



**Ndatho v Gitonga & 3 others (Environment and Land Constitutional
Petition E002 of 2022) [2023] KEELC 18959 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18959 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E002 OF 2022**

**CK YANO, J
JULY 26, 2023**

BETWEEN

GEOFFREY MWIKAMBA NDATHO PETITIONER

AND

JOSEPH GITONGA 1ST RESPONDENT

DANIEL NTHATU 2ND RESPONDENT

**DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER THARAKA
NITHI 3RD RESPONDENT**

ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. The application for determination is a notice of motion dated December 16, 2022. The petitioner/
applicant is seeking for orders-;
 - a. Spent
 - b. That this honourable court be pleased to issue interim conservatory orders in favour of the
applicant to continue staying, living on land parcel No 1811 Kamaguna Adjudication Section
continue cultivating, ploughing on the same land pending hearing and determination of the
application inter partes.
 - c. That the honourable court be pleased to issue permanent conservatory orders in favour of
the petitioner applicant to stay continue staying, living on land parcel No 1811 Kamaguna
Adjudication Section, pending hearing and determination of this petition.
 - d. That the orders herein be served upon the 1st, 2nd and 3rd respondents for compliance.



- e. That the orders do contain a notice of penal consequences in case of disobedience to wit:-
- “That if you, the 1st, 2nd and 3rd respondents do not obey this lawful court order, you will be cited for contempt of court proceedings which carry a maximum of 6 months’ imprisonment or fine or both.”
- f. That costs of the application be provided for.
2. The application is premised on the grounds that;-
- a. The applicant/petitioners right under the Constitution have been threatened with injury and unless conservative orders are issued the petitioner stands to suffer irreparably.
 - b. That the 3rd respondent has acted unconstitutionally in the way he conducted objection No 221 in respect of land parcel No 1811 a manner that infringes upon the bill of rights as envisaged upon Chapter (4) of our Kenya Constitution 2010.
 - c. That a constitutional court has power to supervise, prevent and enforce the constitutional provisions in our 2010 Constitution.
 - d. That the 1st and 2nd respondents would not be prejudiced at all as they are in occupation of land parcels 1809 and 1810 respectively (which form the subject matter in ELC Marimanti No 17 of 2018 respectively).
3. The application is supported by the affidavit of Geoffrey Mwikamba Ndatho, the applicant in which he states that the 1st and 2nd respondents herein are his close relatives/paternal cousins and that his grandfather, Mirugi had three sons namely Rangani Mirugi, Kathare Mirugi, Ndatho Mirugi.
4. The applicant states that he is the legal representative of the estate of his father Ndatho Mirugi and has annexed a copy of letters of administration marked “GM – 01”. That after the death of the first born, Mwenda Rangani inherited his father’s share and that of Kathare Mirugi who also passed on.
5. The applicant avers that Mwenda Rangani sold parcel No 1811 to his father Ndatho Mirugi vide an agreement dated January 4, 1989 and upon purchase, he took possession, constructed a house and also constructed a living house and that’s a place they call home until today. That initially their grandfather’s un surveyed land which was almost 60 acres was eventually subdivided into three portions land namely Parcel No 1809, Land parcel No 1810 and Land Parcel No 1811.
6. The applicant further avers that the sold piece by one Mwenda Rangani was now land parcel No 1811 which was registered in the demarcation book as belonging to the applicant and he has annexed a copy of the demarcation register marked “GM 03.” That the other portions were registered and recorded on the names of the 1st respondent and 2nd respondent respectively.
7. The applicants states that sometimes in 2015 – 2016, the 1st and 2nd respondents forcefully entered into the land parcels 1809 and 1810 respectively a fact which led the plaintiff to file ELC Case No 137 of 2016 (Meru) which was transferred to Chuka ELC court and given No 231 of 2017 but which case was eventually withdrawn with costs.
8. The applicant further states that after withdrawal of the case in paragraph 7 above, ELC No 17 of 2018 was filed in Marimanti which matter is pending in respect of parcel number 1809 and 1810 respectively. That it is while the ELC case No 17 of 2018 is pending at Marimanti Law courts that the 1st and 2nd respondent purported to file an objection No 221 with the 3rd respondent. A copy of the said proceedings marked “GM – 05” are annexed.



