



**Chemogisichi & another v Towet & 11 others (Environment & Land
Petition 5 of 2021) [2023] KEELC 18028 (KLR) (8 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18028 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND PETITION 5 OF 2021**

FM NJOROGE, J

JUNE 8, 2023

BETWEEN

ISAAC CHERUIYOT CHEMOGISICHI 1ST PETITIONER

GRACE CHERONO CHEMOGISICHI 2ND PETITIONER

AND

LINNER TOWET 1ST RESPONDENT

CHEPKWONY ARAP TONUI 2ND RESPONDENT

KIPLANGAT HILLARY KOSKEI 3RD RESPONDENT

STEVEN SIANDOI 4TH RESPONDENT

JOSEPH ROTICH 5TH RESPONDENT

LAND REGISTRAR, NAKURU COUNTY 6TH RESPONDENT

LAND SURVEYOR, NAKURU COUNTY 7TH RESPONDENT

**HILLARY MUTYAMBAI, INSPECTOR GENERAL NATIONAL POLICE
SERVICE OO BEHALF OF NESSUIT POLICE STATION 8TH RESPONDENT**

**GENERAL SERVICE UNIT COMMANDANT ON BEHALF OF NESSUIT
GENERAL SERVICE UNIT 9TH RESPONDENT**

**FRED MATIANGI, CABINET SECRETARY FOR INTERIOR &
COORDINATION OF NATIONAL GOVERNMENT ON BEHALF OF JOSEPH
ROTICH (AREA CHIEF NESSUIT) 10TH RESPONDENT**

ATTORNEY GENERAL 11TH RESPONDENT

OFFICE OF DIRECTOR OF PUBLIC PROSECUTION 12TH RESPONDENT



RULING

1. Before this court are two applications dated March 8, 2021 and March 18, 2021 respectively. The two shall be determined in this single ruling.
2. The application dated March 8, 2021 seeks the following orders:
 - i. ... spent;
 - ii. ...spent;
 - iii. That pending the hearing and determination of this petition inter partes the petitioners be allowed unconditional use of their registered parcels of land Nakuru/Nessuit/896 and 897 measuring 2.0 and 2.02 hectares herein to exclusion of 1st, 2nd and 3rd respondents;
 - iv. That pending the hearing and determination of this petition inter partes the 4th and 5th respondents do not be seen anywhere near registered parcels of land Nakuru/Nessuit/896 and 897 measuring 2.0 and 2.02 hectares herein;
 - v. That OCS attached to Neissuit Police Station supervise these orders;
 - vi. That pending the hearing and determination of this petition inter partes, conservatory orders of stay do issue to restrain the 1st, 2nd and 3rd respondents, either by themselves, assigns, representatives, employees or agents, from building, erecting, burning, tilling land, planting on the registered parcels of land Nakuru/Nessuit/896 and 897 measuring 2.0 and 2.02 hectares herein;
 - vii. That pending the hearing and determination of this petition inter partes, the Director of Criminal Investigation do investigate, do investigations and file a detailed report in court on the owner(s) of the timber miller tractor KTCB354N and lorry KBV045L, who sanctioned the cutting down of the trees on registered parcels of land Nakuru/Nessuit/896 and 897 measuring 2.0 and 2.02 hectares herein;
 - viii. That pending the hearing and determination of this petition inter partes the 6th and 7th respondents avail the relevant information and documentation of the suit parcels since the time when the said parcels belonged to a Government Scheme (Nessuit Settlement Scheme) for final hearing and determination of the matter herein.
 - ix. Costs and further incidentals to this application be provided for; and
 - x. Such further or other relief as the honourable court may deem just and expedient to grant.
3. The application dated August 18, 2021 is seeking the following orders:
 - i. ... spent;
 - ii. ...spent;
 - iii. ...spent;
 - iv. ...spent;
 - v. That pending the hearing and determination of this petition inter partes, conservatory orders of say do issue to restrain the 8th and 9th respondents either by themselves, assigns,



representatives, employees or agents, from harassing, supervising demolitions, destroying, vandalizing, plundering, lootings on the petitioners' private property Nakuru/Nessuit 896 and 897;

