporting Affidavit sworn on 25th November 2022 show that the suit centers around the ownership of the land parcel known as L.R. No. 12979/1/R which is purported to be a subdivision of L.R. No. 12979. The suit equally addresses the violation and breach of constitutional rights. The petitioners pleaded to be members of the interested party. Any actions taken by the interested party are in the interest of the petitioners and vice versa. Therefore, the ELC case instituted by the interested party synonymously protects the petitioners’ interests. The petitioners’ claim in this petition flows from their membership to the interested party hence its interest is equally subject to protection in the petition. Accordingly, the parties claiming the ELC case and this petition are the same. The case of *Legal Advice Centre aka Kituo Cha Sheria v Communication Authority of Kenya* [2015] eKLR was cited in support of this position.
11. It was also contended that there is no basis in granting conservatory orders since granting the same will not enhance the constitutional values and objects of any specific right under the Bill of Rights but denying them will do. The petitioners through the interested party are patrons of an illegal allocation of public land. The conservatory orders will not only be aiding the illegality but also undermining the constitutional values of the rule of law. The orders will equally run contrary to Article 62 (4) of *the Constitution* of Kenya, 2010 which provides that public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use. There has been no such demonstration of compliance with any statutory provisions in the purported allocation to the interested party.
12. The Court has carefully considered the applications as presented as well as the parties’ affidavits and written submissions for and against the applications. In my view, the main issues for determination are as follows: -
  - i. Whether this court should set aside and or vacate its orders issued on 18<sup>th</sup> October 2022.
  - ii. Whether the Petition should be struck out for being sub-judice
  - iii. Whether the 2<sup>nd</sup> Respondent is guilty of contempt.
  - iv. Who should bear the costs of both applications.
13. I will proceed to analyze all the issues sequentially.
14. Rule 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (The Mutunga Rules) provides as follows: -

Rule 23;



“Conservatory or interim orders

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.
  - (2) Service of the Application in sub rule (1) may be dispensed with, with leave of the Court.
  - (3) The orders issued in sub-rule (1) shall be personally served on the respondent or the advocate on record or with leave of the Court, by substituted service within such time as may be limited by the Court.”
15. It is thus evident that the Mutunga Rules do not specifically provide for the form in which a conservatory order may be set aside or reviewed. However, the Civil Procedure Rules still remain the parent rules for reference, and where there is a lacuna in a procedure under the Mutunga Rules, the Civil Procedure Rules apply.
16. In the instant case, the interim conservatory Order was issued on 17<sup>th</sup> October, 2022 on the basis of the information that was provided by the Petitioners, the 2<sup>nd</sup> Respondent has since opposed the issuance of the said interim orders and sought for setting aside and vacation of the same on the basis that the Petitioners failed to disclose the existence of Nairobi ELC case number 1243 of 2016-Eastend Development Properties Limited v The Cabinet Secretary for Interior and Coordination of National Security and 9 Others (hereafter “the ELC case”) was instituted by the interested party.
17. The jurisdiction of the court to set aside an order of injunction is outlined under Order 40 Rule 7 Civil Procedure Rules, 2010 which provides as follows:
- “Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”
18. In the instant case, on 17<sup>th</sup> October 2022 the Court granted interim conservatory orders. A court may set aside its orders on the discovery of new and important issue or evidence which it did not have at the time of issuance of the said orders. The 2<sup>nd</sup> Respondent claims that the Petitioners failed to bring it to the attention of the Court that there existed a pending suit- ELC No. 1243 of 2016 in which constitutional issues and violation of rights were raised similar to the petition.
19. It was also submitted that the subject matter within ELC No. 1243 of 2016 being LR No 12979/1/R is similar to the instant petition. Paragraph 3 of the Petition states:
- “The Petitioners are members of Eastend Development Properties Limited who is the registered proprietor of LR No 12979/1/R situated in Ruai...”
20. Additionally, Paragraph 50 of the Petition states:
- “...there is no other pending suit between the parties herein on the issues raised in the instant proceedings.”
21. Having perused the pleadings in instant petition and ELC No. 1243 of 2016, I am convinced that the issues raised will ultimately have great impact on the ownership, occupancy and use of the suit property. I am of the mind that allowing issues to be addressed in the first suit is a prudent use of judicial resources and in the circumstances this court proceeds to set aside its interim conservatory given on



- 17<sup>th</sup> October 2022. It is also evident that the Petitioners being members of the interested party herein cannot feign ignorance in respect to the existence and pendency of ELC No. 1243 of 2016.
22. The principle of sub judice serves to save the courts from the embarrassment brought about by the multiplicity of suits and issuance of conflicting decisions by the competent courts. In the circumstances I will proceed to struck out the said Petition on this basis. I see no need of having parallel suits proceeding concurrently in the same court over the same subject matter.
23. On the issue of whether or not the 2<sup>nd</sup> Respondent is guilty of contempt, the grounds to be proved in contempt proceedings, according to G. Bonnie and N. Lowe, “The Law of Contempt” 4th Edition, London Butterworth’s, 2010, P.129 are:
- a. The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding the Respondent;
  - b. The Respondent had knowledge of a proper notice of the terms of the order
  - c. The Respondent has acted in breach of the terms of the order; and
  - d. The Respondent’s conduct was deliberate.
15. Contempt of court has been defined as conduct which interferes with the administration of justice or impedes or perverts the course of justice. Civil contempt consists of a failure to comply with a judgment or order of a court or breach of an undertaking of court. (See Osborne’s Concise Law Dictionary).
16. In the case of Sam Nyamweya & Others v Kenya Premier League Ltd and Others [2015] eKLR it was stated as follows:
- “Contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”
24. This Court takes note that the Petitioners submitted only a copy of the OB Number 25 as proof of complaint of the incident for which they averred that the contemnors flagrantly disobeyed Court orders. The evidence placed before this Court does not confirm any personal service or any deliberate and willful actions on the part of the 2<sup>nd</sup> Respondent to disobey the said orders.
25. In view of the foregoing, the 2<sup>nd</sup> Respondent’s application dated 25<sup>th</sup> November 2022 and the Petitioner’s applications dated 12<sup>th</sup> January 2023 and 14<sup>th</sup> October 2022 are disposed in the following terms:
- i. The application dated 12<sup>th</sup> January 2023 is hereby dismissed.
  - ii. The Petitioners application and Petition dated 14<sup>th</sup> October 2022 are hereby struck out for being sub judice in view of Nairobi ELC Case No. 1243 of 2016-Eastend Development Properties Limited -vs- The Cabinet Secretary for Interior and Coordination of National Security and 9 Others.
  - iii. Each party to bear own costs of proceedings.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF APRIL 2023.**



**E. K. WABWOTO**

**JUDGE**

**In the presence of: -**

**Ms. Awour for the Petitioners.**

**N/A for the 1<sup>st</sup> Respondent**

**Mr. Limo for the 2<sup>nd</sup> Respondent**

**N/A for the 3<sup>rd</sup> Respondent**

**N/A for the 4<sup>th</sup> Respondent**

**N/A for the 5<sup>th</sup> Respondent**

**N/A for the 6<sup>th</sup> Respondent**

**N/A for the 7<sup>th</sup> Respondent**

**N/A for the Interested Party**

**Courts Assistant- Caroline Nafuna.**