9. The applicant faults the manner in which the 3rd respondent conducted the objection proceedings because of the following reasons-;
 - a. That despite the petitioner having participated in the objection proceedings, the petitioner was never informed of the decision/judgment date.
 - b. That the petitioner had sought for consent to take the matter to court, issued to him, with limitation of 60 days, whereas it was issued after the said 60 days had lapsed.
 - c. That the 3rd respondent played tricks to the petitioner, till he read the decision without him being present.
 - d. That the petitioner produced an agreement to the 3rd respondent but by trickery or otherwise, the 3rd respondent denied such a production in the proceedings.
10. The applicant further avers that eventually when the decision was read allegedly on November 18, 2021 the same was communicated to his wife through a letter dated August 4, 2022 yet his wife was not party to the case at all and he has annexed a copy of the said letter marked “GM – 06”.
11. The applicant states that consequently the 3rd respondent’s decision gave ownership to the 1st and 2nd respondents. He contends that the respondents conspired to deny the petitioner a right to own property, that their conduct denied him a fair administrative action and that the petitioner’s constitutional rights were not only denied but also violated and caused him great prejudice.
12. The applicant avers that consequently and as a result of the unconstitutional conduct of the 1st, 2nd and 3rd respondents, land parcel Number 1811 wherein he has called home for almost 50 years is faced with the threat of eviction and that is the reason why he has come for preservative orders pending the hearing and determination of the petition.
13. The applicant further avers that unless preservative orders are issued directed to the 1st, 2nd and 3rd respondents to enable the petitioner and his family continue living, staying, ploughing, tilling upon land parcel No 1811 till the petition is heard and determined, the petition may be overtaken by events and their rights would be trampled upon unfairly.
14. The 1st respondent filed his replying affidavit dated January 30, 2023. He states that he makes the said affidavit on his own behalf and the 2nd respondent.
15. The 1st respondent denies the contents of paragraph 6 &7 of the applicant’s affidavit and put the applicant to strict proof and he further denied the contents of paragraph 8 and states that the applicant’s father took ownership of 56 acres which is currently in possession of the applicant and his brother.
16. The 1st respondent admitted that there is a case currently in court challenging the adjudication process with regards to the suit properties parcel No 1809 and 1810. He admitted that there was ELC case No 137 of 2015 (Meru) which was transferred to Chuka ELC Court 231 of 2017 which case was dismissed since the applicant had failed to obtain a consent from the Adjudication officer before instituting the suit.
17. The 1st respondent states that parcel No 1811 was not subject to the ELC Court 17 of 2018 proceedings thus the parcel was subject to adjudication proceedings which objection was duly heard and determined and that the applicant took part in the proceedings. He annexed a copy of the objection proceedings marked as “JG 1”



18. The 1st respondent avers that the applicant has had ample opportunity to appeal the ruling issued on November 18, 2021 to the minister as per the procedure having acquired letters from the land Adjudication Officer and a demand notice from the applicant's advocate and has annexed copies of Letters marked as "JG 2".
19. The 1st respondent further averred that the claims by the applicant in paragraph 14 are untrue since the applicant acquired a consent letter on the same day the ruling was delivered to file a suit and a demand notice served to him the following day.
20. The 1st respondent denies the contents of paragraph 15, 17 and 18 of the applicant's affidavit and put him to strict proof.
21. The 1st respondent further states that the applicant had ample opportunity to adhere to Section 29 of the *Land Adjudication Act* but did not follow the procedure set in place. That the applicant cannot use the court to circumvent the wheels of justice and deny him with his right to property having been heard and determined to be rightful owner of parcel No 1811. The 1st Respondent avers that for the interest of justice, the orders sought should not be allowed as the application before the court is frivolous and vexatious and stands to impede on his rights under Article 40 of the *Constitution*.
22. The application was canvassed by way of written submissions, but only the applicant filed his submissions on 21st February, 2023. The respondents relied on their responses.
23. I have carefully considered the application. The issue for determination is whether the court should grant the conservatory orders sought by the applicant pending the determination of this petition.
24. The petition herein arises from proceedings conducted by the 3rd respondent pursuant to the provisions of the *Land Adjudication Act* Cap 284 Laws of Kenya. The petitioner contends that the manner in which the 3rd respondent conducted himself and the entire proceedings are unfair, unprocedural and greatly injures the constitutional rights of the petitioner and his family. Among the remedies sought by the applicant in the petition are a declaration that the 3rd respondent's decision is null and void, an order dismissing the objection No 221 of 2021, an order declaring land parcel No 1811 rightfully belongs to the petitioner as well as permanent and mandatory injunctions.
25. The principles on which the court will grant conservatory orders are fairly settled. Firstly, the applicant must show a prima facie case with a likelihood of success, and that if the conservatory orders are not granted, the applicant is likely to suffer prejudice.
26. In the case of *Centre for Rights Education and Awareness (CREAW) & 7 others Vs Attorney General* [2011] eKLR, Musinga, J (as he then was) observed:-

“... 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 conservatory order in terms of prayer 3 of the petitioner's application and not the petition. I will therefore not 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 irreparable prejudice as a result of the violation or threatened violation of the *Constitution*.”



27. In *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others* [2014] eKLR, the Supreme Court stated 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 applicant’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.”

28. The question is whether, in the present case, the petitioner has met the criteria enunciated in the above decisions. A perusal at the documents that are annexed to the petitioner’s affidavit in support of the application, it is clear that there have been long standing proceedings before the courts involving the parties herein and over the same subject matter and others. There is also no denial that the *Land Adjudication Act* has an elaborate mechanism in which parties can pursue their grievances where they are aggrieved by any decision by the 3rd respondent. I am conscious of the fact that as I determine whether or not I should grant the conservatory orders sought by the petitioner, I must not venture into the scrutiny of the facts and evidence. That will be for the trial court. However, the petitioner ought to demonstrate how his rights have been impeded or put to risk.

29. In my view, the interest in this case would not be served by the grant of the conservatory orders in the petitioner’s favour, considering that the previous litigations in courts that have been there over subject matter herein.

30. In the circumstances, I am not persuaded that I should grant the conservatory orders sought.

31. The upshot is that the notice of motion dated December 16, 2022 is dismissed. The costs thereof shall await the outcome of the petition.

32. Orders accordingly.

DATED SIGNED AND DELIVERED AT CHUKA THIS 26TH DAY OF JULY, 2023

In the presence of:

Court Assistant – Martha

N/A for Ondari for Petitioner who is present

Ms. Gikundi for 1st & 2nd Respondents

Ms. Kendi for 3rd & 4th Respondents

C. K. YANO,

JUDGE.