- vi. ...spent;
 - vii. That pending the hearing and determination of this petition inter partes, the 1st, 2nd, 3rd and 4th respondents, assigns, representatives, employees or agents, be restrained from harassing, demolishing, removing fence, digging, erecting, planting, cutting trees and general interference of petitioners' private property Nakuru/Nessuit 896 and 897;
 - viii. That pending the hearing and determination of this petition inter partes the 12th respondent do file in court a detailed report on the action taken on the investigations forwarded to them owing to the following OBs
 - a. OB/5/5/16/3/21
 - b. OB/03/03/2021
 - c. OB/13/02/2021
 - d. OB/09/3/3/2021
 - e. OB/12/01/11/2020
 - f. OB/6/27/11/2020
 - ix. Costs and further incidents to this application be provided for; and
 - x. Such further or other relief as the honourable court may deem just and expedient to grant.
4. The grounds that support the application are at the foot thereof and are also reiterated in the supporting affidavit of the 1st petitioner. They are that the petitioners, having followed all due procedure, acquired titles to the two properties named herein and they are not subject to any encumbrance; that though he is entitled to quiet possession the 1st -4th respondents have expressed interest to acquire the said land and by means of force, fraud and deception and by their activities they are now intent on infringing on the petitioners' constitutional rights to property; that the conduct of the 1st - 4th respondents is being emboldened to violent means of acquisition of the land by the 8th and 9th respondents' officers; that the proper remedy for the 1st - 4th respondents is to institute civil proceedings if they have any grievance and that the 9th respondent has failed to conduct independent investigations yet the petitioners have been booked in a police station several occasions whose OB numbers are given in the prayers herein above.
5. The 1st -4th respondents filed their response to the applications through the sworn affidavit of Linner Cherono Towett the 1st respondent. She stated that Nakuru Chief Magistrate's Court ELC 35 of 2020 has been lodged before the present suit and in that suit orders of injunction were sought *vide* an application dated December 3, 2020 in respect of parcel number Nakuru/Nessuit/896 and Nakuru/Nessuit/897; that on December 3, 2020 the parties in that suit agreed that the status quo regarding the suit lands shall be preserved pending the outcome of the application; that soon after filing the case in the lower court the applicants filed the present petition alleging that their rights under the Constitution had been violated; that the instant suit offends the sub judice rule; that the object of the rule is to prevent courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject matter and the same relief and that hence the application is lacking in merit.



6. The 9th respondent filed a sworn replying affidavit of Daniel Kipchumba, assistant superintendent of police, GSU Base Camp, dated September 16, 2021 in response to the applications stating that his only mandate in the area concerned is to quell conflict and not to resolve land disputes; that by March 6, 2021 the 9th respondent had already moved out of the area; that the 5th respondent has never had power over the GSU personnel detail or attached to it; that he never issued permits for logging as it does not fall within his mandate but that of the Nessuit Forest Officer; that the claim of injury to the 1st petitioner's son is unfounded and calculated to elicit sympathy from court and there is no evidence of a report to the authorities of the injury; that the OB bookings alleged by the petitioner are not within his mandate and that he has not violated the petitioners' rights in any manner.
7. The 5th – 11th respondents filed grounds of opposition to the applications, stating as follows:
 1. That the petitioners have not satisfied the grounds for granting the orders sought;
 2. That the instant suit is an ownership dispute camouflaged as a dispute about the violation of the petitioners' fundamental rights;
 3. That the information sought by the petitioners in prayer (vii) of the application dated March 8, 2021 is information that is accessible to the public by carrying out a search of the motor vehicles mentioned;
 4. That the petitioners are on a fishing expedition;
 5. That prayer (viii) in the application dated March 8, 2021 is vague as it is not clear which particular information the petitioners intend the 6th and 7th respondents to avail;
 6. That the application dated March 8, 2021 has introduced the 12th respondent who is not a party to the main petition;
 7. That the petition is an abuse of the court process.
8. The petitioners filed two sets of written submissions on July 15, 2021 and on March 3, 2023 respectively addressing the two applications. I have perused the court file and I have found no submissions filed by the respondents. I have considered the filed submissions while preparing the present ruling.

