



**Odida v County Director of Housing, Homa Bay & 2 others (Environment & Land Petition E004 of 2022) [2023] KEELC 17613 (KLR) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17613 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT & LAND PETITION E004 OF 2022  
GMA ONGONDO, J  
MAY 30, 2023**

**BETWEEN**

**CHRISTOPHER OTIENO ODIDA ..... PETITIONER**

**AND**

**COUNTY DIRECTOR OF HOUSING, HOMA BAY ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT, HOMA BAY ..... 2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling is in regard to an application by way of a Notice of Motion dated 14<sup>th</sup> April 2022 and filed in court on even date by the petitioner, Christopher Otieno Odida (the applicant herein) through the firm of Olel, Onyango Ingutiah Advocates LLP. The application is mounted pursuant to, *inter alia*, Articles 2(1), (5) and (6), 21(1), 22, 23, 27, 28, 29, 40, 47, 48 and 50 of [the Constitution](#) of Kenya, 2010 seeking the orders *infra*:
  - a. Spent
  - b. Spent
  - c. That pending the hearing and determination of this petition, this honourable court be pleased to issue a conservatory order of injunction restraining the defendant/respondent by itself, its officers, employees, servants and/or agents or otherwise howsoever from interfering with the petitioner's peaceful use and possession of Central Kasipul/Kamuma/5770 (the suit land herein).
  - d. Spent
  - e. The costs of this application be awarded to the plaintiff/applicant



2. The application is anchored upon grounds (a) to (g) set out on the face of it namely that unless the respondents are restrained, the petitioner stands to suffer irreparable loss and damage. Further, that the petitioner has a *prima facie* case with high chances of success, among others. The same is further premised on the applicant's supporting affidavit of twenty four paragraphs sworn on even date and the annexed documents marked as "AO-1(a) to AO-3" which include; a copy of title deed in respect of the suit land (AO-1(a)), a search certificate in respect of the suit land (AO-1(b)), a copy of WARMA approval letter to drill water (AO-2(a)), a copy of letter dated 27<sup>th</sup> October 2021 from the 1<sup>st</sup> respondent (AO-2(b)) and a copy of the area Registry Index Map (AO-3).
3. The applicant laments that he is the registered proprietor of the suit land measuring approximately nought decimal nought eight hectares (0.08 Ha) in area, having purchased the same from one Risper Atieno Opap in 2013 at a consideration of Kenya shillings one million, one hundred thousand (Ksh 1,100,000). That he took possession of the suit land and has been utilizing the same. That sometime in November 2021 when the applicant decided to drill water on the suit land, the 1<sup>st</sup> and 2<sup>nd</sup> respondent officers visited the suit land and stopped the process alleging that the suit land was government land. The applicant avers that although the suit land borders government houses at Kosele, it is a distinct parcel. That the respondents have continued to trespass onto the suit land, thereby occasioning him financial loss and damage and violating his rights under the Constitution of Kenya, 2010. Thus, the applicant urged the court to allow the instant application.
4. In a replying affidavit dated 13<sup>th</sup> June 2022 and duly filed herein on 15<sup>th</sup> June 2022, the 1<sup>st</sup> and 3<sup>rd</sup> respondents opposed both the petition and the application on the grounds that;
  - a. The suit land arose from subdivision of land parcel number Central Kasipul/Kamuma 2699 belonging to one Joram Opap Ongondo(the deceased), which parcel was acquired by the government in 1976 for a consideration of Kenya shillings one thousand.
  - b. That the Land Registrar adjudicated the land dispute and resolved that since the government had acquired land parcel number Central Kasipul/Kamuma 2699 from the deceased, all the parcels resulting from subdivision of the said parcel, including the suit land, belong to the government and all the interest held by the applicant and other private citizens are illegally acquired.
  - c. That the suit land houses government unit Oyug/Hou/Mg 1.
  - d. That even after the deceased conceded to have received compensation, his wife Risper Opap Otieno continued to subdivide the parcel and sold it to third parties. That the onus was on the applicant to conduct proper due diligence before acquiring the suit land.
5. The applicant filed a further supporting affidavit dated 4<sup>th</sup> October 2022 on 5<sup>th</sup> October 2022 wherein he reiterated that the suit land does not form part of the government land. That the undated affidavit capturing the signature of the deceased is a fabrication since the deceased could not read and write. That further, the government never compensated the deceased hence, cannot claim that they legally acquired parcel number Central Kasipul/Kamuma 2699. That in the meeting held on 27<sup>th</sup> September 2011, it was agreed that the private land owners let go of government houses so long as they are left with the surrounding plots. The applicant denied the assertion by the 1<sup>st</sup> and 3<sup>rd</sup> respondents that the suit land houses a government house.
6. The application was heard by way of written submissions further to this court's directions of 5<sup>th</sup> October 2022 as provided for under Order 51 Rule 16 of the Civil Procedure Rules, 2010.