Determination

9. The issues that arise in the present applications are as follows:
 - a. Whether the applications are in violation of the sub judice rule.
 - b. Whether the conservatory orders sought ought to be granted.
10. The 1st - 4th respondents' main defence is that the applications are in violation of the sub judice rule by reason of the fact that the existent of a prior suit in the lower court over the same matter in which an injunction had been sought. In the lower court case the plaintiff seeks declaration of ownership, injunctions and mesne profits which are purely private remedies. Unlike in the suit in the court below which is principally between citizens, the instant petition has joined public officers and what are being sought are conservatory orders pending the ventilation of the applicants' grievances in the main petition. In the case of Peter Gatirau Munya the distinction between conservatory orders and interlocutory injunctions was made. There are other cases such as *Martin Nyaga Wambora v Speaker of County Assembly of Embu & 3 others* 2014 eKLR and *Benson Mutura v County Government of Nairobi & 7 others* 2016 eKLR which do the same.



11. The court in *Kenya Hotel Properties Limited v Willesden Investments Limited & Kenya Revenue Authority* [2018] eKLR stated as follows:

“In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* (above) the Supreme Court of Kenya expressed itself on the matter as follows:

“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.”

Such considerations as public interest should therefore be borne in mind by the court when considering whether to grant relief in the form of a conservatory order, whether at an interlocutory stage of the proceedings or upon full hearing.”

12. In view of the distinction made in the *Kenya Hotel Properties Limited* and the *Peter Gatirau Munya* decisions above, this court declines to rule that the present applications are sub judice as the questions before the two courts are merely related but not similar.
13. Regarding the issue of whether the conservatory orders sought ought to be granted, I have considered the fact that the applicants have exhibited copies of title documents showing that they are the owners of the suit lands known as Nakuru/Nessuit/896 and Nakuru/Nessuit/897 while the 1st -4th respondents have not exhibited anything that can support their claim to the land as at the date of this ruling yet the matter has been pending in court for the last two years. This is not to state that this court ought to try the merits of the substantive petition at this interlocutory stage at all but just to point out that the court has noted no prima facie defence raised at this point on the part of the 1st - 4th defendants to the claim that the applicants own the suit land.
14. The foregoing notwithstanding, I find that there being another suit addressing the claims of ownership and injunctive orders in a civil manner which a petition such as the present one can not address, it would be not fit to issue conservatory orders at the moment against the 1st - 4th respondents in this petition especially in the absence of any information from the parties as to the fate of the injunction application in the lower court or the final decision on ownership in a court of competent jurisdiction.
15. In regard to the prayers sought against the public offices, it is clear that the situation was volatile and required intervention of security agents. However, these security agents must act to enforce the injunctive orders that emanate from the lower court, if any, which would be the equivalent of the supervision of enforcement action sought against the police herein.
16. Regarding prayers affecting the Director of Criminal Investigations (DCI), this court is of the view that the DCI ought to investigate independently the reports made to him of any criminal conduct and does not need the orders or directions of this court to do so.
17. Regarding the request for information regarding the said parcels from the Land Registrar and the Land Surveyor Nakuru, this court is of the view that the applicants have not demonstrated that they have



previously sought the information and that they have been denied it by the 6th and 7th respondents hence the basis for those prayers has not been laid and they can not be granted.

18. The upshot of the foregoing is that the two applications dated March 8, 2021 and March 18, 2021 lack merit and they are dismissed. However, each party shall bear their own costs.
19. As the substance of the main petition has not been determined the parties shall appear before this court on a mention on June 19, 2023 to take directions inter alia as to the mode of hearing of the main petition.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 8TH DAY OF JUNE, 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