7. By the submissions dated 5<sup>th</sup> December 2022 and lodged in court on 6<sup>th</sup> December 2022, learned counsel for the applicant was of the view that the issues for determination include; whether the applicant has made out a case to warrant grant of conservatory orders over the suit land pending the hearing and determination of the main petition and whether the costs of the application should be awarded to the petitioner/applicant. Counsel submitted that the petition raises arguable issues thus, a conservatory order ought to be granted.
8. To fortify the submissions, counsel cited, *inter alia*, the Supreme Court of Kenya decision in [Gatirau Peter Munya v Dickson Mwenda Kitbinji and 2 others](#) (2014) eKLR, among others. Therefore, counsel urged this court to grant the orders sought in the application with costs to the applicant.
9. In the 1<sup>st</sup> and 3<sup>rd</sup> respondents' submissions dated 3<sup>rd</sup> March 2023 and filed herein on 8<sup>th</sup> March 2023, counsel identified one issue for determination thus: whether the applicant should be granted the orders as sought. Counsel cited, among other authoritative pronouncements, the case of [Gatirau Peter Munya](#) (*supra*) and submitted that the applicant has not demonstrated real danger of suffering prejudice and which deserves immediate redress by this honourable court. Thus, counsel urged the court to dismiss the instant application with costs to the respondents.
10. The 2<sup>nd</sup> respondent neither responded to the application nor filed submissions in respect of the instant application.
11. I have carefully considered the application, the 1<sup>st</sup> and 3<sup>rd</sup> respondents' replying affidavit and the rival submissions in their entirety. The principal issues for determination are:
  - a. Whether the applicant has met the threshold for grant of conservatory orders
  - b. Who should bear the costs of this application?
12. The threshold for grant of conservatory orders was established by the Supreme Court in the case of [Gatirau Peter Munya](#) (*supra*) 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...”
13. In the case of [Centre for Rights Education and Awareness \(CREAW\) & 7 others v Attorney General](#) [2011] eKLR, the court held that:
 

“...It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner’s application and not the petition. I will not therefore delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of [the Constitution](#)...”



14. Further, in the case of *Board of Management of Uburu Secondary School v City County Director of Education & 2 others* [2015] eKLR the Court held that:

“...26. It is in my view not enough to merely establish a *prima facie* case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The *prima facie* case ought to be beyond a speculative basis...”
15. In the case of *Trust Bank Limited v Amin Company Ltd & another* [2000] KLR 164, as cited in *Mary Wangari Mwangi v Peter Ngugi Mwangi T/A Mangu Builders Ltd & 3 others* [2013] eKLR, Ringera, J defined a “frivolous case” as follows:

“...A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action...”
16. The petition raises the issue of violation of his rights as provided under *the Constitution* of Kenya, 2010, particularly under Articles 27, 28, 29, 40, 47 and 50. Thus, the petition cannot be said to be frivolous.
17. The second limb to be proven by an applicant seeking conservatory orders is that the substratum of the petition will be rendered nugatory if orders are not granted. On one hand, the applicant has argued that since he already deposited building materials on the suit land and commenced construction thereon before the respondents stopped him, there is real danger that he will suffer prejudice which can result into a loss and detriment. On the other hand, counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents submitted that the applicant does not stand to suffer a loss if the conservatory orders sought are not granted as it is only in the success of his petition that he will be able to put up and maintain the intended developments on the suit land.
18. It is this court’s considered view that the applicant has not put forward a satisfactory argument that the petition will be rendered nugatory if a conservatory order is not granted.
19. The final issue is on whether public interest lies in granting the orders sought by the Applicant. According to *Black’s Law Dictionary*, 10<sup>th</sup> Edition, “public interest” is defined as:

“...The general welfare of the public that warrants recognition and protection; or something in which the public as a whole has a stake especially an interest that justifies governmental regulation...”
20. In my considered view, the applicant has not demonstrated how granting of a conservatory order is in the interest of the public in the instant application.
21. In conclusion, this court finds that although the applicant has established a *prima facie* case, he has not met the other requirements for the grant of conservatory orders.
22. To that end, I find the application dated 14<sup>th</sup> April 2022 and filed in court on even date lacks merit and it is hereby dismissed.
23. Costs of the application to be in the cause.



**DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 30<sup>TH</sup> DAY OF MAY 2023.**

**G M A ONGONDO**

**JUDGE**

**Present**

- 1. Ms. Adingo holding brief for Ms. Jumma, learned counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents**
- 2. Okello and Mutiva, Court Assistants**

